

Monday, 16 October 2023

Ms Emma Baudinette
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By email: charitiesconsultation@treasury.gov.au

Dear Ms Baudinette

Australian Charities and Not-for-Profits Commission (ACNC) secrecy provisions reform – re new and ongoing investigations

Chartered Accountants Australia and New Zealand (**CA ANZ**), CPA Australia, Institute of Public Accountants and The Tax Institute (collectively **the Joint Bodies**) appreciate the opportunity to comment on Treasury Laws Amendment (Measures for Consultation) Bill 2023: ACNC Review Rec 17 – Secrecy Provisions (**exposure draft legislation**). The exposure draft legislation seeks to empower the Australian Charities and Not-for-profits Commissioner (the **Commissioner**) to make increased disclosures regarding new and ongoing investigations.

Background

The exposure draft legislation proposes that the Commissioner will be able to authorise the disclosure of protected ACNC information if the Commissioner reasonably suspects that a registered entity has contravened the Australian Charities and Not for Profit Commission Act 2012 (**ACNC Act**), a governance standard, or external conduct standard, and the Commissioner is satisfied that the disclosure is necessary to prevent or minimise the risk of significant:

- harm to public health, public safety or an individual; or
- mismanagement or misappropriation of funds or assets of the entity or contributions to the entity; or
- harm to the public trust and confidence in the Australian not for profit sector or part thereof.

In addition, the Commissioner needs to be satisfied having regard to the above matters, the seriousness of the contravention, and the strength of evidence, that any harm likely to be caused to the registered entity or the registered entity's employees, contractors, volunteers, service providers by the disclosure would not be disproportionate.

Paragraph 1.23 of the exposure draft explanatory materials to the Bill states that "if the suspected contravention or non-compliance is very severe, the Commissioner may consider that the harm likely to be caused to the registered entity or an individual is not disproportionate to the public harm that disclosure would avoid, and therefore authorise disclosure **even where there is limited evidence**" (**emphasis added**).

As drafted, there is no requirement that the Commissioner give notice to the registered entity of the proposed disclosure of protected ACNC information. Nor is there any mechanism for a registered entity to have such a decision reviewed. Paragraph 1.14 of the exposure draft explanatory materials

states that “any decision made by the Commissioner or an ACNC officer in relation to the disclosure of information about a new or ongoing recognised assessment activity about a registered entity’s suspected contravention or non-compliance is not subject to merits review. This is appropriate given the decision relates to an ongoing or proposed investigation into an enforcement matter. Additionally, disclosures will only occur if necessary to avoid public harm, so any delay caused by a merits review process could lead to public harm.”

Reputational matters

Making public disclosures about new or ongoing investigations which reveal the identity of the registered entity is high risk and potentially commits the Commissioner and the registered entity that is subject of investigation to a “trial by media”.

Public disclosures may:

- have a detrimental impact on procedural fairness (e.g., the registered entity’s ability to respond both publicly and via legal avenues); and
- permanently damage the registered entity’s and / or its officers’ reputations, thus impacting the entity’s ability to raise funds, retain and recruit staff or volunteers, and generally conduct day-to-day operations.

However, the inability of a regulator, such as the ACNC, to disclose the fact of an investigation, when the issue at the cause of the investigation is in the public domain, could potentially damage the regulator’s reputation, diminish the role of the regulator and place the reputation of the registered entity in jeopardy as rumours may influence the process. The relatively recent RSL case is an important example in this context.

We support the proposed two-part test as we consider that it strikes the right balance in setting:

- the appropriate threshold level in paragraph 150-52(3)(c), being one of significant harm to the public and therefore fixes on a high degree of severity of conduct and risk, not just mere public interest; and
- the balancing considerations in subsection 150-52(4) which allow disclosure only if the Commissioner is satisfied that any harm likely to be caused to the registered entity or connected individuals will not be disproportionate relative to the public harm. This is an important safeguard in the design of the public disclosure power.

Procedural fairness

The Joint Bodies agree with the following comment in the Law Council of Australia’s submission dated 26 August 2021 in response to the Reform of the Australian Charities and Not-for-profits Commission secrecy provisions - Recommendation 17 of the ACNC Review consultation paper:

“The Commissioner should be required to consult with the affected charity. This will allow the affected charity to inform the ACNC of potential risks that may arise from disclosure, of which the ACNC may not be otherwise aware and provide the ACNC with information about the significance of the risk.”¹

¹ <https://lawcouncil.au/resources/submissions/reform-of-the-australian-charities-and-not-for-profits-commission-secrecy-provisions-recommendation-17-of-the-acnc-review>

Such notice may allow the registered entity to obtain an injunction, or to make submissions to the Commissioner who must undertake the delicate balancing of considerations that is required before disclosing information about a new or ongoing investigation. It is particularly important that this option is available before the disclosure as the registered entity may be irrecoverably damaged by the disclosure and a merits review after the disclosure would be futile.

It is noted that under section 95-20 of the ACNC Act, the Commissioner can apply to the Court for an urgent interim injunction against the registered entity. The Commissioner is generally likely obtain an injunction on the same day if the conduct and concern is urgent or serious, e.g., major fraud or criminal activity.

We therefore recommend the following amendments to the exposure draft (recommended changes are in red):

150-52(5) The Commissioner ~~must may~~ give an entity notice, in writing, **no less than 3 working days before authorisation**, that the Commissioner is considering giving an authorisation under subsection (3) in relation to information that concerns the entity.

150-52(7) ~~To~~ To avoid doubt, the Commissioner is not required to do anything under subsection ~~(5)~~ ~~or~~ (6) before **publishing the response or** information under that subsection.

Time limit to website publication

We note that the amendment does not limit the time for which the Commissioner can continue to publish this information on the ACNC website. We recommend that a maximum period of 5 years be specified, and the amendment should permit or require the Commissioner to remove the information earlier once satisfied that the risk has been eliminated or sufficiently mitigated.

We consider that this is an important aspect of maintaining the right balance between public risk and risk to the registered entity. Once the public risk has dissipated, ongoing publication risks disproportionately harming the entity and/or its connected individuals.

Should you have any queries in relation to this submission, please contact Susan Franks on 0401 997 342 or susan.franks@charteredaccountantsanz.com

Yours sincerely,

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