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Confidential

Dear Treasury

**Submission on Public Consultation
Proposed Amendments to ACNC Governance Standard 3**

1 Introduction

- 1.1 Thank you for the opportunity to make a submission in response to the exposure draft of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (Cth), as released on 16 February 2021 (the **Draft Regulations**).
- 1.2 Prolegis Lawyers is a legal practice established in 2001 that exists to assist charities and not-for-profits. All of our clients are either charities or individuals or businesses seeking to establish charitable or other not-for-profit entities. Prolegis is based in Sydney and Melbourne and our clients are located across all States and Territories in Australia as well as overseas.
- 1.3 The Draft Regulations seeks to amend regulation 45.15 of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (**Governance Standard 3**) to broaden the scope of the offences that may result in a breach of Governance Standard 3. We are encouraged by the Government's attempts to clarify the law relating to advocacy by charities and seek to provide comments that will:
 - (a) prompt reconsideration of the overall necessity of the Draft Regulations; and
 - (b) encourage consideration of alternative approaches available.

2 Summary of our comments and recommendations

In summary, our submission is that the Draft Regulations in its current form will not achieve its stated objective of reducing uncertainty in the law regarding charitable advocacy (namely, the distinction between advocacy and disqualifying purposes).

3 Draft Regulations

3.1 The Draft Regulations amend Governance Standard 3 to “address uncertainty about when engaging in or promoting certain kinds of unlawful activity may affect an entity’s entitlement to registration under the Act”, as per the draft Explanatory Statement.

3.2 The draft Explanatory Statement states that:

The purpose of the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (the Regulations) is to address uncertainty about when engaging in or promoting certain kinds of unlawful activity may affect an entity’s entitlement to registration under the Act. ...

These amendments reflect community expectations that registered entities should govern the use of their resources responsibly and ensure that their resources are subject to controls and safeguards against potential misuse, either from within or outside the entity.

3.3 The proposed amendments are as follows:

- (a) a new sub-regulation (2)(aa), which expands the scope of registered charities’ requirements to comply with Australian laws to include three types of summary offences:
 - (i) real or personal property of any description, whether tangible or intangible; or
 - (ii) a legal or equitable estate or interest in any such property, or a right, power or privilege in connection with any such property; or
 - (iii) causing personal injury to an individual, or any other kind of impairment of an individual’s health, including the risk or threat of causing such injury or impairment.

- (b) new sub-regulations (3)-(4), which expands the scope of charities’ requirement to comply with Australian laws to include a requirement that a “registered entity must take **reasonable steps** to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions by any entity that may be dealt with as described in paragraph (2)(a), (aa) or (b)”, and defines the term “resources” to include a charity’s:
 - (i) funds; and
 - (ii) responsible entities, and employees, when acting in that capacity; and
 - (iii) websites, social media accounts and other publications;

but does not include any of the charity’s volunteers who are not one of its responsible entities.

4 Context for the Draft Regulations

Advocacy by charities

4.1 Australian charities are permitted to engage in issue-based advocacy for charitable purposes:

- (a) In *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at [48] (**Aid/Watch**), the High Court recognised that issue-based advocacy for charitable purposes is charitable in Australia:

This is because the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in Pemsel.

- (b) Section 12 of the *Charities Act 2013* (Cth) (**Charities Act**) codifies the Aid/Watch position by providing that the following purpose is charitable: the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if the change is in furtherance of, or in opposition to, another Charities Act charitable purpose.

4.2 Section 11 of the Charities Act provides that two purposes are “disqualifying”:

- (a) engaging in activities that are contrary to law or public policy; or
 (b) promoting or opposing political parties or candidates for political office.

ACNC Review Panel

4.3 The ACNC Review Panel in 2018 recommended that:

“Test case funding should be made available to develop the law in matters of public interest, including disqualifying purposes”. (Recommendation 20)

4.4 This recommendation was based upon the uncertainty to which issues-based advocacy may develop into an independent political (and hence ‘disqualifying’) purpose:

There have been a number of cases that highlight the ambiguity around the threshold between issues-based advocacy which the vast majority of charities engage in, and activities undertaken to achieve a purpose which may turn into a political purpose in its own right, and could constitute a ‘disqualifying purpose.’ This is a contested area of charity law where litigation would lead to greater clarity and certainty for the sector. (p82)

4.5 Relevantly, the ACNC Review Panel was not claiming that uncertainty existed with respect to illegal purposes (being the other limb of a ‘disqualifying purpose’).

4.6 Recommendation 20 was rejected by the Commonwealth Government in its 2020 response to the ACNC Review Panel, in favour of exploring “legislative options to address uncertainty in the law”; namely, by means of the Draft Regulations.

4.7 However, the Draft Regulations are inconsistent with the ACNC Review Panel recommendations 9 and 20, as follows:

- (a) firstly, the ACNC Review Panel was recommending clarification of distinction between issues-based advocacy and a political purpose, and not the distinction between (occasional) illegal activity and an illegal (and hence ‘disqualifying’) purpose;

- (b) secondly, the Draft Regulations do not clarify the distinction between (occasional) illegal activity and an illegal purpose; rather, it conflates the effect of both by setting the bar for potential loss of registered charity status at too low a threshold; and
- (c) finally, rather than strengthening Governance Standard 3, the ACNC Review Panel recommended that Governance Standard 3 be repealed for the following reasons:

Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence (unrelated to the ACNC's regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.¹

5 Our comments on the Draft Regulations

Introduction

- 5.1 It is not in issue that charities should comply with Australian laws at all times, whether these charities are registered with the ACNC or otherwise.
- 5.2 The Draft Regulations do not change this position, but seek to increase the penalties for registered charities (ie regulatory intervention and potential loss of registered charity status) as a consequence of failure to comply with certain summary offences.
- 5.3 Our concerns regarding the Draft Regulations are as follows:
 - (a) it is too broad and captures too many types of summary offences;
 - (b) in that context, the ACNC Commissioner is allowed too broad a discretion; and
 - (c) the potential impact of a breach of a summary offence (or potential offence) may be disproportionate.

