



Law Council  
OF AUSTRALIA

*Legal Practice Section*

15 August 2022

Director  
Not-for-profit Unit  
Treasury  
Langton Cres  
Parkes ACT 2600

By email: [charitiesconsultation@treasury.gov.au](mailto:charitiesconsultation@treasury.gov.au)

Dear Director

### Remake of ACNC Regulations

1. Australian Charities and Not for Profits Committee of the Law Council of Australia's Legal Practice Section (**Charities Committee**) is grateful for the opportunity to provide a submission to the Treasury's consultation on the draft *Australian Charities and Not-for-profits Commission Regulations 2022 (draft Regulations)*.
2. The Charities Committee includes amongst its members some of the most experienced legal practitioners as well as academics in the area of charity law in Australia. Members have extensive experience in advising charities including in relation to their establishment and ongoing compliance requirements that apply after registration. In preparing this submission, members of the Charities Committee have drawn on this collective experience.
3. The Charities Committee accepts that the proposed changes to the draft Regulations are minor amendments to reflect current drafting practices, improve clarity and to remove provisions that are no longer required. It is noted, however, that the draft Regulations, if implemented, will commence on 1 April 2023 which allows time for a consideration of recommendations contained within the 2018 report: *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review (the Report)*.<sup>1</sup>
4. The Charities Committee therefore recommends that consideration be given to further amendment of the existing *Australian Charities and Not-for-profits Commission Regulation 2013 (existing Regulation)*, to take account of the Report's recommendations with appropriate consultations.
5. The Charities Committee also notes that the 'Additional Amendments' identified in Appendix B to the Report ought to be considered in respect of the existing Regulation, noting in particular the following recommended amendments:

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<sup>1</sup> Available at <<https://treasury.gov.au/publication/p2018-t318031>>.

- Regulation 40.10 of the existing Regulation  
*Redraft to provide more effective private ancillary fund privacy protection as discussed in chapter 8.*
- Regulation 45.25(3) of the existing Regulation  
*If a registered entity is a trust with more than one responsible person, then each responsible person must disclose any conflicts of that responsible person to all the other responsible persons unless a state imposed or other comparable governance standard apply.*
- ACNC Regulations  
*Consider prescribing for the purpose of section 60-3(1)(e) of the Australian Charities and Not-for-profits Commission Act 2012 (Cth) that an audit or review can be undertaken by a member of the Chartered Accountants Australian and New Zealand, Society of Certified Practising Accountants or Institute of Public Accountants.*

6. The Charities Committee highlights other matters recommended or raised in the Report, that should be considered in the context of the draft Regulations, including:

- that Governance Standard 5 be retained, but amended to remove the word 'perceived' with respect to conflicts of interest;<sup>2</sup>
- that 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 Australian Charities and Not-for-profits Commission (**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;<sup>3</sup>
- that the existing Regulation be amended to disqualify a person from being a responsible person if they have a conviction for terrorism, terrorism financing, money laundering, fraud, importation or distribution of illicit drugs or a child sexual offence under Commonwealth, State or Territory law.<sup>4</sup>

7. The Charities Committee strongly endorses consideration of the recommended reforms of Governance Standards 3 and 5. The Charities Committee also recommends consideration of issues raised in the ACNC's submission to the Review Panel that produced the Report,<sup>5</sup> being:

- amending paragraph 45.25(2)(e) of the existing Regulation to add a requirement that conflicts of interest are managed appropriately;
- amending section 45.150 of the existing Regulation to require the date of birth of the responsible person to be added to the Disqualified Persons Register;
- amending section 40.1 of the existing Regulation to include the additional data items to enhance the ACNC Register such as:

<sup>2</sup> *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review (2018)*, 9.

<sup>3</sup> *Ibid*, 47.

<sup>4</sup> *Ibid*, 11.

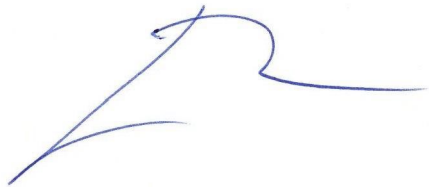
<sup>5</sup> Available at <<https://www.acnc.gov.au/about/acnc-submissions>>.

- the date an Annual Information Statement (**AIS**) and Annual Financial Report (**AFR**) is lodged with the ACNC. Including these dates on the Register would make it plain that a registered charity has or has not lodged its reports within the statutory timeframes;
- that information has been withheld from the Register and an explanation of 'withheld', noting that section 40-10 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) gives express power to the Commissioner to withhold information that would otherwise be displayed on the ACNC Register in certain circumstances. By including a statement on the Register page for a registered charity that particular information has been withheld, the Register would be more intelligible;
- the names, appointment and cessation dates of responsible persons, noting that the Register displays the names only of current responsible persons. Registered charities have an obligation to notify the Commissioner if an entity has ceased to be, or has become, a responsible entity of the registered entity, and displaying the appointment and cessation dates of a charity's responsible person(s) would increase transparency and accountability to the public;
- the backdating of a charity's registration. Under section 30-30 of the ACNC Act, a charity's registration has effect from a date specified by the Commissioner. Registration may be backdated if an entity satisfies the ACNC that it has been entitled to registration for a period prior to its application for registration. Displaying the date of the decision to register would make it easier to identify when a charity's registration has been backdated. In addition, a note could be added to explain that no reports have been lodged for previous reporting periods because the charity's registration has been backdated;
- retaining information that was displayed on the ACNC Register about formerly registered charities, noting the ACNC Act currently authorises the display of specific items of information about a former registered charity;
- ground(s) for revocation/summary of reasons for revocation. The Commissioner may revoke the registration of a registered entity if the Commissioner reasonably believes that any of the conditions in paragraphs (a) to (e) of subsection 35-10(1) of the ACNC Act are met. Displaying this information and a summary of the reasons for revocation on the Register would provide greater transparency and accountability;
- legal structure, incorporated association number (for incorporated associations) and Australian Company Number (for companies). Displaying this information on the Register would provide a greater degree of transparency about other regulatory regimes that apply to a registered charity;
- charitable purpose (mission statement). Governance Standard 1 requires that a registered entity make information about its purposes available to the public (paragraph 45.5(2)(b) of the existing Regulation). Publishing a statement of a charity's charitable purpose(s) on the Register would be an appropriate way of complying with this requirement;

- a compliance agreement entered into by the charity. Because the Commissioner may only exercise the enforcement powers in Part 4-2 of the ACNC Act with respect to federally regulated entities, ACNC compliance officers use a range of other compliance mechanisms, including entering into voluntary compliance agreements. Recording on the Register that a charity has entered into a compliance agreement would increase transparency; and
- deductible gift recipient status (**DGR**). The display of this information on the Register would enable users to search for charities that have DGR status.

8. While the Charities Committee might not support all the above ACNC recommendations in their final form, the Government may wish to consider taking the opportunity to turn its mind to these identified issues and their worthiness for inclusion in the draft Regulation process.
9. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Charities Committee Chair, Ms Seak-King Huang at [shuang@milnerhuang.com.au](mailto:shuang@milnerhuang.com.au).

Yours sincerely



**James Popple**  
**Chief Executive Officer**