AUSTRALIAN CONSERVATION FOUNDATION

Senior Advisor
Not-For-Profit Unit, Not-for-profits and Tax Administration Branch
Treasury Melbourne
Level 16, 530 Collins Street
Melbourne VIC 3000

Via email: charitiesconsultation@treasury.gov.au

18 March 2021

Dear Treasury,

Submission on the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (the proposed regulations)*

The Australian Conservation Foundation (**ACF**) appreciates the opportunity to make a submission on the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the **Proposed Regulations**). This submission builds on the Hands Off Our Charities submission, to which ACF is a signatory.

ACF is Australia's oldest national environmental organisation, founded in the mid-1960s with the support of eminent Australians, the Australian community and the Australian Government. ACF protects, restores and sustains Australia's environment through research, consultation, education, partnerships and advocacy. ACF is strictly non-partisan and we are proud of our political independence. Over the past 50 years our independent advocacy has helped drive extraordinary commitments from governments of all political persuasions as well as from business and communities.

ACF is a charity registered under the *Australian Charities and Not-for-profits Commission Act 2012* (the **Act**). ACF supports a robust regulatory regime which focuses on ensuring charities' objectives and activities are consistent with a charitable purpose. It is the charitable purpose that rightly gives rise to the various concessions for charities in tax and other legislation.

The proposed regulations are not necessary. Compliance with the additional rules will come at a significant cost. The explanatory material provides no evidence of any benefit that will arise. There is in fact almost no explanation of the need for, and purpose of the regulations.

The explanatory material refers to the proposed regulations being a response to unspecified "*uncertainty*" in existing regulations. This is unsatisfactory given the cost and risk the changes present for charities across Australia. We also note that the proposed regulations **add** enormous uncertainty due to the structure and drafting.

The Assistant Minister's explanation for the changes is different to Treasury's. His rationale relates to unspecified claims of an apparently small number of illegal actions by charities. It is not explained why over 58000 charities should bear the burden in the proposed regulations due to the alleged actions of a few.

ACF's concerns about the proposed regulations are elaborated upon in this submission, in short, the proposed regulations:

- Place an additional regulatory cost and risk on overstretched charities which is unjustified.
- Will have a chilling effect on legitimate, lawful advocacy by charities.
- Impose a duplicate regulatory layer on charities. For-profit entities and political parties are not subject to this duplication.
- Expose charities to risk of deregistration for minor and/or inadvertent acts of employees.
- Give too much discretion and power to the ACNC Commissioner (the **Commissioner**), including a quasi-judicial role in relation to summary offences.
- Contradict the Parliamentary intent behind the governance standards and the findings of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (the **2018 Review**)

Recommendation:

That the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulation 2021* not proceed in any form.

AUSTRALIAN CONSERVATION FOUNDATION

I. Parliamentary intent

The proposed regulations will amend Governance Standard 3 in the *Australian Charities and Not-for-profits Commission Regulations 2013* (the **Regulations**). "*Governance Standards*" are created under the Act (Division 45).

The Act was passed by the Australian Parliament in 2012. The original bill introduced by the then Government was subject to amendment by Parliament. A "*revised*" and two "*supplementary*" explanatory memoranda were prepared due to these amendments. The Act established a national regulator and national regulatory framework. The first Explanatory Memorandum (the **2012 EM**) to the Bill stated:

> *A national regulatory system that promotes good governance, accountability and transparency for NFP entities will help to maintain, protect and enhance the public trust and confidence that underpins the sector.*
> …
> *The regulation will be proportional to size and risk in order to minimise regulatory duplication and compliance costs, and to allow registered entities to focus on achieving their mission.*

The proposed regulations are contrary to the Act's intent. Amendment to the Act is required for the proposed regulations to be valid and consistent with the Act's intent. Self-evidently that requires more than Ministerial direction and the potential for a disallowance motion. Full Parliamentary scrutiny is required.

To be clear; ACF does not say the Act should be amended to this end. That is unnecessary because the proposed regulations are unnecessary and flawed.

