EC 20-000277

Mr Jason Lange

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Dear Mr Lange

**Athens Convention Regulation Impact Statement – final assessment**

I am writing to seek consideration for final assessment of the draft Regulation Impact Statement (RIS) prepared for consideration on whether Australia should accede to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol (Athens Convention). The draft RIS was provided to you on 7 August 2020 for first pass assessment (OBPR ID 25252).

I believe the RIS meets best practice requirements and is consistent with the ten principles for Australian Government policy makers.

In particular, I note that the RIS addresses the seven RIS questions:

* *What is the problem?*

The International Maritime Organization (IMO) Athens Convention seeks to implement a regime for assigning liability in international passenger shipping that provides passengers and carriers with greater legal certainty and assurance of cover.

Presently, Australian passengers on international cruise ships who pursue a claim relating to injury or luggage can be faced with an overly complex process which may impact the ability to make legitimate claims. Some of the factors that contribute to this are that many cruise ships are registered in foreign countries; the companies that own the cruise ships are often based internationally; the accidents often happen in international waters or in the territory of another country; and, the burden of proof lies with the claimant whom also, typically only has one year to bring any type of claim for injuries against a cruise ship.

The problem assessed by the RIS is to consider whether Australia acceding to the IMO Athens Convention is of a tangible benefit to Australia.

* *Why is government action needed?*

The Australian cruise ship industry is a growing industry, with Australian passenger numbers quadrupling over the last decade. With this growth, there is a greater need to ensure that Australian passengers and shipping carriers are provided with high quality legal protections informed by the world’s best practice.

The Athens Convention provides an internationally recognised regime for claims for the recovery of damages for death and personal injury, as well as loss or damage to the passenger's luggage, sustained during the course of international carriage. To afford Australian cruise consumers with access to that regime requires the Australian Government to become a State Party.

* *What policy options are you considering?*

The RIS considers four options, although the fourth option is dependent on the uptake of either Options 2 or 3. The options are:

1. Retain the status quo (non-regulatory option);
2. Accede to the Athens Convention but, opt out of the Convention’s liability limits and retain the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol liability limits;
3. a) Accede to the Athens Convention with the liability limits or b) increase the Convention’s Tier 2 liability limits; or
4. Accede to Athens Convention through either Option 2 or 3 and extend the application of the Convention to ‘voyages to nowhere’ and smaller domestic operators.

* *What is the likely net benefit of each option?*

**Option 1**. Retains the status quo and thus imposes no new regulatory or direct costs on cruise companies and insurers, does not increase need for legal advice and regulators will not have to make changes to their current arrangements. Passengers however will be unable to access the benefits listed below against Options 2, 3 and 4 and may continue to experience difficulties and complications in lodging, finalising and disputing claims with some cruise operators.

**Option 2.** The cruise operator must hold mandatory liability insurance to a minimum of 175,000 SDR[[1]](#footnote-1) times the registered passenger carrying capacity of the ship. Passengers will have access to a large pool of insurance funds, depending on the number of claimants in the event of shipping incident, with the minimum available 175,000 SDR.

Net benefits, that are equally applicable to Options 2, 3 and 4, include the following:

* for passengers, the burden to prove no fault lies with the carrier for shipping incidents. For non‑shipping incidents, the claimant must prove the cruise operator was at fault;
* the requirement for cruise operators to hold mandatory insurance to a standard minimum although this may increase insurance costs and passenger fares;
* ability for the passenger to claim directly from the insurer, but which may impose an increased workload on insurers;
* international consistency and standard regulation for insurance and claims;
* legal costs should remain relatively the same, although there could be a shift in the required legal hours/workload from passengers to cruise operators;
* greater choice of jurisdiction for claimants for court cases; and
* provides for compulsory luggage loss or damage compensation insurance for passengers.

**Option 3a** The cruise operator must hold mandatory liability insurance up to a minimum of 250,000 SDR per passenger. Passengers will have access to a guaranteed amount of insurance funds in the event of shipping incident. Passengers can access an upper limit tier 2 liability of 400,000 SDR, unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

**Option 3b\*** is similar to Option 3a but provides an option to set a greater amount of upper limit tier 2 funds greater than 400,000 SDR.

**Option 4** extends the Convention to ‘voyages to nowhere’ and smaller Australian domestic operators, providing for a uniform liability requirement regardless of voyage type.

* *Who will you consult and how will you consult them?*

In November 2017 the Department conducted a consultation process and published a Discussion Paper, seeking submissions from relevant organisations and parties. Five submissions were received from Carnival Australia; Royal Caribbean Cruises; Professor Kate Lewins; Professor Nicholas Gaskell; and the Maritime Law Association of Australia and New Zealand. This exercise set the groundwork for the development of the options used in the RIS.

In November 2019 the Department engaged the consultancy, NineSquared Pty Ltd, to comprehensively research the problem, undertake a consultation process and develop the RIS. NineSquared initially developed a summary of options paper for distribution, with a survey and consulted with the cruise and maritime industry, legal sector, government, insurance and consumer groups. NineSquared’s consultation process was through a variety of channels including online survey, phone discussion, email and face to face meetings.

The Department undertook separate consultation with relevant Australian Government departments and agencies, mainly through email, providing that feedback to NineSquared for the development of the RIS.

* *What is the best option from those you have considered?*

The conclusion from the RIS is that whilst there are benefits to passengers if Australia were to accede to the Athens Convention using any of the Options 2 to 4 outlined above, there is no strong or urgent case for government action.

Any benefits to passengers, including greater clarity on injury liability outside of Australian waters, would be outweighed by the regulatory burden on the cruise industry and the considerable work required by all Australian, state and territory governments to implement the Athens Convention. Accession to the Athens Convention would require amendments to the Australian Consumer Law that is model legislation that has been implemented in every Australian jurisdiction. The amendments would need to be agreed to nationally and passed by each parliament before the Athens Convention could be signed.

Although the analysis was undertaken before the full impacts of the COVID-19 situation are known, it is clear that the cruise industry will be significantly affected. There is also some noteworthy legal action currently underway regarding the liability of cruise ships. Given the changing circumstances and the lack of an urgent case for action, it is recommended that the government consider deferring action until the implications are clearer.

The recommendation is therefore Option 1, to remain with the status quo.

* *How will you implement and evaluate your chosen option?*

No action is required for Option 1. The Department will continue to monitor and review whether circumstances have sufficiently changed, particularly with regard to the effect of COVID-19 on the cruise industry, to reconsider the issue of Australia acceding to the Athens Convention.

I submit the draft RIS to the Office of Best Practice Regulation for final assessment.

Yours sincerely

David Hallinan

August 2020

1. SDR - Special Drawing Rights which are a supplementary foreign-exchange reserve asset defined and maintained by the International Monetary Fund (IMF). The SDR is an artificial unit of account for the IMF, and is not a currency per se. An SDR instead represents a claim to currency held by IMF member countries for which they may be exchanged. On 13 November 2019, 1 SDR = AUD $2.00724. [↑](#footnote-ref-1)