

Charities: Understanding & applying the new External Conduct Standards

Corney & Lind Panel

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Purpose of ECS – Division 50 (ACNC Act)

50-5 Object of this Division

- of
- (1) *The object of this Division is to give the public (including donors, members and volunteers of registered entities) confidence that:*
 - (a) *funds sent outside Australia by registered entities:*
 - (i) *are reaching legitimate beneficiaries; and*
 - (ii) *are being used for legitimate purposes; and*
 - (iii) *are not contributing to terrorist, or other criminal, activities; and*
 - (b) *activities engaged in outside Australia by registered entities are not contributing to terrorist, or other criminal, activities.*
 - (2) *This Division achieves that object by setting up a system to allow the regulations to specify standards:*
 - (a) *with which an entity must comply in order to become registered under this Act, and to remain entitled to be registered under this Act; and*
 - (b) *regulating funds sent outside Australia by registered entities, and activities engaged in outside Australia by registered entities.*

External Conduct Standards

Australian Charities and Not-for-profits Commission Amendment (2018 Measures No. 2) Regulations 2018 (Cth) amended the Australian Charities And Not-for-profits Commission Regulation 2018 (Cth) to add (the “Regulations”):

- Two ECSs on **public accountability** and **financial matters**; and
- Two ECSs on **conduct outside of Australia**.

Ensures charities meet appropriate standards of governance and behaviour when operating outside of Australia and assists Australia to adhere to obligations under international treaties.

ECS Commenced: 23 July 2019

ECS apply to all charities even apply to BRC's

50-10 External conduct standards

*(1) The regulations may specify standards (the **external conduct standards**) with which an entity must comply in order to become registered under this Act, and to remain entitled to be registered under this Act.*

The carve out that exists for BRCs in respect of the Governance Standards (s45-10(5) ACNC Act) does not apply in respect of the ECSs.

Overview

Australian Charities and Not-for-profits Commission Amendment (2018 Measures No. 2) Regulations 2018, s 50.1 → Steps and actions required by a registered charity to comply with the ECS will depend on:

- Its size;
- The sources of its funding;
- Whether it works directly overseas or gives money to other organisations located overseas;
- The nature of its activities;
- The overarching purpose that the Standards are set up to achieve;
- Technical matters the ACNC Commissioner needs to consider when they are exercising their powers as listed in section 15-10 of the ACNC Act.

Application

Each of the External Conduct Standards has this pre cursor provision:

Application

(2) This standard applies to a registered entity that is:

- (a) operating outside Australia; or*
- (b) working with third parties that are operating outside Australia.*

Regulation 50.4 Application – Operating outside Australia

- (1) *For the purposes of this Division, a registered entity, or a third party, operates outside Australia if it **operates outside Australia in whole or in part.***

- (2) *However, a registered entity does **not operate outside Australia only** because it carries out activities outside Australia (including providing funds to be used outside Australia) that are directly related to the pursuit of the registered entity's purposes in Australia and merely incidental to its operations in Australia.*

Operating outside Australia

Exempt from ECS	<u>Incidental activity</u> outside Australia <u>directly related to</u> (front line) purpose delivery in Australia
Caught by ECS	<u>Any (front line) purpose delivery outside Australia</u> (including inside Australia activity directly related to outside Australia purpose delivery)

EM – Example 2—Directly related to purposes and incidental to operations in Australia

A registered entity is set up in Australia to help homeless Australians. The entity acquires supplies, such as blankets, from overseas providers who are third parties of the registered entity. The activities are directly related to the registered entity's purposes in Australia. The activities are also incidental when compared to the entity's operations in Australia because purchase of blankets under the arrangement is incidental to helping homeless Australians, in the sense that it is a factor used in that service.

EM – Example 4—Not directly related but incidental to operations in Australia

A registered entity which is a church asks for collections in Australia for the purpose of sending the funds overseas to contribute to foreign disaster relief. The registered entity gives the small amount of funds raised to an overseas church, which is not a registered entity. Because the amount of money raised is small when compared to the church's overall collections and donations to other organisations and causes in Australia, the incidental element is satisfied. However, because the funds are sent to an overseas church for a foreign purpose, it is not directly related to the pursuit of the registered entity's purposes in Australia. As the activities are not directly related to the pursuit of its purposes in Australia, the entity has obligations under the standards.

