

COMMISSIONER'S POLICY STATEMENT: Compliance and Enforcement (CPS 2013/01)

This Commissioner's Policy Statement is issued under the authority of the Commissioner and should be read together with the [ACNC Policy Framework](#), which sets out the scope, context and definitions common to our policies.

Policy Statement

1. This Commissioner's Policy Statement supplements the ACNC's regulatory approach statement, which sets out our general approach to regulating charities. This policy statement will be reviewed regularly in the light of further experience.
2. This policy statement sets out:
 - the principles we adopt when addressing compliance concerns about registered charities
 - our general approach to carrying out our compliance and enforcement activities
 - the ACNC's information gathering, monitoring, enforcement and revocation powers and how we will use them, and
 - the ACNC's policy on the removal or withholding of information from the ACNC Register in relation to the use of enforcement powers.

Scope of ACNC Powers

3. The ACNC's regulatory approach statement sets out generally when we will and won't take action in relation to a registered charity. This policy sets out the legal extent and limits to our use of information gathering, monitoring and enforcement powers. These powers relate to a charity's ongoing entitlement to registration, as well as its compliance with the ACNC Act and ACNC Regulation.

Registered entity

4. The ACNC's powers can only be used in relation to registered charities. The ACNC cannot use its powers once a charity's registration is revoked.

Federally regulated entity

5. The ACNC's enforcement powers are generally available only in relation to a 'federally regulated entity'. This is defined in section 205-15 of the ACNC Act as:
 - a 'constitutional corporation' (which are either foreign, trading or financial corporations formed within the limits of the Commonwealth referred to under paragraph 51(xx) of the Constitution of Australia, or bodies corporate incorporated in a Territory),
 - a trust where all of its trustees are constitutional corporations,
 - a body corporate that is taken to be registered in a Territory under section 119A of the *Corporations Act 2001* (Cth),
 - a trust, if the proper law of the trusts and the law of the trusts' administration are the law of a Territory, or
 - an entity, the core or routine activities of which are carried out in or in connection with a Territory.
6. In the case of non-compliance with 'external conduct standards', our enforcement powers can be used in relation to any registered charity. In addition to these powers, we can revoke the registration of any registered charity.
7. In cases where our enforcement powers do not apply because the charity is not a federally regulated entity, we may work with the charity to bring about compliance, without resorting to the most serious power of revocation, although this will depend on the nature and severity of any breach. We will also adopt, where possible, a collaborative approach with other government agencies to address non-compliance in a proportionate and effective manner.

Basic religious charity

8. In respect of basic religious charities, governance standards do not apply. This means that the ACNC cannot suspend or remove a responsible person of a basic religious charity (section 100-5(3)). A basic religious charity is defined in section 205-35 of the ACNC Act. To qualify, the charity must be registered only for the purpose of advancing religion, is not entitled to be registered as any other subtype and not be disqualified under the definition because of (for example) their method of incorporation or deductible gift recipient status.

Principles

9. This policy statement explains how the ACNC uses information gathering, monitoring and enforcement powers to ensure compliance with the ACNC Act and associated regulation.
10. The ACNC is guided by four principles when exercising its compliance and enforcement function. These principles are explained below and supplement those values that underpin the ACNC regulatory approach.
11. Compliance and enforcement activities are also undertaken in accordance with relevant Australian legislation, policies and guidelines. For example, if a formal investigation is necessary, it will be undertaken in accordance with the Australian Government Investigations Standards.

Principle 1: Reflecting risk

12. We operate under an evidence-based, risk-based framework and aim to use the most appropriate compliance and enforcement measures to address non-compliance.

13. The ACNC has discretion in how we exercise our functions and address non-compliance and its impact. Our discretion includes how we prioritise and allocate our resources, how enforcement decisions are made and what compliance action is to be taken.
14. Before taking compliance or enforcement action, we will assess and consider, as a whole, a number of factors, including:
 - the type of problem, contravention or misconduct
 - what or who is at risk
 - the likelihood and frequency of occurrence or reoccurrence
 - the potential impact on the charity (including the impact of any proposed enforcement action), and
 - the risk profile of the charity and the behaviour of those on the governing body.
15. These factors ensure that any action taken by the ACNC is suitable and relative to individual circumstances.
16. The ACNC is not resourced to be able to investigate every regulatory concern that is brought to its attention. It has to prioritise the investigations it takes forward based upon the level of risk.

