

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 82

Issued by authority of the Assistant Treasurer

Australian Charities and Not-for-profits Commission Act 2012
Australian Charities and Not-for-profits Commission Amendment
Regulation 2013 (No. 2)

The *Australian Charities and Not-for-profits Commission Act 2012* (the Act) establishes a new independent statutory office, the Australian Charities and Not-for-profits Commission (ACNC) as the Commonwealth level regulator for the not-for-profit (NFP) sector. The Act also establishes a new regulatory framework for the NFP sector.

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.

Subsection 40-10(1) of the Act provides that the Regulations may specify circumstances where the Commissioner must not publish certain information on the Australian Charities and Not-for-profits Register (the Register), or must remove certain information from the Register.

The purpose of the Regulation is to amend the *Australian Charities and Not-for-profits Commission Regulation 2013* to specify circumstances in which the Commissioner should not publish certain information on the Register or must remove certain information from the Register.

The Act establishes the Register as a single source of easily accessible public information on the NFP sector. The introduction of the Register aims to increase transparency, enable registered entities to demonstrate appropriate levels of accountability and governance, provide information to the public about registered entities and promote philanthropy, public confidence in the sector and informed choices for the public when deciding what registered entities to support.

The Regulation would prevent the publication of certain information provided to the ACNC for the purpose of putting on the Register, where that information may result in the identification of the private details of a philanthropist or donor. This is intended to protect the privacy of individual donors and philanthropists and prevent an unreasonable administrative burden being placed on certain entities (if they were to be inundated by donation requests from other not-for-profit entities) by withholding personal identifying information while still ensuring appropriate levels of transparency and accountability of entities registered with the ACNC.

Details of the Regulation are set out in Attachment A.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the measures in the Regulation are compatible with human rights. A copy of the Statement is at [Attachment B](#).

Description of Consultation

In the May 2011-12 Budget, the Government announced a number of measures as part of its commitment to drive major reforms in the not-for-profit sector and to deliver smarter regulation, reduce red tape and improve transparency and accountability for the sector. This Regulation is made as part of the broader NFP Reform Agenda and complements the requirements already included in the Principal Regulations and policy statements outlined in the Revised Explanatory Memorandum to the Australian Charities and Not-for-profits Commission Bill 2012.

Over the last 18 years, there have been six separate reviews of the charitable and NFP sector. These reports include:

- the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations*;
- the 2009 review into Australia's future tax system;
- the 2010 Productivity Commission's report, *Contribution of the not-for-profit sector*; and
- the 2011 *Final Report on the Scoping Study for a National Not-for-profit (NFP) Regulator*.

These reports involved public consultation and recommended reforms to the NFP sector.

In addition, following the May 2011-12 Budget announcement, the Government has undertaken considerable public consultation and targeted consultation on the proposed reforms, including public consultation on an Exposure Draft of the Australian Charities and Not-for-profits Commission Bill.

Throughout the reform process, targeted consultation has been undertaken with the NFP Sector Reform Council, relevant government agencies, including the Australian Charities and Not-for-profits Commission Implementation Taskforce (the Taskforce), the ACNC, and the Australian Taxation Office, and affected entities from the sector.

The Taskforce has also carried out consultation on matters related to the administration of the NFP reforms, and conducted public road-shows around the country to inform interested parties about the reforms.

Further consultation on the final text of this Regulation was also undertaken with expert sector representatives.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it was registered.

ATTACHMENT A

Details of the *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 2)*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 2)

Section 2 – Commencement

This section provides for the Regulation to commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

This section provides that the Regulation is made under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Section 4 – Schedule

This section provides that the amendments in Schedule 1 amend the *Australian Charities and Not-for-profits Commission Regulation 2013* (the Principal Regulation).

Schedule 1 – Amendments of the *Australian Charities and Not-for-profits Commission Regulation 2013*

Items 1, 2 and 3 – Section 4

Section 4 of the Principal Regulation provides definitions for terms used throughout the Principal Regulation.

