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Vice-Chancellor and Principal

21 September 2018

Marisa Purvis-Smith
Division Head
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ExternalConductStandards@treasury.gov.au

Dear Ms Purvis-Smith,

Exposure draft: charities' external conduct standards Regulations

The University of Sydney is grateful for the opportunity to provide the attached feedback on the exposure draft of the *Australian Charities and Not-for-Profits Commission Amendment Regulations (No.2) 2018 (Cth)* ("draft Regulations").

We do so as an institution established for charitable education and research purposes by the Parliament of New South Wales in 1850, which is registered both as a higher education provider with the Tertiary Education Quality and Standards Agency (TEQSA) and as a charity with the Australian Charities and Not-for-profits Commission (ACNC).

Our main interest in the draft Regulations is to ensure that the University, which already operates under a robust and comprehensive external and internal regulatory, reporting, quality assurance and risk management framework, is not subjected to unnecessary and unreasonable additional red tape.

Specifically, we are concerned that under the draft Regulations Australian universities will be required to keep records in a specified manner, and report in detail to the ACNC annually on their offshore activities in every country in which they are active.

We trust this feedback is helpful as Treasury and the ACNC finalise the draft Regulations and would be happy to provide further information as required.

Yours sincerely,

(Signature removed)

Michael Spence

Separate attachment MoU between the ACNC and TEQSA, executed 13 November 2013

cc Professor Nick Saunders, Chief Commissioner, Tertiary Education Quality and Standards Agency
The Hon Dr Gary Johns, Commissioner, Australian Charities and Not-for-Profits Commission

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University of Sydney feedback on the Exposure Draft – Australian Charities and Not-for-Profits Commission Amendment Regulations (No.2) 2018, released August 2018

Summary

The University of Sydney welcomes the opportunity to provide feedback on the exposure draft of the *Australian Charities and Not-for-Profits Commission Amendment Regulations (No.2) 2018 (Cth)* (the “draft Regulations”). We provide this feedback as a charitable public institution registered with both the Australian Charities and Not-for-profits Commission (ACNC) and the Australian Tertiary Education Quality and Standards Agency (TEQSA).

While we strongly support the policy objectives of the ACNC Act and the draft Regulations, we are concerned to ensure that the Regulations do not impose an unnecessary and unreasonable additional regulatory compliance burden on Australian universities, which already conduct their domestic and offshore activities in accordance with very strong and comprehensive external regulation and reporting frameworks.

Our submission discusses the regulatory principles of proportionate regulation, necessity and reflecting risk that underpin the regulatory approaches of both the ACNC and TEQSA Acts. We note that the Financial Action Taskforce recommendations to which the draft Regulations partly respond, advocate expressly against a one-size-fits all approach to regulating non-profit organisations to combat risks of money laundering and financing terrorism and the proliferation of weapons of mass destruction.

We provide background on the arrangements the ACNC and TEQSA have agreed to minimise regulatory duplication and reporting red tape for Australian universities and the many other non-profit higher education providers that are registered with TEQSA and the ACNC. We then provide a high-level overview of the comprehensive regulatory, external public reporting, audit and internal quality assurance arrangements that already apply to Australian universities’ domestic and overseas activities.

To resolve our concerns that the Regulations could impose excessive and unnecessary additional regulation and reporting burdens on Australian universities, we conclude by offering three possible solutions for consideration by Treasury and the ACNC:

1. An early ruling or policy determination from the ACNC Commissioner that all Australian universities’ offshore activities are considered incidental to the pursuit of their charitable purposes inside Australia, within the meaning of section 50.4(2) of the draft Regulations, and that as a consequence, Australian universities do not operate outside Australia for the purposes of the draft Regulations.
2. An amendment to the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth)* which provides that universities that are already complying with legislation regarding offshore activities, are taken to be complying with section 50.25 of the draft Regulations (Standard 2 – Annual review of overseas activities and record-keeping).
3. An extension of the terms of the existing ACNC/TEQSA MoU to allow the ACNC to receive the audited annual financial reports of Australian universities and/or of all higher education providers registered with TEQSA in satisfaction of the draft regulation’s proposed annual submission by registered charities of Overseas Activity Statements as part of their Annual Information Statements and record keeping obligations.



Support for the Government's policy objectives

We preface our feedback and recommendations below by confirming our strong support for the objects of the ACNC Act – 'to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.'

We also offer our strong support for the policy intent of the draft Regulations – to assure donors to Australian charities that the funds are being used to further their charitable purposes, in accordance with relevant Australian laws and the Government's international obligations.

Proportionate and efficient regulation

Our main interest in the draft Regulations relates to the ACNC's third purpose; reducing unnecessary regulatory obligations on the Australian not-for-profit sector. We are keen to ensure that Australian universities, which already operate under very strong and comprehensive regulation and reporting frameworks, are not subjected to unnecessary and unreasonable additional red tape.

Specifically, we are concerned that under the draft Regulations (and in the absence of some form of special accommodation from the ACNC) Australian universities will be required to keep records in a specified manner, and report in detail to the ACNC annually on their offshore activities in every country in which they are active.

For the University of Sydney and many other Australian universities with extensive offshore activities, we believe this will impose a very onerous burden; the cost of which would be disproportionate to any benefits that would be delivered to the ACNC and donors through the production of such reports each year.

Relevant background

Efforts to reduce regulatory duplication and red tape for higher education providers

We note the following contextual points relevant to the treatment of Australian universities under the external conduct standards framework the draft Regulations would establish.

