Monitor 3 of 2022 – Ministerial Responses

Contents

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS22-000193

Senator 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 correspondence 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 10 December 2021, the Committee has sought my advice as to:

- how the exceptions apply to a 'niche and defined group';
- whether the exceptions can be included in primary legislation, and if not, given the importance of providing certainty to stakeholders, further detail as to why it would not be more appropriate for the exceptions to be provided for in primary legislation; and
- whether the *Corporations Regulations 2001* can be amended to provide that the exceptions set out in the instrument cease to operate after five years, and if not, the committee would appreciate detailed advice as to why, even with a longer timeframe, self-repeal after five years would be inappropriate.

Application of exceptions to niche and defined groups and use of delegated legislation

I reiterate my view that each of the exceptions relate to the sale or offer of specific financial products, and as such apply to a niche and defined group, rather than to all persons who make offers to sell or issue financial products. The prohibition against hawking itself is broad and applies to all financial products. The definition of Financial Product in the *Corporations Act 2001* is broad and includes 12 broad categories of products such as general insurance, securities and superannuation. However, each of the exceptions is narrow and applies to particular financial products within a category and in specific circumstances. For example, subregulation 7.8.21A(b) provides an exception for financial services licensees who make an offer to issue or sell securities to a client who has brought or sold securities from that licensee in the 12 month period before the offer was made. A financial services licensee cannot rely on this exception to offer a recent client any other kind of financial product or offer securities to other persons with whom they did not have a recent

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relationship. It is expected that this would only capture a small portion of the total number of securities which are issued or sold each year.

Similarly, each of the other exceptions only apply to offers to sell or issue particular products in specific circumstances. As a result, only a relatively small number of the total number of offers to sell or issue a financial product will be excluded. It is expected that the vast majority of offers to sell or issue a financial product will still be subject to the hawking rules in the *Corporations Act 2001*.

As each of these exceptions apply to a niche and defined group, they are an appropriate use of the regulation making power under s992A of the *Corporations Act 2001*.

Appropriateness of use of delegated legislation and permanency of provisions

As outlined in my previous correspondence, I reiterate my view that it is appropriate for these exemptions to be included in the *Corporations Regulations 2001,* rather than the *Corporations Act 2001* and that it would be inappropriate for these exemptions to be subject to a period of self-repeal.

In my previous correspondence I outlined why I believe the permanency of these exceptions within the *Corporations Regulations 2001* is appropriate. This permanency gives effect to the policy intention that the hawking prohibitions apply only in situations where there is a risk of consumer harm, and provides certainty for businesses that rely on these exceptions. Repealing the exceptions, whether after a period of three years or five years, would impose significant commercial risks and compliance costs to business. It is my view that imposing such risks and costs to businesses in these circumstances is not appropriate.

I note that the Committee has raised what it believes to be an inconsistency in my previous correspondence, with reference to the desire to provide business with certainty as appropriate, while also acknowledging that the use of the regulation making power allows for the Government to quickly respond to new and different financial product to mitigate the risk of consumer harm.

To clarify, these two principles can be consistently applied and considered. The use of the regulation making power allows the Government to quickly respond to new and different financial products as required to mitigate the risk of consumer harm. This ability to respond to new issues in a timely manner, does not conflict with the desire to then provide businesses with certainty as to that response, as appropriate. In any case, it is my view that this approach strikes the correct balance in terms of applying those two principles.

Finally, I would also reiterate that given the Australian Law Reform Commission (ALRC) has undertaken to conduct a review *of Chapter 7 of the Corporations Act 2001*, with a final report due by 30 November 2023, I expect the framing and structure of the exceptions to hawking will be considered as part of that process, providing an avenue for review and consideration as to their ongoing appropriateness.

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

7 / 2 / 2022

THE HON ANGUS TAYLOR MP
MINISTER FOR INDUSTRY, ENERGY AND EMISSIONS REDUCTION

MC21-007693

09 FEB 2022

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

Dear Chair Connie

I refer to your letter of 21 October 2021 regarding concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) in relation to the *Australian Renewable Energy Agency (General Funding Strategy) Determination 2021* (the 2021 GFS). I thank the Committee for its consideration of the 2021 GFS, and am happy to provide advice in response to the concerns raised.

