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Dear Sir,

Unlawful activity - changes to the governance standards for registered charities

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as not-for-profit organisations and the public sector. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Our activities in the charitable sector

Governance Institute members are involved in governance, corporate administration and compliance with the Corporations Act 2001 (Corporations Act). Many of our members serve as officers of charities, or work for, or are involved with charities and are therefore involved in compliance with the requirements of the Australian Charities and Not-for-profits Commission (ACNC).

Governance Institute is itself a charity operating in the legal form of a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information.

Executive summary

- Governance Institute members welcome the Government's ongoing commitment to reducing the regulatory burden on the charitable sector, including harmonised financial reporting thresholds which is the subject of a separate Treasury consultation process.

- Our members do not in any way condone illegal activity by registered entities and we commend the Government for its commitment to upholding the law and removing regulatory uncertainty.
- Our members question the need to expand the scope of governance standard three. We note that *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (ACNC Review 2018) recommended that governance standard three should be repealed.
- The new subdivisions, as drafted, may impose onerous compliance burdens at a time when the not-for-profit sector needs reduced regulatory red tape. Already scarce resources may be diverted away from the purposes of registered charities towards administrative processes to address the heavier compliance burden.
- We do not believe the Government has evidenced widespread unlawful activity or any other systemic issues that give rise to a pressing need to regulate in this area.
- Governance Institute members are satisfied that the ACNC Act, the ACNC Commission and the other existing legislative and regulatory frameworks, external accountability regimes, civil court action, and state, territory and federal police forces are robust enough to ensure the sector's political advocacy is lawful.
- It is appropriate for registered entities to conduct political advocacy, including peaceful and lawful assembly and protest, on behalf of their members where it aligns with their organisation's purpose.
- Rather than proceeding with *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the amending instrument), we **recommend** the Government pursues other pressing reform needs to reduce regulatory red tape in the not-for-profit sector such as harmonising state, territory and Commonwealth legislation on reporting thresholds and charitable fundraising.

Our submission does not address all the provisions in the amending instrument but concentrates on those areas of most concern to our members.

General comments

Evidence of policy problem

Explanatory Statement page 1:

The existing scope of this governance standard may create uncertainty in the public domain about when engaging in or promoting other kinds of unlawful activities may affect an entity's entitlement to registration under the Act.

The amending instrument proposes extending the scope of governance standard three from indictable offences and civil penalty provisions attracting 60 penalty units to include certain summary offences. This would broaden the activities that might put an entity's ACNC registration status at risk. It is, in effect, a lower threshold for deregistration. The intent of the expanded scope, according to the Explanatory Statement, is to address uncertainty about when engaging in or promoting kinds of unlawful activity may affect an entity's entitlement to Australian Charities and Not-for-profits Commission (ACNC) registration.

Governance Institute members are not aware of such uncertainty. In fact, our members see a risk that this amending instrument will increase, not decrease, uncertainty around the application of governance standard three. This is because by introducing such a wide scope of summary offences, covering unlawful gathering offences and other complex areas of law, registered entities may be forced to avoid lawful political advocacy to minimise their risk of deregistration. We address this issue in more detail later in this submission.

In a media release dated 13 December 2020, the former Assistant Minister for Finance, Charities and Electoral Matters, Senator Zed Seselja, said the amending instrument was aimed at "activist organisations masquerading as charities" that "are using their position as charities to

engage in, promote and condone activities that are not legitimate charitable acts and are, quite frankly, criminal”.

Governance Institute members are unaware of systemic lawlessness. Our members report that registered entities are on the whole well governed, committed to lawful conduct, delivering value for stakeholders, and fulfilling an important democratic role in civil society through political advocacy. In a small minority of cases where there is lawless behaviour, it is already effectively dealt with by the ACNC Act, the ACNC Commission and the other existing legislative and regulatory frameworks, external accountability regimes, civil court action, and state, territory and federal police forces.

The Explanatory Statement does not detail any evidence of a systemic issue to support the need for expanded regulation that should be applicable to the whole sector. Given the potential regulatory compliance burden imposed by the expansion of standard three our members would welcome more evidence of systemic issues.

Governance Institute recommends that given the potential regulatory compliance burden imposed by the proposal there be greater evidence of the types of systemic issues the proposal is designed to address.

