

Our Ref: DFM:09/0005
Your Ref:

9 March 2021

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

By email: charitiesconsultation@treasury.gov.au

Dear Senior Advisor

**Unlawful activity - changes to the governance standards for registered charities:
submission**

I **enclose** our submission. Our submission's central point is:

If the Government really is concerned about charity "cowboys" (to adapt a news headline noted in the submission), then taking away charity Responsible Persons' immunity from prosecution under current ACNC legislation would be a good start.

"Turning on" directors duties is a better response to address acts and omissions causing malicious damage, vandalism and common assault, than de-registration of charities.

Whilst we believe the submission is self-explanatory, I am happy to further discuss its propositions with Treasury if necessary.

Our Melbourne based firm practises exclusively in the law of charities and not for profit organisations.

Yours faithfully

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Derek Forbes Mortimer

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A. Purpose of proposed amendments to Governance Standard 3

1. The Exposure Draft Explanatory Statement explains that proposed amendments to Governance Standard 3 (“the proposed amendments”) will require a charity to “not do an act, or omit to do an act” if that act or omission could be dealt with as a summary offence. Examples of offences said to be covered by the proposed amendments include:
 - (a) unlawful gathering or remaining on land or in a building;
 - (b) malicious damage, vandalism or theft of personal property; and
 - (c) common assault or threatening violence against an individual.
2. The focus of the proposed amendments is on a charity’s particular activities, rather than on a charity’s “purpose”. This may be because section 11 of the *Charities Act 2013* (Cth) already declares that an entity cannot be a charity if the entity’s purpose is:

engaging in, or promoting, activities that are unlawful or contrary to public policy...”, noting the term “public policy” includes “the safety of the general public”.
3. The proposed amendments focus on acts and omissions causing intentional harm to people and property (“intentional harm”).
4. Taking the proposed amendments at face value, they appear to not be concerned about limiting public protests or critiques of government policy. Those concerns about the proposed amendments have been publicly expressed. ¹ Our submission acknowledges those concerns and does not take issue with them.

¹ Luke Michael “ALP concerned by push to boost ACNC enforcement powers” *Pro Bono News* 25 February 2021, quoting ALP Senator Louise Pratt.

5. Instead, our submission will address the proposed amendments at face value ie that the Government on the face of things, intends no more by the proposed amendments than to address acts of intentional harm committed by persons associated with a charity.

B. What happens in the “for profit” corporate world about alleged vandalism?

6. It is worth taking a look at what happens in the for profit corporate world for a moment.
7. There is an expectation that for profit company officers should be held accountable for acts and omissions regarded say, as vandalism. Two widely reported examples are the blowing up of the Juukan Gorge rock shelters by Rio Tinto, and the demolition of the Corkman Pub in Carlton, Victoria by its property developers.
8. The destruction of the Juukan Gorge rock shelters by Rio Tinto has been widely reported. One commentator described the destruction as “an egregious act of vandalism”.² A parliamentary inquiry recommended Rio Tinto negotiate payment of compensation to traditional owners.³ There has been no suggestion by that inquiry that Rio Tinto should give up its licence to mine.
9. It has also been reported that a Rio Tinto CEO and several Rio Tinto board members (including its chair) have resigned as a direct consequence of failures within Rio Tinto that led to the destruction of the Juukan Gorge rock shelters.⁴
10. The destruction of the Corkman Pub in Carlton has also been widely reported. Robert Doyle is said to have described the Pub’s demolition in his time as Melbourne Lord Mayor as “the most brazen and wanton act of vandalism”.⁵

² Marcia Langton, “We need a thorough investigation into the destruction of the Juukan Gorge caves. A mere apology will not cut it”, *The Guardian* 28 July 2020.

³ Calla Wahlquist and Lorena Allam “Juukan Gorge inquiry: Rio Tinto’s decision to blow up Indigenous rock shelters ‘inexcusable’” *The Guardian* 9 December 2020.