- The Financial Action Taskforce (FATF) recommendations of 2012 on combatting money laundering and financing terrorism and the proliferation of weapons of mass destruction, on which the draft regulations are partly based, advocate expressly against a 'one-size-fits-all' approach to the regulation of non-profit organisations, and for the adoption of risk-based regulatory frameworks by participating nations.
- Proposed subsection 50.1 of the draft Regulations states that the steps registered charities will need to take to comply will vary according to their circumstances, and that the compliance obligations imposed by the ACNC will be interpreted having regard for a range of factors including the principles of regulatory necessity, reflecting risk and proportionate regulation.
- Under section 50.25(4) of the draft Regulations (Standard 2 — Annual review of overseas activities and record-keeping), the ACNC Commissioner will have the discretion to decide whether a registered charity must provide an Overseas Activities Statement as part of its Annual Information Statement.



- In 2013, the ACNC and TEQSA executed the **separately attached** MoU, intended to, among other things, minimise regulatory duplication and reporting red tape for registered higher education providers. This was achieved by the ACNC allowing providers' audited annual financial reports lodged with TEQSA to be accepted by the ACNC as satisfying the annual reporting requirements for registered charities set by section 60-C of the ACNC Act. We understand that this MoU and the resulting reporting arrangement for higher education providers remains in place between the ACNC and TEQSA.
- The red tape reducing arrangements agreed between the ACNC and TEQSA in their 2013 MoU are consistent with the Commissioner's powers to accept statements, reports or other documents, given by a charity to another Australian government agency in place of the ACNC's annual reporting requirements for registered charities. See, for example, the ACNC Commissioner's statement: [Accepting other government reports](#) of January 2014.

Existing regulation of registered Australian higher education providers

All Australian universities operate within comprehensive frameworks of external and internal regulation of their domestic and offshore operations. There are currently 40 Australian universities, including the University of Sydney, registered and regulated as 'Higher Education Providers' by the Tertiary Education Quality and Standards Agency (TEQSA).

Along with a further 130 providers, the domestic and offshore activities of Australian universities are regulated consistently by TEQSA. This occurs in accordance with the standards and risk-based regulatory framework established by the TEQSA Act 2011 and the Higher Education Threshold Standards 2015.

TEQSA is also responsible for enforcing the *Education Services for Overseas Students Act 2000 (Cth)* and the *National Code of Practice for Providers of Education and Training to Overseas Students*, which together set the regulatory framework governing all aspects of the provision of registered educational courses to international students in Australia.

Higher education providers in receipt of funding support from the Commonwealth for education, research and research training activities must also comply with the quality and accountability requirements set by the *Higher Education Support Act 2003 (Cth)*. These include extensive annual financial and other reporting requirements to the Federal Department of Education and Training.

Except for the Australian National University, Australia's public universities are established by Acts of State and Territory parliaments. As statutory public bodies they are subject to extensive financial reporting, audit and public disclosure requirements under the laws of the jurisdiction in which they were established.

For example, in NSW universities must report annually to the NSW Parliament in accordance with the *Annual Reports (Statutory Bodies) Act 1984 (NSW)* and make their annual reports publicly available.

The NSW Auditor General also reports annually to the NSW Parliament and publicly on the performance of NSW's public universities, which must also make extensive financial and other information publicly available in accordance with the requirements of the *NSW Government Information (Public Access) Act 2009 (NSW)*.



External audits and quality reviews of Australian universities are conducted frequently in compliance with relevant laws and for courses leading graduates to professional registration, in accordance with the accreditation requirements set by Australian and international professional bodies. For example:

- the NSW Auditor General audits all NSW universities annually;
- all Australian universities must be audited independently every five years for compliance with federal laws governing the delivery of education to international students; and
- every seven years Australian universities must demonstrate compliance with the Higher Education Threshold Standards when applying for reregistration with TEQSA.

Australian universities cannot remain registered with TEQSA unless they demonstrate regularly that they have strong internal governance, risk management, quality and assurance and information management processes in place for their domestic and offshore operations.

Options for consideration by Treasury and the ACNC

Recognising Treasury's, the ACNC's and TEQSA's shared commitment to proportionate, risk-based regulation, and to minimising unnecessary regulatory and reporting burdens for the charitable organisations they both regulate, we propose the following three possible options for consideration as solutions to address the concerns we have raised:

1. An early ruling or policy determination from the ACNC Commissioner that all Australian universities' offshore activities are considered incidental to the pursuit of their charitable purposes inside Australia, within the meaning of section 50.4(2) of the draft Regulations, and that as a consequence, Australian universities do not operate outside Australia for the purposes of the draft Regulations.
2. An amendment to the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) which provides that universities that are already complying with legislation concerning their offshore activities, are taken to be complying with section 50.25 of the draft Regulations (External Conduct Standard 2 - Annual review of overseas activities and record-keeping). We note that a similar exemption for incorporated associations exists as at regulation 45.130(3) of the [Australian Charities and Not-for-profits Commission Regulation 2013](#) (Cth).

While this exemption expired on 1 July 2017, we suggest that the wording of the exemption could be adopted when formulating an exemption for universities. Possible wording could be:

If a registered entity is a university that is subject to a law of the Commonwealth, a State or Territory in respect of universities, and that law sets out the duties of universities in relation to their activities outside Australia, and the registered entity is complying with that law, the registered entity is taken to be complying with External Conduct Standard 2.

3. An extension of the terms of the existing ACNC/TEQSA MoU to allow the ACNC to receive the audited annual financial reports of Australian universities and/or of all higher education providers registered with TEQSA in satisfaction of the draft Regulation's proposed annual submission by registered charities of Overseas Activity Statements as part of their Annual Information Statements, and record keeping obligations under External Conduct Standard 2.