



14 July 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]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Conferral of discretionary powers

Clarity of drafting

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers on a person. In addition, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

The instrument amends the Australian Charities and Not-for-profits Commission Regulation 2013 (principal instrument) to alter governance standards relating to charities' engagement in, or promotion of, certain unlawful activities. Registered entities must comply with the standards in order to qualify for certain exemptions, benefits and concessions under the *Australian Charities and Not-for-profits Commission Act 2021* (ACNC Act). Failure to comply with the governance standards may result in revocation of the entity's registration under section 35-10 of the ACNC Act and the exercise of certain enforcement powers under Part 4-2 of the ACNC Act.

The amendments made by the instrument appear to enable the Australian Charities and Not-for-profits Commission (ACNC) Commissioner to exercise a range of discretionary powers in determining whether a registered entity has failed to comply with the governance standards through engaging in, or promoting, unlawful conduct. For example, the instrument inserts new paragraph 45.15(2)(aa) into the principal instrument. This paragraph provides that registered entities must not engage in conduct, or omit to engage in conduct, if that conduct may be dealt with as a summary offence under Australian law and the offence relates to certain types of actions. While the explanatory statement to the instrument provides some examples as to the type of offences to which this provision may apply, it is unclear what the full scope of the offences may be. In this regard, it appears that the ACNC Commissioner may exercise some discretion in determining what summary offences may be covered by paragraph 45.15(2)(aa). It is

unclear why the specific offences are not set out on the face of the instrument, or whether there are any limitations on, or guidance in relation to, the exercise of this discretion.

Additionally, the instrument inserts a note to subsection 45.15(2) to the principal instrument. This note states that the ACNC Commissioner may consult with a law enforcement agency or other relevant entity in forming a reasonable belief about compliance with the governance standards under subsection 35-10(1) of ACNC Act. The explanatory statement explains that this is intended to 'address general concerns from stakeholders about the ACNC Commissioner's discretion and enforcement powers'. However, it does not provide guidance as to the scope of this discretion, such as the circumstances in which the ACNC Commissioner may seek such advice, or indicate which entities may be contacted.

Further, the instrument inserts new subsection 45.15(3) into the principal instrument. This provision requires registered entities to maintain reasonable internal control procedures to ensure that its resources are neither used nor continued to be used to actively promote another entity's acts or omissions that may be dealt with under paragraphs 45.15(2)(a), (aa) or (b). Some examples of the types of internal procedures that a registered entity may maintain are set out on the face of the instrument. The explanatory statement further notes that 'whether internal control procedures are reasonable in any particular case is to be determined objectively and will depend on the specific circumstances of the registered entity, including its size, purpose and activities'. It also explains that this is consistent with the requirements for external conduct standards. However, in the absence of further information in the explanatory statement, it is unclear what objective test will be applied in determining whether a registered entity has complied with the requirements in subsection 45.15(3).

The committee generally considers that instruments that confer discretionary powers on a person should clearly address the purpose and scope the discretion and why it is considered necessary in the explanatory statement. Additionally, the committee expects that the explanatory statement should explain the factors that must be considered in exercising the discretion, and the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy. In this instance, the committee considers that the explanatory statement does not provide sufficient detail as to the scope of these discretionary powers, their necessity, or any relevant limitations. The committee considers that such information is important to enable charities to clearly understand their obligations under the governance standards. The committee concerns are particularly amplified noting that the discretionary powers to be exercised by the Commissioner may relate to the determination of whether a criminal law has been breached.

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

- **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, including:**
 - **what specific summary offences that registered entities may not engage in under new paragraph 45.15(2)(aa);**
 - **the factors that the ACNC Commissioner must consider when determining when to seek advice from law enforcement agencies or other relevant entities in forming a reasonable belief about compliance with the governance standards under section 35-10 of the ACNC Act;**
 - **what objective test is applied to determine whether a registered entity has complied with the requirements of subsection 45.15(3); and**

- **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.**

Implied freedom of political communication

Senate standing order 23(3)(b) requires the committee to scrutinise each legislative instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid. This includes whether an instrument may restrict the implied freedom of political communication.

As outlined above, the instrument has the effect of preventing registered entities from engaging in or actively promoting certain kinds of unlawful activity as this may affect an entity's entitlement to registration under the Act.

In the absence of contrary information in the explanatory statement to the instrument, it is unclear whether the instrument may limit registered entities' implied freedom of political communication, by preventing them from engaging in, or supporting certain activities. This may include limiting their ability to engage in, or support, certain types of political protest.

The committee makes no judgement on the permissibility of limitations on the implied freedom, or on the constitutionality of the instrument, more broadly. However, from a scrutiny perspective, the committee generally expects that instruments which may have the potential to infringe the implied freedom of political communication should include an explanation of how the instrument does not impermissibly restrict the implied freedom in the explanatory statement.

The committee therefore requests your advice as to how the instrument is compliant with the implied freedom of political communication, and whether the explanatory statement can be amended to include this analysis.

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 above, the committee would appreciate your response by **28 July 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

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

Thank you for your assistance with this matter.

Yours sincerely,

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