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Dear Madam/Sir,

**Submission: 'Deductible Gift Recipient Reform Opportunities'**

**About AID/WATCH**

Aid/Watch is pleased to have the opportunity to make a submission to the Treasury consultation on reform opportunities for Deductible Gift Recipient (DGR) status.

Aid/Watch is a small organisation that monitors the Australian Government policies on aid and trade as they affect people and their environment in developing countries. Our principal purpose, as defined in our constitution, is to 'to seek to ensure that... aid projects and development programs and projects are designed to protect the environment and associated human rights of local communities in countries that receive Australian aid'. Aid/Watch is a charity and holds DGR status under the Register of Environmental Organisations.

In 2006, the Australian Taxation Office (ATO) stripped Aid/Watch of charitable status citing projects and campaigns by the organisation as inherently political. This began a court process that led to the High Court four years later for a test case watched closely by the Australian charity sector. The outcome in the High Court stated that charities could have a dominant purpose of influencing and engaging in public 'agitation' for legislative and policy changes. This landmark decision was a win for freedom of political communication. For the charity sector in Australia, it resolved almost a decade of uncertainty and strengthened the ability of charities to advocate for the public good. We believe the judgement as it relates to charitable status also applies to DGR status. This position is reflected in our response to this discussion paper.

**Summary**

The submission addresses consultation question 12 first (Section A); this is discussed at some length given its relevance to our history and circumstances. We make several strong and positive proposals on this issue and more generally, to move the debate forward. We then respond to the remaining consultation questions.

There are three sets of recommendations:

**A. Recognise and Promote Policy Advocacy** The public benefit of ‘agitation for legislative and political changes’, as recognised by the High Court, should be reflected in DGR regulations. DGR registers should explicitly recognise policy advocacy organisations as acting in the public benefit, and thus deserving of DGR status. This should include an updated definition of ‘Environmental Organisation’ under the REO to make it consistent with the 2010 High Court decision and with Charity law.

**B. Strengthen the Role of the ACNC in DGR** Charitable status should be a condition of DGR status; exceptions to this rule should be subject to separate reporting requirements. Given the powers of the ACNC, no further reporting on advocacy or other matters is required for DGR charities beyond what currently exists. If DGR administrative responsibility is to move from Departments it should go to the ACNC, not the ATO.

**C. Extend Access to DGR status to all Charities** As all charities by definition meet the ACNC’s public benefit test we suggest there is no reason, in principle, why DGR status should not be granted to all charities that seek it. We suggest the possible costs and benefits of such a proposal merit investigation.

## **SECTION A. Response to Consultation Question 12: Proposal to delimit the scope for advocacy allowable for Environmental Organisations in receipt of DGR status**

The 2010 High Court judgement in the Aid/Watch case established that the constitutional right to freedom of political communication applies to the availability of tax concessions for non-government organisations. The judgement as it relates to charitable status should also apply to DGR status. Any disqualification of DGR status on the basis of an organization having engaged in advocacy as a predominant or sole purpose would fall foul of the High Court judgement. There would, we believe, be substantial grounds for overturning any such measure through the courts.

In 2010 the Aid/Watch case established that, under Australian constitutional law, charities could have a dominant purpose of influencing and engaging in public “agitation” for legislative and political changes’ (para 45). The decision applied the right to freedom of political communication in Australia, which the High Court had previously defined as a constitutional precondition for representative democracy. In the Aid/Watch case the Court found that ‘the generation by lawful means of public debate... itself is a purpose beneficial to the community’ (para 47), adding that ‘in Australia there is no general doctrine which excludes from charitable purposes “political objects”’ (para 48).

Reflecting this, the judgement was later expressed in the 2013 Charities Act, which recognises that any charity with aims ‘beneficial to the general public’ can have a sole purpose of: ‘promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country’ (12.1.1).

**DGR rules should reflect the public benefit of ‘promoting or opposing a change to any matter established by law, policy or practice’.**

DGR provisions need to be reformed to make them consistent with current Charity Law on advocacy, which itself reflects the High Court interpretation of Constitutional Law as it relates to freedom of political communication for charities. Any restriction on the ability of charities to exercise this public benefit – including as vested in DGR regulations – is potentially unconstitutional.

The 2010 judgement concerned the political purposes of organisations seeking a tax exemption under charitable status. But the judgement is also directly relevant to the administration of ‘Deductible Gift Recipient’ status. Here, again, the law and associated regulations cannot discriminate against organisations simply because their principal or sole purpose is to agitate for policy change.

Legislation and regulations governing DGR status must not disqualify organisations that focus on policy advocacy as to do so would curtail freedom of political communication. To date the implications of the High Court’s Aid/Watch decision for the government’s several DGR registers have not been tested – but they could (and should) be if organisations are struck-off or denied access to DGR due to a dominant or sole focus on advocacy and policy change.

