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Thank you for the opportunity to make a submission on the proposed changes to governance standard 3 contained in the exposure draft of the A*ustralian Charities and Not-for-profits Commission Regulation 2013* released on 16 February 2021.

Greenpeace Australia Pacific Limited (Greenpeace) is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC). We are an independent campaigning organisation that uses peaceful protest and creative confrontation to expose global environmental problems and promote solutions that are essential to a green and peaceful future. For over 40 years we have raised the level and quality of public debate on essential public interest environmental issues. We have a proud history of running campaigns which have led to better air quality, supported the corporate sector switch to renewable energy, protected Australia's oceans and defended the global climate. We are an entirely independent, people-powered, registered charity and do not accept donations from governments or corporations. We are not aligned to any political party and advocate equally to governments of all persuasions.

These proposed changes are deeply flawed and should not proceed in any form. We urge the government to withdraw them.

1. **These proposed changes impose consequences immensely disproportionate to the relevant acts.**

The amendments will restrict legitimate and lawful non partisan policy advocacy. They give the ACNC Commissioner the ultimate discretion to deregister a charity for very minor, inadvertent, isolated actions or summary offences. If the proposed changes proceed, it will have a chilling effect on freedom of speech in Australia and will hamper the ability of charities to fulfil their charitable purpose and continue their important public interest work.

Charities play an essential role in our democracy. They educate the community about the impact of policies and they promote educated debate on issues of public interest. In a free and open society, people will have different points of view, but it is alien to the values we hold as a society

that the very existence of an organisation could be threatened simply because the government of the day disagreed with them.

If the proposed amendments come into effect, charities could be deregistered for simply tweeting in support of a human rights protest where a protester peacefully stepped on private land. They could be deregistered for providing legal support to whistleblowers and journalists who speak out against injustice. They could lose their registration for simply providing legal observers at protests where protesters hinder foot traffic. They may even lose their registration for setting up a Facebook Group or Zoom meeting of grassroots activists where the participants then start a petition which accidentally breaches the *SPAM Act 2003* (Cth).

The infractions which could spark deregistration are so minor in nature that they could easily be used in retaliation against charities who raise genuine concerns about government policies in order to silence dissent or reform. Under these misguided amendments, deregistration of a charity can occur despite the offence being minor, no intent being established and the offence having absolutely no relationship to the charity's activities or purpose.

Advocacy is an essential tool used by charities to achieve their charitable purpose in a democracy. Assistant treasurer, Michael Sukkar, told *The Australian* that while the government supports the right to peaceful protest, the federal government wanted to stop activists "masquerading" as charities. That is, with respect, contrary to the High Court's explanation of what constitutes charitable activity. In *Aid/Watch Inc v Federal Commissioner of Taxation*[1] the High Court recognised advocacy and political activity as vital to the work of charities in Australia. It reasoned that public debate is a purpose that is beneficial to the community and that political communication is essential for maintaining Australia's system of responsible and representative government. In its unanimous judgment in *Lange*, the High Court stated that '[f]reedom of communication on matters of government and politics is an indispensable incident of the system of representative and responsible government which the [Australian] Constitution creates and requires.'[2]

Political advocacy by charities enriches the political process by encouraging debate about matters affecting government, politics and policies; facilitating citizen participation; and engaging and promoting political pluralism.[3] The wisdom of the High Court in *Aid/Watch* was recognised by Parliament and enshrined in the *Charities Act 2003* (Cth), which notes at 12(l) that charitable purpose includes…"the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country" if the change is in furtherance of, or in opposition to, one or more other charitable purposes. The Explanatory Memorandum to the *Charities Act* recognises that this provision protects the right to freedom of expression and the right to take part in public affairs.[4]

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[1] *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539.
[2] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR, 559.
[3] Chia, Joyce, Harding, Matthew and O'Connell, Ann, 'Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation' (2011) 35 *Melbourne University Law Review* 353, 365.
[4] Explanatory Memorandum, *Charities (Consequential Amendments and Transitional Provisions) Bill 2013*, pp. 44-46.

It is ultimately not possible to effectively protect the environment without engaging in advocacy. While 'on the ground activities' by environmental organisations are important, they can be rendered largely ineffective if they are not complemented by policy change. For example, 'on the ground' conservation of intact ecosystems or biodiversity (like planting trees) will be ineffective in the long term unless there is effective policy action on climate change.

It is a well-established principle in Australian law that a charity can, and indeed should, engage in advocacy or political activity in pursuit of its charitable purpose. The mere fact that a charity peacefully advocates against a government's policy should not be grounds for deregistration, but under the proposed amendments it would become so.

