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## **Re: UNLAWFUL ACTIVITY - CHANGES TO THE GOVERNANCE STANDARDS FOR REGISTERED CHARITIES**

NAVA welcomes the opportunity to respond to the draft changes to governance standard three in the *Australian Charities and Not-for-profits Commission Regulation 2013* to expand the scope of impermissible activities that registered charities must not engage in or promote others to engage in.

The National Association for the Visual Arts (NAVA) leads advocacy, policy and action for a contemporary arts sector that's ambitious and fair. As the peak body protecting and promoting the professional interests of the Australian visual and media arts, craft and design sector, NAVA undertakes advocacy on behalf of the sector and sets and monitors adherence to best practice standards. Since its establishment in 1983, NAVA has been influential in bringing about policy and legislative change to encourage the growth and development of the visual arts sector and to increase professionalism within the industry. NAVA also provides direct service to its Members and the sector generally by offering industry advice, referrals, professional development programs and resources, grants, and a range of other opportunity brokerage and career development services.

Advocacy work by not-for-profit organisations have made valuable contributions to effective and informed government policy-making throughout Australia's history. The important advocacy work that NAVA and other arts organisations do is based on our intimate contact with and expert knowledge of our sector. NAVA's own history as a strong advocate for the Australian visual arts sector is a testament to the way this work contributes to effective and informed government policy-making.

NAVA is concerned that the proposed expansion of Governance Standard 3 will be used to silence charities and reduce activism and advocacy within the independent arts sector. There are hundreds of independent galleries, art spaces and arts organisations registered with the ACNC. The changes are a backward step for our democracy, increasing red tape for charities and threatening the implied freedom of political communication enshrined in the Australian Constitution.

## CONTEXT

The National Association for the Visual Arts (NAVA) is a registered charity, reporting to the Australian Charities and Not-for-profits Commission (ACNC) annually. NAVA is also a tax-deductible fund listed on the Australian Government's Register of Cultural Organisations (ROCO) maintained under Subdivision 30-B of the Income Tax Assessment Act 1997.

Over many years, NAVA has provided expert advice to the Government and has worked closely with Ministers, their advisers and departmental staff to achieve mutually desired legislative and policy outcomes. NAVA is pleased to be playing the same role in relation to these proposed amendments alongside other pertinent advocacy bodies as well as our legal partners, Arnold Bloch Leibler.

NAVA's previous successes include (but aren't limited to) the introduction of the Moral Rights<sup>1</sup> legislation in 2000 as a result of NAVA's successful lobbying in collaboration with other arts industry bodies.

NAVA mobilised various parts of its constituency to form a Visual Arts Industry Guidelines Research Project (VAIGRP) 1998 - 2001, which called for an in-depth study to be undertaken by government. This resulted in the Contemporary Visual Arts and Craft (Myer) Inquiry conducted in 2001/02. The recommendations led to an agreement by federal, state and territory governments to introduce the jointly funded Visual Arts and Craft Strategy (VACS).<sup>2</sup>

The second outcome of the VAIGRP research work was the production of NAVA's Code of Practice<sup>3</sup> 2001 which provides a set of practical and ethical guidelines for the conduct of business between art/craft/design practitioners and galleries, agents, dealers, retailers, buyers, sponsors and partners, commissioners, employers and the managers of residencies, workshops, competitions, prizes and awards. Although not mandatory, it continues to improve practices across our sector. With NAVA's permission, it has been copied in Canada and South Africa.

Also in 2001, we launched Valuing Art Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts, Craft and Design Sector.<sup>4</sup>

In 2005, after eight years of negotiation NAVA secured the ATO Taxation Ruling: Income tax: carrying on business as a professional artist (TR 2005/1)<sup>5</sup> which uses art industry standards rather than just profits to assess artists' income tax entitlements.

NAVA did the foundation work for the Indigenous Art Code<sup>6</sup> project, consulting extensively for three years, 2008 - 2010.

NAVA was also one of the leaders of a successful campaign to change Sedition clauses in the Anti-Terrorism Act 2005,<sup>7</sup> to protect artists' freedom of expression. In 2011, it was replaced by 'Urging Violence' in the National Security Legislation Amendment Bill 2010. NAVA is a strong advocate for freedom of artistic expression and acts to try to ensure that censorship is not used to constrain artists from exercising this right within the law. NAVA continues to regularly defend the work of artists which are critical of government, and or made in alignment with global social justice issues including climate change, state violence and police brutality.

In 2010 the Artists' Resale Royalty<sup>8</sup> legislation was introduced after over twenty years of campaigning by NAVA in alliance with some other peak arts and copyright bodies.