Background and context

The Australian Renewable Energy Agency (ARENA) was established by the *Australian Renewable Energy Agency Act 2011* (the Act) and commenced operations in 2012.

ARENA's main statutory objective is to improve the competitiveness of renewable energy technologies and increase the supply of renewable energy in Australia. The agency also has limited functions under the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (the Regulation), to enable it to implement five programs announced in the 2020-21 Budget and also support the five priority low emission technologies identified in the Liberal National Government's first Low Emissions Technology Statement.

ARENA meets its legislated objectives by providing financial assistance for projects that fall within its functions. It uses its annual General Funding Strategy (the GFS) to determine the kinds of projects that will meet this criteria for each upcoming year. Specifically, each GFS must "state ARENA's principal objectives and priorities for the provision of financial assistance under [the] Act"[1], and "must not require financial assistance to be provided to a particular person, or for a particular project"[2]. ARENA may only enter an agreement to provide financial assistance if such an agreement is in accordance with the provisions of the current GFS[3].

[1] Act, paragraph 19(3)(c).
[2] Act, subsection 19(4).
[3] Act, section 10.

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The ARENA Board is responsible for developing each GFS[4]. Once developed, a GFS only comes into force when it has been approved by the Minister and enacted as a legislative instrument for transparency[5]. This legislative instrument is not subject to disallowance.[6]

The 2021 GFS was enacted on 25 August 2021 in compliance with the statutory framework outlined above. It provides an overview of ARENA's principal objectives and priorities for the provision of financial assistance in relation to its statutory renewable functions as well as its regulatory non-renewable functions.

Exemption from disallowance

You have expressed a concern that the exemption from disallowance provided to the 2021 GFS (and each annual GFS) by subsection 20(2) of the Act is inappropriate.

As outlined above, the GFS specifies ARENA's funding priorities for each upcoming year. It is developed entirely by the ARENA Board; while the Minister has the power to approve the GFS and the responsibility to formally enact it, they are unable to modify it or direct its composition. In this sense, the GFS is akin to a strategic planning document that the Parliament determined, with the passage of the Act in 2011, to elevate to the status of delegated legislation. Such status does not necessarily mean the document would otherwise be of a legislative character.

It would be inappropriate for the Parliament to now seek a power of disallowance over the GFS. The Parliament does not routinely claim powers of disallowance over the strategic planning documents of other statutory entities, so it is not clear why this would be appropriate in the case of ARENA. Opening up the GFS to disallowance would infringe upon ARENA's independence, create ongoing uncertainty as to ARENA's strategic direction, and dampen market confidence by creating a risk that ARENA's funding decisions might be subject at any time to unexpected Parliamentary interference. Disallowance could also impede ARENA's ability to implement the Act because of the limitations imposed by section 10.

It is also not the case that "classification of [the 2021 GFS] as exempt from disallowance prevents parliamentary oversight of how public money will be invested by the ARENA". The Parliament set ARENA's overarching funding and operational limits when it established the agency in 2011, and the Government has further refined them by enacting regulations earlier this year.

The Parliament, when creating the Act, also provided a number of governance and oversight mechanisms to regulate and moderate the powers of the agency. For example:

- ARENA may not make grants in excess of $50 million without the permission of the Minister[7];
- ARENA may not launch grants programs in excess of $15 million unless guidelines for the program have been approved by the Minister[8];
- the Minister has a chance to comment on ARENA's annual work plan before it is finalised[9];

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[4] Act, subsection 19(1).
[5] Act, sections 20 and 21.
[6] Act, subsection 20(2).
[7] Act, section 12.
[8] Act, subsection 25(1).
[9] Act, subsection 27(5).

- the Governor-General may expand ARENA's functions by regulation[10];
- the Minister may open up ARENA's investment remit beyond the use of grants[11];
- the Minister may request ARENA to consider funding specific projects[12]; and
- the Minister may direct ARENA to provide advice on certain issues[13].

