

EXPOSURE DRAFT

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Australian Charities and Not-for-profits Commission Act 2012

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021

The *Australian Charities and Not-for-profits Commission Act 2012* (the Act) provides for the registration and regulation of charities by the Australian Charities and Not-for-profits Commission (ACNC).

Section 200-5 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations) 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.

An entity is entitled to registration under the Act if it meets specified requirements, including the requirement to comply with the governance standards set out in the *Australian Charities and Not-for-profits Commission Regulation 2013*. Registration under the Act is a necessary precondition for access to a range of exemptions, benefits and concessions, including certain Commonwealth tax concessions.

Governance standard three currently provides that registered entities must not act in a way that may be dealt with as:

- an indictable offence under an Australian law; or
- by way of a civil penalty of 60 penalty units or more.

The existing scope of this governance standard may create uncertainty in the public domain about when engaging in or promoting other kinds of unlawful activities may affect an entity's entitlement to registration under the Act.

The Regulations address this uncertainty by extending the scope of governance standard three to make clear that an entity is not entitled to be registered or remain registered under the Act if:

- the entity does an act (or omits to do an act) that may be dealt with as a summary offence under an Australian law relating to real property, personal property or causing personal injury or harm to an individual; or
- the entity fails to take reasonable steps to ensure its resources are not used to promote acts (or omissions) by any entity that may be dealt with as an indictable offence, a relevant summary offence, or a civil penalty of 60 penalty units or more.

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The Regulations implement the Government's response to recommendation 20 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018*. Recommendation 20 states that test case funding should be made available to develop the law in matters of public interest. In response to this recommendation, the Government stated it would explore legislative options to address uncertainty in the law.

Details of the Regulations are set out in the [Attachment](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after the earlier of:

- the day both Houses of Parliament pass a resolution approving the Regulations; and
- the last day on which the Regulations could be disallowed in either House of Parliament.

Details of the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021

Section 1 – Name

The name of the instrument is the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations).

Section 2 – Commencement

The Regulations commence on the day for commencement specified in section 45-20 of the *Australian Charities and Not-for-profits Commission Act 2012*. That is, the day after the earlier of:

- the day both Houses of the Parliament pass a resolution approving the Regulations; and
- the last day on which the Regulations could be disallowed in either House of the Parliament, unless the Regulations are disallowed or either House passes a resolution disapproving the Regulations before that day.

Section 3 – Authority

The Regulations are made under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Section 4 – Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 amends subsection 45.15(2) of the *Australian Charities and Not-for-profits Commission Regulation 2013* by replacing the references to “engage in conduct” with “do an act” in that provision. This is a technical amendment that is not intended to alter the meaning or operation of the provision.

Extending governance standard three to include certain summary offences

Item 2 adds paragraph 45.15(2)(aa) to governance standard three. Under this new provision, a registered entity must not do an act or omit to do an act if:

- the act or omission could be dealt with as a summary offence under an Australian law; and
- the offence relates to one of the following:
 - real or personal property of any description, whether tangible or intangible;
 - a legal or equitable estate or interest in any such property, or a right, power or privilege in connection with any such property;

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- causing personal injury to an individual or any other kind of impairment of an individual’s health, including the risk or threat of causing such injury or impairment.

This is intended to cover summary offences under Commonwealth, State and Territory laws relating to real property, personal property and interference with an individual. Examples of the kinds of summary offences that are covered include:

- unlawfully gathering or remaining on land or in a building;
- malicious damage, vandalism or theft of personal property; and
- common assault or threatening violence against an individual.

Other summary offences are not included in the new provision as they are less likely to affect the governance or proper regulation of charities. For example, the amendments do not cover a situation where an employee of a registered entity receives a traffic infringement in the course of their employment.

The purpose of this amendment is to make clear that in all cases, a registered entity is not entitled to registration under the Act if it engages in any of the relevant summary offences. Applying this standard in all cases provides greater clarity for registered entities.

Additionally, this amendment aims to give the public greater confidence that a registered entity is governed in a way that is consistent with its purposes, and that it protects its assets, reputation and the people it works with. This is consistent with the existing objective of governance standard three.

Registered entities can meet this standard by adopting a common sense approach, which could include ensuring responsible entities (such as board or committee members) have a general knowledge of the laws relating to the relevant summary offences and having a process in place to ensure the charity meets its legal obligations.

