

SUBMISSION TO THE NOT-FOR-PROFIT SECTOR TAX CONCESSION WORKING GROUP

Response to the Discussion Paper: *Fairer, simpler and more effective tax concessions for the not-for-profit sector* (November 2012)

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December 17th, 2012

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THE REFORM PROCESS: RESPONSES TO DGR OPTIONS PUT FORWARD IN THE NFPSTCWG DISCUSSION PAPER

INTRODUCTION

Of the approximately 2,500 Indigenous corporations registered with the Office of the Registrar of Indigenous Corporations (ORIC), 577 are listed as charities (ACNC website) and about 1,800 are NFPs. In addition estimates suggest that there are at least another 2,500 Indigenous organisations registered under other incorporation regimes (the Australian Securities and Investment Commission and state or territory), however, it is not known how many of these are charities or NFPs. Also the Australian Government's *Strategic Review of Indigenous Expenditure* (2010) indicated that almost half of the commonwealth's overall budget for Indigenous services was being handed directly to more than 9,000 organisations with a responsibility for delivering some 232 Indigenous-specific programs and mainstream programs with provisions specific to the Indigenous community. This means that, given the numbers above, there are about 4,000 mainstream agencies delivering services to the Indigenous community.

For the purposes of this submission the same essential criterion for identifying an "Indigenous corporation" under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act), namely, that while the CATSI Act allows an Indigenous organisation non-Indigenous members, a majority of members (and directors) must be Indigenous, is used here to identify an Indigenous organisation or entity. That is, it must be Indigenous controlled – "the CATSI Act test".

While the ATO registers regarding the different DGR categories (eg, PBIs and health promotion charities) have not yet been researched, it is noted, however, that with regard to the registers of environmental, cultural and harm prevention charitable institutions maintained by the respective federal agencies, Indigenous charitable organisations are grossly under represented. Of the 583 environmental organisations listed in the Register of Environmental Organisations (Australian Government 2006, and as at 17 August 2011) only three are Indigenous. All three are based in the Northern Territory. However, the Australian Government Working on Country program supports over 80 Indigenous ranger organisations, employing more than 600 rangers, that could possibly qualify for Environmental DGR status. Of the 1343 organisations listed in the Register of Cultural Organisations maintained by the Office of the Arts of the Department of the Prime Minister and Cabinet (Australian Government 2008, and as at February 2011), only some 34 are Indigenous (although this number needs further verification). There appears to be no Indigenous cultural organisations in the ACT and Tasmania. Only in the Northern Territory are Indigenous cultural organisations well-represented with 7 of the 31 being Indigenous. In Queensland, of the total of 186 cultural organisations listed, only 8 are Indigenous. With regard to the Register of Harm Prevention Charitable Institutions – Deductible Gift Register, as at 29 August 2012, 61 organisations are listed none of which are Indigenous. While the Jawun Fund, named in the register, is specifically established to serve the Indigenous community, it fails the CATSI Act test, and other organisations, like the Gunawirra Public Fund, may also be involved with providing support and services to

Indigenous communities and organisations and have Indigenous (minority) membership on their governing bodies. Given that this register and its application processes are the responsibility of the federal Department of Families, Housing, Community Services and Indigenous Affairs and the high rates of suicide, self-harm, alcohol and substance abuse among Indigenous communities particularly in remote areas – it is somewhat perplexing that there are no harm prevention Indigenous organisations appearing on this register.

The difficulties experienced by Indigenous organisations in applying for DGR endorsement irrespective of category have only recently been identified. In the *Australian Indigenous Guide to Philanthropy* (VACCHO 2004:20) it was stated that among the difficulties faced by Indigenous organisations when attempting to obtain DGR status “tax deductibility is often the biggest hurdle for Indigenous organisations.” More recently, Macdougall and Lyons (2008:1) noted that:

Indigenous organisations encounter barriers to obtaining philanthropic funding partially due to the lack of DGR status. Indigenous organisations often work with a broad mandate and address numerous issues in their communities, including education, health, abuse, unemployment, cultural education, suicide and substance abuse. Indigenous organisations typically try to deal with issues in their community by tackling causes and taking a holistic approach, to build the community. Obtaining DGR endorsement is difficult if the organisation has broad activities as it does not neatly fit within one category of DGR.