In addition to this, the Minister has previously issued ARENA with Statements of Expectation indicating the type and range of work they expect the agency to undertake[14]. Finally, like all statutory agencies, ARENA is subject to corporate reporting obligations[15], and regularly appears before Senate Estimates.

In summary, the Parliament established a range of oversight mechanisms to direct and scrutinise ARENA's funding decisions as part of the Act. There are also the usual scrutiny opportunities available through ARENA's corporate reporting obligations and its presence at Senate Estimates hearings. There is no need to create yet another scrutiny measure by removing the disallowance exemption that the Parliament expressly assigned to the GFS in 2011; indeed, removing this exemption would permit the Parliament to interfere in the strategic planning decisions of an independent statutory entity, a power it doesn't have in relation to other agencies and shouldn't have in relation to ARENA.

Compliance with authorising legislation

You have expressed a concern that, in prescribing objectives and priorities with non-renewable subject matter in reliance on the Regulation, the 2021 GFS may be invalid. This stems from a concern that the Regulation is invalid because it infringes an implied limitation in the Act that ARENA's functions should relate to renewable energy alone.

I do not intend to repeat the arguments I have already made as to why the Regulation is validly made under the Act. One disallowance motion in the House of Representatives and two disallowance motions in the Senate have already been defeated. I would note further that the majority of the Committee's membership have voted against disallowance on the floor of the Senate.

Until such time as the Regulation is formally disallowed, it continues to prescribe certain non-renewable functions for ARENA to implement, and the 2021 GFS will remain valid to the extent that it relies upon these functions.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

ANGUS TAYLOR

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[10] Act, paragraph 8(f).
[11] Act, section 4 (definition of "financial assistance").
[12] Act, section 11.
[13] Act, section 13.
[14] The latest Statement of Expectation is available at https://arena.gov.au/about/legislation-and-regulation/.
[15] See, for example, *Public Governance, Performance and Accountability Act 2013*, section 46; Act, section 70.

The Hon David Littleproud MP

Minister for Agriculture and Northern Australia
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MC21-011280

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

Dear Senator

Thank you for your letter of 25 November 2021 as Chair of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), requesting further advice in relation to the *Northern Australia Infrastructure Facility Investment Mandate Direction 2021* (Investment Mandate).

I am pleased to make an undertaking to the committee that the 2024 statutory review of the operation of the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act) will consider the appropriateness of the Investment Mandate not being subject to disallowance.

However, I do not consider it necessary to amend the current explanatory statement to the Investment Mandate to justify the Investment Mandate's exemption from disallowance, as the 'parent statutes' of the Investment Mandate – the NAIF Act and *Legislation Act 2003* with reference to the *Legislation (Exemptions and Other Matters) Regulation 2015*, clearly stipulate that Ministerial directions to a body such as the NAIF are not subject to disallowance.

I have copied this letter to Senator the Hon Simon Birmingham, Minister for Finance, who is also a responsible Minister for the Investment Mandate.

Thank you for bringing to my attention the work of the committee.

Yours sincerely

DAVID LITTLEPROUD MP

cc Senator the Hon Simon Birmingham, Minister for Finance

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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: MC22-002252

3 March 2022

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

We refer to your correspondence of 25 January 2022 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.

We appreciate the level of scrutiny you are providing to this instrument which provides a framework for one of the most sensitive areas of aged care. We trust that the further detail we are providing through this correspondence will assure you of the need for a legislated framework for restrictive practices in its current form, which places at its centre safeguards and protections for care recipients and accountability for those who support them.

Defining emergency

As outlined in previous correspondence to the Committee on 3 September, 15 October and 25 November 2021, 'emergency' is not defined so as not to stipulate or restrict the term and to ensure that no situations, which may have not been considered in the definition but are representative of a genuine emergency, are excluded. However, as highlighted in our previous correspondence of 25 November 2021, in the context of amending the Quality of Care Principles, we have sought advice from the Department of Health and the Office of Parliamentary Counsel to consider options to potentially include a definition of 'emergency'.

