



## The Australian Charities and Not-for-profits Commission Act 2012 A guide for charities

The Australian Charities and Not-for-profits Commission (**ACNC**) is the centrepiece of a broad range of reforms to the regulation of not-for-profits (**NFPs**) currently being undertaken by the Australian Government. The ACNC is intended to be a one-stop shop to oversee the entire NFP sector in Australia on a national level. At this stage however it will only replace certain Commonwealth registration and reporting requirements and only for charitable bodies.

The relevant legislation is the Australian Charities and Not-for-profits Commission Act 2012 and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012, which was assented to and came into effect on 3 December 2012.

### What is the role of the ACNC?

The ACNC will be the primary regulator for charities. In that role, it will be responsible for ensuring registered charities comply with governance standards and “external conduct standards” and will receive financial statements and other reports from registered charities.

The ACNC will be responsible for determining the charitable status of bodies and registering them as such for the purposes of all Commonwealth legislation. Registration with the ACNC will be voluntary but will be a prerequisite for continued access to Commonwealth concessions for charities, including tax concessions. The ACNC will also maintain a publicly-accessible register of information on registered charities.

The Australian Taxation Office (ATO) will accept the ACNC’s determination of an organisation as a charity (including as a public benevolent institution) but will remain responsible for all other aspects of a charity’s compliance with the requirements for accessing tax concessions.

### Do I need to register with the ACNC?

Registration with the ACNC is voluntary for any organisation, but your organisation will not be able to access Commonwealth tax concessions and other benefits without it.

If your organisation was registered as a charity with the ATO, it should have become a registered entity under

the ACNC legislation automatically when the ACNC was established in December 2012.

If your organisation does not wish to be subject to the ACNC’s regulation, it can opt out by providing notice to the ACNC by 31 March 2013, but this means you would lose access to tax concessions and other Commonwealth benefits available to charities.

If your organisation is not currently registered with the ATO and it wants to access those concessions and benefits, it will need to apply for registration directly to the ACNC.

### What will I have to report to the ACNC?

If your organisation is registered, it will be required to lodge annual information statements with the ACNC from the 2012-13 financial year onwards. For organisations whose reporting period ends on 30 June, the first statement will be due on 31 December 2013.

Your organisation will also be required to lodge financial reports with the ACNC from the 2013-14 financial year onwards if it is a medium or large registered entity. For organisations whose reporting period

ends on 30 June, the first financial report will be due on 31 December 2014. A medium registered entity can choose to have its financial reports audited or reviewed, but a large registered entity must have its financial reports audited.

Your organisation will be:

- a small registered entity if its revenue is less than \$250,000 a year;
- a medium registered entity if its revenue is more than \$250,000, but less than \$1 million;
- a large registered entity if its revenue is more than \$1 million.

Whether your organisation is endorsed as a deductible gift recipient does not affect its classification as small, medium or large.

The contents of these statements and reports have not yet been finalised (the requirements for financial reporting will be set out in regulations).

The ACNC may accept reports prepared for other regulators as meeting the ACNC's reporting requirements. In particular, the ACNC will accept reports from schools reporting under the Schools Assistance Act 2008 as meeting the ACNC's reporting requirements.

It is not yet clear whether the reporting obligations to the ACNC will replace the reporting obligations to the ATO for registered entities such as charitable public and private ancillary funds.

## Charities that are also established as companies under the Corporations Act

If your organisation is a charity established as a company under the Corporations Act, such as a company limited by guarantee, the ACNC will largely replace the Australian Securities and Investments Commission as your regulator.

There is a staggered approach to the transition:

- some requirements to notify ASIC of certain events under the Corporations Act will no longer apply once your organisation is registered with the ACNC from December 2012;
- many other obligations under the Corporations Act will no longer apply to your organisation and its directors from 1 July 2013.

Instead, your organisation will need to notify the ACNC of relevant events, and other obligations will be found in the ACNC legislation and regulations.

This also means that you will no longer report to ASIC or be required to comply with the rules for auditing of financial reports under the Corporations Act from 1 July 2013.

## Will my organisation's information be made public?

A key goal of the establishment of the ACNC is to increase the transparency of charities.

The ACNC will maintain a public register including extensive details about all registered entities. This will include:

- contact details for the entity;
- governing rules;
- annual information statements and financial reports;
- details of warnings or other enforcement action taken by the ACNC (and any responses of the entity to that action); and
- names and positions of directors or other responsible entities of the entity, but not other contact details.