In collaboration with two other lead bodies, NAVA secured a Senate Inquiry into the impact of the 2014 and 2015 Commonwealth Budget decisions on the Arts, we advocated for arts policy<sup>9</sup> to be on the 2016 and 2019 elections agenda.

In 2020, NAVA assessed impacts of COVID-19 on the Australian visual arts and craft sector, led policy discussions, and worked with government bodies to present useful information. Our weekly National Visual Arts Roundtable examined policy, risk and business continuity issues for organisations and sector bodies, serving as a recovery taskforce as well as a reference point for collegiate exchange. Our 27 March 2020 open letter to the Prime Minister,<sup>10</sup> front bench, Opposition, state ministers and lord mayors was signed by 130 organisations across all artforms, following which several of our requests were met by the Australian Government, including wage subsidies, eligibility changes for support payments, support for Aboriginal arts centres and an increase to the Regional Arts Fund. We outlined what's missing and what's still needed,<sup>11</sup> and we continue to advocate.<sup>12</sup>

We also continue to urge the government to adopt an evidence-based cultural policy to guide decisions by successive governments.

NAVA responds to the amendments to Governance Standard 3 proposed by the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 as follows:

## **THE PROPOSED REGULATIONS ARE NOT SUPPORTED BY THE REGULATION MAKING POWER IN THE ACNC ACT**

The Governor General is empowered to make regulations prescribing matters:

- a) required or permitted by the ACNC Act; or
- b) necessary or convenient to be prescribed for carrying out or giving effect to the ACNC Act.<sup>13</sup>

The proposed regulations meet neither of these criteria. Rather, they are prohibited from being made by section 45-10(6) of the ACNC Act. 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.*

In Australia's democracy citizens are entitled 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 can also be the case that at these events, summary offences are conducted by those present, whether that be inadvertently or intentionally.

As mentioned, there are hundreds of independent galleries, art spaces and arts organisations registered with the ACNC across Australia. NAVA is concerned that this proposal has implications for arts organisations engaging in advocacy and other work considered as 'activism'. Equally we are concerned of the impact this proposal may have on arts organisations and galleries supporting the production and presentation of artwork.

The effect of the Reasonable Steps Extension will be that a registered charity is required to not comment on protest action or political rallies even though this comment is entirely lawful and furthers or is in aid of the charity's purpose.

## **PROTEST ACTION IS FUNDAMENTAL TO CIVIL SOCIETY**

Artists and arts organisations 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.

Visual artists are increasingly making critical work in response to a number of global social, political, economic and environmental issues. At what point would an arts organisation or gallery be stripped of their charity status for presenting an environmentally focussed art exhibition program or arts festival that was critical of Australian law or policy.

Artistic practice is about expressing ideas. Political art plays a significant role in challenging systems and structures of power and helps us to engage with and counter socio-political conditions and imagine a more just world, all important to a healthy democracy.

Protest action can, but certainly does not necessarily always, include acts which can be in breach of the law. Protest action is, of course, not synonymous with unlawful activity. However, given the abundance of potential summary offences that can be unwittingly committed at a lawful gathering of people in protest, the proposed Governance Standards will make all protest action a risk for registered charities. This is not acceptable in a democratic society. It also raises questions of constitutional validity as addressed under the heading of implied freedom of political communication below.

## **QUESTIONS OF CONSTITUTIONAL VALIDITY**

### **Implied freedom of political communication**

The Reasonable Steps Extension infringes the implied freedom of political communication enshrined in the Constitution.

NAVA contends that as society's chroniclers, commentators and critics, artists should be at liberty to make art about any subject and by using any means. Freedom of Expression is a universal human right and one that is particularly valued by artists. The right to express opinions without interference should not be subject to any exception or restriction.

While the Australian Constitution does not explicitly protect freedom of expression, the High Court has held that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the Constitution.

### **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. Only registered charities are entitled to income tax exemption under the Income Tax Assessment Act 1997 (Cth).

Under compliance with the law, advocacy is a legitimate and effective way for charities to pursue their charitable purpose. Donors and communities expect charities to advocate and campaign on public policy, including the promotion or opposition of a change in the law, and to advance public debate.

The proposed amendments to Governance Standard 3 provide that if the Commissioner reasonably believes it is more likely than not that a charity will not take reasonable steps to ensure that its resources are not used to promote or support acts that could be dealt with as an offence, the Commissioner can revoke the status of a registered charity.