Inconsistency with ACNC Review 2018 recommendation 9

We note the independent ACNC Review 2018 Report (ACNC Review) recommended that governance standard three be repealed (recommendation 9).

ACNC Review 2018 page 47:

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.

Our members consider serious offences by registered entities should have consequences. However, we support the independent review panel’s finding that governance standard three already imposes a regulatory compliance burden on the sector. Expanding its scope would increase this compliance burden.

Governance Institute recommends that the Government reconsider the need to expand the scope of governance standard three in light of the ACNC Review’s recommendation for its repeal.

Alignment with ACNC Review recommendation 20

The Explanatory Statement refers to recommendation 20 of the ACNC Review as the basis for the amending instrument.

On our members’ reading of ACNC Review recommendation 20 it distinguishes between lawful political advocacy that is allowed and lawful political advocacy that is **not** allowed, as set out by the ACNC Act, the Commonwealth Electoral Act, relevant case law and other authorities.

ACNC Review 2018 page 82:

There have been a number of cases that highlight the ambiguity around the threshold between issues-based advocacy which the vast majority of charities engage in, and activities undertaken to achieve a purpose which may turn into a political purpose in its own right, and could constitute a ‘disqualifying purpose.’

Governance Institute members do not interpret ACNC Review recommendation 20 as relating to the issue of unlawful political advocacy involving criminal offences or civil penalties.

Governance Institute recommends that if the amending instrument proceeds, the Government reconsider its basis.

Specific comments on the amending instrument

Interaction with Commissioner's power to revoke registration

Explanatory Statement page 6:

The ACNC Commissioner's enforcement powers under Chapter 4 of the Act may be exercised if the ACNC Commissioner reasonably believes that it is more likely than not that the entity will not comply with a governance standard. This means it is not necessary for a registered entity to be charged or found guilty of a relevant summary offence for the ACNC Commissioner to take appropriate enforcement action under Chapter 4 of the Act.

It appears the amending instrument would give the ACNC Commissioner the power to take enforcement action – including removal of tax-deductible status – on a reasonable belief that a registered entity will engage in certain summary offences **in the future**, and without being proven in court.

ACNC Act Section 35.10(1)(c)(ii) already empowers the Commissioner to revoke the registration of a registered entity if the Commissioner reasonably believes 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.

By expanding the scope of governance standard three to include certain summary offences, the Commissioner would be able to take extraordinary enforcement action, on a mere suspicion, for a lower threshold of offences – before they are proven in court. We note that the Explanatory Statement, at page 6, says the ACNC Commissioner would “generally” give registered entity’s the opportunity to present their case as to why they should not be registered, consistent with the rules of procedural fairness and current practice. However, it says “generally” not in every case.

Governance Institute members consider that such broad powers should be granted carefully and sparingly with appropriate safeguards. They may be necessary in extraordinary cases, such as where organised crime is involved, where there is a pattern of criminal behaviour and a concerted effort by those accused to conceal their crimes. These powers appear entirely inappropriate in the sector, which based on our members experience is on the whole well governed, committed to lawful conduct, delivering value for its stakeholders, and fulfilling an important role in civil society through issues-based advocacy.

Governance Institute recommends that if the amending instrument proceeds, it be amended to address only proven criminal conduct, not a mere suspicion of future criminal or civil breaches.

Broad range of summary offences

The range of summary offences that would be added to governance standard three is exceedingly broad.

New subdivision 45.15(2)(a) reads:

Insert:

- (aa) as a summary offence under an Australian law, and the offence relates to:*
- (i) real or personal property of any description, whether tangible or intangible; or*
 - (ii) a legal or equitable estate or interest in any such property, or a right, power or privilege in connection with any such property; or*
 - (iii) causing personal injury to an individual, or any other kind of impairment of an individual's health, including the risk or threat of causing such injury or impairment; or*

The Government provides some examples such as unlawfully gathering, discussed below. However, it does not provide an exhaustive list of summary offences that would be included by this sweeping provision. The uncertainty created by this new subsection is likely to increase the compliance burden on registered entities. They may need to seek extensive legal advice on all possible summary offences covered by the provision, to minimise deregistration risk.