2. The proposed changes effectively criminalise protest activity.

Charities have a long and proud history of engaging in protest action as part of an extended tradition of peaceful and nonviolent protest and persuasion that is a valued part of Australia's democratic system.

Greenpeace has a long and successful advocacy history and uses a variety of tactics, including peaceful protest, to achieve its purpose to protect, preserve and enhance the natural environment. Most notably, for over thirty years Greenpeace has taken action, often involving protest action, to protect whales - the gentle giants of the sea. Together with our global Greenpeace network our work has helped end whaling in nearly every country and revived decimated whale populations.

Protest action can, but certainly does not necessarily, include acts which can be in breach of the law. In the UK and in Australia courts have recognised a distinction between those who peacefully break the law seeking to achieve a political or social objective and those who break the law to further their own interests.

Protest action is not synonymous with unlawful activity. However, given the plethora of potential summary offences that can be unwittingly committed at a lawful gathering of people in protest, the proposed amendments will make involvement in protest action an existential risk for registered charities.

Protest has been widely used to challenge injustice across the globe. Protest is not only a legitimate form of advocacy, but sometimes it is the only remaining source of advocacy. Protests are typically practiced when injustice is widespread and intransigent, and when the laws and lawmakers are not responding to other forms of advocacy or public sentiment.

Activists who engage in protest activity submit to the judgment of society, arguing the justification for the act but accept its consequences in law. Their actions are not without consequence and there is no uncertainty at law to be addressed.

3. The proposed changes will increase uncertainty.

The draft explanatory statement notes that the purpose of these changes 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. However, the changes do not address any perceived uncertainty.

Conversely, they fundamentally change the threshold for deregistration. The breadth of both the discretion granted to the ACNC Commissioner, and the proposed regulation makes it impossible for a charity to confidently assess what conduct will trigger deregistration, thereby increasing uncertainty. The drafting fails to adequately outline how summary offences are confined, and the definition of 'resources' is vague and incredibly broad in its ambit. The sheer amount of potential summary offences and minor infractions that may potentially spark deregistration under the amendments have already caused the sector untold concern and widespread uncertainty.

4. The proposed changes will reduce public confidence in the charity sector.

Additionally, the draft explanatory statement proposes that the changes aim to give the public greater confidence that a registered entity is governed in a way that is consistent with its purposes. In practice however, the changes will reduce the public's overall confidence in the sector.

Diverting valuable donations which have been entrusted to charities to unreasonable and excessive compliance activities will inevitably result in a lower public perception of charities and less confidence in the sector over time.

Charities are already subject to the law. They are already vicariously liable for their employees and they work hard to create a culture of compliance and transparency. People are far less likely to raise concerns of charitable non compliance or misconduct, if they do not trust that the regulator will deal with their concerns fairly and proportionately. The amendments disincentivise employees and community members who experience misconduct or witness non compliance from speaking up, because voicing concerns about the minor non compliance of one individual employee could have dire consequences and result in the entire charity being deregistered. This will have an extremely detrimental effect on culture and compliance within charities and will work against Treasury's stated objective of increasing confidence in the sector.

Charities which are registered with the ACNC are required to comply with higher standards than not for profits which aren't registered. The average Australian does not appreciate the nuanced difference between a not for profit and a registered charity. They tend to view the sector as a whole. The higher standards and reporting obligations imposed on registered charities bolster confidence in the sector. If the proposed deregistration powers given to the ACNC Commissioner are wielded, a plethora of charities may be deregistered for minor, inadvertent, isolated breaches. Once deregistered these charities would no longer be subject to the more stringent ACNC reporting requirements, the responsible person obligations, the external conduct

standards or the other ACNC Governance Standards. In essence, this means a larger proportion of not for profit organisations would be subject to lower standards. This would only serve to reduce the public's confidence in the sector. In addition, once deregistered, these not for profit organisations would no longer be required to refrain from having a purpose of promoting or opposing political parties or candidates.

In its 2018 report 'Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review' an independent review panel noted that there were a small number of registered charities with links to high risk criminal misconduct (such as terrorism financing, money laundering, illicit drug dealing and child sexual offences). The panel recommended that the ACNC work with the Australian Criminal Intelligence Commission (ACIC), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Federal Police (AFP) and other Commonwealth departments and agencies to develop a regulatory model for high-risk registered entities based on specific risk indicators. Deregistering organisations puts them outside the ambit of the ACNC's authority. Rather than seeing the ACNC fulfil the panel's recommendation of taking a larger role in developing a regulatory model for such high risk entities by implementing additional reporting requirements, training and governance, these changes would see the ACNC deny all responsibility for regulating them. The panel clearly voiced its view throughout the report that while the ACNC should develop a regulatory model, it should *not* be given responsibility for the regulation of criminal offences.[5]

5. **The changes will place an unreasonable administrative burden on the charity sector**

Charities across the sector have provided essential services and support during the bushfires, the pandemic and the current economic recession. For many charities resourcing and capacity is already incredibly thin on the ground. These amendments will create additional, untenable administrative and legal burdens on charities at a time when the community needs the sector most. They will divert resourcing away from impactful purpose driven initiatives to inefficient and excessive compliance activities.