⁴ Ben Butler and Calla Wahlquist “Rio Tinto investors welcome chair’s decision to step down after Juukan Gorge scandal” *The Guardian* 3 March 2021 where the article byline says “Simon Thompson accepts he is ‘ultimately accountable’ for the destruction of ancient rock shelters”; Calla Wahlquist “Juukan Gorge ‘cop-out’: talk about protecting Aboriginal sites goes curiously quiet in WA” *The Guardian* 6 March 2021 where the author states “Never have so many corporate heads rolled over the destruction of an Aboriginal heritage site”;

⁵ Larry Schlesinger, “‘Cowboy’ developers face \$1m in penalties over pub destruction” *Australian Financial Review* 18 October 2016.

11. Litigation followed the Pub's destruction with a view to prosecuting the two directors of the development company nominally responsible. As VCAT observed in a contempt proceeding: ⁶

A company has neither arms nor legs, body nor soul. It can only act, or fail to act, through human agency. In this case the human agency was provided by the two directors.

12. The VCAT decision also went on to state: ⁷

as observed in *Christian Youth Camps v Cobaw Community Health Services Ltd* a company's state of mind is a legal fiction [our italics]. The requisite element of intention, which is implicit in the very idea of contumaciousness will therefore be imputed from the actions or statements of the controlling officers of a company in all the circumstances.

13. The two examples above show that:

- (a) directors of for profit companies involved in acts perceived to be vandalism are being held to account; and
- (b) the law supports the principle of holding directors to account where the relevant acts and omissions demonstrate intentional harm.

C. The proposed amendments' absurd consequence

14. The proposed amendments say that a charity will lose its charity registration (with consequent loss of taxation privileges), if the ACNC Commissioner finds that the proposed amendments are more likely than not to have been broken.
15. The proposed amendments do not suggest a charity's individual "Responsible Persons" (ie charity management committee/board) may be held accountable.
16. Presently for federally regulated charities, Responsible Persons (unlike their counterpart "for profit" company directors) are not individually liable for failing a duty to their charity. This is because parts of the *Corporations Act 2001* relevant to directors' duties have been "switched off" for charity directors by the ACNC legislation.⁸

⁶ *Melbourne CC v 160 Leicester Pty Ltd* [2020] VCAT 1255 [125].

⁷ *Melbourne CC v 160 Leicester Pty Ltd* [2020] VCAT 1255 [125] citing *Christian Youth Camps Ltd v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 .

⁸ Specifically sections 180 to 183 of the *Corporations Act 2001* (civil obligations of directors and other officers to exercise due care and diligence, act in good faith and not to improperly use their position or company information).

17. Hence the proposed amendments if enacted mean that a charity could lose its charity registration and consequent tax privileges, but the charity's (purported) Responsible Persons (who ultimately must take responsibility for a charity's acts and omissions) escape censure under current ACNC legislation. Indeed, Responsible Persons are practically immune from prosecution under current ACNC legislation.

D. Turning on Directors' Duties

18. The ACNC Review⁹ recommended that the *Corporations Act 2001* (Cth) be amended to "turn on" the directors' duties.
19. The Government has noted the ACNC Review's recommendation to "turn on" directors' duties. However the Government is yet to release a consultation paper as it has said it would do, seeking feedback on the recommendation's merits and risks.¹⁰
20. If Government is serious about acts and omissions of intentional harm caused by people associated with charities (as on the face of the proposed amendments the Government would appear to be serious about), then it must consider the ACNC Review's recommendation to turn directors' duties back on.

Derek Mortimer
9 March 2021

⁹ Patrick McLure et al *Strengthening for Purpose: The Australian Charities and Not-for-profits Commission Legislation Review Final Report 2018* [49] stating that turning on directors duties "would also clarify the right of others to take action against those directors".

¹⁰ *Australian Government response to the Australian Charities and Not-for-profits Commission (ACNC) Legislation Review 2018* 6 March 2020, [12].