

45.3 Interpretation of governance standards

The governance standards in Subdivision 45-B of this Division must be interpreted in a manner that is consistent with the objects of the Act and the requirements of section 15-10 of the Act.

Subdivision 45-B—Governance standards

45.5 Governance standard 1—Purposes and not-for-profit nature of a registered entity

Object

- (1) The object of this governance standard is:
 - (a) to commit a registered entity, its members and its responsible entities to the registered entity's purposes; and
 - (b) to give the public, including members, donors, employees, volunteers and benefit recipients of the registered entity, confidence that the registered entity is acting to further its purposes.

Standard

- (2) A registered entity must:
 - (a) be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes and its character as a not-for-profit entity; and
 - (b) make information about its purposes available to the public, including members, donors, employees, volunteers and benefit recipients; and
 - (c) comply with its purposes and its character as a not-for-profit entity.

Note: Information in relation to the purposes of a registered entity would be available to the public if it appears on the Australian Charities and Not-for-profits Register or in an Australian law or is otherwise made available on request. Australian law could in 2022 be viewed on the Federal Register of Legislation website (www.legislation.gov.au) or on the AustLII website (<http://www.austlii.edu.au>).

45.10 Governance standard 2—Accountability to members

Object

- (1) The object of this governance standard is to ensure the accountability and transparency of a registered entity to its members.

Standard

- (2) A registered entity that has members must take reasonable steps to ensure that:
 - (a) the registered entity is accountable to its members; and
 - (b) the registered entity's members have an adequate opportunity to raise concerns about the governance of the registered entity.

Note 1: The steps that a registered entity may take to ensure that it is accountable to its members could include:

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- (a) holding annual general meetings; and
- (b) providing members with an annual report (including financial information and achievements towards its purpose); and
- (c) providing for elections for its responsible entities.

Note 2: The steps that a registered entity may take to ensure its members have an adequate opportunity to raise concerns could include:

- (a) holding an annual general meeting with a question and answer session; and
- (b) providing an opportunity for members to propose resolutions and to vote upon those resolutions.

Note 3: When taking the reasonable steps required by governance standard 2, regard must be had to requirements of the governing rules of the registered entity, to the extent that those governing rules include appropriate accountability mechanisms. If those governing rules include appropriate accountability mechanisms, compliance with those rules would demonstrate compliance with governance standard 2.

Note 4: Subdivision 60-C of the Act sets out rules about the preparation of annual financial reports.

45.15 Governance standard 3—Compliance with Australian laws

Object

- (1) The object of this governance standard is to give the public (including members, donors, employees, volunteers and benefit recipients of a registered entity) trust and confidence that a registered entity is governed in a way that ensures its ongoing operations and the safety of its assets, through compliance with Australian laws (including preventing the misuse of its assets).

Note: Compliance with Australian laws sets a minimum benchmark by which all entities should govern themselves. A failure by a registered entity to comply with an Australian law puts the public (including members, donors, employees, volunteers and benefit recipients of the registered entity) at risk and, therefore, governance standard 3 allows the Commissioner to take a proportionate approach to:

- (a) protect public trust and confidence; and
- (b) protect the assets of the registered entity; and
- (c) ensure that the registered entity continues to operate in a manner that is sustainable and consistent with its purposes.

Standard

- (2) A registered entity must not engage in conduct, or omit to engage in conduct, if the conduct or omission may be dealt with:
 - (a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or
 - (b) by way of a civil penalty of 60 penalty units or more.

Note 1: See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.

Note 2: Governance standard 3 does not extend Australian law to overseas jurisdictions. An Australian law may already extend to an overseas jurisdiction by other means.

Note 3: While a registered entity must comply with all Australian laws, a serious infringement of an Australian law covered by governance standard 3 may allow the Commissioner to exercise their enforcement powers under Part 4-2 of the Act, following consideration of the matters mentioned in subsection 35-10(2) of the Act.

45.20 Governance standard 4—Suitability of responsible entities

Object

- (1) The object of this governance standard is to maintain, protect and enhance public trust and confidence in the governance and operation of a registered entity.

Standard

- (2) A registered entity must:
- (a) take reasonable steps to ensure that each of its responsible entities meet the conditions mentioned in subsection (3); and
 - (b) after taking those steps:
 - (i) be, and remain, satisfied that each responsible entity meets the conditions; or
 - (ii) if it is unable to be, or remain, satisfied that a responsible entity meets the conditions, take reasonable steps to remove that entity.

Note 1: Other Australian laws may require responsible entities to be replaced, if removed, because a registered entity may need to have a minimum number of responsible entities.

Note 2: The reasonable steps required of a registered entity may include:

- (a) obtaining declarations from responsible entities and searching public registers on appointment; and
- (b) obtaining a commitment from a responsible entity that, if its circumstances change, it will advise the registered entity.

- (3) Subject to subsection (5), the conditions for each responsible entity are that:
- (a) it is not disqualified from managing a corporation, within the meaning of the *Corporations Act 2001*; and
 - (b) it is not disqualified by the Commissioner, at any time during the preceding 12 months, from being a responsible entity of a registered entity under subsection (4).

Note: Other Australian laws may place other limitations on who may be the responsible entity of a registered entity, or a particular type of registered entity.

- (4) The Commissioner may disqualify an entity from being eligible to be a responsible entity for the purpose of this governance standard if:
- (a) the entity has been previously suspended, or removed, under Division 100 of the Act as a responsible entity of a registered entity; and
 - (b) the entity has been given notice of its disqualification by the Commissioner; and
 - (c) the Commissioner reasonably believes that the disqualification is justified having regard to the objects of the Act.

