

**ARNOLD BLOCH LEIBLER'S SUBMISSION IN RELATION TO
PROPOSED AMENDMENT TO ACNC GOVERNANCE
STANDARD 3**

15 MARCH 2021

BACKGROUND

- 1 Section 35-10 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) provides that the Commissioner may revoke the registration of a registered entity if the Commissioner reasonably believes, amongst other matters, that at any time after the date of effect of the registration, “the registered entity has not complied with a governance standard or external conduct standard, or it is more likely than not that the registered entity will not comply with such a standard”.
- 2 In its current form, Governance Standard 3 prohibits a registered entity from engaging in conduct, or omitting to engage in conduct, if that conduct or omission may be dealt with as an indictable offence under an Australian law, or by way of a civil penalty of 60 penalty units or more.
- 3 The amendments to Governance Standard 3 proposed in the exposure draft of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (**Proposed Regulations**) expand the range of circumstances in which the Commissioner may exercise his or her enforcement powers under the ACNC Act. This includes the aforementioned power to revoke the registration of a registered entity.
- 4 The Proposed Regulations significantly broaden the scope of acts or omissions which a registered entity is precluded from engaging in, to include any acts or omissions which would constitute a summary offence under an Australian law, providing that offence “relates to” the matters in the three categories specified in the proposed section 45.15(2)(aa) (the **Summary Offences Extension**).
- 5 The Proposed Regulations also seek to significantly regulate the use of a registered entity’s resources, by imposing a requirement that a registered entity “must take reasonable steps to ensure 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)” (being the prescribed criminal offences described above) (the **Reasonable Steps Extension**).
- 6 The Proposed Regulations are an unjustifiable intrusion into civil society. In our submission they:
 - (a) are unjustified;
 - (b) are likely ultra vires;
 - (c) are unconstitutional;
 - (d) will have an unquantifiable negative impact on the sector;



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- (e) will not address any uncertainty in the legislation;
- (f) will increase administrative burden; and
- (g) are fundamentally inconsistent with our democratic system of government.

The existing Governance Standards are accepted and understood as setting minimum standards for governance of charities. The recent addition of Governance Standard 6 set a dangerous precedent for the use of the Governance Standards as a vehicle for enforcing government policy through regulation of charities. These amendments go further. They are a clear fetter on freedom of political communication and on dissent by civil society. They distort charity law in the process and must not be made law.

THE PROPOSED REGULATIONS ARE UNJUSTIFIED, ULTRA VIRES & UNCONSTITUTIONAL

Unjustified

- 7 Charities should not be held to a standard well beyond other sectors. Much is made by some about a so-called privileged position of charities in being exempt from income tax, with the underlying assumption being that income tax exemption for charities is an unjustified concession. The Government has used this argument in its justification for why Governance Standard 3 ought to be amended to impose stricter regulations on charities' activities and the use of their resources.¹
- 8 This assumption overlooks the fact that entities pursuing a charitable purpose have been exempt from taxation since the first income tax legislation was introduced in England. The reason for charities' exempt status is not that they are privileged, but instead because it is accepted that individuals are the appropriate unit upon which to impose income taxes. Charities have no owners, only purposes, and are legally prohibited from distributing surpluses to individuals. To trace individual beneficiaries of a charity would be almost not impossible, expensive, and given many beneficiaries of charities would be unlikely to pay tax because they are financially disadvantaged, would be pointless.²
- 9 Income tax exemption of charities is not a generous concession from government. It is based on sound tax theory and its continuation was supported in both the Henry Review³ and the Productivity Commission Report.⁴ The fact that charities are exempt from income tax does not justify holding these entities to a standard far beyond that to which every other sector in society is held.
- 10 The repeal of Governance Standard 3 was recommended by an independent review panel.

¹ Assistant Minister for Finance, Charities and Electoral Matters, "Charities Supporting Unlawful Behaviour Will Not Be Tolerated", Media Release, Sunday 13 December 2020. Accessed via: <https://www.financeminister.gov.au/assistant/media-release/2020/12/13/charities-supporting-unlawful-behaviour-will-not-be-tolerated>.

² For discussion see Myles McGregor-Lowndes, Matthew Turnour and Elizabeth Turnour, 'Not for profit income tax exemption: is there a hole in the bucket, dear Henry?' (2011) 26(4) *Australian Tax Forum: a journal of taxation policy, law and reform* 601-631.