An example of this potential uncertainty is public profanity offences. Public profanity is a summary offence in all states and territories. New subsection 45.15(2)(a)(aa) makes it clear the governance standard would apply to “an Australian law”, thus including state law. Summary Offences Act 1966 (Vic) section 17 and Summary Offences Act 1953 (SA) section 22 prohibit profane, indecent or obscene language in public. Would a charity risk deregistration if it organised a peaceful protest at which protest slogans containing profanity were chanted, or placards containing profanity were displayed, or over-excited attendees swore? New subsection 45.15(2)(a) says the summary offence must relate to “causing personal injury to an individual, or any other kind of impairment of an individual's health, including the risk or threat of causing such injury or impairment”. It is unclear if this extends to emotional injury and whether profanity could cause emotional injury. Before planning public protests, boards of charities may need to seek expensive legal advice to determine if any behaviour at the protest could conceivably amount to a summary offence covered by this subsection and put processes in place to minimise risk.

Another example is unlawful gathering offences. The Explanatory Statement says new subsection 45.15(2)(a)(ii) is specifically intended to include the summary offence of ‘unlawfully gathering or remaining on land or in a building’. This appears to be an offence contained in Summary Offences Act 2005 (Qld) section 12. Unlike the common law offence of unlawful assembly, the elements of the offence in Queensland do not require physical violence. The Queensland offence also covers public buildings – where peaceful protests are often held. Governance Institute members have concerns about the potential impacts of this new subsection on the right of civil society organisations to peacefully assemble and protest. Unlawful gathering and other related offences are a complex area of law. Many peaceful demonstrations occur on land (“real property”) that is not owned by the registered entity organising the demonstration. It may be difficult for charities to find out who may hold a legal or equitable interest or right, power or privilege in or in connection with the property on which the demonstration is held. Public buildings, which are commonly the site of peaceful demonstrations, could be caught by this subsection. There are many registered entities, including community groups, multicultural organisations, women's organisations and faith-based organisations, that may be dissuaded from peacefully assembling for fear they may in some way unintentionally breach this subsection.

If this new subsection becomes regulation, faith-based organisations and other important civil society organisations may be at increased risk of losing their charity status if they engage in peaceful assembly and protest. They may decide to avoid public advocacy, even where it appears lawful, to minimise any possible risk of enforcement action by the ACNC Commissioner and loss of registration. This would be a serious loss to the richness and diversity of Australian civil society and its important role in participatory democracy. It may be that new subsection

45.12(2)(a) has the effect of constraining the ability of registered entities to participate in lawful advocacy.

Governance Institute recommends that the Government carefully consider whether subsection 45.12(2)(a) poses a risk to the ability of registerable charities to engage in peaceful and lawful assembly.

Broad definition of ‘resources’

The amending instrument would add new subsection 45.15(3) requiring a registered entity to take reasonable steps to ensure its “resources” are not used, nor continued to be used, to promote or support indictable offences, certain summary offences, or civil penalties attracting 60 or more penalty units. New subsection 45.15(4)(c) defines “resources” non-exhaustively as including “websites, social media accounts and other publications”.

It would seem the ACNC Commissioner would be empowered under ACNC Act 2012 section 35.10 to revoke registration if the Commissioner forms a reasonable belief that the registered entity will, in future, post on social media promoting a peaceful protest that amounts to an unlawful gathering. This is an unlikely, but possible, example of how far the ACNC Commissioner’s powers could be extended by the amending instrument.

Governance Institute recommends that if the amending instrument proceeds, new subsection 45.15(3) and (4) be removed or substantially amended.

Non-compliance notifications

The expansion of governance standard three may impose added compliance burden on charitable boards and company secretaries through non-compliance notifications.

It is good governance for boards to have oversight of legislative and regulatory compliance, including breach notification obligations. Company secretaries typically support the board in this area. The amending instrument creates some practical difficulties.

ACNC Act 2012 section 65.5(1)(e) and 65.5(2)(a)(ii) already require registered entities to notify the ACNC Commissioner by signed declaration if they do not comply with a governance standard if the contravention or non-compliance is significant enough to mean the charity is no longer entitled to be registered. The Explanatory Statement confirms (page 6) that it is intended under the amending instrument that “a failure to comply with the new governance standard may be a significant matter that must be reported to the ACNC Commissioner under section 65-5 of the Act. An administrative penalty applies for failing to give the ACNC Commissioner such a notice within the required time.”

