



Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 1)

Select Legislative Instrument No. 23, 2013

I, Quentin Bryce, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Australian Charities and Not-for-profits Commission Act 2012*.

Dated 1 March 2013

Quentin Bryce
Governor-General

By Her Excellency's Command

David Bradbury
Assistant Treasurer

OPC50361 - 15

Contents

1	Name of regulation	1
2	Commencement	1
3	Authority	1
4	Schedule(s)	1

Schedule 1—Amendments of the Australian Charities and Not-for-profits Commission Regulation 2013	2
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1 Name of regulation

This regulation is the *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 1)*.

2 Commencement

This regulation commences on the later of:

- (a) the commencement day referred to in section 45-20 of the *Australian Charities and Not-for-profits Commission Act 2012*; and
- (b) 1 July 2013.

Note: Section 45-20 of the *Australian Charities and Not-for-profits Commission Act 2012* relates to Parliamentary scrutiny of a regulation made for the purposes of subsection 45-10(1) of that Act.

3 Authority

This regulation is made under the *Australian Charities and Not-for-profits Commission Act 2012*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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 of the Australian Charities and Not-for-profits Commission Regulation 2013

1 Section 4

Insert:

member has the meaning given by the *Income Tax Assessment Act 1997*.

2 Subsection 40.1(1) (after table item 1)

Insert:

1A	Purpose of registered entity	Both of the following: (a) the information has been voluntarily disclosed to the Commissioner by the registered entity, as an extract of the governing rules of the entity, for the purpose of being included on the Register; (b) the Commissioner is satisfied that the extract: (i) is consistent with the governing rules of the entity; and (ii) complies with governance standard 1, set out in section 45-5
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3 After Division 40

Insert:

Division 45—Governance standards

Subdivision 45-A—Preliminary

45.1 Simplified outline—how the governance standards apply

The governance standards support registered entities in fulfilling their objectives by providing a minimum level of assurance that they meet community expectations in relation to how a registered entity should be managed.

Community expectations in relation to governance may include expectations about how a registered entity goes about managing its affairs, the use of public monies, volunteer time and donations provided to it, how the entity manages the risks that it faces, how the entity promotes the effective and responsible use of its resources and how the entity goes about demonstrating that it is operating transparently and for a proper purpose.

The steps a registered entity will need to take to comply with the governance standards will vary according to its particular circumstances, such as its size, the sources of its funding, the nature of its activities and the needs of the public (including members, donors, employees, volunteers and benefit recipients of the registered entity).

The compliance obligations, processes and reasonable steps specified in the governance standards are to be interpreted having regard to the objects of the Act and the matters the Commissioner must consider in exercising the Commissioner's powers as listed in section 15-10 of the Act (in particular, the principles of regulatory necessity, reflecting risk and proportionate regulation, as well as the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia).

The objects of the Act are: to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and to promote the reduction of

unnecessary regulatory obligations on the Australian not-for-profit sector.

The governance standards also act as a mechanism which may enliven the enforcement powers in Part 4-2 of the Act to help protect and sustain the not-for-profit sector and maintain and enhance public trust and confidence.

45.2 Application

For the purposes of section 45-10 of the Act, the governance standards in Subdivision 45-B are specified.

45.3 Interpretation of governance standards

The governance standards in Subdivision 45-B must be interpreted in a manner that is consistent with the objects of the Act and the requirements of section 15-10 of the Act.

Subdivision 45-B—Governance standards

45.5 Governance standard 1—Purposes and not-for-profit nature of a registered entity

Object

- (1) The object of this governance standard is:
- (a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and
 - (b) to give the public, including members, donors, employees, volunteers and benefit recipients of the registered entity, confidence that the registered entity is acting to further its purposes.

Standard

- (2) A registered entity must:
- (a) be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity; and

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- (b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and
 - (c) comply with its purposes and its character as a not-for-profit entity.

Note: Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register or in an Australian law on www.comlaw.gov.au or www.austlii.edu.au, or is otherwise made available on request.

45.10 Governance standard 2—Accountability to members

Object

- (1) The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.

Standard

- (2) A registered entity that has members must take reasonable steps to ensure that:
 - (a) the registered entity is accountable to its members; and
 - (b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.

Note 1: The steps that a registered entity may take to ensure that it is accountable to its members could include:

- (a) holding annual general meetings; and
- (b) providing members with an annual report (including financial information and achievements towards its purpose); and
- (c) providing for elections for its responsible entities.

Note 2: The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns could include:

- (a) holding an annual general meeting with a question and answer session; and
- (b) providing an opportunity for members to propose resolutions and to vote upon those resolutions.