³ Australia's Future Tax System Review Panel, *Australia's Future Tax System: Report to the Treasurer* (The Treasury, 2009) 88.

⁴ Productivity Commission, *Contribution of the Not-for-Profit Sector: Research Report* (2010).

- 11 In its report ‘Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review’, tabled on 22 August 2018 (**Strengthening for Purpose Report**), an independent review panel commissioned by the Commonwealth Government recommended that Governance Standard 3 be repealed. We entirely agree with this recommendation for the reasons expressed in the Strengthening for Purpose Report. Registered charities, like every other person, natural or corporate, must comply with all applicable laws. It is simply not the function of the ACNC to force registered entities to enquire into whether they may or may not have committed an offence unrelated to the regulatory obligations imposed by the ACNC. It is also simply not the role of the ACNC Commissioner to consider and determine whether a charity has acted or omitted to act in a way that might be dealt with as an offence of the kind covered by Governance Standard 3. Nor is it the role of the ACNC Commissioner to determine whether reasonable steps have been taken to avoid expending resources in promoting or supporting those offences. The ACNC Commissioner has no relevant expertise in this area.
- 12 The Government has represented the Proposed Regulations as a response to recommendation 20 of the Strengthening for Purpose Report.⁵ But that representation by the Government is not accurate. Recommendation 20 was that test case funding be made available to develop the law in matters of public interest, including disqualifying purposes. Amplifying the reach of Governance Standard 3 is not in any way whatsoever in furtherance of making test case funding available to develop the law in matters of public interest. Further, additional and unnecessary regulation of a charity’s activities has no connection whatsoever to clarifying the law in relation to disqualifying purposes, which is addressed in more detail below.

Ultra Vires

- 13 The Governor-General is empowered by the ACNC Act to make regulations prescribing matters:
- (a) required or permitted by the ACNC Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to the ACNC Act.⁶
- 14 The Proposed Regulations do not meet either of these criteria. To the contrary, the Proposed Regulations are actually expressly prohibited from being made by section 45-10(6) of the ACNC Act.
- 15 Section 45-10(6) provides:
- (6) *The regulations must not require an entity not to comment on, or advocate support for, a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:*
 - (a) *the comment or advocacy furthers, or is in aid of, the purpose of the entity; and*
 - (b) *the comment or advocacy is lawful.*
- 16 Australia’s democratic society entitles its citizens to express satisfaction or dissatisfaction with matters established by law, policy or practice of a government by engaging in protest action or participating in marches and political rallies. It may be

⁵ Exposure Draft Explanatory Statement, *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (Cth) (**Exposure Draft Explanatory Statement**) 2.

⁶ ACNC Act, section 200-5.

the case that at these events, summary offences are committed by those present, whether inadvertently or intentionally.

- 17 The effect of the Reasonable Steps Extension will be that a registered charity is required to not comment on protest action or political rallies, where there is even the slightest risk those actions or rallies may involve acts or omissions constituting an offence that “may be dealt with as described in paragraph (2)(a), (aa) or (b)” of the Proposed Regulations. That is, the Reasonable Steps Extension will compel a registered charity to err on the side of caution and refrain from commenting in such circumstances, even if that comment would otherwise be entirely lawful and further or be in aid of the charity’s purpose.
- 18 Such a broad-brush approach to regulation of the use of charities’ resources of the kind set out in the Proposed Regulations is exactly the sort of regulatory provision sought to be disallowed by the prohibition in section 45-10(6) of the ACNC Act. This is made clear in the Revised Explanatory Memorandum for the Australian Charities and Not-for-profits Commission Bill 2012 (Cth), which discussed the intended purpose of s 45-10(6):

The governance standards cannot prevent a registered charity from undertaking an activity where that activity furthers, or is in aid of, its purpose, and that activity is advocating or attempting to change the law or government policy except where that activity is in breach of an Australian law [Subsection 45-10(6)]. This will protect the independence of registered entities from inappropriate Government interference, and ensure them sufficient autonomy in carrying out their operations by ensuring the governance standards cannot limit a registered entity’s ability to make its own decisions on how to best meet its mission without undue influence and control from the Commonwealth Government and its agencies.⁷

- 19 For these reasons, the Reasonable Steps Extension falls foul of the prohibition in section 45-10(6) and is thereby ultra vires and presumptively invalid.