Third Parties – very broadly defined

THIRD PARTY (Rg 4): *Means an entity that the charity **formally or informally collaborates with** to advance that charity’s charitable purpose, and include entities with which the charity has:*

- *a membership, association or alliance; or*
- *an “arrangement”.*

Note: “entity” includes an individual.

EXCEPTION: Where the third party is itself a registered charity with the ACNC.

ECS 1 (Reg 50.20)

Topic: Activities overseas and control of resources overseas

Purpose: To give the public confidence that a charity is governed in such a way that it remains solvent, minimises risks to assets, ensures the charity and its resources are furthering its charitable purposes, and operates in a manner consistent with its purpose and character as a not-for-profit entity (Reg 50.20(1)).

ECS 1

Reg 50.20(3) → A [charity] must:

- a) **take reasonable steps** to ensure that its activities outside Australia are carried out in a way that is consistent with its purpose and character as a not-for-profit entity;
- b) **maintain reasonable internal control procedures** to ensure that resources (including funds) are used outside Australia in a way that is consistent with its purpose and character as a not-for-profit entity; and
- c) **take reasonable steps** to ensure that the resources (including funds) **given to third parties** outside Australia (or within Australia for use outside Australia) are applied:
 - i. in accordance with the entity's purpose and character as a not-for-profit entity; and
 - ii. with **reasonable controls and risk management processes** in place.

ECS 1

Reg 50.20(4) → A charity must comply, in relation to its activities outside of Australia, with Australian laws relating to any of the following:

- a) Money laundering;
- b) The financing of terrorism;
- c) Sexual offences against children;
- d) Slavery and slavery-like conditions;
- e) Trafficking in individuals and debt bondage;
- f) People smuggling;
- g) International sanctions;
- h) Taxation; and
- i) Bribery

Reg 50.20(5) → A charity must **maintain reasonable internal control procedures** to ensure compliance.

ECS 1 – Practical tips for compliance

First, guidance on complying with the **second part of ECS 1 (Reg 50.20(4))**:

- Keep a list of Australian laws (and the requirements of the laws) affecting a charity's overseas activities;
- Periodically review list to ensure legal obligations are factored into plans for projects and activities;
- Have regulatory obligations as a standing meeting Agenda item (monitor changes); and
- Maintain a register of completed and outstanding compliance activities (review regularly).

Source: <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards/external-conduct>

ECS 1 – Second Part

Examples of Australian Laws relating to the matters in ECS 1 (Reg 50.20(4)).

- *Anti-money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
- *Criminal Code Act 1995* (Cth)
- *Crimes (Currency) Act 1981* (Cth)
- *Crimes (Overseas) Act 1964* (Cth)
- *Modern Slavery Act 2018* (Cth)
- *Migration Act 1958* (Cth)
- *Charter of the United Nations Act 1945* (Cth)
- *Autonomous Sanctions Act 2011* (Cth)
- *Customs Act 1901* (Cth)
- *Taxation Administration Act 1953* (Cth)
- *Income Tax Assessment Act 1936* (Cth)
- *Income Tax Assessment Act 1997* (Cth)
- *Fringe Benefits Tax Assessment Act 1986* (Cth)
- *A New Tax System (Good and Services Tax) Act 1999* (Cth)

ECS 1 – Practical tips for Compliance

Back to the first part of ECS 1 (Reg 50.20(3)). A charity must ensure:

- Activities carried out overseas are conducted in accordance with charitable purpose and not-for-profit character (“take reasonable steps”);
- Resources sent overseas are used in accordance with charitable purpose and not-for-profit character (“maintain reasonable internal control procedures”);
- Resources sent to third parties overseas, or for use overseas, are applied in accordance with charitable purpose and not-for-profit character (“take reasonable steps” and “with reasonable controls and risk management processes in place”).