The feedback received from both the Department and the Office of Parliamentary Counsel is consistent with that which was raised in previous correspondence. Of particular note, the provisions of Part 4A of the Quality of Care Principles that refer to 'emergency' are made in reliance on subsection 54 10(2) of the *Aged Care Act 1997* (Act). 'Emergency' is not defined in the Act and so has its ordinary meaning in subsection 54–10(2). 'Emergency' is not defined so as not to speculate or limit the term and to ensure there are no unintended consequences that may exclude situations of a genuine emergency.

It is also useful to note that other provisions in the Act which refer to 'emergency'; Section 14 9 (Allocations in situations of emergency), and Section 42–2A (Determining situations of emergency to enable additional leave), both rely on the Secretary or the Minister forming a view about the existence or impact of emergencies and do not provide a definition of an 'emergency'. As such, defining 'emergency' in respect of the use of restrictive practices would be inconsistent with other provisions of the Act.

You may also be interested to know that, outside of the Health portfolio other legislation also includes the term 'emergency' but does not provide a definition. This includes *The National Emergency Declaration Act 2020* which states that… *the term 'emergency' takes its natural and ordinary meaning*; and that… *this is important so as not to limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies* (section 28).

Charter of Aged Care Rights

In relation to the Committee's request to amend the instrument from '*not inconsistent with*' the Charter of Aged Care Rights (Charter) to '*consistent with*' the Charter, we remain very concerned about the impact of the change proposed by the Committee.

As outlined in previous correspondence of 3 September, 15 October and 25 November 2021, '*not inconsistent with*' is the preferred drafting over '*consistent with*' because it takes into consideration the fact that some elements of the Charter may be irrelevant to the use of restrictive practices. In these situations, the provider would be unable to be consistent with them.

We would like to expand on our previous advice to the Committee, to demonstrate the unintended consequences that the proposed change would cause. As the Committee will be aware, the Charter applies to all care recipients equally. The Committee's request would mean an approved provider must act consistently with both the rights of a care recipient who is the subject of a restrictive practice and any care recipient(s) who may be affected if the restrictive practice is not used. This will lead to circumstances where the rights of both care recipients will be in conflict. In this instance, the use of '*not inconsistent*' is more practical, as acting '*consistent with*' the rights of both care recipients would be unachievable and disadvantage one of the care recipients.

For example, a care recipient being supported with a restrictive practice may have their right to independence impacted, however, if the restrictive practice is not used, another care recipient affected by the actions of the first care recipient may have their right to live without abuse and neglect impacted. This type of scenario, where the behaviour of one care recipient with cognitive impairments is impacting on another, is not uncommon in residential aged care.

With disallowance of the instrument, our most vulnerable older Australians in residential aged care will be living without adequate protections and safeguards in the use of restrictive practices. The Government's introduction of more stringent safeguards on the use of restrictive practices from 1 July 2019, demonstrates the serious consequences for providers if these practices are not managed well. The instrument requires transparent procedures for the use of restrictive practices, subjects them to external scrutiny and potential compliance action by the Aged Care Quality and Safety Commission (ACQSC), if the laws are not complied with.

We are mindful that the restrictive practices legislative framework only commenced in 2019 with further enhancements in 2021. It is a sensitive area and one which should be monitored closely. The Government accepted the Royal Commission into Aged Care Quality and Safety's (Royal Commission) final report recommendation to deliver a new Aged Care Act. The Department has commenced work on this important reform, with the new Act expected to take effect from 1 July 2023, subject to Parliamentary processes.

As you would be aware, the Government has committed to a new Act that will place high-quality, safe, compassionate and needs-based care and services for older people at the heart of the aged care system. The new Act is an opportunity to consider the functionality of the restrictive practices legislative framework and make further refinements if required. Any changes to the framework will be based on intelligence captured by the ACQSC and feedback from consumers, providers and other stakeholders including clinicians. We have directed the Department to consider this intelligence and feedback on the operation of the restrictive practices framework as part of the development of the new Act, to ensure that the framework is meeting its objectives including the legislated requirement that restrictive practices are used as a last resort. The Committee will have an opportunity to provide input to these matters again as the bill for the new Act progresses and related delegated legislation is developed and tabled.

