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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 14 July 2021 concerning the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021*.

In that letter, the Committee requested my advice about:

- why it is considered necessary and appropriate to expand the discretion that the ACNC Commissioner may exercise in determining whether a registered charity complies with the governance standards under section 45.15 of the principal instrument;
- the scope of the powers that the ACNC Commissioner may exercise under the instrument;
- the nature and source of any limitations or safeguards on the exercise of the ACNC Commissioner's discretionary powers under section 45.15, including whether they are set out in law or policy; and
- how the instrument is compliant with the implied freedom of political communication.

I have set out my response in the Annexure to this letter.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP

Amendment to governance standard three

As stated in the explanatory statement, the purpose of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations) is to:

- give the public trust and confidence that a registered entity is governed in a way that ensures its on-ongoing operations and the safety of its assets, through compliance with Australian laws; and
- address uncertainty about when engaging in or actively promoting certain kinds of unlawful activity may affect an entity's entitlement to registration under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Governance standard three currently requires charities to comply with Australian laws. Acting lawfully protects a charity's assets, reputation, and the people it works with. This standard does not impose a new burden on charities as they are already required to comply with all Australian laws. Rather the intent of the standard is to allow the ACNC to investigate serious breaches of the law and take enforcement action, if required, to improve organisational governance and protect trust and confidence in the charities' sector.

To this end, governance standard three, as it existed prior to these amendments, provided that registered charities must not engage in conduct that may be dealt with as an indictable offence or a breach of law that has a civil penalty of 60 penalty units or more. In drafting the law, the policy intent was to enable the ACNC Commissioner to take appropriate action where a charity has engaged in a serious criminal offence but carve out less serious offences that do not concern the proper governance of a registered charity (such as traffic infringements).

The amendments to governance standard three empower the ACNC Commissioner to investigate and take enforcement action, if appropriate, in situations where a registered charity engages in or actively promotes serious unlawful acts of trespass, vandalism, theft, assault or threatening harm. These amendments are required because the existing scope of governance standard three has led to inconsistent outcomes for certain unlawful conduct. This is because there is inconsistency between the laws of the states and territories with respect to which unlawful activities are classified as indictable or summary offences. The practical effect of these inconsistencies is that the ACNC Commissioner is unable to take appropriate action in cases where some charities are being misgoverned, potentially threatening trust and confidence across the whole sector. In turn, this undermines public trust and confidence in the ACNC as an effective regulator.

Scope of the ACNC Commissioner's powers under the instrument

The ACNC Commissioner's powers are set out in the Act. The amendments to governance standard three do not expand, modify, or alter the ACNC Commissioner's powers in any respect. The governance standards support charities in fulfilling their objectives by providing a minimum level of assurance that they meet community expectations in relation to how a charity should be managed.

The steps a charity needs to take to comply with the governance standards varies according to its circumstances, such as its size, the sources of its funding, the nature of its activities and the needs of the public (including members, donors, employees, volunteers, and benefit recipients of the registered entity). It is for this reason that each of the governance standards are framed as principles with each charity deciding how it best to achieve each standard given its individual circumstances.

The amendment to governance standard three is designed consistently with the other standards to reduce the complexity, ensure there is greater flexibility for charities in how they manage their internal affairs, and a greater degree of future-proofing as jurisdictions make changes to their laws over time.

As mentioned in the explanatory statement, the kinds of summary offences that are covered under paragraph 45.15(2)(aa) of the *Australian Charities and Not-for-profits Commission Regulation 2013* include those under an Australian law that relate to trespass to land or premises, vandalism, theft of personal

property, common assault, or threatening violence. Listing every relevant state and territory statute (or part thereof) is neither practical nor appropriate as it would obscure the policy outcome to be achieved by the standard and would require constant revision as states and territories make changes to their statutes over time.

Whether a registered entity complies with the new requirement will depend on whether the elements of the relevant summary offence (including any fault elements) are met and whether any defences are available. In particular, where an element of the offence is not met or where a complete defence (such as the defence of sudden or extraordinary emergency) is available, the registered entity has not engaged in conduct that may be dealt with as a relevant summary offence. For example, if the relevant summary offence relating to entering real property requires intention to be made out as a fault element, and that intention is not present (because for instance, the entity mistakenly entered the property), the registered entity has not contravened the new requirement.