Principle 2: Proportionate regulation

17. Compliance measures and responses will be proportional to the problem they seek to address. This means that where charities have made an honest mistake or oversight, we will ordinarily work with them to correct the error and get the charity back on track. This is consistent with our approach to provide guidance and education to assist charities to comply with their obligations.
18. The ACNC will act swiftly and firmly where vulnerable people or significant charity assets are at risk, where there is evidence of serious mismanagement or misappropriation, or if there is a serious or deliberate breach of the ACNC Act or ACNC Regulation.

Principle 3: Consistency

19. Outcomes of our compliance and enforcement activities should be consistent and predictable. We aim to ensure charities with similar circumstances or with similar issues are treated consistently and can expect similar compliance and enforcement outcomes.
20. Where the ACNC is involved in issues that also affect other regulators or government bodies, the ACNC will seek to work collaboratively and cooperatively to ensure that issues are addressed consistently.
21. It will be appropriate, in some circumstances, for the ACNC to share information about particular charities with other regulators or government bodies even if the ACNC itself is not involved in any compliance activities. For details on how the ACNC may share information, refer to the ACNC's [Corporate Policy on information handling](#) and the ACNC's Operational Procedure on Information Provision, Referrals and Information Exchange, and the Operational Procedure – ACNC Protected Information Procedure.

Principle 4: Regulatory necessity

22. In the exercise of regulatory power we aim not to burden charities any more than is reasonably necessary.

Compliance and enforcement measures

23. The ACNC becomes aware of instances of potential non-compliance from a number of sources, including complaints, referrals from government agencies and our own internal intelligence.
24. The ACNC monitors potential non-compliance through a range of methods, including making initial enquiries and investigations.
25. An initial enquiry may be made to a charity to obtain information or clarification in relation to a specific concern in order to assess general levels of compliance and to determine if a formal investigation is warranted. This initial enquiry will be sent to a charity in writing and will generally rely on voluntary disclosure of information.
26. An investigation will generally be initiated where a complaint or referral indicates serious or deliberate non-compliance and it may be necessary to use compulsory information gathering powers and/or enforcement powers.
27. The degree and severity of the non-compliance is a major factor in the use of compliance and enforcement powers. The ACNC uses a combination of voluntary and enforceable methods in addressing and managing compliance risks. In addition to the powers set out below, ACNC officers will provide guidance and advice on how to comply with the ACNC legislation and governance standards and, where necessary, provide support on how to remedy any non-compliance.

Information gathering and monitoring powers

28. The ACNC has the power to gather information necessary to monitor compliance with the ACNC Act, ACNC Regulation and provisions of the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth) that create offences to the extent that they relate to the ACNC Act or ACNC Regulations. Information gathering and monitoring powers are used to determine ongoing entitlement to registration, to determine the correctness of certain information and to monitor compliance with certain provisions.

Information gathering powers

29. The ACNC can use information gathering powers to request information and documents and can require a person to attend and give evidence. Information gathering powers may also be used to request information from a third party. These powers are set out in Division 70 of the ACNC Act and other legislation, such as privacy legislation, may apply.
30. Depending on the nature, seriousness, and other facts and circumstances of the case, the ACNC may seek to obtain the necessary information or documents under a formal notice under section 70-5 of the ACNC Act., rather than by requesting the charity provide the information voluntarily.
31. If the ACNC decides to use formal powers, a formal notice will be issued to a person or organisation to provide information, attend and give evidence and/or produce documents or copies of documents.
32. Include a link to the Information Gathering Powers, Operational Procedure for further information.

Monitoring powers

33. In investigating serious contraventions or non-compliance, ACNC officers may need to gain access to premises, either with the consent of the occupier or under a monitoring warrant. Where access to premises is necessary, the ACNC will always seek to enter with consent where appropriate. A monitoring warrant would only be considered in limited circumstances. Examples

of such circumstances would be where a charity has demonstrated serious, deliberate and ongoing non-compliance.