Unconstitutional

Implied Freedom of Political Communication

- 20 For the reasons outlined below, the Reasonable Steps Extension infringes the implied freedom of political communication enshrined in the Constitution.
- 21 The requirement for freedom of political communication is an implication drawn from sections 7, 24, 64, 128 and related sections of the Constitution.⁸
- 22 The implied freedom of political communication limits the exercise of legislative power so that the free expression of political opinion is not impeded.⁹ It was described by the High Court in *Lange v Australian Broadcasting Corporation* as “an indispensable incident of that system of representative government which the Constitution creates”.¹⁰

⁷ Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth) [5.40].

⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**) at 567 (the Court).

⁹ *Brown v Tasmania* (2017) 261 CLR 328 (**Brown**) at [88] and [90], per Kiefel CJ, Bell and Keane JJ.

¹⁰ *Lange* at 559.

- 23 As to what would constitute “political communication” and engage the operation of the implied freedom, in *Clubb v Edwards* (**Clubb**),¹¹ Nettle J noted that “[t]he range of matters which may qualify as government and political matters is broad and, in one sense, it is enough to say of a matter that it is political if it is a matter of political controversy”.¹² Relevantly, it is accepted that the implied freedom of political communication “protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth”.¹³
- 24 The test for determining whether a law infringes the implied freedom of political communication was recently set out by the plurality of the High Court in *Clubb*:
- (a) Does the law effectively burden the implied freedom in its terms, operation or effect?
 - (b) If “yes” to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
 - (c) If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?¹⁴

The Proposed Regulations impose an effective burden on the implied freedom of political communication.

- 25 A majority of the High Court recently acknowledged that a “law which prohibits or limits political communication to *any extent* will generally be found to impose an effective burden on the implied freedom of political communication”.¹⁵
- 26 The Reasonable Steps Extension will impose an effective burden on the implied freedom because it will deter registered entities from making comments or engaging in advocacy, including protest action, in circumstances where they apprehend there is a risk the Commissioner may deem that conduct to constitute the use of the registered entity’s resources to “promote or support acts or omissions by any entity that may be dealt with as described in paragraph (2)(a), (aa) or (b)” of the Proposed Regulations.
- 27 Similarly, in *Brown*, the plurality concluded the implied freedom was effectively burdened given the effect of the impugned legislative provisions was to deter protesters “from voicing their protests with respect to forest operations”.¹⁶
- 28 Of significance to the existence of the burden is that the practical operation of the Reasonable Steps Extension would require an assessment to be made on the part of the registered entity as to whether the use of its resources could be used to promote or support acts or omissions that “*may be dealt with*” as a summary offence, indictable offence or an offence attracting a civil penalty of 60 penalty units or more.

¹¹ *Clubb v Edwards* (2019) 267 CLR 171 (**Clubb**).

¹² *Ibid* at [249].

¹³ *Brown* at [88] per Kiefel CJ, Bell and Keane JJ.

¹⁴ *Clubb* at [5] per Kiefel CJ, Bell and Keane JJ, by reference to the test adopted by the majority of the High Court in *McCloy v New South Wales* (2015) 257 CLR 178 (**McCloy**) at [2]-[4], and subsequently applied by the plurality in *Brown* at [104].

¹⁵ *Comcare v Banerji* (2019) 267 CLR 373 at [29] per Kiefel CJ, Bell, Keane and Nettle JJ (emphasis added).

¹⁶ *Brown* at [95].

- 29 It is plain that the effect of this provision would be to disincentivise registered entities from engaging in what would otherwise be wholly lawful commentary and advocacy, including protest action, in circumstances where they apprehend there is a risk that conduct could involve an act or omission in contravention of the offences described in section 45.15(2)(a), (aa) or (b).
- 30 Furthermore, the burden imposed by the Reasonable Steps Extension has a discriminatory effect: it operates on registered entities and on the very activities that are central to the existence and operation of those entities. That is, it specifically diminishes a registered entity's ability to leverage its resources for the lawful purpose of engaging in commentary and advocacy, including protest action, on matters of significance to the entity's stated purpose.
- 31 In *Brown*, the plurality had regard to whether the impugned legislative provisions effected a "discriminatory burden" on the freedom, given they operated to impose a burden solely in relation to protesters. The plurality held that "[a] law effecting a discriminatory burden on the freedom does not necessarily effect a greater burden on the freedom", but also observed that "[a] discriminatory law does, however, serve to identify the group targeted by a law and informs the assessment of the restrictions imposed by the law upon the ability of those persons to communicate on matters of politics and government".¹⁷