The breadth of this discretion is cause for deep concern. The parameters are extremely vague, allowing fickle and inconsistent application of this power. By enabling the imposition of taxation liability, the proposed regulations compromise the constitutional basis for the governance standard.

### **Increasing administrative burden on charities**

The advocacy activities of charities are already well covered, explained and protected in Australian law as set out by the Charities Act 2013<sup>14</sup> and supplementary advice published by the ACNC: Charity advocacy<sup>15</sup> and Charities, elections and advocacy.<sup>16</sup> There are also mechanisms in place for the public to make a complaint to the ACNC if they believe that a charity is engaging in inappropriate activity.

It is already a requirement that charities registered with the ACNC must submit an Annual Information Statement. This information is used for the purpose of administering the ACNC Act (including assessing entitlement to registration, and compliance with the ACNC Act – ‘recognised assessment activities’). NAVA notes that there is already a question regarding how activities contribute to the organisation’s charitable purpose.

If the proposed regulations are made law registered charities will be required to consider not only whether anything they might do or not do could be a summary offence of the kind mentioned in the proposed regulations but also whether any of their employees, responsible persons, funds, websites, social media accounts and publications could be viewed by the ACNC as promoting or supporting acts or omissions covered by Governance Standard 3.

The uncertainty of what might be considered ‘reasonable steps’ and what might be ‘promoting or supporting’ will only add to the administrative burden on charities.

NAVA, like many registered charities, has *thousands* of Members and subscribers from each state and territory. These Members represent a very diverse group of Australians, each with their own backgrounds, interests and agendas. We cannot possibly support this proposal that essentially aims to penalise non-profit organisations when their staff, members, subscribers, volunteers, or even people “without formal connections to the organisation” are involved in illegal or unlawful activity.

Imposing additional reporting on advocacy work is unnecessary, serving only to increase red tape to already under-resourced charitable organisations. The silencing of advocacy work can only be seen as being politically motivated.

## CONCLUSION

NAVA is concerned that the proposed expansion of Governance Standard 3 will be used to silence charities and reduce activism and advocacy within the charity sector. This proposal has implications for arts organisations and galleries engaging in advocacy and other work considered as 'activism', including the production and presentation of politically charged artwork by Australian artists.

Australians have the right to engage in public debate and peaceful protest, this is fundamental to sustaining a healthy democracy. Being engaged in, or connected to, peaceful protests does not imply that an organisation is involved in 'illegal' or 'unlawful' activity.

NAVA does not support the draft changes to governance standard three in the Australian Charities and Not-for-profits Commission Regulation 2013 to expand the scope of impermissible activities that registered charities must not engage in or promote others to engage in. These proposals suggest a politically motivated silencing of advocacy work - work that plays an important role in our democracy.

Please do not hesitate to contact me for any further information I can provide.

Sincerely,



Penelope Benton  
Acting CEO / General Manager

## REFERENCES

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- <sup>1</sup> <https://visualarts.net.au/code-of-practice/87-moral-rights/>
- <sup>2</sup> <https://visualarts.net.au/advocacy/visual-arts-and-craft-strategy/>
- <sup>3</sup> <https://visualarts.net.au/code-of-practice/>
- <sup>4</sup> [https://visualarts.net.au/media/uploads/files/Valuing\\_Art\\_Respecting\\_Culture\\_1.pdf](https://visualarts.net.au/media/uploads/files/Valuing_Art_Respecting_Culture_1.pdf)
- <sup>5</sup> <https://visualarts.net.au/advocacy/tax/artists-income-tax/>
- <sup>6</sup> <https://indigenousartcode.org/the-indigenous-art-code/>
- <sup>7</sup> <https://visualarts.net.au/advocacy/freedom-expression/sedition-and-urging-violence/>
- <sup>8</sup> <https://visualarts.net.au/advocacy/artists-resale-royalty/>
- <sup>9</sup> <https://visualarts.net.au/advocacy/policy/>
- <sup>10</sup> <https://visualarts.net.au/news-opinion/2020/letter-federal-and-state-ministers-re-covid-19/>
- <sup>11</sup> <https://visualarts.net.au/news-opinion/2020/creative-industry-stimulus-whats-missing-and-whats-urgently-needed/>
- <sup>12</sup> <https://visualarts.net.au/advocacy/covid-19/>
- <sup>13</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/acanca2012523/s200.5.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/acanca2012523/s200.5.html)
- <sup>14</sup> <https://www.legislation.gov.au/Details/C2013A00100>
- <sup>15</sup> <https://www.acnc.gov.au/advocacy-charities>
- <sup>16</sup> <https://www.acnc.gov.au/tools/guides/charities-elections-and-advocacy>