34. Under Division 75 of the ACNC Act, the ACNC has the ability to enter premises for the purpose of monitoring compliance with provisions subject to monitoring (as defined in section 75-5) and/or determining whether certain information 'subject to monitoring' (as defined in section 75-10) is correct.
35. Once on the premises, the ACNC can exercise a range of monitoring powers including searching premises, inspecting or examining any thing on the premises, taking photographs or video recordings of the premises or any thing on the premises and taking extracts or making copies of any documents. Section 75-20 of the ACNC Act provides further details of the monitoring powers available to ACNC officers.
36. Where entry to the premises is with consent, the ACNC will leave the premises if the consent is withdrawn (section 75-45(6)). In this situation, it may be necessary for the ACNC to seek a monitoring warrant to determine compliance with certain provisions or whether certain information is correct
37. Include a link to the Monitoring Powers Operational Procedure for further information.

Enforcement powers

38. The ACNC has a range of enforcement powers to assist in maintaining, protecting and enhancing public trust and confidence in the charity sector. The ACNC will use the following measures to enforce the law and respond to serious incidents of non-compliance.
39. In deciding the most appropriate action to take, we will consider:
 - the nature, significance and persistence of the contravention or non-compliance
 - any action taken by the Commissioner, the charity or any of the responsible persons, to address or prevent the contravention or non-compliance, including whether the charity has provided timely notification to the ACNC of the contravention or non-compliance (the duty to notify (section 65-5) requires registered charities to notify the ACNC of certain matters, including significant contraventions or non-compliance)
 - the desirability of ensuring contributions made to the charity are applied consistently with the charity's not-for-profit nature and purpose
 - the objects of any Commonwealth law that refer to registration under the ACNC Act
 - the extent (if any) to which a charity is conducting its affairs in a way that may cause harm to, or jeopardise, the public trust and confidence in the sector
 - the welfare of members of the community (if any) that receive direct benefits from the charity, and
 - any other matter that the Commissioner considers relevant.
40. The above factors are listed under section 35-10(2) of the ACNC Act and will be considered prior to the application of any enforcement powers to ensure consistency. We will also apply the principles in the Commissioner's Policy Statement on Decision-Making.

Warnings

41. Formal warnings may be given to a charity when the Commissioner reasonably believes a charity has contravened the ACNC Act or has not complied with a governance standard or an external conduct standard (or is more likely than not to contravene or not comply in the future) (section 80-5). The notice of the formal warning will inform the charity of the circumstances relating to the contravention or non-compliance and outline action that may be taken in response.

42. A formal warning will not be issued if informal advice or education would suffice.
43. Formal warnings provide charities with an opportunity to address compliance issues themselves and may be able to limit the gravity of contraventions or non-compliance.

Directions

44. Directions may be given to a charity when the Commissioner reasonably believes a charity has contravened the ACNC Act or has not complied with a governance standard or an external conduct standard (or is more likely than not to contravene or not comply in the future) (section 85-5). The ACNC can direct a charity to act or not to do a particular act that is necessary to address the contravention or non-compliance or to prevent the likely contravention or non-compliance (Division 85).
45. A directions notice will specify the ground(s) on which the direction is issued and the period of time the charity has to comply. If the Commissioner gives a direction or varies it, and the direction has not been varied or revoked for 12 months after that time, the Commissioner must consider within a reasonable time after the end of that 12 months whether it would be reasonable to vary or revoke the direction (section 85-20). The required statutory review ensures the ACNC considers the appropriateness of the direction at the later time. If a charity is dissatisfied with the decision to give, vary, or not to vary or not to revoke a direction, they may seek an internal review of the decision (i.e. make an objection).
46. A directions notice is generally appropriate where:
 - a charity does not respond to informal advice to do so, or has failed to comply with or alter behaviour in accordance with a formal warning notice
 - there is a major ongoing contravention or substantial or significant concern (for example, a directions notice may be used to direct a charity not to engage in a particular activity that may result in harm to beneficiaries)
 - Urgent action is needed to address wilful and persistent misconduct (such as in cases of fraud or misappropriation of funds or property).