Impact of disallowance

While we note your comments advising of the Committee's intention to retain the notice of motion to disallow this instrument until the Committee is satisfied their concerns have been resolved, we respectfully ask the Committee to consider the dire impact of disallowing this instrument.

The practical effect of disallowance is that a significant number of care recipients across Australia who require behaviour support with restrictive practices will continue to do so, but without the safeguards and protections contained in the instrument. These safeguards and protections include multiple 'checks and balances' before restrictive practices can be used, create obligations on providers and subjects them to scrutiny, monitoring and sanction if they are found to be in breach of the strict obligations.

Disallowing the instrument would be a serious retrograde step in aged care, and one which consumers, aged care providers, their peak body representatives and the Australian public will not accept. It will push the aged care sector back to a pre-2019 operating environment where there were no explicit requirements in relation to the use of restrictive practices. The results of using restrictive practices in this unregulated environment were featured in evidence before the Royal Commission.

Once again, we appreciate the Committee's scrutiny of the instrument which covers matters of significance for the wellbeing of aged care recipients, and we acknowledge the Committee's commitment to issues facing older Australians. We hope that the additional contextual information in relation to the Charter and the information about the advice underpinning our position on the use of the term 'emergency' will support your consideration of this matter and provide reassurance to the Committee.

Yours sincerely

Greg Hunt

Richard Colbeck

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS22-000180

Senator the Hon Concetta Fierravanti-Wells (Chair)
Senate Standing Committee on the Scrutiny of Delegated Legislation
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CANBERRA ACT 2600

Dear Chair

Australian Citizenship (special residence requirement) Instrument 2021

I thank the Senate Standing Committee on the Scrutiny of Delegated Legislation for its letter of 25 January 2022 in relation to *Australian Citizenship (special residence requirement) Instrument (LIN 21/069) 2021* [F2021L01422] (the instrument).

The Committee has requested advice as to:

- whether the 'S&P/ASX 200 share market index' is incorporated in the instrument; and if so; and
- whether the 'S&P/ASX 200 share market index' is incorporated as in force from time to time or at a fixed point in time, including, if applicable, the authority in the enabling legislation for the instrument to incorporate external materials as in force from time to time (noting the general prohibition on time to time incorporation in subsection 14(2) of the *Legislation Act 2003*).

Whether the 'S&P/ASX 200 share market index' is incorporated in the instrument

Section 6 of the instrument specifies kinds of work for the purpose of section 22B of the *Australian Citizenship Act 2007* (the Act). A person may satisfy the special residence requirements to be eligible for citizenship, if, among other things, at the time of application for citizenship they are engaged in work of a kind specified in a legislative instrument and the person is required to regularly travel outside of Australia for that work (see paragraph 22B(1)(a) of the Act). Section 6 of the instrument specifies, under subsection 22C(3) of the Act, kinds of work for this purpose.

The instrument operates by reference to factual circumstances that exist at a particular point in time that is, whether a person is a chief executive officer or executive manager of an S&P/ASX All Australian 200 company.

Paragraph 6(2)(c) of the instrument operates by reference to the factual circumstances that a person is employed by an S&P/ASX All Australian 200 (listed) company in the position of chief executive officer or executive manager. If that circumstance exists, a person may satisfy the special residence requirements in section 22B of the Act.

The definition of 'S&P/ASX All Australian 200 listed company' in section 3 of the instrument, operates by reference to the objective fact that a company has been relevantly listed in the share market index.

The instrument does not apply, adopt or incorporate content from the S&P/ASX All Australian 200. Subsection 6(2) and the definition of 'S&P/ASX All Australian 200 listed company' in section 3 of the instrument take the inclusion of a company being relevantly listed in the share market index at a point in time as a criterion for their operation. If the circumstance exists, that is a person is a chief executive or executive manager of an S&P/ASX All Australian 200 company, the special residence requirements in section 22B of the Act may be satisfied. By doing so, the instrument does not give the index the status of law.

It is an objective fact whether, at the time of making an application, a person works as a chief executive officer or executive manager for an ASX 200 company. It is similarly a matter of fact as to whether a person works on duty as a crew member of a ship or aircraft at the time of making their application (see paragraph 6(2)(a) of the instrument). A list of ASX 200 companies is not incorporated by reference in the instrument.