Issue 1: Summary offences

- 5.4 The draft Explanatory Statement clarifies that the Draft Regulations are not intended to extend to all summary offences:

“Other summary offences are not included in the new provision as they are less likely to affect the governance or proper regulation of charities. For example, the amendments do not cover a situation where an employee of a registered entity receives a traffic infringement in the course of their employment”.
- 5.5 However, the range of summary offences included within the ambit of the Draft Regulations is very broad and would arguably include the following (with examples from Victoria and Queensland as a sample of the types of summary offences that may be caught in other jurisdictions):
 - (a) The following are summary offences in the *Summary Offences Act 1966* (Vic):
 - (i) Section 6 – Direction to move on;
 - (ii) Section 7(a)-(c) – Negligent behaviour allowing public harm;
 - (iii) Section 10(1) – Posting placards, bills and stickers;

¹ See also Recommendation 9 of the ACNC Review Panel report.

- (iv) Section 11(1)(a) – Lighting a fire in open air;
 - (v) Section 32 – Offering property from wrecks for sale;
 - (vi) Section 33 – Failure of examination of persons through whose hands property has passed; and
 - (vii) Section 38(1) – Use of vehicle without consent of owner.
- (b) The following are summary offences in the *Summary Offences Act 2005* (Qld):
- (i) Section 11A – Unlawful driving of motorbike on public land;
 - (ii) Section 16 – Unlawful possession of suspected stolen property;
 - (iii) Section 24 – Throwing things at a sporting event; and
 - (iv) Section 25A – Advertising a reward for the return of stolen property.

5.6 If the intention of the Governance Standards is to examine and regulate the conduct of the governing body of the registered charity, then its focus must remain on what the governing body does or does not do to ensure compliance with relevant laws. However, the types of summary offences that may be caught by the Draft Regulations are unlikely to be elevated to the governing board until such time as charges are regularly made and upheld in the Courts. This puts the governing body in an impossible position.

Issue 2: Enforcement powers of the ACNC

- 5.7 The ACNC Commissioner has broad enforcement powers in sections 70 to 100 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth):
- (a) the Commissioner can gather information necessary to monitor registered entities' compliance with certain provisions and to assess registered entities' ongoing entitlement to registration (section 70);
 - (b) an ACNC officer can monitor whether certain provisions have been, or are being complied with (section 75);
 - (c) that the Commissioner may give a registered entity a warning notice if it has contravened a provision of the Act, or if the Commissioner reasonably believes that the entity has not complied with a governance standard, is more likely than not to fail to comply with a governance standard, or if the Commissioner reasonably believes that the entity has not or will not comply with an external conduct standard (section 80);
 - (d) the Commissioner can provide:
 - (i) written directions to entities which fail to meet their obligations (section 85); or,
 - (ii) enforceable undertakings (section 90); or,
 - (iii) injunctions (section 95).
- 5.8 The impact of these broad powers is noted in the Draft Regulations:

The ACNC Commissioner's enforcement powers under Chapter 4 of the Act may be exercised if the ACNC Commissioner reasonably believes that it is more likely than not that the entity will not comply with a governance standard. This means it is not necessary for a registered entity to be charged or found guilty of a relevant summary offence for the ACNC Commissioner to take appropriate enforcement action under Chapter 4 of the Act.

- 5.9 As noted by the ACNC Review Panel (please refer paragraph 4.7(c) above), the ACNC is not properly established or equipped to determine whether or not a registered charity has or is likely to be engaged in encouraging or resourcing the commissioning of summary offences.
- 5.10 Absent proper resourcing, enforcement action by the ACNC is likely to be *ad hoc* and inconsistent; this will most likely reduce the standing and regard of the ACNC as a regulator and so undermine confidence in the charitable and not-for-profit sector.

Issue 3: Disproportionality

- 5.11 The ACNC Governance Standards were introduced in 2013 by the *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 1) (Cth) (Amendment Regulation)*.
- 5.12 The Explanatory Statement to the Amendment Regulation specifically addresses Governance Standard 3 (r 45.15 of the *Australian Charities and Not-for-profits Commission Regulation 2013 (Cth)*), and states that Governance Standard 3 (as it currently stands) represents "a minimum benchmark by which all entities should govern themselves", and that Governance Standard 3 "allows the Commissioner to take a **proportionate** approach to protect public trust and confidence, and the assets of the registered entity, and ensure the registered entity continues to operate in a manner that is sustainable and consistent with its purposes."
- 5.13 By greatly expanding the ambit of Governance Standard 3, the Draft Regulations are disproportionate. The potential loss of charity registration, including both the loss of access to tax concessions and also potential damage to reputation, is wholly disproportionate to the commissioning of a summary offence which is not part of an illegal/criminal purpose.

6 Concluding comments

We welcome the opportunity to provide our submission to you which we trust will be of assistance. Please contact me if you have any questions or wish to discuss further.

Yours faithfully
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