

# Operational Procedure 5:

## Investigations

[http://www.acnc.gov.au/ACNC/Publications/Procedure\\_PDFs/OP\\_Investigations.aspx](http://www.acnc.gov.au/ACNC/Publications/Procedure_PDFs/OP_Investigations.aspx)

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

### ***Introduction***

1. This Operational Procedure sets out the purposes and procedures of investigations, one of the compliance measures used by the Compliance Directorate when it decides to intervene to maintain public trust and confidence in the Australian not-for-profit sector.
2. This procedure is informed by the ACNC regulatory approach and Compliance and Enforcement Policy, with which it must be read.

### ***Purpose of an investigation***

3. An investigation will be undertaken when the ACNC believes there is a likelihood of serious or deliberate non-compliance and/or it may be necessary to use compulsory information gathering powers and/or enforcement powers.

### ***Steps we take before starting an investigation***

#### **Risk identification**

4. The ACNC is alerted to concerns about charities from complaints (from the public and others), from referrals from other agencies (including agencies of states and territories) and through the regular reporting by charities to us. We also actively seek to identify risks, vulnerabilities and good practice in partnership with the sector.

#### **Evaluation and risk assessment**

5. **The Operating Procedure: Evaluation and Risk Assessment** outlines our processes for evaluating and assessing risks.

## Reasons to begin an investigation

6. When a concern about a charity has been assessed the ACNC may decide to:
  - Take no further action
  - Schedule the charity for future monitoring
  - Provide advice to the charity by way of an educational response
  - Initiate a compliance review of the charity
  - Initiate an investigation of the charity
  - Refer the matter to a more appropriate regulator or agency which is better placed to act
  - Initiate a wider (thematic) compliance review across a range of charities.
7. The ACNC examines six factors as a whole to determine the appropriate response. Here is an example of how these factors may result in a response that is an investigation:
  - **Type of problem:** the apparent non-compliance is more than just a technical or administrative nature. It may involve serious mismanagement and misappropriation, or a serious or deliberate breach of the ACNC Act, external conduct standards or governance standards (where applicable). For example, diverting money to non-charitable purposes or not disclosing serious conflicts of interest.
  - **What or who is at risk:** the concern presents a potential serious risk to a specific charity or related group of charities, their beneficiaries, reputation or assets. The beneficiaries may be vulnerable. There may be a broad impact on public trust and confidence across the charitable sector or across similar charities.
  - **Nature and degree of potential harm:** the concern may cause serious harm to people or other charities. There may be an urgent or immediate need for enforcement powers to protect the charity or its beneficiaries.
  - **Likelihood and frequency of occurrence or recurrence:** There is a reasonably high likelihood of serious non-compliance and it may have occurred repeatedly or over a long time period. There may be reason to believe the charity may not work collaboratively with the ACNC to address the concerns.
  - **Risk profile of the charity:** The charity may have a history of serious non-compliance. Internal or external accountability mechanisms may be minimal or non-existent. The charity structure appears to

be of a medium or high level of complexity and this is relevant to the concern raised. The assets or transactions related to the concern may be significant in proportion to the size of the charity.

- **Behaviour of those responsible for the charity:** the apparent non-compliance may result from an intention to do the wrong thing.

8. Sometimes our ongoing assessment of these six factors will result in a compliance review being escalated to an investigation.

## ***The investigations procedure***

### **Initiation**

9. The recommendation to commence an investigation must be endorsed by a compliance manager, reviewed by the Compliance Case Conference and formally approved by the Director of Compliance. Then a compliance manager will allocate the investigation to an ACNC officer. There may be other ACNC officers to assist or assure the quality of the investigation.

### **Confidentiality**

10. The ACNC does not generally make public whether it is, or is not, investigating a particular matter nor any findings or the outcomes of an investigation (except as required under the ACNC Act). However there may be exceptional circumstances where the ACNC considers that it would be appropriate to announce that it is investigating a particular charity, such as where this may help prevent widespread malpractice or serious misconduct. We will discuss our approach with the charity before any public announcement is made and ensure that a secrecy exemption applies to allow this information to be disclosed. Any decision to make any part of an investigation public must be approved by the ACNC Executive.