During consultation on the ACNC legislation, concerns were raised as to the amount of information that would be made public on the register, particularly on behalf of private ancillary funds. In response, under the final legislation:

- contact details of directors will not be publicly accessible;
- the ACNC has a discretion to withhold or remove information from the register in certain circumstances; and
- regulations may be made to provide further exemptions from disclosure.

## Staying registered – complying with governance standards

As a condition of registration, your organisation must comply with governance standards which are to be set out in regulations. The governance standards may require your organisation:

- to have specified matters in its governing rules;
- to achieve specified outcomes and specify principles as to how your organisation is to achieve those outcomes;
- to establish and maintain processes for the purpose of ensuring specified matters.

The governance standards cannot include gag clauses that would prevent your organisation from commenting on or advocating for changes to law, policy or practice if the comment or advocacy furthers your organisation's purpose and is lawful.

These standards may mean that changes need to be made to your organisation's governing rules (such as its constitution, rules of association or trust deed) and to the way your organisation conducts itself (such as how and when it holds members' meetings). New standards to which your directors or other responsible entities need to perform their duties may also apply.

The exact terms and date of commencement of these governance standards are not yet known, but the Government must undertake public consultation with stakeholders before it makes the regulations. This consultation is expected to begin before the end of

2012. We expect that the standards will take the form of broad principles, rather than prescriptive requirements on how your organisation needs to be managed.

To coincide with the introduction of these standards regulated by the ACNC, a number of governance requirements and civil directors' duties in the Corporations Act will cease to apply to registered entities from 1 July 2013. These include:

- a director's civil duty to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise (section 180 of the Corporations Act);
- a director's civil duty to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose (section 181 of the Corporations Act);
- a director's civil duty to not improperly use their position or information gained as a director to gain an advantage or cause detriment to the corporation (sections 182 and 183 of the Corporations Act);
- provisions dealing with disclosure of and voting on matters involving material personal interests of directors (sections 191 to 194 of the Corporations Act); and
- provisions governing meetings of members (Part 2G.2 of the Corporations Act).

The fact that these provisions will cease to apply to ACNC registered entities suggests that the governance standards may be expected to cover similar requirements.

The regulations will also provide for "external conduct standards" with which registered entities must comply as a condition of registration. These are expected to cover foreign activities or dealings by registered entities, including anti-money laundering and counter-terrorism financing. Again, the terms of these standards are not yet known and the Government must

undertake public consultation with stakeholders before they can be made. The consultation is expected to begin before the end of 2012.

## Are directors and responsible entities directly liable for obligations?

In some circumstances, obligations and liabilities under the ACNC legislation are imposed directly on the directors, trustees or members of committees of management (described collectively as "responsible entities") of your organisation. These can vary depending upon the type of organisation.

In contrast to the position taken in earlier drafts, the legislation does not say that an offence under the legislation committed by a company or trust can also be taken to have been committed by the directors of the company or corporate trustee.

### *What if your organisation is unincorporated?*

All obligations that an unincorporated registered entity has under the ACNC legislation are also imposed on each individual who is a member of the committee of management of the entity (but may be discharged by any of those individuals) and any amounts payable under the legislation by the entity are also payable by the individuals. In certain circumstances, those individuals may also be taken to have committed any offences under the legislation that are committed by the organisation.

### *What if your organisation is a body corporate?*

If your organisation is a body corporate, its directors may be liable to pay amounts under the ACNC legislation that are payable by the organisation, but only if the amount is payable because of the director's deliberate act or omission involving dishonesty, gross negligence or recklessness.

This includes administrative penalties arising under the ACNC legislation for making false or misleading statements to the ACNC or failing to lodge documents on time.

### *What if you are or your organisation is a trustee?*

If your organisation is a trust, an obligation imposed on the trust under the ACNC legislation is imposed on each trustee and on each director of a corporate trustee of the trust (but may be discharged by any of those entities).

The exact scope of this obligation is not clear but it appears to be quite expansive. A similar provision in an earlier exposure draft of the legislation which applied to bodies corporate was subject to considerable criticism during consultation and was subsequently removed.