Note 3: When taking the reasonable steps required by governance standard 2, regard must be had to requirements of the governing rules of the registered entity, to the extent that those governing rules include appropriate accountability mechanisms. If those governing rules

include appropriate accountability mechanisms, compliance with those rules would demonstrate compliance with governance standard 2.

Note 4: Subdivision 60-C of the Act sets out rules about the preparation of annual financial reports.

45.15 Governance standard 3—Compliance with Australian laws

Object

- (1) The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).

Note: Compliance with Australian laws sets a minimum benchmark by which all entities should govern themselves. A failure by a registered entity to comply with an Australian law puts the public (including members, donors, employees, volunteers and benefit recipients of the registered entity) at risk and, therefore, governance standard 3 allows the Commissioner to take a proportionate approach to:

- (a) protect public trust and confidence; and
- (b) protect the assets of the registered entity; and
- (c) ensure that the registered entity continues to operate in a manner that is sustainable and consistent with its purposes.

Standard

- (2) A registered entity must not engage in conduct, or omit to engage in conduct, if the conduct or omission may be dealt with:
- (a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
 - (b) by way of a civil penalty of 60 penalty units or more.

Note 1: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2: Governance standard 3 does not extend Australian law to overseas jurisdictions. An Australian law may already extend to an overseas jurisdiction by other means.

Note 3: While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by governance standard 3 may allow the Commissioner to exercise his or her

enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10 (2) of the Act.

45.20 Governance standard 4—Suitability of responsible entities

Object

- (1) The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.

Standard

- (2) A registered entity must:
- (a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and
 - (b) after taking those steps:
 - (i) be, and remain, satisfied that each responsible entity meets the conditions; or
 - (ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

Note 1: Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

Note 2: The reasonable steps required of a registered entity may include:

- (a) obtaining declarations from responsible entities and searching public registers on appointment; and
- (b) obtaining a commitment from a responsible entity that, if its circumstances change, it will advise the registered entity.

- (3) Subject to subsection (5), the conditions for each responsible entity are that:
- (a) it is not disqualified from managing a corporation, within the meaning of the *Corporations Act 2001*; and
 - (b) it is not disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).

Note: Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

- (4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this governance standard if:
- (a) the entity has been previously suspended, or removed, under Division 100 of the Act as a responsible entity of a registered entity; and
 - (b) the entity has been given notice of its disqualification by the Commissioner; and
 - (c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.
- Note 1: The secrecy provisions in Part 7-1 of the Act prohibit ACNC officers (including the Commissioner) from disclosing protected ACNC information unless the disclosure is authorised by the Act. This prohibits the ACNC from disclosing information about ongoing investigations about particular responsible entities that may be subject to compliance with governance standard 4.
- Note 2: The effect of a disqualification lasts for no longer than 12 months from the day a notice is issued by the Commissioner (see paragraph (3)(b)).
- (5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.
- (6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.

45.25 Governance standard 5—Duties of responsible entities

Object

- (1) The object of this governance standard is:
- (a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:
 - (i) the relationship between them and the entity were a fiduciary relationship; and
 - (ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and

- (b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:
 - (i) is acting to prevent non-compliance with the duties imposed on responsible entities; and
 - (iii) if non-compliance with the duties imposed on responsible entities occurs—will act to identify and remedy non-compliance with the duties imposed on the entity.

Standard

- (2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:
 - (a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;
 - (b) to act in good faith in the registered entity's best interests, and to further the purposes of the registered entity;
 - (c) not to misuse the responsible entity's position;
 - (d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
 - (e) to disclose perceived or actual material conflicts of interest of the responsible entity;

Note: A perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

 - (f) to ensure that the registered entity's financial affairs are managed in a responsible manner;
 - (g) not to allow the registered entity to operate while insolvent.

Note 1: Governance standard 5 sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2: Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3: For paragraph (f), ensuring that the registered entity's financial affairs are managed in a responsible manner includes putting in place appropriate and tailored financial systems and procedures.

The systems and procedures for a particular registered entity should be developed having regard to the registered entity's size and circumstances and the complexity of its financial affairs.

The systems and procedures may include:

- (a) procedures relating to spending funds (for example, the approval of expenditure or the signing of cheques); and
- (b) having insurance that is appropriate for the registered entity's requirements.

- (3) For paragraph (2)(e), a perceived or actual material conflict of interest must be disclosed:
- (a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
 - (b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
 - (c) if the registered entity is a company—to the members of the registered entity; or
 - (d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

Note 1: **Company** is defined in section 205-10 of the Act, to include a body corporate or any unincorporated association or body of persons (but not a partnership).