Legitimate purpose

- 32 The Reasonable Steps Extension is purportedly intended to further the stated object of Governance Standard 3, to ensure a registered entity "is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets)".¹⁸ The Reasonable Steps Extension places additional obligations on registered entities to guard against non-compliance with Australian laws, by requiring a registered entity to take "reasonable steps" to ensure its "resources" (as defined) are not used to promote or support acts or omissions that may be dealt with as criminal offences.
- 33 We recognise this purpose is compatible with the system of representative and responsible government enshrined in the *Constitution*.
- 34 Another view, which is not unreasonable having regard to the Exposure Draft Explanatory Statement for the Proposed Regulations, is that the legitimate purpose of the Reasonable Steps Extension 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.
- 35 Whilst these purposes likely satisfy the criterion of legitimacy, for the reasons explained below, it is clear the Reasonable Steps Extension is not reasonably appropriate and adapted to either of these purposes.

Not reasonably appropriate and adapted

- 36 The determination of whether the Reasonable Steps Extension is reasonably appropriate and adapted to its identified purposes requires consideration of whether the provision is suitable, necessary and adequate in its balance. These criteria were developed by the High Court in *McCloy*, and described by the majority in that case as follows:

¹⁷ Ibid at [92]-[95].

¹⁸ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth), section 45.15(1).

- (a) *suitable* – as having a rational connection to the purpose of the provision;
- (b) *necessary* – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
- (c) *adequate in its balance* – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.¹⁹

Not suitable

- 37 The Reasonable Steps Extension is not suitable to either the purpose of ensuring registered entities comply with Australian laws or the purpose of addressing uncertainty about the circumstances in which charities may engage in unlawful conduct.
- 38 This is because the Reasonable Steps Extension is not directed to a registered entity's compliance with Australian laws. Rather, it is directed to the question of whether an entity is promoting or supporting such conduct, even where such promotion or support is not itself unlawful.
- 39 Further, the ambiguity inherent in the concepts of "reasonable steps" and what could entail "promotion" or "support", as well as the myriad acts or omissions which could potentially be dealt with as relevant offences, means that the Reasonable Steps Extension is not rationally connected to the purpose of addressing any prevailing uncertainty.

Not necessary

- 40 The Reasonable Steps Extension is also not necessary. There are obvious and compelling alternatives. One is a retrospective focus on registered entities' resources having been used to promote or support acts or omissions that constitute a contravention of the Australian laws described in paragraph (2)(a), (aa) or (b). That is, the enforcement measures in the ACNC Act would only apply to a registered entity where the entity's resources have in fact been used in a manner which results in the commission of an offence. Another obvious and compelling alternative is to limit the amendments in the Proposed Regulations to the Summary Offences Extension itself, given it serves to uphold the object of ensuring registered entities' compliance with Australian laws.

Not adequate in its balance

- 41 Finally, given the legitimate and respected place of protest action as a tool used within the sector to pursue charitable purposes, it is doubtful that a Court would view the Reasonable Steps Extension as adequate in its balance. The practical effect of the Reasonable Steps Extension would be to curb the engagement of registered entities' resources for the purposes of undertaking or supporting a range of otherwise legitimate acts which are foundational to the purpose and operation of those entities. In other words, it would have a "chilling" effect on registered entities' otherwise legitimate engagement in various forms of political

¹⁹ *McCloy* at [2].

communication. Accordingly, as in *Brown*, the Reasonable Steps Extension is “likely to deter protest of all kinds and that is too high a cost to the freedom”.²⁰

The Taxation Power

- 42 In their paper ‘Charities are the New Constitutional Law Frontiers’,²¹ Nicholas Aroney and Matthew Turnour question whether the Governance Standards in the *Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) (ACNC Regulation)* are properly made under section 51(ii) of the Constitution (**the Taxation Power**).
- 43 To maintain a connection to the Taxation Power, the ACNC Act and ACNC Regulation rely on the fact that a registered charity must comply with the Governance Standards to be registered, and that registration is a pre-requisite for an entity’s entitlement to certain taxation concessions.
- 44 It is accepted that a law will not be constitutional if the connection to its head of power is “tenuous, vague, fanciful or remote”.²² Even prior to the Proposed Regulations, the connection between the Governance Standard regime and the Taxation Power is already both tenuous and vague.²³ As posited by Aroney and Turnour, the absence of any substantive provision in the ACNC Act which links the registration procedure and conditions, which include the Governance Standards, to the duty to pay tax, makes the connection of the Governance Standards regime to the subject-matter of taxation, and the Taxation Power, too remote and tenuous.²⁴
- 45 The proposed amendments to Governance Standard 3 are a stark demonstration of this lack of connection. The real purpose of the Proposed Regulations is plainly to limit the ability of charities to engage in protest action. This is clear from the types of summary offences targeted, as well as public statements made by Senator Seselja in his capacity as Assistant Minister for Finance, Charities and Electoral Matters.²⁵ If the Proposed Regulations, with a purpose so clearly divorced from an entitlement to taxation, are made under section 45-10 of the ACNC Act, it would likely undermine the validity of the entire Governance Standards regime.