Whether the 'S&P/ASX 200 share market index' is incorporated as in force from time to time or at a fixed point in time

The S&P/ASX 200 share market index is not incorporated in the instrument.

Thank you for raising this matter.

Yours sincerely

ALEX HAWKE

8 / 2 / 2022

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

MC22-000516

Senator the Hon Concetta Fierravanti-Wells
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09 FEB 2022

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Dear ~~Chair~~ Connie

Thank you for your further letter of 25 January 2022 regarding - (Senate Standing Committee for the Scrutiny of Delegated Legislation) - Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 (Amending Regulations).

In your letter you reiterated the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) request that:

> "the Great Barrier Reef Marine Park Regulations 2019 be amended to provide that no-anchor areas may only be declared in a disallowable legislative instrument or primary legislation, as opposed to a notifiable instrument".

As my previous correspondence outlines, the Amending Regulations were initiated by the Great Barrier Reef Marine Park Authority (Reef Authority) in direct response to the danger posed to the Great Barrier Reef Marine Park (Marine Park) by unregulated anchoring activities in certain areas.

As responsible manager of the Marine Park, the Reef Authority took extensive advice on the means by which these concerns could be lawfully and most expeditiously addressed. That advice was that it could, and would best, be done by the notifiable instrument mechanism already contained within the *Great Barrier Reef Marine Park Regulations 2019* (Principal Regulations).

Without resiling from its position with respect to the integrity of the Amending Regulations, the Reef Authority appreciates and, of course, respects the different view taken by the Committee of the Amending Regulations, as do I. The Reef Authority will continue to find best practice ways of managing no-anchoring areas taking into account the views of the Committee moving forward.

Having considered the request in your letter, please consider this response as an undertaking that the Principal Regulations will be amended in the manner described in your letter. I trust that providing this undertaking addresses the Committee's concerns and will result in the Committee withdrawing its notice to disallow the Amending Regulations.

As described in Chapter 15 of *Odgers' Australian Senate Practice*, this undertaking is intended to provide surety for an outcome agreeable to, and requested by, the Committee without interrupting administration and implementation of the Amending Regulations.

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

Yours sincerely

SUSSAN LEY

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

MS22-000138

Senator the Hon Concetta Fierravanti-Wells (Chair)
Senate Standing Committee on the Scrutiny of Delegated Legislation
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CANBERRA ACT 2600

Dear Chair Connie,

Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021

I thank the Senate Standing Committee on the Scrutiny of Delegated Legislation for its letter of 25 January 2022 in relation to the *Migration Amendment (Humanitarian Response to Events in Afghanistan) Regulations 2021* (the Humanitarian Response Regulations).

The Committee has requested my advice as to whether the *Migration Regulations 1994* (the Migration Regulations) can be amended to incorporate the measures in the *Migration (Class of persons – Refugee and Humanitairan (Class XB) vis) Instrument (LIN 21/080) 2021 [F2021L01569]* (the Instrument) in order to provide robust parliamentary oversight of the measures through the disallowance processes.

As the Committee is aware, Australia's air evacuation operation in Afghanistan was one of the largest humanitarian airlift operations in our history. Since evacuations commenced from Kabul in August 2021, more than 4,300 Afghan evacuees have been brought to Australia. This important legislative change aligns to a practicable extent, visa outcomes for this group with what they would likely have received through the Humanitarian Program, if they did not need urgent evacuation from Afghanistan. It will provide these evacuees access to a process to secure a permanent Refugee and Humanitarian (Class XB) visa over the coming months, as they establish their lives in their new home.

As you would be aware, the Refugee and Humanitarian (Class XB) visa (Subclass 201) is a permanent visa normally only available to applicants who are outside Australia (the offshore humanitarian visa). The Humanitarian Response Regulations amended the Class XB visa (Subclass 201) so that a person could be in Australia at the time of application and grant of the visa if the applicant:

- holds a Subclass 449 (Humanitarian Stay (Temporary) visa (the visa they were evacuated on), and
- is in a class of persons specified by the Minister in a legislative instrument.