Extending governance standard three to include promoting unlawful activities

Item 3 adds new subsections 45.15(3) and (4) to governance standard three. Under these new provisions, a registered entity must take reasonable steps to ensure that its resources are not used (nor continued to be used) to promote or support acts or omissions by any entity that may be dealt with as:

- an indictable offence under an Australian law; or
- a summary offence under an Australian law that relates to real property, personal property or causing personal injury or harm to an individual; or
- a civil penalty provision of 60 penalty units or more.

New subsection 45.15(4) provides that a registered entity’s resources includes its funds, responsible entities and employees acting in that capacity, websites, social media accounts and other publications. This list is not exhaustive and other resources (that meet the ordinary meaning of the term) of the registered entity are also captured. For example, a registered entity’s resources includes its other assets and property, such as its mailing list and land owned by the entity.

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However, for the purposes of the provision, a registered entity's resources does *not* include its volunteers, unless the volunteer is a responsible entity. This means that a registered entity does not contravene the standard if a volunteer (that is not a responsible entity) promotes or supports another entity to engage in a relevant unlawful activity without the authorisation of the registered entity. This approach reflects that these volunteers are unlikely to have control or influence over the charity's operations.

The *entity* that a registered entity must not use its resources to promote or support to engage in a relevant unlawful activity has the same meaning as in section 205-5 of the Act. Therefore, a registered entity must not use its resources to promote or support relevant unlawful activity by any individual, body corporate, body politic, unincorporated association or body of persons, or trust.

While some volunteers are excluded from being part of the registered entity's *resources*, all volunteers would still be *entities* for the purposes of the new provisions. Therefore, if a registered entity uses its resources (such as a mailing list which includes the email addresses of its volunteers) to promote or support its volunteers to engage in a relevant unlawful activity, that would contravene the new standard.

These amendments reflect community expectations that registered entities should govern the use of their resources responsibly and ensure that their resources are subject to controls and safeguards against potential misuse, either from within or outside the entity.

As with the existing governance standards, the steps that are reasonable to comply with the new provision are to be determined objectively and will depend on the specific circumstances of the registered entity (including its size, purpose and activities).

However, registered entities can generally meet this standard by adopting a common sense approach. This could involve a registered entity:

- having appropriate processes, safeguards and controls in place about who can access and use the entity's funds, office and social media accounts;
- undertaking regular reviews and audits of the entity's outgoing payments;
- ensuring responsible entities and employees have a general knowledge of any relevant legal obligations; and
- addressing the improper use of the entity's resources promptly (for example, by taking down any unauthorised publications as soon as practicable).

Failure to comply with the new provisions

Consistent with current practice, the ACNC will provide guidance and education to registered entities to help them understand and comply with these new obligations.

A failure to comply with the new governance standard means that the entity is not entitled to be registered under the Act. This enlivens the ACNC Commissioner's power to consider revocation of the entity's registration. If the ACNC Commissioner

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exercises this power, the entity will no longer be able to access certain government funding, exemptions, concessions and benefits. This is consistent with the consequences for failing to comply with the existing governance standards.

If the entity is a federally regulated entity, a failure to comply with the new provisions may result in enforcement action being taken by the ACNC Commissioner under Chapter 4 of the Act. This could include for example, issuing formal warnings and giving directions relating to actions required to comply with the new obligations.

The ACNC Commissioner's enforcement powers under Chapter 4 of the Act may be exercised if the ACNC Commissioner reasonably believes that it is more likely than not that the entity will not comply with a governance standard. This means it is not necessary for a registered entity to be charged or found guilty of a relevant summary offence for the ACNC Commissioner to take appropriate enforcement action under Chapter 4 of the Act.

Additionally, a failure to comply with the new governance standard may be a significant matter that must be reported to the ACNC Commissioner under section 65-5 of the Act. An administrative penalty applies for failing to give the ACNC Commissioner such a notice within the required time.

Before enforcement action or action to revoke an entity's registration is taken by the ACNC Commissioner, registered entities will generally have the opportunity to present their case, consistent with the rules of procedural fairness and current practice.

These options give the ACNC Commissioner flexibility to pursue the most appropriate action in each case, depending on their assessment of various considerations, including the severity and nature of the failure. These options are also consistent with the options that apply for a failure to comply with the existing governance standards.

Application

Item 4 provides that the amendments apply in relation to acts or omissions occurring on or after the day the amending instrument commences. That is, these amendments do not apply to acts or omissions occurring before the commencement of the Regulations.