UNQUANTIFIABLE NEGATIVE IMPACT

- 46 It is not only those registered charities who pursue their purpose through engagement in protest action who will be affected by the Proposed Regulations. Charities which have a presence at protests, marches and rallies to uphold rights or ensure safety will also be at risk of deregistration if the Proposed Regulations are made law.
- 47 For example, community legal centres produce materials to explain what will and will not constitute unlawful action at protests and political rallies. They sometimes have representatives present at protests and rallies to assist citizens to know and act within their rights. In addition, they provide legal defence for people who have been accused of acting or omitting to act in a way that could constitute an offence. There is a real risk that any or all of these actions could fall within the scope of the proscription contained in the Reasonable Steps Extension.

²⁰ *Brown* at [145], per Kiefel CJ, Bell and Keane JJ.

²¹ Nicholas Aroney and Matthew Turnour, ‘Charities are the New Constitutional Law Frontiers’ (2017) 41(2) *Melbourne University Law Review* 446.

²² *R v Sharkey* (1949) 79 CLR 121, 151.

²³ See above n 21.

²⁴ See above n 21, 465.

²⁵ See above n 1.

- 48 Other charities may also be present to provide first aid assistance at protests and political rallies. They too will be at risk of exposure to serious consequences under the ACNC Act, through operation of the Reasonable Steps Extension.
- 49 More broadly, it is difficult to envisage many summary offences that are not encapsulated by the summary Offences Extension. Charities in the aged care, childcare, health care and disability sectors will be particularly at risk in relation to the category of summary offences in paragraph (2)(aa)(iii) pertaining to causing personal injury to an individual “or any other kind of impairment to an individual’s health”. The risk will be extended to all charities with workplace health and safety obligations, to charities working with children such as non-government schools and to charities where responsible persons, staff or volunteers drive motor vehicles in relation to their work, or prepare food.
- 50 As a result, whilst it is clear from Senator Seselja’s public statements that the present target of the Proposed Regulations is charities engaging in protest action, if enacted, the impact of the Proposed Regulations across the sector will be wide-ranging and legitimately creates significant cause for concern.

THE PROPOSED REGULATIONS WILL NOT ADDRESS UNCERTAINTY

- 51 The Exposure Draft Explanatory Statement to the Proposed Regulations states that their purpose 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 [ACNC] Act”.²⁶
- 52 However, there simply is no prevailing uncertainty in the law.
- 53 The current Governance Standard 3 clearly specifies those offences which a registered entity must not commit in order to remain compliant.
- 54 The ACNC Act sets out the consequences for breach, or even for the perception of likely breach, of a Governance Standard. These fall along a sliding scale and involve significant regulator discretion. Adding additional criminal offences to the scope of Governance Standard 3, in a form that will clearly operate to capture acts or omissions which do not constitute a criminal offence, will not serve to improve clarity in the operation of the scheme. Rather, it will compound uncertainty for charities and undermine the integrity of that scheme.
- 55 The suggestion in the FAQs published alongside the Proposed Regulations that the Proposed Regulations will ensure that Governance Standard 3 is more consistent with the disqualifying purposes set out in the *Charities Act 2013* (Cth) (**Charities Act**) serves to create uncertainty, rather than resolve it.
- 56 Governance Standard 3 has no relevance to the clarity or otherwise of what will constitute a disqualifying purpose.
- 57 The disqualifying purpose doctrine is founded on centuries old common law and at its origin is the public nature of charities and the law of trusts.²⁷
- 58 The common law doctrine of disqualifying purpose is enshrined in section 11 of the Charities Act, which provides that a disqualifying purpose is:

²⁶ Exposure Draft Explanatory Statement, 1.

²⁷ G E Dal Pont, *Law of Charity* (LexisNexis, 2nd ed, 2016) 71.