This item inserts definitions of ***individual donor***, ***private ancillary fund***, ***private ancillary fund guidelines*** and ***taxation law*** into section 4 of the Principal Regulation. The definitions of ‘private ancillary fund’, ‘private ancillary fund guidelines’ and ‘taxation law’ rely upon the meanings given to those terms in the *Income Tax Assessment Act 1997* and are used throughout Subdivision 40-B.

The definition of ‘individual donor’ broadens the ordinary meaning of that concept to include individuals who provide contributions (within the meaning of the Act), not just donations, to registered entities.

Item 4 – Subdivision 40-B

This item inserts a new Subdivision into Division 40 of the Principal Regulation.

Consistent with the approach adopted in the *Income Tax Assessment Regulations 1997* the numbering of the Regulation reflects the equivalent numbering within the Act. For that reason, the Regulation inserts a new Subdivision, Subdivision 40-B, into

Division 40 because it relates to the Australian Charities and Not-for-profits Register (the Register) which is also located in Division 40 of the Act.

Background

Under subsection 40-5(1) of the Act there are a number of different types of information that the Commissioner is required to publish on the Register. Under subsection 40-5(4) of the Act, the Register is to be made publicly available on the internet.

The table below provides an overview of the information that the Commissioner is already required to put on the Register under section 40-5 of the Act.

Table of information to be published on the Register under section 40-5 of the Act

Type of information	Reference in Act
The entity's name	40-5(1)(a)(i) 40-5(1)(b)(i)
The entity's contact details (including its address for service)	40-5(1)(a)(ii)
The entity's ABN	40-5(1)(a)(iii) 40-5(1)(b)(ii)
Type	40-5(1)(a)(iv) 40-5(1)(b)(iii)
Subtype	40-5(1)(a)(v) 40-5(1)(b)(iv)
Date of effect of each type/subtype registration	40-5(1)(a)(vi) 40-5(1)(b)(v)
Governing rules	40-5(1)(a)(vii) 40-5(1)(b)(vi)
Name of each responsible entity	40-5(1)(c)(i)
Position held by each responsible entity	40-5(1)(c)(ii)
Annual information statements (except information that is "not for publication")	40-5(1)(d)
Financial reports, and any audit or review reports	40-5(1)(e)
Warnings (and any resolution or response)	40-5(1)(f)(i)
Directions (and any resolution or response)	40-5(1)(f)(ii)

Type of information	Reference in Act
Undertakings (and any resolution or response)	40-5(1)(f)(iii)
Injunctions (and any resolution or response)	40-5(1)(f)(iv)
Suspension or removal (and any resolution or response)	40-5(1)(f)(v)

Section 40.1 of the Principal Regulation prescribes a number of additional types of information that the Commissioner will be required to publish on the Register.

The additional information types complement the existing information that is required to be published on the Register under the Act.

The inclusion of these information types on the Register aims to provide information to the public about registered entities and promote philanthropy, public confidence in the sector and informed choices for the public when deciding what registered entities to support.

Subsection 40.1(1) of the Principal Regulation sets out a table which identifies the additional types of information that must be included on the Register and the conditions that apply as a prerequisite to that information being published.

Subdivision 40-B specifies the circumstances in which the Commissioner should not include certain information on the Register or must remove certain information from the Register.

Subdivision 40-B prevents the publication of certain information provided to the ACNC for the purpose of putting on the Register, where that information may result in the identification of the private details of a philanthropist or donor. This is intended to protect the privacy of individual donors and philanthropists and prevent an unreasonable administrative burden being placed on certain entities by withholding personal identifying information while still ensuring appropriate levels of transparency and accountability of entities registered with the ACNC.

Details of Subdivision 40-B

Section 40.10

Section 40.10 prescribes a number of circumstances where the Commissioner must not publish certain information on the Register or must remove certain information from the Register.