Enforceable undertakings

47. Enforceable undertakings are court-enforceable agreements that are voluntarily entered into by the charity (Division 90).
48. A written enforceable undertaking will specify an action or series of actions that a charity has agreed to take, or refrain from taking, in order to comply with its obligations. For example, if incoming board members discover that a charity has breached the ACNC Act or governance standards, the ACNC can agree with the charity (through the new board members) that they will take specific action to address these concerns.
49. The Commissioner may accept an enforceable undertaking where:
 - the person or charity takes active responsibility for the contravention
 - it is in the public interest and is the most appropriate form of enforcement response in all the circumstances, and
 - Will achieve the desired compliance outcome.
50. An enforceable undertaking is binding on the charity. The ACNC may seek enforcement of the agreement by a court if it believes that the charity has breached the undertaking.

Injunctions

51. The ACNC can apply for an injunction from the court to order a person to do or not do something to make sure they comply with their obligations (Division 95). The court may also grant an injunction by consent of the ACNC and relevant charity.
52. Generally, injunctions will only be sought where the contravention or non-compliance is of a serious and persistent nature, and urgent action is required such as where there is an immediate or direct risk to a charity, person or property (such as in cases of fraud or misappropriation of funds or property).
53. An injunction may also be sought where other enforcement measures have not been effective, such as where a person or charity has not complied with a directions notice.

Suspension and removal of responsible entity

54. The Commissioner may suspend or remove a responsible person when he/she reasonably believes a charity has contravened the ACNC Act or has not complied with a governance standard or an external conduct standard (or is more likely than not to contravene or not comply in the future), and can also appoint an acting responsible person (Division 100). Such action would only be where it is appropriate and necessary to do so. This power is not available in relation to basic religious charities, or a responsible person who is a trustee in bankruptcy, a receiver or receiver and manager of the charity's property, an administrator, an administrator of a deed of company arrangement executed by the charity, a liquidator, a trustee or other entity administering a compromise or arrangement made between the charity and someone else.
55. The Commissioner will not exercise the power to remove or suspend a responsible person without evidence that indicates serious contraventions or non-compliance.
56. If a responsible person is dissatisfied with the decision to suspend the person, change the time the suspension ends, or to remove the person, they seek an internal review of the decision (i.e. make an objection).

Compliance Agreement

57. A Compliance Agreement is an action plan drawn up by the ACNC in consultation with the charity setting out the measures that a charity needs to undertake to ensure it is not in breach of the ACNC Act or ACNC Regulation. The measures generally relate to improvements to a Charity's management practices or governance arrangements to mitigate the concerns or risks identified by the ACNC.
58. A Compliance Agreement is not a formal enforcement power under the ACNC Act and a charity's commitment to a Compliance Agreement is made by way of a voluntary undertaking.
59. A Compliance Agreement is a way that the ACNC can have a documented commitment from a Charity to make certain changes or implement governance improvements, particularly, if the charity is not a federally regulated entity and the ACNC cannot use its formal enforcement powers. The charity's compliance with the agreement is monitored by the ACNC Compliance directorate to ensure the charity implements improvements to get back on track.
60. Should the ACNC not be satisfied with a charity's progress in addressing the concerns set out in a Compliance Agreement, the ACNC will consider further compliance action, which could result in the charity having its registration revoked.