In line with current practices, the ACNC will provide guidance and education to registered charities once the amended standard comes into effect to help them understand and comply with the governance standard. However, to be clear, the ACNC Commissioner does not have discretion to determine the summary offences that are covered or what procedures a charity is required to have in place. Rather, whether a summary offence is covered by this new paragraph depends on whether it is a summary offence under an Australian law and the offence relates to one of the matters prescribed in subparagraph 45.15(2)(aa)(i) to (iv). Similarly, whether a charity's internal controls meet the requirements of the standard is a question of fact as assessed against an objective standard having regard to the individual circumstances of the charity.

Factors the ACNC Commissioner must consider before seeking advice from a relevant entity

The Regulations do not introduce a new power for the ACNC Commissioner to seek advice from law enforcement agencies. Consistent with the requirements applying to most regulatory agencies, it is up to each agency to decide if and when to consult other agencies in performance of their statutory functions. Providing regulators with appropriate discretion is necessary because the circumstances of any given case will vary. For example, if a registered entity has reported its non-compliance with the ACNC Commissioner, it may not be necessary, nor appropriate, for the ACNC Commissioner to then seek advice from the relevant law enforcement agency.

Under the requirements set out in the Act, before taking action against a registered entity in relation to non-compliance with a governance standard, the ACNC Commissioner must reasonably believe that non-compliance has occurred or will occur. Whether the ACNC Commissioner's powers are enlivened under the Act are to be assessed against an objective standard. In other words, prior to taking action, the ACNC Commissioner must be satisfied that, based on the facts and evidence before the ACNC Commissioner, a reasonable person would believe that non-compliance has occurred or will occur. In practice, and as covered in the explanatory statement, this generally means that there needs to be sufficient, reliable, and accurate evidence about these matters.

As I noted above, the Regulations do not expand, modify, or alter the ACNC Commissioner's powers which are set out in the Act.

Limitations and safeguards on the exercise of the ACNC Commissioner's powers

Under section 45.3 of the *Australian Charities and Not-for-profits Commission Regulation 2013*, the governance standards must be interpreted in a manner that is consistent with the objects of the Act and the requirements set out in section 15-10 of the Act.

This means that the ACNC Commissioner must have regard to a range of matters when performing their statutory functions, including:

- the principle of regulatory necessity;
- the principle of proportionate regulation; and

- the benefits gained from assisting registered entities in complying with and understanding the Act, by providing them with guidance and education.

Where enforcement action is required in relation to the governance standards, the ACNC Commissioner has a range of powers to allow the ACNC Commissioner to provide a proportionate and effective regulatory response. These responses could include providing regulatory advice, education, or a warning notice, enforcing undertakings, issuing directions to comply, or revoking an entity's registration.

In deciding whether to revoke registration, the ACNC Commissioner must take account of specific factors including the *nature, significance and persistence* of any non-compliance and what action has been taken by the charity to *address or prevent* non-compliance. These matters are set out in subsection 35-10(2) of the Act (and the ACNC Regulatory Approach Statement) and ensure the ACNC Commissioner's actions are proportionate to the problem they are seeking to address. It also ensures the regulatory responses consider the different circumstances of different entities, including the charity's size, revenue and donations received from the public.

The ACNC also has a Regulatory Approach Statement which can be found on its website. The Statement covers the values that underpin the ACNC's regulatory approach and how it will regulate registered entities. Any action taken by the ACNC Commissioner will be consistent with the Statement.

The Statement makes clear that the ACNC operates with a presumption of honesty and applies principles of procedural fairness. In particular, the Statement provides that before the ACNC Commissioner makes a decision in relation to a registered entity, the entity will generally be contacted to clarify matters and to give the entity a reasonable opportunity to address these issues. Registered entities may also seek an internal review of the ACNC's decisions (referred to as an objection decision under the Act).

The ACNC's decisions are also reviewable by the Administrative Appeals Tribunal and the Federal Court of Australia.

Compliance with the implied freedom of political communication

The implied freedom of political communication is a limitation on Commonwealth legislative power implied from certain provisions of the Constitution in order to ensure that the Australian people may exercise a free and informed choice as electors. It is well established that the implied freedom of political communication is not an absolute freedom and political communication may be subject to valid legislative restrictions in certain circumstances. The Regulations do not interfere with the implied freedom of political communication as the Regulations relate solely to matters that are unlawful under other Australian laws.