### **Activities**

11. Investigations may involve the following types of activities:
  - reviewing information held by the ACNC in relation to the charity
  - reviewing open source information in relation to the charity
  - conducting corporate intelligence inquiries on proprietary databases available to the ACNC to verify information

- contacting the charity or complainant (if applicable), by telephone, e-mail or in writing (the **Operational Procedure – Concerns raised by the public** outlines procedures for contacting the charity and complainants)
- asking the charity to provide information voluntarily
- making site visits to view the charity records, either with the charity's consent (pursuant to section 75-45 of the ACNC Act) or with the authorisation of a monitoring warrant (pursuant to section 75-50)
- verifying or confirming facts with third parties
- obtaining evidence that assists in establishing the facts and determining the issues in question. Examples of evidence includes:
  - verbal and written statements, including statements from potential witnesses
  - constitutions and trust deeds
  - website content (both current and historic)
  - bank documents
  - agendas and minutes of meetings
  - appointment books and electronic scheduling calendars
  - database checks
  - annual reports and organisational policy documents
  - third-party compliance reports
  - financial accounting documents
  - contracts, tender documents or invoices
  - documents demonstrating equipment and capital purchases.

## Police assistance with investigations

12. The ACNC may require the assistance of police during the conduct of an investigation, including where:
- An investigation identifies potential offences that fall under the responsibility and jurisdiction of a specific police service (refer to the **Referrals and Information Exchange Procedure**)

- Assistance is required in executing a monitoring warrant (i.e. to ensure the safety of the premises)
- There are legitimate concerns for the personal safety or the safety and wellbeing of ACNC officers or others.

13. The ACNC will obtain approval for police assistance from the General Counsel.

14. After obtaining approval, the ACNC may approach local police in accordance with any formal arrangement (e.g. a Memorandum of Understanding) or, in the absence of formal arrangements, by directly contacting the Officer in Charge of the closest police station to the proposed ACNC compliance activity.

15. Joint operations between the police and the ACNC will be considered in the appropriate circumstances. They must be supported by the Compliance Case Conference and approved by the Commissioner's delegate.

## Witnesses

16. A witness may be a complainant, informant, whistle-blower or source of information under investigation. For example, a witness may be:

- A person who witnessed a breach of, or offence against, the ACNC Act
- A person who can help establish one or more elements of a breach or offence
- A person who can corroborate evidence
- An expert witness.

17. When obtaining information from a witness, the ACNC will follow the **Operational Procedure: Information Gathering Powers** and apply the principles outlined in the Australian Government Investigation Standards (AGIS).

## Outcomes

18. Compliance responses should be proportional to the non-compliance they seek to address. The following outcomes are expected to be typical of investigations:

- Taking no further action
- Providing regulatory advice or information (such as fact sheets or a response to a specific issue)
- Referring the charity to appropriate educational activities being conducted by the ACNC, or by external bodies (e.g. peak bodies)

- Agreeing on a course of action to resolve the non-compliance within a reasonable timeframe (and if that timeframe is not met, taking progressively stronger action until the issue is resolved)
- Making a referral to another government body or agency where it becomes apparent that the matter falls more appropriately within the jurisdiction of another agency or department, or that a discrete issue falls more appropriately within the jurisdiction of another government body or agency
- Applying enforcement powers such as warnings, directions, enforceable undertakings, injunctions, or suspension and removal of responsible entities
- Imposing administrative penalties
- Requiring the charity to lodge additional reports or have accounts audited
- Revoking registration
- Making a referral to the Commonwealth Director of Public Prosecutions (CDPP)
- Where it is appropriate and on a confidential basis, sharing the issues and learnings from the investigation with the wider charitable sector, to help other charities avoid the same type of compliance issues
- Recommending changes to legislation or policy.

## Revocation

19. The Registration Directorate is responsible for revoking charities' registration in the following circumstances:
  - Where a charity voluntarily requests deregistration (under subsection 35-10(1)(e) of the ACNC Act)
  - All charities with cancelled ABNs
  - All charities invalidly registered with the ATO before the commencement of the ACNC on 3 December 2012.
20. The Compliance Directorate is responsible for actioning:
  - A small proportion of voluntary requests for deregistration (based on identified risk indicators)
  - All other revocation under subsection 35-10 of the ACNC Act.

21. For information about voluntary revocations, refer to the Commissioner's Policy Statement – **Choosing to Deregister (CPS 2012/07) and Operational Procedure: Request to revoke registration as a charity or a subtype of charity (Form 5A)**.