This requirement derives from subsection 40-10(1) of the Act which provides the authority for this Regulation. The revised Explanatory Memorandum to the Australian Charities and Not-for-profits Commission Bill 2012 states that the intent behind subsection 40-10(1) of the Act was to remove or not publish certain information where the information could adversely affect the privacy of individual donors or significantly overburden a charity with administrative costs of responding to members of the public.

Subsection 40.10(1) prescribes the circumstances where certain types of information must not be included on the Register or must be removed from the Register if a registered entity, to which the information relates, makes a request to the Commissioner, in the approved form, to have the information not included or removed.

Generally, under the Regulation, information must not be included on the Register or must be removed from the Register only to the extent that the publication of the information is likely to result in the identification of an individual donor to a registered entity or create an unreasonable administrative burden on the registered entity.

However, information should only be withheld in these circumstances to the extent that it is likely to result in the identification of an individual donor to a registered entity or create an unreasonable administrative burden on the registered entity. This may require the redacting of certain documents that are to be published on the Register. The Commissioner is likely to require those registered entities that seek to have information withheld from the Register to provide the Commissioner with both a full version of those documents and a redacted version for including on the Register.

By withholding this information from the Register, this will prevent the publication of information which would identify the private details of individual philanthropists or donors and also prevent an unreasonable administrative burden being placed on a registered entity if those details were made public.

An unreasonable administrative burden on the registered entity in this sense means that the entity is inundated by donation requests from not-for-profit entities and faces a substantial and unmanageable strain on the entity's resources in dealing with the requests and associated administrative processes.

The circumstances that are prescribed under subsection 40.10(1) vary slightly depending on the type of information to be included on the Register and the type of registered entity the information relates to.

Name and ABN of a registered entity

Under Item 1 of the table in subsection 40.10(1), the name and ABN of a registered entity must not be included on the Register or must be removed from the Register where the registered entity is a private ancillary fund (PAF) and the publication of the name is likely to result in the identification of an individual donor.

Additionally, the name and ABN must not be included on the Register or must be removed from the Register where it can be substituted on the Register with a new description where the Commissioner has firstly consulted with the registered entity about the new description.

The new description to be substituted for the name and ABN must be developed by the Commissioner to ensure that the description:

- is unlikely to result in the identification of an individual donor;
 - This ensures that the intention of the item is not undermined by use of a description that may still result in the identification of an individual donor.
- would not mislead the public as to the nature and characteristics of the registered entity;
 - This ensures that the description does not result in a member of the public accessing the Register from being misled into believing that the registered entity is a different category of registered entity from the one it actually is. For example, a member of the public accessing the website should continue to be able to identify the registered entity as a PAF and not a different type of charity.
- would not reasonably be regarded as identifying a different registered entity; and
 - This ensures that the description does not result in a member of the public accessing the Register from being misled into believing that the registered entity is another registered entity.
- would make it clear that the registered entity’s legal name has been withheld.
 - This ensures that a member of the public accessing the Register knows that the registered entity’s name and ABN has been withheld for privacy reasons.

In order to meet the requirements above, and avoid misleading the public, the description will need to incorporate more than a mere number, it will need to provide an adequate short hand description of the registered entity, such as “Private Ancillary Fund ABC1234 (legal name withheld)”.

In determining whether the publication of a registered entity’s name is likely to result in the identification of an individual donor, the Commissioner must look to whether the information can either directly or indirectly result, in the identification of an individual donor.

For example, the information would directly result in the identification of the donor if the name of the PAF incorporates the family name of a donor. However, an example of indirect identification would be where someone could use the information along with other publicly available information (on the Australian Business Register or Australian Securities and Investments Commission register) to find out who an individual donor is likely to be.

This process may require the Commissioner to effectively look-through intermediaries, if the publishing of intermediary's details is likely result in the identification of an individual donor through tracing.