To understand why the proposed regulations are contrary to Parliament's intent the whole Act must be considered. Useful guidance can also be obtained from the circumstances of its creation, which we address now. This section also notes the position of Coalition members of Parliament in 2012 that contradicts the approach taken in the proposed regulations.

The 2012 EM explained the Governance Standards this way:

> *The Governor-General is expected to make the standards principle-based, specifying the outcome to be achieved, rather than detailing how an entity must meet the standards in its particular situation.*

The 2012 EM said '*Governance*' is the "*set of practices and procedures in place to ensure that an entity operates to achieve its objectives in an effective and transparent manner*."

The process of development of the Act saw a clear move away from governance standards that prescribe charities' conduct and towards a principles-based approach.

The original bill included - in the governance standard making power - that standards may require charities to, "*act, or not act, in a specified manner…*". This level of prescription was **removed**. The reference to *"act, or not act, in a specified manner…"* was replaced with:

> *(b) require the entity to achieve specified outcomes and:*
> *(i) not specify how the entity is to achieve those outcomes; or*
> *(ii) specify principles as to how the entity is to achieve those outcomes; …*

This is consistent with a less prescriptive approach to regulation under the governance standards. The abandoned element of "*act, or not act*", will effectively be inserted by the proposed regulations. The addition of summary offences and restrictions on "*promote or support*", take Governance Standard 3 further away from Parliament's intention with respect to what governance standards should do.

The Bill was also amended to include sub-section 45-10(6). This places a restriction on the governance standard making power. It specifically protects a charity's ability to comment on, or advocate support for, a change to law, policy or practice. The Supplementary EM in this regard stated:

> *1.5 Amendment 4 ensures that the governance standards cannot prevent or constrain a registered charity from engaging in political advocacy for its charitable purpose, except where such advocacy is illegal (from an Australian perspective).*
>
> *1.6 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.* **(*emphasis added*)**

The ability of the Commissioner to deregister or take other enforcement measures in the circumstances proposed is "*inappropriate government interference*". Criminal offending is a matter for police and the judiciary. Reposing the power proposed in the Commissioner (particularly with respect to deciding if an act may be dealt with as an offence) offends the principle of the separation of powers.

In the second reading speech to the bill, the Assistant Treasurer and Minister Assisting for Deregulation cited duplicate regulation as a key concern, he said:

> *Equally important is promoting a reduction in unnecessary regulatory obligations on the sector. The sector is currently subject to overlapping, inconsistent and duplicative regulatory and reporting arrangements.*

The proposed regulations massively expand what is a duplicate regulatory system (as noted by the 2018 Review) in Governance Standard 3; by inserting a vast number of summary offences from state and federal statutes into the standard.

The Bills Digest 21, 2012 - produced by the Parliamentary Library summarised the development of the ACNC Bill including the views of stakeholders and parties.

The Digest states the "*main source of disquie*t" for Coalition members of the House of Representatives Economics Committee, was that the ACNC Bill would not reduce "*red tape for the NFP sector*". It is therefore surprising that the current Government wants to increase charities' red tape with these reforms.

The *Parliamentary Joint Committee on Corporations and Financial Services* conducted an inquiry into the ACNC Bill. A dissenting report was produced by Coalition members which includes the following ("Mr Fletcher" is Minister Paul Fletcher MP):

> *1.14 Witnesses pointed to the fact that the Bill unnecessarily duplicates existing laws in key areas.*
>
> > ***Mrs Fletcher**: … Here it is asking the ACNC to regulate anti-moneylaundering and counterterrorism laws when the reality is that there is already a whole body that does that—in relation to everybody, not just in relation to charities. So our primary preference would be that it stays the way it is now and that the ACNC is not also required to operate in this space. Our concern is that if it does then we could end up in a situation where we have different standards and different laws operating in relation to what we have now.*

> ***Mr FLETCHER**: So you would say that this is unnecessary regulatory duplication when there is already a regime to deal with this.*
>
> ***Mrs Fletcher**: Exactly.*

ACF shares the concern expressed in this exchange with respect to the proposed regulations. They create a duplicate regulatory regime for charities in relation to summary offences.