Directors of a corporate trustee are also personally liable to pay any amount that is payable by the trust, but only if the amount is payable by the trust because of a deliberate act or omission of the director involving dishonesty, gross negligence or recklessness.

To an extent, the higher obligations on directors of corporate trustees is consistent with the approach taken under the Corporations Act which makes directors personally liable for a corporate trustee's obligations in certain situations.

## What if your organisation is a religious charity?

Aspects of the ACNC legislation apply differently to "basic religious charities".

Basic religious charities are those charities which satisfy the following requirements:

- registered with the ACNC as having a purpose of advancing religion;
- not incorporated under the Corporations Act, the Corporations (Aboriginal and Torres Strait Islander)

Act 2006 or the State and Territory associations incorporation legislation;

- not deductible gift recipients (unless it is only a deductible gift recipient for the operation of one or more funds, authorities or institutions with a combined revenue of less than \$250,000);
- not reporting to the ACNC as part of a group; and
- not receiving grants from Australian government agencies of more than \$100,000.

The different treatments for such charities under the ACNC legislation include:

- not needing to comply with governance standards;
- not being required to give financial reports to the ACNC;
- not being subject to the ACNC's powers to remove or suspend responsible individuals.

Religious charities that are not "basic religious charities" will be treated under the ACNC legislation in the same way as other registered entities.

## Do I still need to comply with State/Territory-based requirements?

In a word, yes.

It is understood that the Government and the ACNC are in the process of negotiation with State and Territory NFP regulators to co-ordinate the approaches of those regulators with the ACNC, including reporting requirements under State and Territory associations incorporation and fundraising legislation.

Additionally, the ACNC has been given powers to accept statements, reports and other documents given to other Australian government agencies (including State and Territory authorities) as being information statements and financial reports for the purposes of the ACNC legislation.

To date, however, there have been limited public signs that any level of co-ordination has been achieved or in which circumstances the ACNC will exercise that power.

On 11 October 2012, South Australia became the first jurisdiction to announce its harmonisation with the ACNC. In particular, it will harmonise its reporting requirements with the ACNC and will also allow charities registered with the ACNC to conduct fundraising in South Australia. Legislation to achieve this has not yet been passed.

In Victoria, the Associations Incorporation Reform Act 2012 is proposed to come into effect on 26 November 2012. In some respects, this Act uses concepts harmonised to the ACNC legislation. For instance, the tiers of reporting requirements for incorporated associations use the same thresholds as for small, medium and large registered entities under the ACNC legislation. However, under this Victorian legislation, there otherwise remains a separate regulator and separate obligations.

Accordingly, until there are further developments, charities will need to continue to separately satisfy all State/Territory requirements imposed on them in addition to their ACNC reporting requirements.

## What powers does the ACNC have?

The ACNC has been given a broad range of enforcement powers, including powers to:

- investigate and gather information
- issue warnings
- direct registered entities to take or avoid taking particular actions
- accept enforceable undertakings
- suspend or remove responsible individuals (including trustees of trusts and directors of companies)

- impose penalties for false and misleading statements or failure to lodge required documents.

For constitutional reasons, most of these enforcement powers may only be used against "federally regulated entities", being constitutional corporations (trading, financial or foreign corporations over which the Commonwealth has legislative power under the Australian Constitution) or trusts where the only trustees are constitutional corporations.

It is not entirely clear from case law on the area that charitable bodies can be constitutional corporations. It should also not be assumed that your organisation is a constitutional corporation simply because it is established under the Corporations Act and registered with ASIC. Conversely, your organisation may be a constitutional corporation even if it is incorporated under State or Territory associations legislation, if it is a trading or financial corporation under the Constitution. The exact scope and efficacy of these powers are therefore yet to be tested.

The ACNC's other source of power to enforce the legislation is its ability to revoke the registration of a registered entity, with the resulting loss of access to tax concessions and other benefits available to charities under Commonwealth legislation. The ACNC taskforce has indicated that it will generally exercise this power as a last resort only. However, given the constitutional limitations on its other enforcement powers, the ability to revoke registrations may potentially be the only means by which the ACNC can effectively exercise control over some registered entities.