ECS 1

Guidance on Reasonable steps – consider:

- the nature, scale and complexity of its overseas activities or funding
- the locations in which it operates (according to risk profile – North Korea, or Iran)
- its work with third parties (such as the number involved)
- its size and the number of staff and volunteers it has
- its level of knowledge and experience in managing similar projects or activities
- the effectiveness of current policies and procedures that govern its activities or funding
- any issues or difficulties it has experienced with previous overseas activities or funding

Source:

<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards/external-conduct>

Practical Implementation of ECS 1

Guidance on complying with the **first part of ECS 1 (Reg 50.20(3))**:

- Ensure all overseas activities and funding requests are properly approved internally (by more than a single person);
- Have clear policies outlining the approval process, and keep records of decisions;
- Use secure, monitored services when transferring funds – for example, formal banking systems – and ask recipients to confirm receipt of the funds or otherwise make enquiries;
- Check the reputation and experience of third parties (to determine suitability and values);
- Make sure third parties have appropriate management policies and procedures;
- Written agreements with third parties (outline reporting obligations of the third party);

Practical Implementation of ECS 1

- Thorough recruitment procedures for staff and volunteers (background checks);
- Monitor and inspect (if larger) overseas projects regularly and systematically, including those undertaken by third parties;
- Establish procedures to seek to detect wrongdoing (review transaction records against approved funding levels);
- Establish a process that allows people to report suspected wrongdoing (without fear, recrimination or disadvantage);
- Keep a register of charity equipment (ensure secure storage) and monitor its use (especially the movement of money);
- Monitor the continued eligibility of the charity's beneficiaries.

Practical Implementation of ECS 1

In the event of wrongdoing:

- Prevent or minimise any further loss or damage;
- Report the incident to the responsible authority (for example, the police) if required;
- Plan any statements to the media, the public or its own staff and volunteers;
- Update its risk management plan and take reasonable steps to prevent the incident from re-occurring.

Source: <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards/external-conduct>

Consider:

- Cutting off further funding if a third party is in breach;
- Does the requirement extend to taking legal action for non-compliance?
Compliance may require more than reasonable controls and risk management.

ECS 1 - Third Party Compliance

What are “reasonable steps” to ensure that resources (including funds) given to third parties outside Australia, or for use outside Australia, are applied:

- consistently with charitable purpose; and
- with reasonable controls and risk management processes.

ECS 2 (Reg 50.25)

Topic: Annual review of overseas activities and record-keeping

Purpose: To ensure transparency and accountability to the Australian public with regards to the charity's overseas activities.

ECS 2

Standard

*(3) The registered entity must **obtain and keep** records necessary to prepare a summary of its activities outside Australia on a country by country basis for each financial year during which it:*

- (a) operates outside Australia; or*
- (b) gives resources (including funds) to third parties outside Australia (or within Australia for use outside Australia).*

ECS 2 – The “benign” SLEEPER

Consequences of breach of the External Conduct Standards

Failure to record keep may be a sleeper (for charities of all kinds)

We do know about revocation of Charity status retrospectively for non-compliance with the record-keeping obligation in Part 3-2 of the ACNC Act. See: *Fenn v ABC* [2018] VSC 60 (16 February 2018) and subsequent appeal in a defamation case.

The EC Standards of course also have record keeping obligations and non-compliance is “black-letter” and may provide a basis for regulatory action (when there are broader concerns in relation to the charity).

Fenn v ABC

... the matters asserted in the following published pleadings in an unreported judgement on the pleadings appeal to the Court of Appeal do not seem to be contested:

- *On 3 December 2012, Ethan was registered as a charity on the charity register of the ACNC.*
- *The ACNC Act and the ACNC Regulations prescribe governance standards that entities registered with ACNC ('charities') are required to meet ('the ACNC **Governance Standards**):*
Part 3-2 (section 55.5);

Fenn v ABC

The ACNC launched an investigation into the activities and operations of Ethan and assessed Ethan's eligibility for registration as a charity and its compliance with the ACNC Governance Standards.

The ACNC's investigation revealed that Ethan had failed to comply with its obligations under Part 3–2 of the ACNC Act with respect to record keeping over two consecutive lodgement years.