Turning to the terms of the Act that was passed, one of the three objects of the Act is:

> *(c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.* (section 15-5)

Section 45-5 provides the objects of the governance standard making power, as:

> *(1) The object of this Division is to give the public (including donors, members and volunteers of registered entities) confidence that registered entities:*
> *(a) manage their affairs openly, accountably and transparently; and*
> *(b) use their resources (including contributions and donations) effectively and efficiently; and*
> *(c) minimise the risk of mismanagement and misappropriation; and*
> *(d) pursue their purposes.*

The objects do not extend to what is contemplated by the proposed regulations. That is, ensuring charities do not act in a way that ***may*** be prosecuted summarily pursuant to the thousands of possible offences in that category.

The Act also notes (s45-5(2) Note 3) that charities must notify the Commissioner of "*significant non-compliance*" with governance standards. It is a ground for deregistration not to comply with this. Charities will need to notify the Commissioner if employees commit summary offences or acts that may be dealt with as such.

The governance standard making power is constrained by s45-10(6). The proposed regulations – in particular, the requirement "*to take reasonable steps*" not "*to promote or support*" – contravenes that constraint. Thus the proposed regulations are likely invalid.

The proposed regulations are contrary to the Act's intent. That intention is revealed both in the terms of the Act and its history. Creating a duplicate legislative regime was specifically eschewed by Coalition members when the Act was being debated.

II. *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*

The EM says the amendments implement the Government's response to recommendation 20 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (the **2018 Review**). The Review was commissioned by the Hon. Michael Sukkar MP in 2017.

The 2018 Review raised concerns with the existing scope of discretion reposed in the ACNC Commissioner - given the lack of clear appeal rights. The Review reported on consultation with regulators (including the ACNC) stating "*there does not appear to be significant or widespread risks which threaten public trust and confidence in the sector*".

The 2018 Review notes the governance standards are "*a further layer of red tape for most registered entities.*" The 2018 Review recommended (Recommendation 9) removing entirely Governance Standard 3. It found (p47):

> *Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence (unrelated to the ACNC's regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.*

The Government response to the 2018 Review in relation to Recommendation 9 said:

> *The Government does not support the recommendation. The Government supports the ACNC having the power to take action to deregister an entity where* ***serious*** *offences have been committed and therefore supports the retention of governance standard 3.* (**emphasis added**)

ACF considers the 2018 Review recommendation in relation to Governance Standard 3 was sound. Nonetheless, the Government response reproduced above is consistent with the ACNC **not** having the power of deregistration in relation to minor offences (i.e. summary offences). The proposed regulations contradict this.

The reliance on recommendation 20 is, with respect, nonsensical. That is because recommendation 20 stated:

> *Test case funding be made available to develop the law in matters of public interest, including disqualifying purposes.*

The recommendation arose from the consideration of advocacy by charities (see pages 78-81). The 2018 Review states:

> *This* [i.e. advocacy] *is a contested area of charity law where litigation would lead to greater clarity and certainty for the sector. There is a strong case for the ACNC being provided with resources to enable it to undertake test case litigation.*

The Government response to this recommendation was:

> *The Government does not support the recommendation. The Government will explore legislative options to address uncertainty in the law.*

In context, this "*uncertainty*" clearly relates to advocacy, not governance standards. The proposed regulations are contrary to the 2018 Review's findings.

III. The proposed regulations will create additional regulatory cost and risk on overstretched charities.

The proposed regulations would require charities to take "*reasonable steps*" to ensure their resources will not be used to "*promote or support*" an act or omission which could be dealt with as a summary offence.

Charities will require legal advice to understand what steps are "*reasonable*" and to develop policies, processes, and document trails to demonstrate compliance. "*Reasonable steps*" is undefined; it is left to the judgment of Commissioner. This administrative burden will divert resources away from services to this new red tape.

During the 2018 Review, the Government stated its commitment to "*ensuring charities face minimal red tape — freeing them to focus on serving the community*". In December 2020 the Government announced its commitment to easing the cross-border compliance burden for charities. The current Commissioner has said reducing red tape is a priority for the ACNC. The proposed regulations run contrary to these commitments.