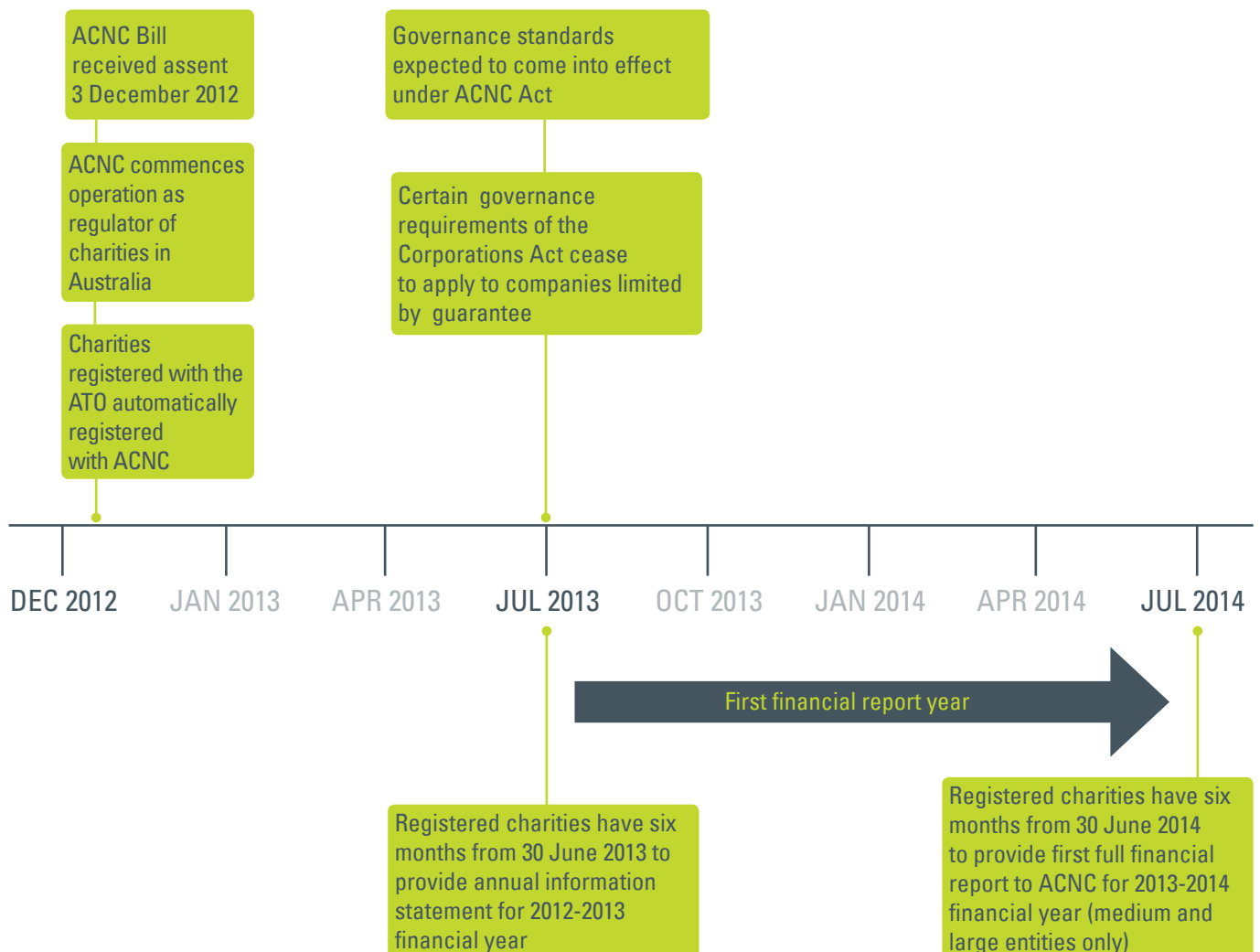
## What if I'm not a charity?

If your organisation is not a charity, it will not be affected by the establishment of the ACNC at this stage. For instance, if your organisation is a sports club or arts society, it will not need to report to the ACNC or comply with the ACNC's governance standards and may continue to self-assess its entitlement to access income tax exemption.

Similarly, if your organisation is a public or private ancillary fund that is not charitable under Commonwealth law (for example, because it makes donations to government-related bodies), it will also remain outside the ACNC's powers.

However, the Government has announced that it intends to enact a new definition of charity for Commonwealth purposes to apply from 1 July 2013. The new definition is not known but may mean that organisations that are currently not charities will become subject to the ACNC's regulation from that date.

## Timeline for the new ACNC regime



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