For example, with regard to mandatory constitutional requirements of environmental organisations, the principal purpose must be the protection of the natural environment. The term “natural” to describe “environment” is used to make a distinction between the natural environment and other types of environments, for example, built, cultural and historic environments. The natural environment would exclude, for example, cultural sites and heritage properties (Australian Government, 2006:9). This renders most Indigenous ranger services and “caring for country” organisations ineligible because the objects of their constitutions/rules of incorporation, in keeping with their holistic approach to culture and country, generally include cultural, as well as a range of other purposes, and thus are too broad to satisfy the criteria for an environmental DGR organisation. A similar situation confronts most Indigenous organisation seeking cultural DGR status.

Sharron Williams, Chairperson of the SNAICC Gift Fund Committee also points out in *SNAICC’s Guide to Applying for Deductible Gift Recipient Status (and surviving!)* that:

When SNAICC began its DGR journey, it soon became clear that the application involved far more time, resources and work than we had initially anticipated. What we also found was that the hurdle appeared that much higher because information was complex or hard to find, and it was often hard to know where to go for help and support (SNAICC 2012:5).

SNAICC’s application for DGR endorsement as a Public Benevolent Institution took two years “as it was a particularly complex application” (p.9).

The difficulties generally faced by Indigenous organisations seeking DGR endorsement are acknowledged in paras 57-58 of the NFPSTCWG’s Discussion Paper.

1. Responses to options put forward in Chapter 2 of the NFPSTCWG Discussion Paper (November 2012)

Option 2.1: extending DGR status to all charities (All charities would be eligible for endorsement [by the ATO] as a DGR entity).

This option is supported. It would simply make it far easier for Indigenous organisations to gain DGR status and should, depending on the regulatory fine print, eliminate many of the difficulties (such as the narrow criteria governing the current different DGR categories) experienced to date.

Option 2.2: extending DGR status to most charities (All charities, except for charities that are primary and secondary education providers; charitable child care providers and entities established for the advancement of religion, would be eligible for endorsement as a DGR entity).

This option is not supported. Within this option, we are particularly concerned about entities that are “charitable child care providers”. There needs to be a distinction between those entities that are “child minders” and those that are “child carers”. The former would cover, for example, crèches and kindergartens. The latter would include the many Indigenous child care services located around the country and for whom the Secretariat of National Aboriginal and Torres Strait Islander Child Care – SNAICC – serves as a peak advocacy and support body. These Indigenous child care agencies are more broadly concerned with an holistic approach to the care of Indigenous children (which includes, education, foster-care, family re-unification, support for children at risk, health advice, etc.), and as such, like SNAICC could qualify as PBIs under the current DGR framework. The arguments presented in para. 76 of the Discussion Paper would not appear to apply to entities like the Indigenous child care agencies.

Option 2.3: establishing endorsement conditions relating to the scope of charitable activities (All charities will be endorsed with restrictions on the scope of activities an entity can use DGR funds to finance).

This option is not supported. Concern here is focused on limiting the scope of activities for which an entity can use its DGR funds (ref. para. 81). With regard to Indigenous charitable entities, there is a need to preserve an holistic approach to the scope of activities that they can undertake. Even if an Indigenous entity is established for a principal purpose, for example, the preservation and maintenance of Indigenous languages, the objects of the constitution/rules usually stipulate a range of other activities/purposes as means to other ends, such as the promotion/building of self-esteem, building cultural pride (with a further end-goal of limiting self-harm, etc).

Option 2.4: implementing a tax offset mechanism for gifts (Donors would receive a tax offset/tax rebate at a rate to be determined for gifts to DGR entities).

This option is not supported in favour of Option 2.5

Option 2.5: hybrid system for donations to private ancillary funds (PAFs) (Donations to PAFs will continue to be tax deductible, and donations to all other DGR would be offset at a fixed rate to be determined).

This option is supported. We are aware of a number of private philanthropists who are supporting, or are keen to support, Indigenous charitable entities (and for which the whole DGR issue is sometimes a sticking point). Many Indigenous organisations could benefit from having a philanthropic champion who is prepared to enter into a long-term relationship/partnership and provide not only essential operational funds to guarantee the longevity of the entity, but who also undertakes some form of mentoring role to assist with governance, and financial management and planning. This scenario assumes a high level of net giving over extended periods of time to a particular Indigenous entity rather than short-term generosity being spread between a number of organisations.

Option 2.6: tax incentive to encourage testamentary giving (Donors would receive a tax deduction for testamentary gifts made to DGRs).

This option is not supported.

Option 2.7: creating a clearing house for donations to DGRs (The ATO would establish and maintain a clearing house for donations to DGR entities which is linked to the Australian Charities Not-for-profits Register – ACN Register).