Charities are already required to comply with a vast amount of laws and regulations in every jurisdiction they operate in, including highly complex and fragmented fundraising and electoral laws. These amendments could see responsible charities deregistered for breaching almost any regulation or law.

These amendments would require each of Australia's 56,000+ registered charities to document that they have taken steps to comply with every conceivable summary offence related to persons and property under Australian law which may affect their activities - or risk deregistration. They will be required to document that they have taken steps to ensure that none of their resources are used to "promote or support" a wide range of acts and omissions. Most charities will need to seek expensive legal advice on a vast array of summary offences across each state, territory and

[5] Hammond, G, McCluskey, S, Turnour, M, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*, Commonwealth of Australia 11, 13, 110, 113.

federal jurisdiction in order to comply. Even if no summary offence is committed, the changes allow charities to be deregistered for failing to keep adequate records about their compliance with Governance Standard 3.[6] In addition, charities could be deregistered for failing to notify the ACNC Commissioner if a significant non compliance with any one of thousands of summary offences has occurred.[7]

The changes unfairly target charities in a way which is unparalleled in the private sector. They place an unreasonable and discriminatory burden on the sector. Charities already face additional sanctions under existing charities law. No rational justification has been given for why existing regulation is insufficient, and the proposed remedy of deregistration is extreme. In the corporate sector for instance it would be unthinkable that an entire company could be deregistered and have its revenue fundamentally impaired simply because a single employee was, or a company's resources were, engaged in a minor infraction. If ASX listed companies were subject to such an incredibly low bar for delisting, it's unlikely there would be a single company left on the ASX.

6. The changes are in opposition to parliament's mandate for the ACNC and the independent review of its powers

In 2012 when the ACNC was founded Parliament clearly set its mandate within the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (the ACNC Act). It determined that the agency empowered under relevant legislation with primary responsibility should be the principal actor in enforcing accountability, unless the failure was so egregious that it triggered questions of governance (under Governance Standard 3) in which case it was recognised the ACNC might reasonably have a role to play. No reasonable person could conclude that minor summary offences committed by an individual employee could trigger such governance concerns, let alone that suspected future offences or the offences of third parties could.

The extensive powers the Treasury intends to grant the ACNC Commissioner are entirely at odds with Parliament's mandate for the regulator. They represent a dangerous departure from parliament's intent of judging a charity's purpose, toward judging charities for the discrete actions of individual employees.

The disciplinary actions Treasury intends to grant to the ACNC Commissioner under the changes are disproportionate and out of step with the *ACNC Act* and the *Charities Act*. Under the proposed amendments charities will be deregistered for acts or omissions which are beyond their reasonable onus of control. They will be required to constantly monitor whether any of their employees, responsible persons, funds, websites, social media accounts, publications or other resources could be viewed by the ACNC as promoting or supporting acts or omissions covered by Governance Standard 3.

The ACNC Commissioner should be focused on the governance of charities, not investigating possible minor future offences by charities' employees. Such offences or possible future offences

[6] Section 55-5 of the *Australian Charities and Not-for-profit Commission Act 2012* (Cth).
[7] Section 65-5 of the *Australian Charities and Not-for-profit Commission Act 2012* (Cth).

should be dealt with by the relevant authority. The ACNC's core objectives are clearly outlined in section 15-5(1) of the *ACNC Act* and include "the reduction of unnecessary regulatory obligations [like this proposed change] on the Australian not-for-profit sector".

In its 2018 Strengthening for Purpose report the independent review panel recommended that Governance Standard 3 be repealed in its entirety.[8] Instead, the government is attempting to significantly broaden it. We agree with the independent committee's recommendation to repeal the standard. 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.

The government posits that the changes are a response to recommendation 20 of the Strengthening for Purpose report, which proposed that "test case funding be made available to develop the law in matters of public interest, including disqualifying purposes". The proposed amendments are entirely unrelated to that recommendation. Extending the powers of the ACNC Commissioner in connection with 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.

7. No relevant link to disqualifying purpose

The common law doctrine that a charity cannot have a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy is enshrined in section 11 of the *Charities Act*.