Note 2: Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.

Note 3: Part 7-6 of the Act provides for the approval of forms.

Note 4: A responsible entity may disclose a conflict of interest in the form of a standing notice with ongoing effect.

- (4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).

- (5) In this section:

insolvent has the meaning given by subsection 95A (2) of the *Corporations Act 2001*.

Subdivision 45-C—Protections under governance standard 5

45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.25.

45.105 Protection 1

- (1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:
 - (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (b) a professional adviser or expert in relation to matters that the responsible entity believes on reasonable grounds to be within the individual's professional or expert competence; or
 - (c) another responsible entity in relation to matters within their authority or area of responsibility; or
 - (d) an authorised committee of responsible entities that does not include the responsible entity.
- (2) In determining whether the responsible entity has made an independent assessment of the information or advice, regard must be had to the responsible entity's knowledge of the registered entity and the complexity of the structure and operations of the registered entity.

45.110 Protection 2

- (1) A responsible entity meets this protection if the responsible entity makes a decision in relation to the registered entity, and the responsible entity meets all of the following:

- (a) the responsible entity makes the decision in good faith for a proper purpose;
- (b) the responsible entity does not have a material personal interest in the subject matter of the decision;
- (c) the responsible entity informs itself about the subject matter of the decision, to the extent the entity reasonably believes to be appropriate;
- (d) the responsible entity rationally believes that the decision is in the best interests of the registered entity.

Note 1: Protection 2 is also referred to as the “business judgement rule”.

Note 2: Protection 2 relates to the duty mentioned in paragraph 45.25(2)(a).

(2) In this section:

decision means any decision to take, or not take, action in relation to a matter relevant to the operations of the registered entity.

45.115 Protection 3

A responsible entity meets this protection if:

- (a) at the time when the debt was incurred, the responsible entity had reasonable grounds to expect, and did expect, that the registered entity was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time; or
- (b) the responsible entity took all reasonable steps to prevent the registered entity from incurring the debt.

Note: Protection 3 relates to the duty mentioned in paragraph 45.25(2)(g).

45.120 Protection 4

This section is satisfied if, because of illness or for some other good reason, a responsible entity could not take part in the management of the registered entity at the relevant time.

Subdivision 45-D—Transitional arrangements

45.130 Exemption until 1 July 2017

Governing rules

- (1) If the governing rules of a registered entity, as in effect on the day this Regulation is registered, prevent the registered entity from complying with a requirement of Subdivision 45-B, the registered entity is exempt from the requirement until 1 July 2017.
- (2) However, the registered entity must comply with the requirements of Subdivision 45-B as far as is possible, without breaching its governing rules.

State or Territory law

- (3) If:
 - (a) a registered entity is an incorporated association that is subject to a law of a State or Territory in respect to incorporated associations; and
 - (b) that law sets out duties of responsible entities to the registered entity; and
 - (c) the registered entity and each of its responsible entities is complying with that law;the registered entity is taken to be complying with governance standard 5.
- (4) Subsection (3) ceases to have effect in relation to a registered entity if the relevant provisions of the law of the State or Territory is amended so that it:
 - (a) sets out duties for responsible entities that are the same as those in governance standard 5; or
 - (b) otherwise adopts the content of governance standard 5.
- (5) Subsection (3) ceases to have effect in relation to all registered entities on 1 July 2017.

Subdivision 45-E—Disqualified Responsible Entities Register

45.150 Disqualified Responsible Entities Register

- (1) The Commissioner must maintain a register, to be known as the Disqualified Responsible Entities Register, in which the Commissioner must include the following information:
 - (a) the name of entity disqualified by the Commissioner from being a responsible entity of a registered entity, under subsection 45.20(4);
 - (b) the date that the entity was disqualified by the Commissioner;
 - (c) whether the disqualification remains subject to review, under Part 7-2 of the Act.
- (2) The Disqualified Responsible Entities Register must be maintained by electronic means.
- (3) The Disqualified Responsible Entities Register must be made available for public inspection, on a website maintained by the Commissioner.

Note 1: The secrecy provisions in Part 7-1 of the Act prohibit ACNC officers (including the Commissioner) from disclosing protected ACNC information unless the disclosure is authorised by the Act. This prohibits the ACNC from disclosing information about ongoing investigations about particular responsible entities that may be subject to compliance with governance standard 4.

Note 2: The Commissioner may remove an entity from the Disqualified Responsible Entities Register if the entity ceases to be disqualified. See governance standard 4 for how the Commissioner disqualifies an entity.