



Australian Government
The Treasury

TSY/AU

Unlawful activity — changes to the governance standards for charities FAQs

Why is the Government making changes to the governance standards?

Charities registered with the Australian Charities and Not-for-profits Commission (ACNC) are generally required to comply with the governance standards. Governance standard three requires registered charities to operate lawfully and comply with Australian laws. Due to the current scope of unlawful activities prohibited under governance standard three, the existing standard may create uncertainty in the public domain about what other kinds of activities, including the promotion of such activities, could place a charity's registration at risk.

For example, the governance standard may give the impression that engaging in an activity that may be dealt with as a summary offence (such as vandalism of personal property) may not place an entity's charity registration at risk. Similarly, the governance standard may give the impression that promoting others to engage in unlawful conduct may not place an entity's registration at risk.

In response to recommendation 20 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (ACNC Review), released on 6 March 2020, the Government committed to explore legislative options to address uncertainty in the law.

This amendment makes clear that in all cases, an entity is not entitled to registration with the ACNC if it engages in any of the relevant summary offences (outlined below) or fails to take reasonable steps to ensure its resources are not used to promote others to engage in any unlawful conduct prohibited under the standard.

What are the existing requirements under governance standard three?

Governance standard three currently provides that registered charities must not engage in certain types of unlawful activity. The governance standard prohibits charities from engaging in conduct that could be dealt with as either an indictable offence or a breach of Australian law that has a civil penalty of 60 penalty units or more. Indictable offences are generally those punishable by a term of imprisonment of at least one or two years, depending on the jurisdiction.

The purpose of governance standard three is to give the public confidence that a registered charity is governed in a way that is sustainable and consistent with its purposes, and that it protects its assets, reputation and the people it works with.

What are the changes under the expanded governance standard?

The amendments to governance standard three contained in the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (the Regulations) will expand the scope of impermissible activities that registered charities must not engage in or promote others to engage in.

The amendments will include that, in addition to the current governance standard, registered charities:

- must not engage in conduct that may be dealt with as a summary offence relating to real property, personal property or persons under an Australian law; and
- must take reasonable steps to ensure their resources are not used, nor continued to be used, to promote or support any entity to engage in unlawful activities prohibited under the standard.

This amendment ensures that governance standard three is more consistent with the disqualifying purposes set out in the *Charities Act 2013*, as it would capture circumstances where charities may engage in other types of unlawful activities or promote others to engage in such unlawful activities.

What is prohibited and required under the change?

Prohibition of certain types of summary offences

Under the changes, registered charities will be prohibited from engaging in summary offences under Commonwealth, State and Territory laws relating to:

- real property (e.g. trespass or unlawful entry, gathering or remaining on land or in buildings);
- personal property (e.g. damage, theft or vandalism of personal property); and
- interference with an individual (e.g. assault, causing injury or harm, threatening violence or otherwise intimidating an individual).

The changes do not extend to all summary offences as this would capture minor or inadvertent contraventions that do not affect the governance or proper regulation of charities. For example, the governance standard will not capture a situation where an employee of a registered charity receives a minor traffic infringement while at work.

Requirement to take reasonable steps to ensure the proper use of resources

The expanded standard will also require registered charities to take reasonable steps to ensure their resources are not used to promote or support any entity to engage in an unlawful activity where that unlawful activity, if undertaken by the charity itself, would result in a breach of governance standard three.

As with the existing governance standards, the steps that are reasonable to comply with the new requirement are to be determined objectively (i.e. from the perspective of a reasonable person) and will depend on the specific circumstances of the charity.

This change covers a situation where a charity's resources are used to promote or support any entity, which includes any individual, organisation, group of persons, as well as a charity's volunteers and third parties (such as beneficiaries or donors), to engage in an unlawful activity.

This new requirement reflects community expectations that registered charities 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.

What is meant by a charity's resources?

In this context, 'resources' is intended to cover a registered charity's senior management and its staff, funds, property and other assets. This includes a charity's online presence (e.g. a website on the internet or social media accounts), communications material (e.g. letters and emails), responsible persons and employees of the charity, charitable revenue (including donations), and land or buildings owned by the charity.

However, 'resources' is not intended to include a charity's volunteers. This means that a registered charity does not contravene the expanded standard if a volunteer promotes or supports any entity to engage in an unlawful activity without the authorisation of the charity.

What will charities need to do to meet the expanded governance standard?

Registered charities can meet the expanded governance standard by adopting a common sense approach.

Registered charities must take reasonable steps to ensure that their resources are not misused. This will depend on the individual circumstances of the charity and may include the following:

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

What are some examples of situations where a charity would contravene the expanded governance standard?

Example #1 – relevant summary offence committed by a registered charity

A registered charity exists to relieve poverty in Australia and internationally, and as part of its activities occasionally advocates against the outsourcing of labour from domestic manufacturers to overseas manufacturers. The charity organises a trespass on to the property of an Australian company that outsources its labour overseas, and vandalises the company's head office.

In this example, the registered charity has contravened governance standard three by engaging in an act that may be dealt with as a summary offence related to real property under Commonwealth and/or state and territory laws.

Example #2 – authorisation of the use of a charity's resources to promote unlawful activities

A registered charity's senior management uses its social media account to encourage participation in an upcoming protest against cyclists using roads. As part of the event, the protest clearly intends that participants steal and damage bikes across the community.

In this example, the registered charity has contravened governance standard three by failing to take reasonable steps to ensure its resources are not used to promote or support others to engage unlawful activities (specifically acts that may be dealt with as a summary offence related to personal property under Commonwealth and/or state and territory laws).

Example #3 – failure to take reasonable steps to ensure resources are not misused or continued to be misused

A registered charity's bank account is used by an outside person to transfer regular amounts of money to an entity that organises and incites people to trespass on private land. The person was

formerly employed by the charity and had access to the charity's bank account, but since leaving the charity has not removed access. The charity fails to adopt reasonable safeguards and access controls for its bank account, and allows the continued misuse of its funds.

In this example, the registered charity contravened governance standard three by failing to take reasonable steps to ensure its resources are not used to promote or support unlawful activities, and for behaving negligently by failing to rectify or address the misuse.

Under this example a registered charity may find that it may have contravened other governance standards; in particular one and five.

What are the consequences if a charity does not comply with the governance standards?

The same enforcement powers the ACNC Commissioner has with regard to all of the governance standards would apply to the expanded governance standard.

Charities that do not comply with the governance standards are subject to the ACNC Commissioner's existing enforcement powers. This includes the power to give warnings and directions, enforce undertakings, seek court injunctions, suspend or remove responsible persons, and revoke an entity's charity registration. Should the ACNC Commissioner revoke the registration of a charity, the entity would lose access to a range of Commonwealth benefits and concessions, including tax concessions.

The ACNC Act exempts basic religious charities from complying with the governance standards.

When will the proposed governance standard apply?

The Regulations will commence the day after the earlier of:

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

What are the next steps?

Treasury will review the submissions and feedback from stakeholders on the governance standard, which will inform any potential refinements to ensure it achieves its intended purpose.