Note 1: The secrecy provisions in Part 7-1 of the Act prohibit ACNC officers (including the Commissioner) from disclosing protected ACNC information unless the disclosure is authorised by the Act. This prohibits the ACNC from disclosing information about ongoing investigations about particular responsible entities that may be subject to compliance with governance standard 4.

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Note 2: The effect of a disqualification lasts for no longer than 12 months from the day a notice is issued by the Commissioner (see paragraph (3)(b)).

- (5) Despite subsection (3), the Commissioner may allow an individual to be a responsible entity for a particular registered entity if the Commissioner believes it is reasonable to do so in the circumstances.
- (6) An entity that is dissatisfied with a decision of the Commissioner to disqualify the entity under subsection (4) may object to the decision in the manner set out in Part 7-2 of the Act.

45.25 Governance standard 5—Duties of responsible entities

Object

- (1) The object of this governance standard is:
 - (a) to ensure that the responsible entities of a registered entity conduct themselves in the manner that would be necessary if:
 - (i) the relationship between them and the entity were a fiduciary relationship; and
 - (ii) they were obliged to satisfy minimum standards of behaviour consistent with that relationship; and
 - (b) to give the public, including members, donors, employees, volunteers and benefit recipients of a registered entity, confidence that the registered entity:
 - (i) is acting to prevent non-compliance with the duties imposed on responsible entities; and
 - (iii) if non-compliance with the duties imposed on responsible entities occurs—will act to identify and remedy non-compliance with the duties imposed on the entity.

Standard

- (2) A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:
 - (a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;
 - (b) to act in good faith in the registered entity's best interests, and to further the purposes of the registered entity;
 - (c) not to misuse the responsible entity's position;
 - (d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
 - (e) to disclose perceived or actual material conflicts of interest of the responsible entity;

Note: A perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

- (f) to ensure that the registered entity's financial affairs are managed in a responsible manner;
- (g) not to allow the registered entity to operate while insolvent.

Note 1: Governance standard 5 sets out some of the more significant duties of responsible entities. Other duties are imposed by other Australian laws, including the principles and rules of the common law and equity.

Note 2: Some of the duties imposed by other Australian laws may require a responsible entity to exercise its powers and discharge its duties to a higher standard.

Note 3: For the purposes of paragraph (f), ensuring that the registered entity's financial affairs are managed in a responsible manner includes putting in place appropriate and tailored financial systems and procedures.

The systems and procedures for a particular registered entity should be developed having regard to the registered entity's size and circumstances and the complexity of its financial affairs.

The systems and procedures may include:

- (a) procedures relating to spending funds (for example, the approval of expenditure or the signing of cheques); and
 - (b) having insurance that is appropriate for the registered entity's requirements.
- (3) For the purposes of paragraph (2)(e), a perceived or actual material conflict of interest must be disclosed:
- (a) if the responsible entity is a director of the registered entity—to the other directors (if any); or
 - (b) if the registered entity is a trust, and the responsible entity is a director of a trustee of the registered entity—to the other directors (if any); or
 - (c) if the registered entity is a company—to the members of the registered entity; or
 - (d) in any other case—unless the Commissioner provides otherwise, to the Commissioner, in the approved form.

Note 1: **Company** is defined in section 205-10 of the Act to include a body corporate or any unincorporated association or body of persons (but not a partnership).

Note 2: Paragraph (c) applies in situations where paragraph (a) cannot apply, for example, if there is only one director or all the directors have a similar conflict.

Note 3: Part 7-6 of the Act provides for the approval of forms.

Note 4: A responsible entity may disclose a conflict of interest in the form of a standing notice with ongoing effect.

- (4) If the responsible entity's conduct is consistent with Subdivision 45-C, the responsible entity is taken to have complied with the duties mentioned in subsection (2).

- (5) In this section:

insolvent has the same meaning as in the *Corporations Act 2001*.

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45.30 Governance standard 6—Maintaining and enhancing public trust and confidence in the Australian not-for-profit sector

Object

- (1) The object of this governance standard is to maintain and enhance public trust and confidence in the Australian not-for-profit sector by ensuring that a registered entity's governance enables it to be accountable for its past conduct relating to institutional child sexual abuse.

Standard

- (2) A registered entity must take reasonable steps to become a participating non-government institution if the entity is, or is likely to be, identified as being involved in the sexual abuse of a person:
 - (a) in an application for redress made under section 19 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* before, on or after the day this section commences; or
 - (b) in information given in response to a request made under section 24 or 25 of that Act in relation to such an application.

Note 1: The reasonable steps that a registered entity could take include agreeing to participate in the National Redress Scheme for Institutional Child Sexual Abuse (the **Redress Scheme**) for the purposes of paragraph 115(3)(c) of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

Note 2: Once a registered entity has become a participating non-government institution, the entity is subject to the Redress Scheme.

- (3) For the purposes of subsection (2), it does not matter whether the application is valid.

Subdivision 45-C—Protections under governance standard 5

45.100 Reasonable steps taken to ensure compliance with duties

If a responsible entity meets a protection mentioned in this Subdivision, the registered entity is taken to have taken all reasonable steps to ensure that its responsible entities have complied with the duties set out in section 45.25.

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- (1) A responsible entity meets this protection if the responsible entity, in the exercise of the responsible entity's duties, relies on information, including professional or expert advice, in good faith, and after the responsible entity has made an independent assessment of the information, if that information has been given by:
 - (a) an employee of the registered entity that the responsible entity believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or