Revocation power

61. A charity's registration may be revoked, in accordance with section 35-10(1) of the ACNC Act, if the ACNC reasonably believes that any of the following applies:
- a charity was not, or is no longer, entitled to be registered. For example, if a charity is no longer undertaking charitable activities or is not operating on a not-for-profit basis
 - a charity provided information, in connection with its application for registration, that was false or misleading in a material particular (this includes misleading information about the identity of responsible persons and/or the nature, purpose and activities of the charity)
 - a charity has contravened the ACNC Act or has not complied with a governance standard or an external conduct standard (or is more likely than not to contravene or not comply in the future) (this will be based on sufficient, reliable and accurate evidence that there is or will be a contravention), or
 - a charity has a trustee in bankruptcy, liquidator, or a person appointed or authorised under an Australian law to manage the charity's affairs because it is unable to pay all its debts as and when they become due and payable
 - a charity has made a request to the Commissioner, in the approved form, that the Commissioner revoke the registration. The ACNC will generally refuse requests to revoke registration where the ACNC is currently conducting any compliance or enforcement activity in relation to the charity (see the Commissioner's Policy Statement on Choosing to Deregister). If the decision is made to not revoke the charity's registration, the charity may seek an internal review of the decision (i.e. make an objection).
62. Revocation is a serious action and may affect eligibility for tax concessions and other government benefits, concessions or exemptions. In this regard, revocation will only be exercised in the most serious of cases.
63. In some circumstances, where non-compliance is of a serious and/or persistent nature and the ACNC does not have jurisdiction to use enforcement powers, revocation will be the only formal power that can be considered. In these circumstances, we will consider the same factors that we consider before the use of other enforcement powers.

Publication of enforcement action

64. The ACNC maintains a public ACNC Register (Register) that contains information about each registered charity. On this Register, the ACNC will also publish details of each warning, direction, undertaking, injunction and the suspension or removal of a responsible person.
65. This public disclosure is an integral part of the ACNC's commitment to maintaining and enhancing transparency and accountability in the sector and contributes to public trust and confidence. It is not intended to punish.
66. Publication will include a summary of why the matter arose, details regarding any response by the charity and the resolution (if any) of the matter.
67. We will usually give charities a chance to provide a response and context relevant to the information that is to be published, before it is published.
68. The ACNC cannot publish information relating to the use of enforcement powers until 14 days after the day the power was exercised (section 40-5(2)). There is an exception if the Commissioner considers that the public interest requires the information to be published earlier.

69. In some circumstances, the ACNC may decide not to publish information until after an internal review period is over or a review decision is made. For further information see the Commissioner's Policy Statement on Reviews and Appeals.

When we will not publish

70. Information may be withheld or removed from the Register in certain circumstances. Primarily, this would be the case where the likely adverse effect of publishing the information outweighs the public interest in publishing the information. This includes consideration of whether information is commercially sensitive and has the potential to cause detriment to the charity (section 40-10(2)(a)). Further information about withholding or removing information from the Register is covered in the Commissioner's Policy Statement on Withholding and Removing Information from the Register.

Warnings

71. Section 40-10(2)(da) of the ACNC Act allows for information about warnings to be withheld or removed from the Register in the following situation:

- the information has the potential to cause detriment to the charity or to an individual; and
- the actual or likely contravention or non-compliance subject to the warning notice was not, or would not be, in bad faith; and
- the actual or likely contravention or non-compliance has been dealt with, or prevented, such that declining to include the information, or removing the information, would not conflict with the objects of the ACNC Act.

72. In all cases where a warning is issued, the ACNC will consider the above factors. This aims to avoid a disproportionate outcome for the charity.

Removing enforcement information from the register

73. Enforcement information may be removed from the Register if it has been on the Register for more than five years and it is considered that the public interest does not require the information to be retained on the Register (section 40-10(4)).

74. In most cases, enforcement information will be removed from the Register after five years. The exception is where there continues to be public interest considerations requiring that information to remain on the Register.

References

[Australian Charities and Not-for-profits Commission Act 2012 \(Cth\)](#)

[ACNC Regulatory Approach Statement](#)

[Commissioner's Policy Statement: Withholding or removing information from the ACNC Register](#)

[ACNC Corporate Policy: Information Handling](#)

[Commissioner's Policy Statement: Choosing to deregister](#)

[Commissioner's Policy Statement on Decision-Making](#)

[Commissioner's Policy Statement: Reviews and Appeals](#)

[Australian Government Investigations Standards 2011](#)

Version	Date of effect	Brief summary of change
Version 1 – Initial policy	03/06/2013	Initial policy endorsed by the Commissioner on 03/06/2013
Version 2 – Revised policy	12/10/2017	Revised policy to include the use of an informal enforcement power – Compliance Agreement