*Following its investigation into Ethan, on 25 July 2016, **the ACNC revoked Ethan's charitable status and backdated the revocation to 1 July 2013.***

ECS 3 (Reg 50.30)

Topic: Anti-fraud and anti-corruption

Purpose: Same as ECS 1 → engendering public confidence.

ECS 3

Standard

(3) *The registered entity must take **reasonable steps** to:*

- (a) ***minimise any risk** of corruption, fraud, bribery or other financial impropriety by its responsible entities, employees, volunteers and third parties outside Australia; and*
- (b) ***identify and document** any perceived or actual material conflicts of interest for their employees, volunteers, third parties and responsible entities outside Australia.*

Note: *A responsible entity of a registered entity must also disclose all material conflicts of interest as one of their duties under governance standard 5—see section 45.25.*

ECS 3 & Conflicts of Interest

- *Identity and document conflicts of interest*
- *Higher requirement than the Governance Standards*
- *Again this is a “black-letter” requirement. The ACNC could issue a notice - consider how you have documented conflicts of interest in compliance with ECS 3.*

Sample – CONFLICTS REGISTER

Parties' Names/ Governor	Description of matters giving rise to the conflict	Who has been notified of the conflict?	Disclosure Date	Actions by the Board in dealing with the conflict	Actions by the conflicted Governor to address conflict
#	#	#	#	#	#

Practical Implementation of ECS 3

- Implementing a clear conflicts of interest policy AND CONFLICTS REGISTER.
- Having clear policies and adequate controls for proper and ethical financial management;
- Ensuring staff, volunteers and others that work with the charity are familiar with the policies and controls;
- Establishing thorough and appropriate recruitment procedures for staff and volunteers;
- Supervising all staff involved in fundraising, managing money or financial reporting;
- Having a way for staff, volunteers and others that work with the charity to report suspected wrongdoing;

Third Parties - Practical Implementation of ECS 3

- Requiring third parties to report any conflicts;
- The Australian charity needs to document the conflicts (even in relation to third parties);
- Addressing any conflicts of interest when selecting third parties;
- Requiring third parties to provide evidence that policies and procedures are being followed;
- Thoroughly checking a third party's reputation and experience;
- Making ethical conduct and good financial oversight key criterion when selecting partners; and
- Ensuring there is a clear written agreement with each third party.

ECS 4 (Reg 50.35)

Topic: Protection of vulnerable individuals

Purpose: To protect vulnerable individuals outside Australia from exploitation and abuse.

ECS 4

Standard

- (3) *The registered entity must take reasonable steps to ensure the safety of vulnerable individuals outside Australia to the extent that those individuals are being provided with services, or accessing benefits, under programs provided by:*
- (a) the registered entity; or*
 - (b) a third party in collaboration with the registered entity.*
- (4) *The registered entity must take reasonable steps to ensure the safety of vulnerable individuals outside Australia to the extent that those individuals are engaged by:*
- (a) the registered entity; or*
 - (b) a third party in collaboration with the registered entity;
to provide services or benefits on behalf of the registered entity or the third party.*

ECS 4 – A higher test of “reasonableness”

A charity must take reasonable steps to **ensure the safety** of vulnerable individuals.

Note that this Standard does not use the language of “minimise risk” as we see in the previous External Conduct Standards – “ensuring the safety” imposes a higher bar.

What is reasonable will depend on the circumstances:

- A larger charity may involve having policy documents and specific employee/volunteer training;
- A smaller charity may only need to investigate and deal with complaints on an ad hoc basis.

What is reasonable will also depend on the level of risk posed to vulnerable individuals.

ECS 4

A charity should consider these additional factors when determining what “reasonable steps” to take under ECS 4:

- the nature and degree of the vulnerability of the people it works with;
- its level of knowledge, and how experienced its people are in working with vulnerable people;
- the working and living conditions of staff and volunteers overseas;
- how disasters or conflict could affect the vulnerability of people in the area;
- and
- cultural issues and local practices.