It further provided that the Minister may specify such a class of persons if the Minister is satisfied that doing so is appropriate to assist persons residing temporarily in Australia as a result of Australia's response to the humanitarian crisis in Afghanistan in 2021 (refer subitems 1402(3B)-(3C) of the Migration Regulations).

The relevant instrument specifies persons who were granted a Subclass 449 visa due to the deteriorating security situation in Afghanistan; or being a family member of such a person; or being a child born in Australia to such persons (refer LIN21/080).

As you noted, the Explanatory Statement to the Humanitarian Response Regulations provided this explanation for using an Instrument to specify the relevant cohort, rather than specifying it directly in the Regulations:

> "The requirement for the applicant to be in a class of persons specified in a legislative instrument provides flexibility to define the cohort covered by the concession and make adjustments if necessary. This is appropriate given the limited and targeted nature of the concession and the need to further consider the circumstances of the large contingent of evacuees from Afghanistan who have arrived in Australia during recent months.
>
> The power to make the legislative instrument is limited by a requirement for the Minister to be satisfied that the making of the instrument is appropriate to assist persons residing temporarily in Australia as a result of Australia's response to the humanitarian crisis in Afghanistan in 2021. This limitation ensures that the legislative instrument cannot be used for any other cohort. The limitation has been included to strengthen accountability to Parliament, which is appropriate because the legislative instrument will not be disallowable by Parliament (see table item 20 in regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, which has the effect that an instrument made under Schedule 1 to the *Migration Regulations 1994* is not subject to disallowance under section 42 of the *Legislation Act 2003*)."

The use of a legislative instrument to define the cohort of evacuated persons, rather than including them in the Regulations, was a response to the urgency with which this measure was required to be implemented. The Committee may be aware that, although the initial evacuation period has passed, Australia has continued to facilitate the ad hoc withdrawal and repatriation of smaller numbers of people who have fled Afghanistan. Defining the cohort within the Regulations poses a risk that we would be unable to respond to the evolving circumstances and ad hoc requirements to appropriately manage the situation.

For these reasons, I do not consider it appropriate to remove the flexibility required to support this vulnerable cohort during this humanitarian response. Significantly, any move to disallow the regulation would delay access to permanent visas for this cohort and disrupt their settlement journey in Australia.

I thank the Committee again for their interest in this matter.

Yours sincerely

Alex Hawke

8 / 2 / 2022

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC22-002250

Senator the Hon Concetta Fierravanti-Wells
Chair
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13 FEB 2022

Dear Chair Connie

I refer to your correspondence of 25 January 2022 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation concerning Therapeutic Goods (Standard for Human Cell and Tissue Products—Donor Screening Requirements) (TGO 108) Order 2021 [F2021L01326] (TGO 108).

You have sought advice as to whether the following terms or phrases identified in your letter and that appear in items 7, 12 and 15 of the table in Schedule 1 to TGO 108 can be redrafted to provide greater clarity as to their operation, purpose and meaning:

- 'recipient of viable animal cells or tissues' in table item 7
- 'sexual activity that puts the person at an increased risk of acquiring infectious diseases' in table item 12
- 'travelled to another country or region within Australia with exposure to particular epidemiological situations' and 'ineligible for a period of time based on a risk assessment using the most up-to-date epidemiological data' in table item 15.

I am pleased to advise amendments to TGO 108 will be progressed to redraft these provisions, with the effect of making it clearer that:

- 'recipient of viable animal cells or tissues' relates to a person who receives, principally in connection with treatment for a disease or condition, animal cells or tissues that are live or otherwise capable of functioning as intended to provide or support a therapeutic use
- 'sexual activity that puts the person at an increased risk of acquiring infectious diseases' relates to any activity of a sexual nature, without any intention to be limited or confined to any particular such activities
- 'travelled to another country or region within Australia with exposure to particular epidemiological situations' relates to where a person travels to a country other than Australia, or to a region within Australia, that is experiencing, or that has experienced, a disease outbreak (e.g. an outbreak of typhoid)
- 'risk assessment using the most up-to-date epidemiological data' relates to an assessment of possible hazards associated with a disease outbreak, using the most current information available about that event.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt