

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer, Minister for Housing and Minister for Homelessness, Social and Community Housing

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 give the public 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. The Regulations also address uncertainty about when engaging in or actively 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 engage in conduct 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 actively promoting other kinds of unlawful activities may affect an entity's entitlement to registration under the Act.

The Regulations address this uncertainty by making clear that an entity may not be entitled to be registered or remain registered under the Act if:

- the entity engages in conduct that may be dealt with as a relevant kind of summary offence under an Australian law; or
- the entity fails to maintain reasonable internal control procedures to ensure its resources are not used to actively promote another entity's acts or omissions that may be dealt with as an indictable offence, a relevant kind of summary offence, or a civil penalty of 60 penalty units or more.

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.

Public consultation on the exposure draft instrument and explanatory materials was held between 16 February 2021 and 14 March 2021. Sixty-five submissions were received in response to the consultation. The following changes were made to the Regulations to take into account the feedback in these submissions:

- narrowing the scope of the summary offences that are captured to better target the summary offences relating to a registered entity's governance;
- replacing the requirement to take reasonable steps to ensure a registered entity's resources are not used to promote or support certain kinds of unlawful activity with a requirement to *maintain reasonable internal control procedures* to ensure a registered entity's resources are not used to *actively promote* certain kinds of unlawful activity; and
- adding notes to the Regulations to:
 - clarify when the ACNC Commissioner may form a reasonable belief about compliance with the new provisions; and
 - provide examples about the matters that the reasonable internal control procedures may deal with.

Additionally, further information was added to the explanatory materials to address concerns about the operation of the new provisions.

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

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 standard could be disallowed in either House of Parliament.

A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulation Impact Statement is at [Attachment C](#).

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

Extending governance standard three to prohibit certain kinds of summary offences

Item 1 adds paragraph 45.15(2)(aa) to governance standard three. Under new paragraph 45.15(2)(aa), a registered entity must not engage in conduct if:

- the conduct may be dealt with as a summary offence under a Commonwealth, State or Territory law; and
- the summary offence relates to one of the following:
 - entering or remaining on real or personal property;
 - destroying or damaging real or personal property;
 - appropriating personal property belonging to another entity;
 - causing personal injury to an individual or any other kind of impairment of an individual’s health, including the risk or threat of such.

In this context, ‘engage in conduct’ means to do an act or omit to perform an act – see section 300-5 of the Act. Therefore, a single act or omission by a registered entity may be sufficient for the registered entity to contravene the new requirement (and the existing requirements under governance standard three).

Whether a registered entity complies with the new requirement will depend on whether the elements of the relevant summary offence (including any fault elements) are met and whether any defences are available. In particular, where an element of the offence is not met or where a complete defence (such as the defence of sudden or extraordinary emergency) is available, the registered entity has not engaged in conduct that may be dealt with as a relevant summary offence. For example, if the relevant summary offence relating to entering real property requires intention to be made out as a fault element, and that intention is not present (because for instance, the entity mistakenly entered the property), the registered entity has not contravened the new requirement.

Examples of the kinds of summary offences that are covered include:

- trespass to land or premises (including buildings, vehicles etc.);
- vandalism;
- theft of personal property;
- common assault; and
- threatening violence against an individual.

For the purposes of the new requirement, the terms ‘real property’ and ‘personal property’ have their common law meaning. The terms therefore include legal and equitable interests in real property and personal property respectively.

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 amendments aim 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 and ensures the ACNC is able to take appropriate action to maintain and protect public trust and confidence in the charitable sector and to ensure the protection of charitable assets and the proper governance of charitable entities.

Additionally, the amendments make clear that in all cases, a registered entity may not be entitled to registration under the Act if it engages in any of the relevant summary offences. This is particularly important because in some cases, it may be difficult to discern when certain conduct may amount to an indictable offence (which would be captured under the existing governance standard three) or when it may amount to a summary offence. Therefore, capturing the relevant summary offences provides greater clarity for registered entities about their obligations under the legislation.

Example 1

A registered entity exists to relieve poverty in Australia and internationally. As part of its activities, it occasionally advocates against the outsourcing of labour from domestic manufacturers to overseas manufacturers. The registered entity organises an event to trespass onto the property of an Australian company that outsources its labour overseas.

The registered entity has failed to comply with the new requirement by engaging in conduct that may be dealt with as a summary offence relating to entering or remaining on real property.

Extending governance standard three to require registered entities to maintain reasonable internal control procedures

Item 3 adds new subsections 45.15(3) and (4) to governance standard three.

Under these new provisions, a registered entity must maintain reasonable internal control procedures to ensure its resources are not used (nor continued to be used) to actively promote another entity's acts or omissions that may be dealt with as:

- an indictable offence under an Australian law; or
- a relevant summary offence under an Australian law (discussed above); or
- a civil penalty provision of 60 penalty units or more.

Consistent with the changes discussed above, these amendments aim to give the public trust and confidence that a registered entity is governed in a way that ensures its on-going operations and the safety of its assets. The amendments also 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.

What are a registered entity's resources?

New subsection 45.15(4) provides that a registered entity's resources includes its funds, websites, social media accounts and other publications, and responsible entities and employees acting in that capacity. Therefore, employees acting in their personal capacity or outside the scope of their employment are not part of the registered entity's resources.

The list in subsection 45.15(4) is not exhaustive and other resources (that meet the ordinary meaning of the term) are also captured. For example, a registered entity's resources include its other assets and property, such as its mailing list and land owned by the registered entity.

However, for the purposes of the provisions, a registered entity's resources do *not* include its volunteers, unless the volunteer is a responsible entity. This means that under the new requirement, a registered entity is *not* required to maintain reasonable internal control procedures covering its volunteers, unless the volunteers are either responsible entities or otherwise likely to have some control or influence over the

registered entity's resources (such as its social media accounts) – see Example 3 for further information. This approach ensures the requirement is proportionate as volunteers that are unlikely to have control or influence over the registered entity's operations do not need to be covered by the reasonable internal control procedures.

Unlawful activity by 'another entity'

Under the new provisions, a registered entity must maintain reasonable internal control procedures to ensure its resources are not used (nor continued to be used) to actively promote another *entity* to engage in certain unlawful activity.

In this context, the meaning of *entity* has the same meaning as in section 205-5 of the Act. Therefore, a registered entity must not use its resources to actively promote 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 are still *entities* for the purposes of the new provisions. Therefore, a registered entity may fail to comply with the new requirement if it does not maintain reasonable internal control procedures to ensure its resources are not used to actively promote its volunteers to engage in a relevant unlawful activity.

What are reasonable internal control procedures?

Registered entities can generally meet this standard by adopting a commonsense approach. To meet this standard, a registered entity may consider having appropriate processes and controls in place about:

- who can access and use the entity's funds, office and social media accounts (for example, who can make posts on the entity's social media accounts);
- undertaking regular reviews and audits of the entity's outgoing payments;
- relevant training for responsible entities and employees to ensure they understand their obligations under governance standard three; and
- addressing the improper use of the entity's resources promptly (for example, removing unauthorised posts on the entity's social media accounts that actively promotes unlawful activities).

The note following subsection 45.15(3) lists a number of the above matters as examples of the matters that may be dealt with in the internal control procedures.

Whether the internal control procedures are reasonable in any particular case is to be determined objectively and will depend on the specific circumstances of the registered entity, including its size, purpose, and activities. This is consistent with the application of similar requirements for registered entities (such as the existing requirement for registered entities to maintain reasonable internal control procedures under the external conduct standards in the *Australian Charities and Not-for-profits Commission Regulation 2013*).

What does 'actively promote' mean?

For the purposes of the new provisions, the term 'actively promote' has its ordinary meaning. This approach ensures that the reasonable internal control procedures do not need to cover inadvertent, passive, or unintentional uses of a registered entity's resources.

Example 2

A registered entity publishes posts on its social media accounts about events and matters relevant to the local community. The registered entity publishes a factual post about an upcoming protest event that has been organised by another entity in the community. At the protest, there is unlawful damage to personal property.

The registered entity has not failed to comply with the new requirement because of the post on its social media, as the post does not actively promote others to engage in unlawful activity.

Example 3

A small registered entity with a moderate social media presence develops and maintains a number of internal control procedures, including a procedure to review its social media accounts on a weekly basis.

A volunteer for the small registered entity uses the registered entity's social media accounts to make an unauthorised post encouraging others to trespass onto a farm and cause property damage to the farm.

An employee undertaking the registered entity's weekly review of its social media accounts identifies the unauthorised post and promptly takes action to remove the post. The employee also has a conversation with the volunteer to address their actions as appropriate and reiterate the registered entity's social media policy. The employee also removes the volunteer's access to the registered entity's social media accounts.

In this scenario, the registered entity has likely complied with the new requirement.

Other matters

The governance standards cannot prevent a registered entity from undertaking an activity where that activity furthers, or is in aid of, its purpose, and that activity is advocating or attempting to change the law or government policy. However, this requirement only applies to the extent that activity is lawful.

As the provisions in the Regulations only relate to unlawful activities, they are consistent with this requirement.

Failure to comply with the new provisions

The ACNC will provide guidance and education to registered entities to help them understand and comply with these new provisions. This is consistent with the ACNC Commissioner's function of assisting registered entities to comply with and understand their legal obligations by providing them with guidance and education.

If the ACNC Commissioner reasonably believes that a registered entity has not complied with these new provisions, or it is more likely than not that a registered entity will not comply with these provisions, the ACNC Commissioner may:

- consider revocation of the registered entity's registration (noting that if this occurs, the entity will no longer be able to access certain government funding, exemptions, concessions, and benefits); or
- take enforcement action under Chapter 4 of the Act if the registered entity is a federally regulated entity. This could include for example, issuing formal warnings or giving directions to comply with the provisions.

This is consistent with the consequences that currently apply for a failure to comply with the existing governance standards.

Any action taken by the ACNC Commissioner will be consistent with the ACNC Regulatory Approach Statement, which can be found on the ACNC's website.

Whether the ACNC Commissioner reasonably believes that it is more likely than not that a registered entity will not comply with the new provisions requires there to be a substantial or significant likelihood of non-compliance that is based on sufficient, reliable, and accurate evidence.

It does not mean that the ACNC Commissioner can take action where there is only a remote chance that the registered entity has failed, or is likely to fail, to comply with the provisions or where there is only mere suspicion, rumour or a possibility of such.

Whether the ACNC Commissioner reasonably believes that a registered entity has not complied with these provisions also requires that such a belief is based on sufficient, reliable, and accurate evidence.

To ensure the ACNC Commissioner is relying on sufficient, reliable, and accurate evidence before taking any relevant action, the ACNC Commissioner will generally give affected entities the opportunity to present their case and may consult with the relevant law enforcement agency. The latter is made clear in the new note inserted by item 2 at the end of subsection 45.15(2).

Further, the ACNC Commissioner must have regard to a number of factors in exercising these powers, including the principles of regulatory necessity, reflecting risk and proportionate regulation. These requirements are set out in subsection 35-10(2) of the Act (and the ACNC Regulatory Approach Statement) and ensure the ACNC Commissioner's actions are proportionate to the problem it is seeking to address. It also ensures the regulatory responses consider the different circumstances of different entities, including the entity's size, revenue and donations received from the public.

A failure to comply with the new requirements may also 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 by the time required under section 65-5 of the Act.

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.

Review rights

If an entity is dissatisfied with a decision made by the ACNC Commissioner to revoke the entity's registration or in relation to a decision made by the ACNC Commissioner to give, vary or not change a direction, the entity may seek internal review of that decision.

If the entity is dissatisfied with the internal review decision (referred to as an objection decision under the Act), the entity can apply to have the decision reviewed by the Administrative Appeals Tribunal or the Federal Court of Australia.

Application

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

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 (2021 Measures No. 2) Regulations 2021

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 *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations) provide that an entity may not be entitled to be registered or remain registered under the Act if:

- the entity engages in conduct that may be dealt with as a relevant kind of summary offence under an Australian law; or
- the entity fails to maintain reasonable internal control procedures to ensure its resources are not used to actively promote another entity's acts or omissions that may be dealt with as an indictable offence, a relevant kind of summary offence, or a civil penalty of 60 penalty units or more.

The purpose of the Regulations is to give the public 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. The Regulations also address uncertainty about when engaging in or actively promoting certain kinds of unlawful activity may affect an entity's entitlement to registration under the Act.

Human rights implications

The Regulations do not engage any of the applicable rights or freedoms as the amendments only apply to a registered entity, which cannot be an individual.

Conclusion

The Regulations are compatible with human rights as it does not raise any human rights issues.

Regulation Impact Statement

Introduction

This Regulation Impact Statement (RIS) examines the case for action by the Australian Government to implement the Government's response to recommendation 20 of the *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (ACNC Review), applying the principles of Australia's regulatory impact analysis framework as outlined in the Australian Government Guide to Regulatory Impact Analysis¹. Recommendation 20 of the ACNC Review states that test case funding should be made available to develop the law in matters of public interest, including disqualifying purposes. In response to this recommendation, the Government stated it would explore legislative options to address uncertainty in the law.

1. What is the policy problem you are trying to solve?

Duties for registered charities, and indirectly for responsible persons, are set out in the *Australian Charities and Not-for-profits Commission Regulation 2013* (the ACNC Regulations). These governance standards require a charity to remain charitable, operate lawfully, and be run in an accountable and responsible way. The governance standards help maintain public trust and confidence that a registered charity is being governed in a way that ensures its on-going operations and the safety of its assets.²

Compliance with the governance standards is a condition of registration as a charity.³ Where a registered charity fails to comply with the governance standards, this may result in use of the ACNC Commissioner's enforcement powers (such as warnings or directions being issued to the charity, or revocation of a charity's registration). Deregistration results in the charity losing access to certain government funding, exemptions, concessions and benefits.

Governance standard three requires charities to comply with Australian laws. Acting lawfully protects a charity's assets, reputation, and the people it works with. This standard does not impose a new burden on charities as they are already required to follow Australian laws. Rather the intent of the standard is to allow the ACNC to investigate serious breaches of the law and take enforcement action if required.

To this end, governance standard three as drafted in the ACNC Regulations provides that registered charities must not engage in conduct that may be dealt with as an indictable offence or a breach of law that has a civil penalty of 60 penalty units or more. In drafting the law the policy intent was to enable the ACNC Commissioner to take enforcement action with respect to serious criminal offences but carve out less serious offences that do not concern the proper governance of a registered charity (such as traffic infringements).

¹ Available at: <https://www.pmc.gov.au/sites/default/files/publications/australian-government-guide-to-regulatory-impact-analysis.pdf>

² ACNC Regulations

³ With the exception of basic religious charities

However, the framing of governance standard three in terms of indictable offences has led to inconsistent outcomes for certain unlawful conduct which is contrary to the policy intent of governance standard three. This is because, under Australia’s federalist system of government, the States and Territories determine whether unlawful activities are indictable or summary offences. As illustrated in Table 1, this has resulted in potentially serious offences, such as trespass, vandalism, theft, assault and threatening harm to persons being defined as summary offences in some jurisdictions. Consequently, the ACNC is unable to investigate serious breaches of the law by a charity even where action is warranted to protect the charity’s assets, the people it serves, and more broadly, the public trust and confidence in the charity sector more broadly.

Table 1

Jurisdiction	Entering or remaining on property (trespass)	Destroying or damaging property (vandalism)	Appropriating property (theft)	Causing harm to persons (assault)	Risk or threat of causing harm to persons (threatening harm)	Directing or encouraging a criminal offence (incitement)
New South Wales	✓ (partially)	✗	✗	✗	✗	✓ (partially)
Victoria	✓ (partially)	✓ (partially)	✗	✓	✓	✓
Queensland	✓ (partially)	✗	✗	✓	✓	✗
Western Australia	✗	✓ (partially)	✓ (partially)	✗	✓ (partially)	✓ (partially)
South Australia	✓ (partially)	✗	✗	✓ (partially)	✓	✓ (partially)
Tasmania	✓ (partially)	✓ (partially)	✗	✗	✗	✓ (partially)
Australian Capital Territory	✗	✗	✓ (partially)	✓ (partially)	✓	✓ (partially)
Northern Territory	✓ (partially)	✗	✗	✗	✗	✓ (partially)

Legend

✓	The activity is captured under existing governance standard three (i.e. the activity is an indictable offence or incurs a penalty of 60 units or more)
✓ (partially)	The activity is only partly captured (i.e. the activity may only be captured in some cases; aspects of the activity is a summary offence)
✗	The activity is not captured under existing law (for example, where the activity is considered a summary offence) or it is not clear if the activity attracts a criminal offence that would be captured under existing governance standard three

In addition, the framing of governance standard three in terms of indictable offences under an Australian law means that the scope of unlawful activities prohibited under governance

standard three is not clear. This creates uncertainty and complexity for charities and the community more generally.

For a registered charity to comply with governance standard three, or to determine if a breach has occurred (requiring the charity to notify the ACNC Commissioner⁴), a charity must determine if the offence is an indictable offence in the jurisdictions they operate. It was evident during the public consultation that this determination can be difficult for charities to discern in the absence of legal advice given the inconsistent treatment for the same offence between jurisdictions.

For example, in the Northern Territory unlawful entry of a building may be considered an indictable offence, but forcibly entering or remaining land is considered a summary offence. The differing treatment of unlawful activities means that the act of trespass on property in the Northern Territory is only partially covered under existing governance standard three. Another example of this complexity is theft of property in Western Australia, whereby theft may be considered an indictable offence if the value of the property stolen is in excess of \$50,000. This means theft of property in Western Australia is only partially covered under existing governance standard three.

There is also uncertainty in the sector about whether a charity actively promoting others to engage in unlawful conduct is a breach of governance standard three and therefore places a charity's registration at risk. This is because directing or inciting the commission of a crime is an indictable offence under some Australian laws (as illustrated in Table 1). For example, incitement to commit a crime (e.g. encouraging another person to commit a criminal offence) is an indictable offence in Victoria. By contrast, in Western Australia, the Australian Capital Territory, Tasmania and the Northern Territory incitement attracts an equal, similar or lesser offence to the offence incited. Given this complexity, it is difficult for charities to discern, in the absence of legal advice, whether certain kinds of activities to incite a crime may breach governance standard three.

To conclude, governance standard three as currently defined in the ACNC Regulations does not enable the ACNC Commissioner to investigate potentially serious breaches of the law by a charity. This is because jurisdictions define criminal offences differently, meaning that serious unlawful conduct may be beyond the scope of governance standard three or only partially captured. This compromises the ACNC's ability to be an effective regulator, potentially undermining public trust and confidence in the charity sector.

Further, governance standard three creates uncertainty and complexity because it is difficult for the charity sector, and the community more broadly, to discern the scope of unlawful activities prohibited in the jurisdictions they operate. This imposes an unreasonable administrative burden on charities because to be confident they are complying with their obligations under the ACNC Act, many charities may need to engage legal advisers to help them navigate the scope of governance standard three. Consultations demonstrated this is particularly a problem for large charities that operate across multiple jurisdictions. Ultimately, resources spent on legal advisers and compliance with the governance standards diverts charitable funding away from charitable purposes, resulting in less funding being allocated for activities and services that benefit the Australian community.

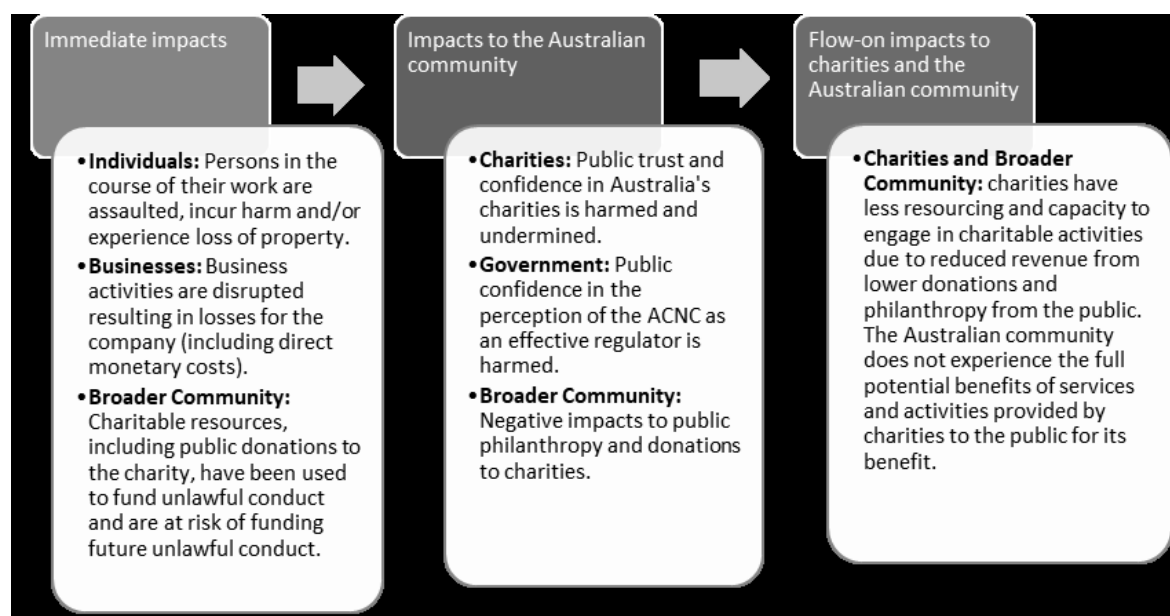
⁴ Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

2. Why is Government action needed?

In recent years a small number of registered charities have engaged in serious unlawful conduct or used their resources to actively promote serious unlawful conduct such as trespass, vandalism, theft, assault and threatening harm to persons. This is evidenced by media coverage in recent years in relation to protests on forestry, mining and farming lands. This does not represent the behaviour of the majority of registered charities, but rather a small minority within the sector. Nevertheless, a failure by a registered charity to comply with an Australian law compromises public trust and confidence in the sector as a whole, adversely impacting public philanthropy, reducing funding available for charitable purposes.

Figure 1 illustrates this risk by describing the immediate and flow-on impacts to the Australian community of serious unlawful conduct, through using the example of a charity participating in trespass, vandalism and common assault upon a business' property and staff.

Figure 1



Government action is therefore needed to ensure the ACNC Commissioner is enabled under law to investigate and take enforcement action, if appropriate, in situations where a registered charity participates or actively promotes offences of trespass, vandalism, theft, assault and threatening harm. This will give the public trust and confidence that a registered charity is governed in a way that complies with Australian laws.

Government action is also needed to clarify uncertainty about the scope of unlawful activities prohibited under governance standard three and resolve the complexity of the law to make it easier and less costly for registered charities to understand their obligations under the governance standard. Reduced compliance costs will provide charities with the ability to allocate more of their resources toward charitable activities in line with their purpose.

During consultations a large charity that operates in multiple jurisdictions indicated to Treasury that the existing regulatory burden of complying with governance standard three (in terms of ensuring all the charity's operations and staff are aware of their obligations and compliant with the current standard) is significant due to the charity's size and activities.

Whilst it is evident that this compliance cost exists, Treasury is unable to reliably quantify this cost due to insufficient information and data.

3. What policy options are you considering?

Option 1 – Maintain the status quo

Maintain the status quo, whereby governance standard three does not enable the ACNC Commissioner to investigate and take appropriate enforcement action in all serious breaches of the law by a registered charity (refer Table 1). This means that potentially serious unlawful conduct undertaken by a registered charity (now or in future) will continue to undermine public trust and confidence, and put charitable assets at risk (refer Figure 1).

Further, maintaining the status quo will also mean that registered charities continue to incur the administrative burden of discerning the scope of unlawful activities prohibited under governance standard three due to uncertainty and complexity in the law.

Option 2 – Voluntary education

This option involves undertaking further education with registered charities. Education and guidance material would be provided by the ACNC to ensure registered charities are aware of their obligations under existing governance standard three. Guidance material will assist in reducing the uncertainty in the law by identifying which unlawful activities fall within the scope of governance standard three and therefore could be the subject of investigation and enforcement action by the ACNC Commissioner. As this option involves voluntary education, registered charities would determine whether they need to engage with the education and guidance material.

However, Option 2 does not enable the ACNC Commissioner to investigate and take appropriate enforcement action if a registered charity operating in certain jurisdictions participates or actively promotes offences of trespass, vandalism, theft, assault and threatening harm.

Option 3 – Changes to governance standard three

This option involves amendments to the ACNC Regulations, to establish two changes to governance standard three:

1. A requirement that registered charities must not directly engage in certain kinds of unlawful conduct that may be dealt with as a summary offence or an indictable offence under an Australian law. The offences in scope relate to the following conduct:
 - entering or remaining on real or personal property (commonly known as trespass);
 - destroying or damaging real or personal property (i.e. vandalism);
 - appropriating personal property belonging to another entity (i.e. theft);
 - causing personal injury to an individual or any other kind of impairment of an individual's health, including the risk or threat of such (i.e. assault or threatening harm).

2. A requirement that registered charities must not actively promote unlawful activities captured under governance standard three.
 - 2.1 The term ‘actively promote’ has its ordinary meaning and requires a direct link to the unlawful activity. For example, a registered charity organises an event to trespass onto the property of an Australian company.
 - 2.1 A registered charity will also be required to maintain reasonable internal control procedures to ensure that its resources are not used in way that contravenes governance standard three. For the avoidance of doubt, a charity’s resources will include its employees, online presence, and communications materials (e.g. websites, social media accounts and mailing lists).

These amendments will enable the ACNC Commissioner to investigate and take enforcement action, if appropriate, where a registered charity engages in the listed unlawful conduct in circumstances where it is a summary offence or an indictable offence under an Australian law.

Reasonable internal control procedures are to be determined objectively by a registered charity and will depend on the specific circumstances of the charity, including its size, purpose, and activities. Examples of internal controls could include: controlling who can access and use the charity’s funds, office and social media accounts; relevant training for responsible persons and employees to ensure they understand their obligations under governance standard three; and addressing the improper use of the charity’s resources promptly (for example, removing unauthorised posts on the entity’s social media accounts that actively promotes unlawful activities).

It would be reasonable for a small charity to take a light touch approach to internal controls where the charity has a basic IT system, minimal social media presence and does not involve itself or its employees in promoting or attending protests. In contrast, a large charity operating across multiple jurisdictions with a significant social media presence and large workforce would be expected to have more sophisticated internal controls in line with modern business practices.

Charities are not expected to keep extensive written records to comply with option 3. The requirement to maintain reasonable internal control procedures is consistent with the application of similar requirements for registered charities (such as the existing requirement for registered charities to maintain reasonable internal control procedures under the external conduct standards⁵ in the ACNC Regulations).

The revised governance standard will be administered by the ACNC, as per its ordinary regulatory functions. The ACNC will provide guidance and education to registered charities to help them understand and comply with option 3. Where a registered charity fails to comply with the governance standards, the ACNC may take appropriate enforcement action (for example, the ACNC Commissioner could in certain circumstances issue formal warnings or give directions to comply with the provisions, or could consider revocation of a charity’s registration).

⁵ The External Conduct Standards (Division 50 of the ACNC Regulations) are a set of standards that govern how a registered charity must manage its activities and resources outside Australia.

Option 4 – Amendments to the Charities Act 2013

This option involves amendments to the *Charities Act 2013* to provide additional clarity around the meaning of and circumstances where a registered charity may have a disqualifying purpose of ‘engaging in, or promoting, activities that are unlawful or contrary to public policy’.⁶ The amendments could include examples of activities that are in scope and out of scope (including those described in Option 3) in terms of what may contribute to a charity being at risk of having a disqualifying purpose, as well as clarification around what constitutes ‘promoting’ unlawful activities.

4. What is the likely net benefit of each option?

Option 1 – Maintain the status quo

By its nature, this option would have no regulatory or compliance costs for registered charities, with the existing governance standard continuing unchanged.

However, in the absence of a change in Australian Government policy the ACNC Commissioner would be unable to investigate and take appropriate enforcement action in potentially serious breaches of the law by a registered charity in certain jurisdictions. Continued and unaddressed serious unlawful conduct by some charities compromises public perception of the ACNC as an effective regulator, potentially undermining public trust and confidence in the charity sector.

As illustrated in Figure 1, serious unlawful conduct can impose physical and economic harm on individuals or businesses targeted by the charity. Stakeholder feedback (by a forestry industry association) indicated that when registered charities have engaged in unlawful activities (such as trespass on private property, vandalism or theft), it has directly cost the industry millions of dollars a year in disruptions to operations, and caused considerable distress to workers who are often subject to intimidation and harassment. Further, serious unlawful conduct can also result in reputational costs and damage to the broader charity sector (including members, employees, volunteers and beneficiaries).

Additionally, in the absence of the Government clarifying the existing uncertainty and complexity in the law, charities (particularly those that operate across multiple jurisdictions) will continue to incur the administrative burden and expense of discerning the scope of unlawful activities prohibited under governance standard three.

Option 2 – Voluntary education

This option would have little or no regulatory or compliance costs for registered charities as the sector would engage with the guidance material on a voluntary basis and the existing governance standard would remain unchanged.

The provision of guidance and education will provide some benefit to the sector as it would clarify that some serious offences related to trespass, vandalism, theft, assault, threatening harm, and inciting another person to commit an offence are indictable offences in some Australian jurisdictions. In this sense, this option will provide clarity to charities where there

⁶ Section 11 of the *Charities Act 2013*.

is uncertainty about the scope of unlawful activities prohibited under governance standard three.

However, option 2, like option 1, does not allow the ACNC to investigate some serious breaches of the law by a charity even where action is warranted to protect the charity's assets, the people it serves, and more broadly, public trust and confidence in the charity sector. The cost of such inaction is illustrated in Figure 1 and is supported by a written submission from a forestry industry association that such serious breaches of the law are costing the sector millions of dollars per year in lost production.

Option 3 – Changes to governance standard three

Option 3 is estimated to have a one-off regulatory cost of \$1.4 million for large charities operating across multiple jurisdictions⁷. This regulatory cost will be offset by long term reductions in the administrative burden for all registered charities who will no longer need to discern the scope of unlawful activities prohibited under governance standard three.

Existing regulatory burden

The revised governance standard does not impose a new burden on charities as they are already required to follow Australian laws. Acting lawfully protects a charity's assets, reputation, and the people it works with. Therefore, registered charities already should have governance processes in place to ensure they do not engage in such activities, including:

- internal controls, policies and procedures to ensure the proper use of the charity's resources (e.g. access controls for who can use the charity's funds, office and social media accounts);
- staff training;
- ad hoc risk assessments on an on-going basis; and
- procedures to address misuse promptly where a charity's resources have been improperly used.

Further, in addition to the current obligations under governance standard three, governance standard five requires responsible persons of charities (i.e. directors) to ensure a charity's financial affairs are managed in a responsible manner. This means charities should have governance processes, internal controls and safeguards in place to ensure good, safe and responsible governance of their financial affairs and assets. For example, a registered charity may have access controls in place to ensure only authorised persons can access and use the registered charity's bank account and premises.

Additionally, a registered charity is required to notify the ACNC Commissioner of any fact or circumstance that may affect their entitlement to registration, including if the charity does not comply with a governance standard or external conduct standard.⁸ Under the ACNC Act a registered charity must notify the ACNC within 28 days of becoming aware that it may have contravened the new provisions.

⁷ This is based on a total estimate where it is assumed that around 9,500 large charities undertake a one-off 2-hour review of their internal control procedures at a labour cost of \$73.05 per hour (based on the Regulatory Burden Measurement Framework).

⁸ Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

Accordingly, all registered charities will have some established governance processes in place to meet their existing obligations under Australian laws and the ACNC Act. However, the extent of the internal controls implemented by a registered charity will inevitably depend on its particular circumstances. For example, a small charity that does not have a social media presence and does not involve itself in protest-based advocacy activities would only be expected to have simple governance processes in place.

Regulatory burden associated with the change

Given the existing regulatory burden to comply with current obligations under Australian laws and the ACNC Act, this option is not expected to create additional ongoing regulatory costs for registered charities.

However, it is expected that some registered charities may initiate a one-off review of their existing internal control procedures to ensure that they are compliant with existing requirements as well as the revised governance standard three. Specifically, charities would need to ensure their internal control procedures appropriately and reasonably protect their resources from being used to actively promote unlawful activities.

The requirement to maintain reasonable internal control procedures needs to be determined objectively and take into consideration the specific circumstances of the registered charity (including its size, purpose, and activities). The vast majority of registered charities are small in size, with only around half maintaining an online presence. These charities could be expected to have simple internal control arrangements which may not require being reviewed as a result of the change. In contrast, large charities operating across multiple jurisdictions will have established more sophisticated internal procedures which may need to be reviewed.

Based on ACNC data, it is estimated that around 50,000 registered charities would be required to comply with the revised governance standard. This estimate does not include Basic Religious Charities which do not have to comply with the governance standards⁹. Of these registered charities, around 9,500 are large charities, that is, they have revenue of \$1 million or more per annum. Assuming that all large registered charities undertake a one-off two-hour review of their internal control procedures, this would impose a one-off regulatory cost of \$1.4 million for large charities (refer Table 2)¹⁰.

Table 2 one-off regulatory burden estimate

One-off regulatory cost (from business as usual)				
Change in costs (\$ million)	Business	Registered charities	Individuals	Total change in cost (\$ million)
Total, by sector	nil	(\$1.4)	nil	(\$1.4)

In addition, a handful of activist charities who engage in unlawful protest action will need to review their internal controls and potentially curb their activities where their conduct is unlawful. Due to the small number of such charities the additional regulatory burden is expected to be immaterial both with respect to transitional and on-going costs.

⁹ Section 45-10(5) of the *Australian Charities and Not-for-profits Commission Act 2012*.

¹⁰ This estimate is based upon a labour cost of \$73.05 in accordance with the Regulatory Burden Measurement Framework.

Several stakeholders have submitted that the proposed changes will introduce new uncertainty and may require charities to obtain additional legal advice. Option three will provide greater clarity and a consistent approach for certain serious offences, however, where charities continue to experience some uncertainty education and guidance material will be provided by the ACNC. This material is expected to minimise the burden on registered charities and assist them in understanding the range of unlawful activities falling within the scope of the revised governance standard three.

Benefits of option 3

The benefit of this option is that it enables the ACNC Commissioner to investigate and take appropriate enforcement action in cases where a registered charity engages in serious unlawful conduct, namely trespass, vandalism, theft, assault, and threatening harm. This amendment addresses the existing complexity in the law, particularly where the unlawful conduct in question is only partially considered an indictable offence or where it is defined as a summary offence in an Australian jurisdiction. This means that the ACNC Commissioner can take appropriate regulatory action to protect the registered charity's assets, reputation and the people it serves where a charity's unlawful conduct places these at risk, consistent with the original policy intent of governance standard three.

Additionally, option 3 is expected to reduce the existing administrative burden and expense for registered charities in discerning the scope of unlawful activities prohibited under governance standard three in the long term. Table 3 below illustrates how the uncertainty has been resolved by ensuring comprehensive coverage of serious breaches of Australian law.

Table 3

Jurisdiction	Entering or remaining on property (trespass)	Destroying or damaging property (vandalism)	Appropriating property (theft)	Causing harm to persons (assault)	Risk or threat of causing harm to persons (threatening harm)
New South Wales	✓	✓	✓	✓	✓
Victoria	✓	✓	✓	✓	✓
Queensland	✓	✓	✓	✓	✓
Western Australia	✓	✓	✓	✓	✓
South Australia	✓	✓	✓	✓	✓
Tasmania	✓	✓	✓	✓	✓
Australian Capital Territory	✓	✓	✓	✓	✓
Northern Territory	✓	✓	✓	✓	✓

The amendments ensure that registered charities and the ACNC will no longer be required to determine whether the targeted conduct is prescribed as an indictable offence under the law of the jurisdiction in which the conduct took place. Additionally, the amendments clarify, in line with community expectations, that registered charities should govern the use of their resources responsibly and ensure that their resources are not used to actively promote others to engage in unlawful activities.

Option 4 – Amendments to the Charities Act 2013

The *Charities Act 2013* could be amended to provide additional clarity around the circumstances in which a registered charity may have a disqualifying purpose of “engaging in or promoting activities that are unlawful or contrary to public policy”. Contraventions of the disqualifying purpose rules result in revocation of a charity’s registration meaning the charity loses access to certain government funding and charitable tax concessions.

Amendments to the *Charities Act 2013* would effectively remove the possibility for the ACNC to adopt other regulatory action (such as issuing formal warnings and giving directions) according to the ACNC Commissioner’s enforcement powers established under the ACNC Act. Accordingly, option 4 is a blunt instrument to address the policy problem the Government is seeking to resolve.

Amendments to the disqualifying purpose rules within the *Charities Act 2013* would apply to all 58,000 registered charities. The higher risk of revocation for potentially accidental or inadvertent contraventions to the *Charities Act 2013* could lead to registered charities operating in a more risk averse way, scaling back their operations to the detriment of the Australian public. In contrast, under option 3, regulatory action will only be taken if the ACNC Commissioner reasonably believes that a registered charity has not complied with option 3, or it is more likely than not that it will not comply with this option.

Under option 4, a handful of activist charities that regularly engage in unlawful protest action could be deregistered as a consequence of amendments to the disqualifying purpose rules if they continue to engage in unlawful activities. A reliable estimate of the costs associated with the loss of charitable tax concessions cannot be quantified given any cost will be contingent on the nature of the charity’s tax affairs, the types of tax concession that the charity is eligible for and any flow effects to the level of donations and other revenue streams.

5. Who did you consult and how did you incorporate their feedback?

Treasury released exposure draft regulation, explanatory statement and FAQs for public consultation on the Treasury website between 16 February 2021 and 14 March 2021. Treasury also conducted two targeted roundtable sessions with representatives from charities and law firms advising the charity sector. The roundtable sessions took place during the public consultation period and involved discussion on the consultation materials broadly consistent with option 3. While the policy intention of option 3 has remained unchanged the drafting has evolved and refined to better reflect the policy intention following public feedback (see below).

Treasury received 65 written submissions in total from charity groups, charity law firms, individuals and organisations including businesses. While some stakeholders were

supportive of the changes, the majority of stakeholders opposed the changes consulted upon. The group that generally supported the changes included some charities as well as other organisations.

A summary of key concerns and issues raised by stakeholders over the course of the consultation period are summarised below.

1. The summary offences captured are too broad, leading to uncertainty and an increased regulatory burden as some charities may be required to obtain additional legal advice. Stakeholders asserted that the breadth of summary offences captured may include very minor or obscure summary offences, particularly in relation to real and personal property. The breadth of potential offences captured creates uncertainty for charities about what offences are captured.
2. The steps a charity must take to protect its resources from misuse (in terms of 'promoting or supporting' unlawful activities) are not practical or reasonable. Stakeholders expressed concern about the meaning of 'reasonable steps' and the regulatory burden this may impose on charities. Charities stated that they may need to keep extensive written records, conduct training of staff, employ additional compliance officers, risk management plans, insure assets, and in some cases seek legal advice to ensure compliance with the new rules in all their activities and operations.
3. Uncertainty about the meaning and practical threshold of what can be considered 'supporting or promoting' unlawful conduct. Some stakeholders said that without further guidance the effect of this provision is that it may deter charities from advertising, reporting on or commenting on lawful protest action altogether. There was also concern that the regulations would have a chilling effect and deter charities from lawful advocacy activities.
4. General concerns about the administration of the revised governance standard in practice, including the ACNC Commissioner's discretion and pre-emptive enforcement powers. Some stakeholders stated that more clarity was needed in situations of inadvertent contraventions (An example being where a charity deploys its resources during disaster and emergency responses, such as evacuating a group of people and gathering on a property).

Treasury incorporated feedback from stakeholders by revising the draft regulations as follows:

1. Refining the scope of summary offences relating to property to key offences intended to be captured under the changes (i.e. trespass, vandalism, theft of property, assault and threatening harm).
2. Refining the provision to require charities to maintain 'reasonable internal control procedures' rather than taking 'reasonable steps' to ensure their resources are not used in contravention of the revised governance standard three.

Maintaining appropriate safeguards and internal controls over a charity's resources is the original intent of the requirement. Charities are not expected to keep extensive written records or seek legal advice to comply with the new rules. This change will clarify in the regulations what charities are practically required to do in order to comply with the new rules.

3. Raising the threshold for enlivening the provision from 'promote or support' to 'actively promote' by a registered charity.

Raising the threshold to 'actively promote' reduces the risk of inadvertent, passive or unintentional breaches. This aligns with the policy intent of the changes which is to capture deliberate and active undertakings by charities to promote unlawful activities.

4. Including a note in the regulations that the ACNC Commissioner may consult relevant law enforcement authorities when forming a reasonable belief about whether or not a charity has engaged in an act which is a serious breach of Australian law.

This note is intended to address general concerns from stakeholders about the ACNC Commissioner's discretion and enforcement powers.

These revisions were accompanied by corresponding revisions to the explanatory statement, as well as the following additional points in the explanatory statement:

- Clarification of the term 'engage in conduct' by reference to the definition in the ACNC Act. The term means to do an act or omit to perform an act. This change is intended to address a common misconception that was identified by Treasury during consultations with stakeholders, where stakeholders understood the term 'conduct' referred to a series of acts rather than a single act.
- Clarification that a charity's non-compliance with the revised governance standard depends upon any fault elements (such as intent to cause damage to or deprive an individual of property) and defences (such as the defence of sudden or extraordinary emergency) that exist under the relevant offences. This clarification is intended to address concerns about inadvertent contraventions to the revised governance standard (i.e. where a charity trespasses on property but for the purpose of evacuating people from a disaster event).
- Examples to illustrate situations that may or may not contravene the revised governance standard. These examples are intended to assist stakeholders in understanding certain aspects of the provisions.
- Where relevant, clarification that the regulations are consistent with the requirements in the ACNC Act and the objects of governance standard three.
- A brief summary of review rights available to entities.

6. What is the best option from those you have considered?

Treasury considers that option 3 is the best option from those considered. This option is the only option that will comprehensively address the policy problem by ensuring the ACNC Commissioner is enabled under law to investigate and take enforcement action, if appropriate, in situations where a registered charity (i) participates in offences of trespass, vandalism, theft, assault and threatening harm or (ii) actively promotes others to engage in unlawful conduct captured under governance standard three. The option also clarifies to charities what types of unlawful activities are not to be engaged in or actively promoted and makes it easier for registered charities to understand their obligations under governance standard three.

The regulatory benefit of this option is that it will provide clarity to charities about their obligations and how they are to comply with governance standard three. Additionally, this option may reduce the risks of material and immaterial costs associated with situations where registered charities may engage in unlawful activities. These include the costs incurred by a charity's members (such as donors and beneficiaries) as well as individuals or businesses adversely impacted by unlawful activities from charities. The changes may also enhance public trust and confidence in Australia's charity sector and the ACNC by providing assurance to the public about the expected standards by which charities should be governed.

These benefits are appropriately weighed against the regulatory burden under the option, namely that charities should consider reviewing their existing internal control procedures to ensure they are compliant with current requirements and revised governance standard three. Given that charities should already have governance processes, internal controls, and safeguards in place to meet current requirements, this option is not expected to create any additional regulatory costs for the majority of registered charities.

Following consultation on the proposed changes to governance standard three, Treasury has incorporated feedback received from stakeholders to address concerns from the sector. The revisions to the draft regulations are intended to provide registered charities with further certainty whilst meeting the Government's policy objectives.

Status of the RIS at major decision making points

The Government was required to undertake a review of the ACNC Act after the first five years of operation. The review evaluated the performance of the legislative framework and regulation of the sector, with an aim to identifying improvements that could be made. A final report was tabled in Parliament on 22 August 2018.

On 6 March 2020, the Government released its response to the ACNC Review, agreeing recommendations that supported an effective regulator, reduced red tape, and strengthened trust. Consistent with the Government's RIS requirements, the ACNC Review was certified by the Department of the Treasury as meeting the requirements of a RIS.

This RIS relates to the Government's response to recommendation 20 of the ACNC Review whereby the Government stated it would explore legislative options to address uncertainty in the law.

The relevant Minister previously supported development of option 3 prior to this RIS being prepared, noting public consultation with the sector was required under the ACNC Act to seek the views of relevant stakeholders before a regulation is made. This RIS was prepared following public consultation outlined above.

7. How will you implement and evaluate your chosen option?

The proposed regulations will come into effect subject to the Parliamentary process for regulations.

Consistent with the ACNC's usual compliance processes, the ACNC will work with registered charities to ensure they understand their obligations under the expanded governance standard. The ACNC will provide guidance and education to registered charities to help them understand and comply with the new provisions.