## Show Cause Notice

22. At the point that the ACNC believes it has enough evidence to justify a charity's involuntary revocation, the ACNC officer will complete a 'show cause' notice and a 'Provisional Reason for Decision' document. The Reason for Decision will not be finalised until a decision to revoke is made.
23. The show cause notice is required under section 35-15 of the ACNC Act.
24. The show cause notice must include the following information:
- The grounds on which the Commissioner proposes to revoke the charity's revocation
  - Invite the charity to give the Commissioner a written statement showing cause why its registration should not be revoked.
25. A charity has 28 days to respond to the show cause notice. Additional time may be given to the charity to provide a written statement, if appropriate. This consideration will be negotiated between the ACNC and the charity on a case-by-case basis.
26. The ACNC officer is required to assess any additional information provided by the charity within the 28 day period. If a response from the charity satisfactorily addresses the issues raised, the ACNC will send a letter acknowledging the charity's compliance and that the need for revocation no longer exists.
27. If no response is received, or if a written statement from the charity fails to address the issues identified, the ACNC will continue with the revocation process. A 'Revocation Notification' letter will be completed using the approved template. The 'Reason for Decision' document will be finalised and attached to this letter when it is sent to the charity.
28. Section 35-15(3) allows for the show cause provisions to be dispensed with if it can be demonstrated, on reasonable grounds, and taking into account the matters listed in subsection 35-10(2), that it would be appropriate under the specific circumstances of the case. These reasons must be included in the 'Reason for Decision' document, and must include the grounds demonstrated, on reasonable grounds, and taking into account the matters listed in subsection 35-10(2), that it would be appropriate under the specific circumstances of the case.

## Reason for decision

29. This document will be sent to the charity with a 'Revocation Notification' letter.
30. Section 35-10(3) of the ACNC Act specifies that a revocation must include the day on which the charity's registration is taken to be revoked. This will be identified in the 'Reason for Decision' document, and the reason for deciding on this date will be recorded in the document.
31. Four possibilities are considered when determining the date of revocation:
- If the charity was not entitled to registration before the date of ACNC commencement (3 December 2012), the date must be 3 December 2012 or later
  - The date that the charity first stopped being entitled to registration (or a later date), if it occurred after the ACNC commenced (this date could be due to an incident such as a court or tribunal determination, deregistration by another state/territory or Commonwealth regulator such as the Australian Securities and Investment Commission (ASIC) or the Office of the Registrar of Indigenous Corporations (ORIC, or a contravention of the ACNC Act)
  - If the charity provided false or misleading information in its application for registration, the date will be the day that the charity was registered, or a later date
  - The date the revocation decision is made (if no other date can be determined) or a later date
32. The charity can object to the decision using the reviews and appeals procedure set out in Part 7-2 of the ACNC Act (section 35-20) and according to our Reviews and Appeals policy.
33. Only one ACNC Assistant Commissioner will be involved in the consideration of a revocation decision. This allows the other Assistant Commissioner to undertake an impartial review of the matter if an objection is lodged by the charity within 60 days.
34. An objection decision will also require a 'Reason for Decision' document, and must be made by a different compliance officer from the one who made the original decision. The process for making an objection decision will be similar to making the original decision, and the ACNC Decision-Making Policy will be applied.
35. Generally, the ACNC Register will be updated to show the charity has been revoked, along with the effective date of revocation, **on the same date** the Revocation Notification letter and Reason for Decision has been issued. To minimise the risk that a charity's interests is adversely affected, the ACNC will include a note indicating that the relevant 60 day objection period applies and that the decision may be overturned on review, and if the charity has been revoked because (1) it requested the revocation, or (2) it appears to be inactive. In exceptional circumstances, the Commissioner may decide that the effective date of revocation will be the day



on which any review or appeal process expires. After expiry of the review/appeal process if the decision of the Commissioner stands, the Commissioner will publish the revocation on the ACNC Register. When revocation occurs the ACNC will refer the matter to the Australian Taxation Office for consideration of any taxation implications (See Appendix D for Involuntary Revocation Checklist – note this is an internal document only).

36. The Commissioner must give the charity notice within 14 days if the registration is revoked and the revocation must specify the date from which registration is taken to be revoked (s35-10(3)-(4).
37. If a charity is dissatisfied with a decision to revoke registration, it can object to the decision in line with Part 7-2 ACNC Act (see [Review and Appeals policy](#)).

### **Application of relevant standards**

38. The ACNC will apply the Australian Government Investigation Standards (AGIS) to the conduct of investigations, including record keeping.
39. ACNC officers may need to prepare briefs of evidence for submission to the Commonwealth Director of Public Prosecutions (CDPP). ACNC officers will consult and follow the below CDPP guidelines as a matter of best practice:
  - [Prosecution policy of the Commonwealth](#)
  - [Disclosure policy](#) , including disclosure to CDPP by investigating agencies
  - [Guidelines for agencies on submitting briefs to the DPP](#)
  - [CDPP Guidelines and Directions Manual](#)
  - [CDPP Guidelines on Offers of Assistance to Authorities](#)
  - [CDPP Cybercrime Manual](#)
  - [CDPP Search Warrants Manuals \(Volumes I and II\)](#)
  - [Jurats, Preambles and Formal Requirements for Witness Statements](#)