Practical Implementation of ECS 4

- Developing a policy that commits the charity's staff, volunteers, third parties and visitors to protecting vulnerable individuals;
- Developing a code of conduct;
- Ensuring staff, volunteers and visitors are aware that they must report suspected abuse within the charity;
- Ensuring the privacy of vulnerable people is always protected;
- Establishing thorough staff and volunteer recruitment processes;

Practical Implementation of ECS 4

- Ensuring staff and volunteers are suitably qualified in safeguarding vulnerable people;
- Having a procedure for confidential complaints that is accessible for all vulnerable persons, staff, volunteers and third parties – how complaints should be reported, documented and acted on;
- Ensuring staff and volunteers working overseas have access to suitable housing, food, insurance, medical services and communications; and
- Thoroughly checking the legal status, reputation and procedures of third parties (more on this later).

Church missionaries

- Churches → Overseas-based missionaries.
- Regardless of whether the bank account is based in Australia or overseas, if those funds will be applied overseas (i.e. missionary living costs), **then they will be caught.**
- **Consider a Missionary/Spiritual Appointee agreement:**
 - Set out duties, expectations and accountability measures.
 - Require current Blue Card and compliance with Church's child protection policy.
 - Reporting requirements (activities and expenditure).

Third Parties

Many Australian charities' sole activities are fundraising in Australia - with those funds then being sent to an overseas-based charity who either:

- Directly applies those funds to front-line charitable services in the destination country:

Charity → Third Party (two-party supply chain)

OR

- On-sends the funds to other parties who then carry out the front-line charitable services:

Charity → Third party → Fourth Party (three-party supply chain)

How do the ECS apply to these arrangements?

Third Parties

Two party supply chain:

The Australian charity must comply with the ECS in respect of:

- Its own activities overseas; AND
- the transfer of funds to the third party; AND
- the third party's use and distribution of those funds.

Three (or more) party supply chain:

The Australian charity must comply with the ECS for:

- Its own activities overseas; AND
- The transfer of funds to the third party; AND
- the activities of the third party; AND
- the activities of other organisations that the third party works with to deliver front-line charitable services.

Practical Application - MOUs

To manage the intersect between the requirements of the ECS and working with third parties, consider a Memorandum of Understanding between the main charity and the third party.

Each project and third party will be different, **and a cookie-cutter MOU won't be sufficient for every case.**

Practical Application – ECS 1 – elements for MOU’s

MOU Inclusions (non-exhaustive)

Require overseas parties to apply Australian charity’s funds/resources in a manner consistent with the Australian charity’s charitable purposes

Require covenants from the overseas parties that they will comply with Australian laws RE “illegitimate activities”

Require overseas parties to provide specific information to the Australian charity at regular set intervals RE risk management, finances, business plans and policies and procedures

Require agreement from overseas parties that the Australian charity may send representatives to inspect books, records, facilities and activities of the overseas parties AND that the overseas parties will co-operate in this respect.

Practical Application – ECS 2 – elements for MOU's

MOU inclusion (non-exhaustive)

Require overseas parties to report back at regular set intervals RE specific activities and projects to which Australian charity resources were applied (on country-by-country basis and a project-by-project basis)

Practical Application – ECS 3 – elements for MOU's

MOU inclusion (non-exhaustive)

Require overseas parties to undertake that they will advise the Australian charity of any conflicts of interest as soon as they become aware of the conflict.

Practical Application – ECS 4 – elements for MOU's

MOU inclusion (non-exhaustive)

Require overseas parties to take reasonable steps to satisfy themselves that they can and will ensure safety of their beneficiaries, employees and volunteers AND require those parties to provide evidence of how they are doing so.

Other Things to Note

- **ACNC Guidance on ECS**
- **Breaches:** ACNC has usual enforcement powers for all charities (not replacing responsible persons for BRC's)
- **Self reporting:** Charities are technically required to self-report on significant non-compliance with the ECS (which would result in the charity no longer being entitled to be registered as a charity) – s65 ACNC Act
- **Key difference between the ECS and the ACNC Governance Standards:** ECS also apply to Basic Religious Charities

QUESTIONS?

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