



12 August 2021

The Hon Michael Sukkar MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Michael.Sukkar.MP@aph.gov.au

CC: dlosukkar@treasury.gov.au

Dear Assistant Treasurer,

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]

Thank you for your response of 28 July 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 11 August 2021. Whilst noting your advice, the committee remains concerned that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concerns are detailed in full in Chapter 1 of *Delegated Legislation Monitor 12 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

Since raising concerns in relation to the instrument, the committee has received considerable correspondence from a wide range of charities and non-government organisations in both writing and by telephone. This correspondence has served to heighten the committee's scrutiny concerns about the potential impact the instrument may have on registered charities.

Conferral of discretionary powers

As set out in the Monitor, the committee remains concerned that subsection 45.15(3) appears to provide for the exercise of a broad discretion by the ACNC Commissioner.

You advised that determining whether a registered entity has reasonable internal control measures is a 'question of fact as assessed against an objective standard'. However, it is unclear how this will not require the ACNC Commissioner to make a subjective judgement, noting that they must have regard to the individual circumstances of each charity. Neither the explanatory statement to the instrument or your response provides clear guidance as to the factors that the ACNC Commissioner must consider in determining whether a registered entity has complied with the requirement in subsection 45.15(3).

In the absence of further information, the committee retains significant concerns that this provision appears to enable the ACNC Commissioner to exercise a broad discretion in determining compliance with the governance standards. The committee's concerns are heightened noting that the lack of clarity on what will constitute 'reasonable internal control procedures' may inhibit charities' ability to understand their obligations under the instrument.

In light of the matters outlined above, the committee requests your more detailed advice as to:

- **what objective test will be applied to determine whether a registered entity has complied with the requirements of subsection 45.15(3); and**
- **what factors the ACNC Commissioner must consider in making this determination.**

Implied freedom of political communication

As set out in the Monitor, the committee notes your advice that the instrument does not interfere with the implied freedom of political communication as it relates solely to matters that are unlawful under other Australian laws. However, while noting this advice, the committee remains concerned that this does not provide a clear explanation as to how the instrument as a whole does not impermissibly restrict the implied freedom.

In particular, it remains unclear to the committee how the effect of the requirements in subsection 45.15(3) of the instrument relating to internal control procedures impact on the implied freedom. The committee's concerns centre on the fact that those requirements relate to the promotion of unlawful activities by other entities and not unlawful actions undertaken by the registered entities themselves. Failure to comply with these requirements may result in the application of certain enforcement powers under Part 4-2 of the ACNC Act.

In this regard, it appears that the instrument may limit a registered entity's ability to support or promote certain types of political protest, without having committed an unlawful act themselves. Accordingly, in the absence of further information, it is unclear whether this provision may impermissibly burden the implied freedom of political communication in its terms, operation, or effect.

The committee therefore requests the your more detailed advice as to how the instrument as a whole, including subsection 45.15(3), does not impermissibly restrict the implied freedom of political communication.

It is 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. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument 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 outlined in *Delegated Legislation Monitor 12 of 2021*, the committee would appreciate your response by **26 August 2021**.

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*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Yours sincerely,

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