Contact details (including the address for service of the entity)

Under Item 2 of the table in subsection 40.10(1), contact details of a registered entity must not be included on the Register or must be removed from the Register where the entity is a PAF and to the extent that the information is likely to result in the identification of an individual donor or create an unreasonable administrative burden on the registered entity.

Governing rules of a registered entity

Under Item 3 of the table in subsection 40.10(1), a governing rule (or part thereof) of a registered entity must not be included on the Register or must be removed from the Register where the entity is a PAF and to the extent that the information is likely to result in the identification of an individual donor.

Name of each responsible entity

Under Item 4 of the table in subsection 40.10(1), the name of a responsible entity of a registered entity must not be included on the Register or must be removed from the Register where the registered entity is a PAF and the inclusion of the name on the Register is likely to result in the identification of an individual donor.

However, there is an exception at subsection 40.10(4) that withholding of such information is not to apply if the responsible entity is of a kind mentioned in Guideline 14 of the Private Ancillary Fund Guidelines 2009.

Individuals identified by Guideline 14 are required to have a degree of responsibility to the Australian community as a whole. These individuals cannot be a founder, a donor to the fund who has contributed more than \$10,000, or an associate of a founder or such a donor.

As these individuals must have responsibility to the public for the independent and accountable management of a PAF, their name should not be removed from the Register.

Annual information statements

Under Item 5 of the table in subsection 40.10(1), a part of an annual information statement of a registered entity must not be included on the Register or must be removed from the Register to the extent that the information is likely to result in the identification of an individual donor.

However, paragraph 40.10(5) sets out circumstances where withholding of information included in the annual information statement is not to apply. These circumstances are if the information in the annual information statement relates to a breach of the Act, a legislative instrument made under the Act or a taxation law. That information should continue to be published on the Register.

Financial reports, audit or review reports

Under Item 6 of the table in subsection 40.10(1), a part of a financial, audit or review report must not be included on the Register or must be removed from the Register if the information is likely to result in the identification of an individual donor.

However, subsection 40.10(5) sets out circumstances where the withholding of the information should not apply. These circumstances are if the information in the financial, audit or review reports relates to a breach of the Act or a legislative instrument made under the Act or a taxation law. Such information should continue to be published on the Register.

Where an individual donor (the subject of a withholding decision) has died

Under subsection 40.10(2), the withholding of information that was likely to have identified an individual donor may continue to be withheld for a period of two years after the donor has died.

However, after the two years has lapsed, the information may continue to be withheld while any responsible entity of the registered entity is an associate of the individual donor.

This ensures that the privacy of the family of an individual donor will remain protected during the administration of the deceased's estate and while the family remains actively involved in the management of the registered entity.

To assist the Commissioner with the administration of subsection 40.10(2), a registered entity is required to notify the Commissioner under subsection 40.10(3) when subsection 40.10(2) ceases to apply and the withheld information is to be included or re-included on the register.

To minimise compliance costs on those registered entities who have sought information to be withheld under Subdivision 40-B, the notification need only be made at the time they lodge their next annual information statement with the Commissioner after they become aware that the information should no longer be withheld. The notification is to be made in the approved form which the Commissioner may choose to incorporate into an annual information statement.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No. 2)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Legislative Instrument is to specify circumstances in which the Commissioner of the Australian Charities and Not-for-profits Commission should not publish certain information on the Australian Charities and Not-for-profits Register (the Register) or must remove certain information from the Register.

The Legislative Instrument seeks to prevent the publication of certain information, where that information may result in the identification of the private details of a philanthropist or donor, which may otherwise be included on the Register. This is intended to protect the privacy of individual donors and philanthropists and prevent an unreasonable administrative burden being placed on certain entities by withholding personal identifying information while still ensuring appropriate levels of transparency and accountability of entities registered with the ACNC.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

The Legislative Instrument seeks to withhold from publication of certain information, in order to protect the privacy of individual donors and therefore is consistent with the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) even though the maintaining the register does not involve the collecting, using, storing and sharing of personal information which is the subject of the ICCPR.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

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