This option is supported. However, in addition to making donations (cash or via credit/debit card) to charities via financial institutions, this service should also be extended through Australia Post. Because of the prevalence of on-line and telephone banking, many remote communities (whether Indigenous or mainstream) now no longer have a bank (or agency) but still have a post office. Given that Australia Post facilities already extend to the payment of taxes, government fees and fines, this would simply be a logical extension of such services, and would make it much easier for many Indigenous people (as well as other Australians living in remote communities) to contribute to their favourite charities. Many Indigenous people also do not have ready access to the internet, and do not have credit cards, and therefore being able to make donations in cash is convenient. Having their local post office able to process their gifts would be a huge bonus.

Option 2.8: simplification of property donation rules and anti-avoidance rules (Property donation rules and integrity rules would be streamlined and simplified).

This option is supported.

Option 2.9: eliminate public fund requirements for charities registered by the ACNC (Where an entity is registered by the ACNC it would not have to comply with public fund requirements).

This option is supported.

Option 2.10: increase the threshold for a deductible gift from \$2 to \$25.

The threshold should be raised to \$10. Assuming under option 2.1 above that DGR status is extended to all charities a \$10 threshold would be more affordable and make it more likely for Indigenous people (and others) to support their own charities. This option should also be read in conjunction with our comments made in support of Option 2.7 above.

2. Case for a special, stand-alone Indigenous DGR category

In para.59 of the NFPSTCWG Discussion Paper, reference is made to Treasury's consultation paper *Native Title, Indigenous Economic Development and Tax*, and its conclusion that "there may be a case for creating a new general DGR category to include Indigenous organisations that carry out activities across multiple DGR categories if broader DGR reform is not pursued."

In this section, the case for a stand-alone Indigenous DGR category is pursued. Our case is underpinned by the conviction that the impediments in the current DGR framework (and as outlined in an earlier submission to the NFPSRC and the NFPSTCWG dated 12 September 2012) have arisen out of a decades-long bureaucratic failure within the ATO to take into account the needs of the Indigenous charitable and philanthropic sector. This failure has also extended to the government agencies responsible for maintaining the registers of environmental, cultural and harm prevention DGRs. It is suggested that this has arisen out of a failure to adequately consult with both the Indigenous community and the philanthropic sector. It was also possibly assumed by the ATO and these agencies that because a huge majority of Indigenous organisations were established in response to various government funding programs they would not need to seek other sources of funding, thus having DGR status would largely be irrelevant and therefore there would be no need to frame the criteria for the different DGR categories to take account of Indigenous needs. As a general consequence, Indigenous organisations have missed out on possibly hundreds of millions of philanthropic support over the years.

A number of arguments could be put forward for a special, stand-alone Indigenous DGR category. These include:

- 1) The policy "fit" with Closing the Gap on Indigenous Disadvantage, Reconciliation Indigenous Engagement, etc.

- 2) Making it easier to identify/isolate issues which specifically affect Indigenous organisations and deal with them without having to “disentangle” them from an all-inclusive general DGR category.
- 3) Making it easier to target Indigenous involvement/input into the management of an Indigenous DGR category
- 4) Making it easier to identify, isolate and deal with state/territory laws that impede/prevent Indigenous organisations/entities from seeking DGR status.
- 5) Enabling a stronger role for ORIC to have input/oversight in conjunction with the ACNC over such an Indigenous DGR category, including (shared) responsibility for maintaining a register of Indigenous charities. To this extent, we advocate the establishment within ORIC of the position of Deputy-Registrar for Indigenous Charities [an alternative to this would be the establishment of the position of Director of Indigenous Charity and Not-for-Profit Services on the ACNC’s Board of Directors]. ORIC also maintains a network of regional offices around Australia through which it could extend its information, advisory, assistance, support and training services to Indigenous charities with regard to governance, compliance and reporting (ref. Para 118 of NRPSTCWG Discussion Paper).
- 6) The need for “catch-up” philanthropy. Arguably, the failure of Indigenous organisations across the board to obtain DGR endorsement irrespective of the category over the last two to three decades has cost the Indigenous community as a whole and its organisations hundreds of millions of philanthropic dollars, jeopardised the viability of many such organisations, and severely impaired their ability to deliver the services/benefits to their communities for which they were established. Special effort from both regulatory agencies and the donor community is needed to redress this imbalance. Having a stand- alone Indigenous DGR category would help facilitate the targeting of philanthropic support to compensate for this past neglect, and ensure that it doesn’t happen in the future.

In the event that Option 2.1 (extending DGR status to all charities) is not put into effect, and that reform entails retaining elements of the status quo regarding different DGR categories, having a special Indigenous DGR category should not preclude Indigenous organisations from seeking DGR endorsement via other categories.

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