In practice, it is likely these declarations would be signed by the director(s) of the registered entity and lodged by the company secretary. Directors and company secretaries at smaller charities are often time-poor volunteers. They already devote significant time to overseeing compliance with the laws, regulations and external accountability regimes that govern charities. As noted above, the ACNC Review 2018 found, at page 47, that the existing governance standard three does “force registered entities to enquire whether they may or may not have committed an offence”. An additional non-compliance notification requirement relating to specified summary offences, that poses a more significant risk of deregistration, is likely to impose a substantial added compliance burden on boards and company secretaries in the sector.

Governance Institute recommends that if the amending instrument proceeds, the Government carefully consider the impact of the potential added compliance burden on boards

and company secretaries, particularly those in smaller charities arising from the proposed non-compliance notifications.

‘Reasonable steps’

Another provision that may impose an added compliance burden is the new ‘reasonable steps’ requirement in the expanded governance standard three.

Under new subsection 45.15(3), each ACNC registered entity “must take reasonable steps to ensure that its resources are neither used, nor continued to be used, to promote or support acts or omissions by any entity” that amount to indictable offences, civil penalties attracting 60 or more penalty units, or the specified summary offences.

The Government’s FAQ document, page 3:

As with the existing governance standards, the steps that are reasonable to comply with the new requirement are to be determined objectively (i.e. from the perspective of a reasonable person) and will depend on the specific circumstances of the charity. This change covers a situation where a charity’s resources are used to promote or support any entity, which includes any individual, organisation, group of persons, as well as a charity’s volunteers and third parties (such as beneficiaries or donors), to engage in an unlawful activity. This new requirement reflects community expectations that registered charities should govern the use of their resources responsibly and ensure that their resources are subject to controls and safeguards against potential misuse, either from within or outside the entity.

In principle, Governance Institute of Australia supports the requirement for directors to ensure they properly oversee the use of their organisation’s resources and put in place controls and safeguards against potential misuse.

Governance standard five already imposes a reasonable steps test on registered entities in relation to directors’ duties. Under existing Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) (the ACNC regulation) subsection 45.25(2), charities must take reasonable steps to ensure their directors comply with a list of duties, including to act in good faith and disclose conflicts of interest. We would expect directors to comply with these duties as a matter of good governance, even if they were not contained in the ACNC regulations.

ACNC regulation subdivision 45-C currently contains a list of protections. If a charitable director’s conduct is consistent with the protections, the registered entity is deemed to have taken all reasonable steps and thus complied with governance standard five. These protections are similar to the safe harbour protections in Corporations Act subdivision C, the reasonable reliance protection in section 189, and the business judgement rule defence in section 180.

The amending instrument has no such protections under the expanded governance standard three. This potentially exposes registered entities and their directors to greater risk of deregistration. It also gives them no guidance as to what constitutes reasonable steps. The addition of relatively minor summary offences to governance standard three significantly increases the scope of what directors must contemplate to comply with their duties. A lack of protections is likely to increase the compliance burden with new subsection 45.15(3). As this is an unprecedented change to the regulation, directors and company secretaries will need considerable time to consider the operation of the subdivision. It will not be immediately clear what reasonable steps need to be taken to comply to reduce deregistration risk. ACNC may also take some time to develop guidance in this area. Case law may be slow to develop. In this context, safe harbour protections seem necessary.

Governance Institute recommends that if the amending instrument proceeds, there be protections added to subsection 45.15(3) to reduce the compliance burden and assist directors to adopt appropriate risk management structures.

Potential inconsistency with ACNC Act

ACNC Act section 45.10(6):

Political advocacy

(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.

Given the express reference to advocacy in support of changes to matters established by law, policy, or practice our members question whether the amending instrument is consistent with the intention of ACNC Act section 45.10(6).

Governance Institute recommends that the Government satisfy itself that the amending instrument is entirely consistent with ACNC Act section 45.10(6).

Conclusion

As noted above, Governance Institute members do not condone illegal activity by registered entities. Our members support lawful and peaceful issues-based advocacy where it aligns with a charity's purpose. They do not see the need for increasing the regulatory burden on the sector absent clear evidence of the need for expanded regulation. Nor do our members think it is beneficial if the sector is forced to reduce its engagement in peaceful assembly and protest to minimise the risk of deregistration.

If you wish to discuss any of the issues raised in this letter, please contact Catherine Maxwell.

Yours faithfully,



Megan Motto
CEO