- (a) *the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or*
 (b) *the purpose of promoting or opposing a political party or a candidate for political office.*

- 59 Governance Standard 3 is entirely separate from this. Governance Standard 3 as currently drafted, as well as the proposed amended Governance Standard, relates to unlawful activities.
- 60 It is uncontroversial law that the activities of a charity are not its purposes.²⁸ While activities are considered in a holistic assessment of the purposes of a charity,²⁹ adding additional sanctions in relation to specific summary offences against persons and property will not impact upon whether a charity has a disqualifying purpose in any way.

THE PROPOSED REGULATIONS WILL INCREASE THE ADMINISTRATIVE BURDEN ON CHARITIES

- 61 Far from clarifying any perceived uncertainty, it is abundantly clear that the Proposed Regulations will increase red tape for charities. This is completely contrary to one of the three objects of the ACNC Act, being to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.³⁰
- 62 The sheer breadth of potential offences covered by the Summary Offences Extension make the Proposed Regulations unworkable and burdensome for a sector already groaning under mountains of red tape. The uncertainty of what might be considered “reasonable steps” and what acts or omissions constitute “promoting or supporting” will only add to that administrative burden.
- 63 Even on this consideration alone, the Proposed Regulations are on any objective view a backwards step for the sector.

PROTEST ACTION IS FUNDAMENTAL TO CIVIL SOCIETY

- 64 While it is clear the Proposed Regulations are directed at protest action by a relatively small number of registered charities, their impact will be far greater than is seemingly intended by the Parliament. However, even if the Proposed Regulations were somehow able to be limited in their application to registered charities who undertake protest action that might involve unlawful activity, they would still remain entirely unsupportable.
- 65 Citizens engage in and support protest action the world over for the purpose of achieving social outcomes. Protest action provides citizens with visually powerful and effective ways of drawing public attention to otherwise hidden issues and achieving real change.
- 66 Charities have a long and proud history of engaging in protest action as part of an extended tradition of peaceful and non-violent protest and persuasion that is a valued part of Australia’s democratic system.
- 67 Protest action can, but certainly does not necessarily always, include acts which can be in breach of the law. In the UK and in Australia courts have recognised a

²⁸ See *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 (**Word Investments**).

²⁹ *Word Investments; Victorian Women Lawyers Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318.

³⁰ ACNC Act, section 15-5(1)(c).

distinction between those who break the law seeking to achieve a political or social objective and those who break the law to further their own interests.

- 68 In the UK context, a celebrated statement on civil disobedience was made by Lord Hoffmann in the case of *R v Jones (Margaret)* [2007] 1 AC 136. His Lordship stated:

My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account.³¹

- 69 Five years before Lord Hoffman's judgment, Judge Latham of the New South Wales District Court presided over a case brought against activists who had entered the site of a nuclear reactor at Lucas Heights, in order to graphically demonstrate the inadequacy of security arrangements at the facility, which the government at the time wished to expand. In dismissing the charges without proceeding to convictions, her Honour stated:

The right to protest and the right to express publicly one's views, albeit by direct action, is one which is to be valued and protected in the context of a modern democracy.³²

- 70 More recently, Mallon J of the New Zealand High Court opined:

Protesting is an exercise of the right to freedom of expression and the right to freedom of thought, conscience and belief. Sometimes breaches of the law of the land ultimately advance a public benefit.³³

- 71 Contrary to this clear recognition at law of the rightful place of civil disobedience, of protest action and political rallies in civil society, the Proposed Regulations create heavier penalties for charities that engage in such activities, than are imposed on any other person.

- 72 Protest action is, of course, not synonymous with unlawful activity. However, given the abundance of potential summary, minor offences that can be unwittingly committed at a lawful gathering of people in protest, the Proposed Regulations will make any and all protest action a real risk for registered charities. This is not acceptable in a democratic society. It also raises serious questions of constitutional invalidity, as described above.

- 73 Prior to the passage of the *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth) Assistant Treasurer David Bradbury MP recognised, in his second reading speech in support of the relevant Bill, that "an unfettered not-for-profit sector is essential to building a democratic and inclusive community." The proposed amendments to Governance Standard 3 run completely counter to this recognition.

³¹ *R v Jones (Margaret)* [2007] 1 AC 136, [89].

³² Transcript of Proceedings, *R v Kirkwood* (NSW District Court), DCZ2293 EF-C, Latham J, 15 May 2002.

³³ *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999, [139].

74 The Proposed Regulations have no place in Australia's statute books and should not be enacted.



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