When faced with these administrative requirements, larger organisations like ACF will have to divert resources to professional financial and legal staff rather than protecting nature and the environment which is the intention of donors. Smaller, less well-resourced organisations will struggle to meet the requirements and consequently will be at risk of enforcement action.

IV. The proposed regulations will have a chilling effect on the legitimate and lawful advocacy by charities

There is a genuine risk charities will self-censor rather than risk enforcement action given the breadth and ambiguity in what is proposed. The breadth and ambiguity arises from, amongst other things, the phrase "*promote and support*" when coupled with the concept of acts or omissions "*which may be dealt with*" and an indefinite list of summary offences.

Charities advocate in respect of many matters in the public interest, whether that be protecting endangered species, closing the gap for indigenous Australians, or providing legal services to people suffering with a mental illness. For ACF, advocacy means influencing decision making in the interests of conservation and sustainability. These activities involve generating public awareness and debate in respect of an issue and through that, encouraging legislative and/or policy change to protect the environment and the people, plants and animals that depend upon it.

Through charities and other public interest organisations, people are able to come together to unite their voice around issues which are important to them. This is an essential role in modern democracy, providing ways for people to speak up for their views and values where they otherwise have limited ability to be heard.

The proposed regulations restrict and will discourage charities from participating in advocacy. This is indicative of a reform that is not in the public interest.

V. The proposed regulations impose a duplicate regulatory layer on charities. For-profit entities and political parties are not subject to this duplication.

Charities must comply with the law. These regulations duplicate criminal penalties by giving rise to a further punishment under the Act. The additional layer however is not subject to the checks and balances in the criminal justice system. Political parties and for-profit entities, which obtain benefit from registration as a body corporate, are not subject to this duplicate regime.

VI. Expose charities to risk of deregistration for minor inadvertent acts of employees.

There are thousands of summary offences on the statute book that are captured by the terms of the proposed regulations. Minor property offences can be inadvertent. Police, understanding the context and actual mischief caused, will often choose not to prosecute. Notwithstanding a police decision that no charge is warranted, the fact that the act or omission of an employee or organisation "*may be dealt with*" as an offence puts the charity at risk. That is because any act which "*may be dealt with*" as a summary offence empowers the Commissioner to take enforcement action. There is no intention required – such as for instance an employee committing an offence deliberately as a means of pursuing the charities purpose. Deliberate conduct is, appropriately, already dealt with under the *Charities Act 2013.*

VII. Giving too much discretion and power to the ACNC Commissioner, including a quasi-judicial role in relation to summary offences.

The Act does not require the Commissioner to have any qualifications whatsoever. Such as for instance a legal qualification.

Currently the Commissioner can revoke registration if (s)he reasonably believes a charity "*is more likely than not*" to breach a governance standard in the future. This breadth of discretion is inappropriate as it renders the Commissioner a de facto judicial body. The proposed regulations will worsen this by broadening the basis upon which the Commissioner may exercise the discretion to include summary offences. This runs contrary to ACNC policy that it will "*not investigate breaches of law or issues that other regulators or the police are better placed to handle*".

An inappropriate breadth of discretion also arises because the impugned act need not be unlawful: it only needs to be an act that "*may be dealt with*" as a summary offence. The Commissioner will also be given the broad discretion of determining whether a charity has taken "*reasonable steps*" to prevent resources from being used to promote or support actions that can be dealt with as summary offences by another entity. These regulations will open the door to, if not actual, at least a perception of a politicised ACNC.

AUSTRALIAN CONSERVATION FOUNDATION

VIII. Conclusion

The explanatory material and public statements inadequately justify the heavy burden the proposed regulations will result in. ACF considers it cannot be justified. The proposed regulations will impose a restriction on political communication by charities. However, the approach taken is not proportionate. Respectfully, this is overreach. ACF recommends it not be pursued but rather the Government revisit the recommendations of the 2018 Review.

Paul Sinclair
Campaigns Director

Adam Beeson
Co-General Counsel