Governance Standard 3 has no relevance to the clarity of what will constitute a disqualifying *purpose*. In its current drafting Governance Standard 3 relates to unlawful activities. It is uncontroversial at law that the activities of a charity are not its purpose, and that isolated breaches of the law do not constitute an illegal purpose. The proposed changes which add an additional and disproportionate sanction to specific summary offences against persons or property will not impact upon whether a charity has a disqualifying purpose in any way.

The likely result is that charities fulfilling their bonafide charitable purpose will be unjustly targeted and deregistered for activities the charity may or may not have done for reasons arising from the advocacy activities of the charity that happen to be embarrassing, uncomfortable or inconvenient for the government of the day. The examples used in the explanatory statement provide clues as to which types of charities will be targeted first but as with all unrestrained power there is no knowing which types of charities will be targeted next.

Charities in aged care, childcare, health care and disability will be particularly at risk, as will schools and any charity involved in food preparation and service. The impact of these proposed regulations across the sector will be enormous and is cause for great concern.

[8] Hammond, G, McCluskey, S, Turnour, M, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*, Commonwealth of Australia 47.

8. **The amendments are wholly inconsistent with Australia's democratic principles of justice, fairness and procedural transparency.**

Concerningly, the proposed amendments will allow the ACNC Commissioner to deregister a charity even if they have not been charged or found guilty of an offence. Charities could be deregistered simply because the ACNC Commissioner formed the subjective view that the charity is "more likely than not" to commit a minor offence in the future. Charities may be considered guilty until proven innocent. This kind of unchecked power completely lacks justice, fairness and procedural transparency.

9. **The submission time frame is too brief to constitute genuine consultation**

While we welcome the opportunity to make a submission, we share the concerns of many within our sector that the brief time frame allocated for community submissions (less than 4 weeks) will exclude many community members from being able to voice their concerns and will limit the value and number of submissions received.

10. **Tax concessions are NOT a subsidy**

The Government often uses the justification that charities are afforded a privilege in being exempt from income tax and that this status is a concession (subsidy) and therefore Governance Standard 3 ought to be strengthened.

Income tax exemption of charities is not a generous concession from the government. Entities pursuing a charitable purpose have been exempt from taxation since the first income tax legislation was introduced in England. It is based on sound tax theory and its continuation was supported in both the Henry Review and the Productivity Commission Report.

The loss of charitable registration with the ACNC may have implications for deductible gift recipient (DGR) status. The suggestion that tax deductible donations are a gift from the taxpayer ignores the benefits to taxpayers and the reality of the tax system's architecture. The DGR status of registered charities is also a gift to the hundreds of thousands of donating taxpayers who receive a tax deduction for making a donation to registered organisations. Furthermore, all taxpayers benefit from the current system because registered organisations rely on DGR status for funding and so are able to perform work that is beneficial for society. Tax concession law recognises that advocacy and public debate play a vital role in allowing not for profits to effectively and efficiently contribute to the betterment of society.

11. **The proposed changes are unlawful and unconstitutional**

The proposed regulations are ultra vires and are not supported by the regulation making power in the *ACNC Act*. In fact, the ACNC is prohibited from making such changes by section 45-10(6) of the Act which states:

(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.

The new obligation to take "reasonable steps" to ensure resources are not used to "promote or support" minor summary offences clearly infringes the implied freedom of political communication enshrined in the Australian Constitution. The stated purpose of the amendments is not legitimate and the amendments are not reasonably appropriate or adapted in accordance with the test outlined in *Clubb v Edwards* 267 CLR 171.

12. A dismissible instrument is not a suitable legislative mechanism for changes of this magnitude

We urge the Senate Standing Committee for the Scrutiny of Delegated Legislation to oppose the use of a dismissible instrument for changes of this magnitude. What is proposed fundamentally changes the role of the ACNC and significantly expands its powers beyond the remit granted by parliament at its inception. If any changes are to be proposed they should not be concealed in a disallowable instrument which may not be subject to parliamentary scrutiny, debate or vote. We note that the Minister has failed to publish the mandatory Statement of Compatibility with Human Rights,[9] and that these concerning amendments unreasonably infringe on a number of rights enshrined in international treaties, including Article 19 of the *International Covenant on Civil and Political Rights*.

Given the extensive rationale outlined above, we are of the view that these unlawful, unconstitutional and misguided changes should not proceed in any form. We urge the government to withdraw them. We trust our concerns will be granted genuine consideration, and we thank Treasury for the opportunity to voice them.

Yours sincerely,

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[9] *Legislation Act 2003* (Cth) s 42; *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1).