### **Current DGR rules potentially violate freedom of political communication**

Currently advocacy groups are excluded when DGR status is only available to organisations that have ‘direct’ provision as their predominant purpose. This is the case for the register of ‘Public Benevolent Institutions’, held at the ATO and the ACNC, which requires PBI’s to have a predominant purpose of providing ‘direct’ relief of poverty. This means that welfare advocacy organisations for instance cannot claim DGR status under the PBI.

Here, DGR status assists in addressing the symptoms of poverty, not its causes: the organisation running the soup kitchen is eligible, not the organization campaigning for welfare rights. If we follow the reasoning adopted by the High Court in the Aid/Watch case, this requirement under the PBI register undermines debate for ‘legislative and political changes’, chills democracy, and is potentially unconstitutional.

The PBI appears to be the only register that imposes this strict requirement. The Overseas Aid Gift Deduction Scheme’, which falls under DFAT, requires that organisations be engaged in providing overseas aid for ‘development and/or relief activities’. Under this scheme aid can be used to address the causes of poverty, through development assistance, as well as its symptoms, through direct relief. Further, such development aid may flow to advocacy organisations, provided they are not agents of political parties.

The Register of Environment Organisations states that the principal purpose for an organization to be on the REO must be ‘the protection of the environment’, which may include ‘the provision of information or education, or the carrying on of research.’ Advocacy for policy change, as it relates to the environment, is not explicitly defined as a purpose.

Clearly DGR status be made consistent with Charity Law in relation to advocacy, and thereby with freedom of political communication. Below we propose simply carrying across the Charity Law provision that purposes may include ‘promoting or opposing a change to any matter as it relates to the protection of the environment that is established by law, policy or practice in the Commonwealth, a State, a Territory or another country’ (12.1.1).

### **The public benefit of political ‘advocacy’ should be reflected in the Register of Environment Organisations**

The Treasury paper raises the question of whether environmental organisations should be required to engage in ‘environmental works’ in order to be eligible for DGR status. This proposal would disqualify organisations that have a predominant or sole purpose of engaging in political advocacy. As such it contradicts Charity Law, which, as noted, clearly defines advocacy for policy change as of public benefit.

We believe that Treasury should be seeking to widen the scope for environmental organisations to engage in public advocacy, not to restrict it. If such advocacy is indeed for the public benefit –

as is recognized under Charity Law and by the High Court – then this should be reflected in DGR regulations. Specifically we recommend that the public benefit of advocacy should be recognized in REO by adding a third clause as follows:

‘(1) Its principal purpose must be:

(a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or

(b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment; or

(c) *promoting or opposing a change to any matter as it relates to the protection of the environment that is established by law, policy or practice in the Commonwealth, a State, a Territory or another country*’

## **SECTION B: Responses to remaining consultation questions**

### **1. ACNC and DGR, Consultation Questions 1, 2, 9, 3, 10, 11, 13**

We are generally in favour of requiring charitable status as a precondition for access to DGR status, mainly as this ensures a clear ‘public benefit’ test is applied, via the ACNC. We believe the ACNC process for registering and then annually affirming charitable status offers more-than sufficient assurance that charities are operating in the public interest. If all DGR recipients are required to hold charitable status then there is no need for additional compliance and reporting requirements for DGR recipients. Exceptions could be made where necessary (eg for organisations specifically listed under the Tax Act, which may have their own reporting requirements). As now, officers of DGR charities would be responsible for maintaining compliance with DGR rules. Given ACNC powers and responsibilities there is no need for a ‘sunset’ clauses or other review provisions for DGR charities.

### **2. CNC and Advocacy, Consultation Questions 4, 5, 6, 13**

It is not clear why the DGR charities should be required to report to the ACNC on their advocacy activities. As noted, such activity is specifically defined in the Charity Act as having public benefit. Clearly charities may not engage in illegal political activity, nor can they directly support/oppose political parties or candidates for office. These requirements are spelt-out by the ACNC and there are clear guidelines in place for organisations. By definition, an organisation cannot gain charitable status if it has a ‘disqualifying purpose’ and there are sanctions in place for violation of these requirements by existing charities.

Para 29 states that ‘there are concerns that charities and DGRs are unsure of the extent of advocacy they can undertake without risking their DGR status’. This statement is not substantiated but insofar as it holds, suggests a need to more explicitly vest political advocacy into DGR rules: as discussed above, this would correct an inconsistency between the Charities Act that recognizes that political advocacy is ‘beneficial to the general public’, and DGR rules that may have the effect of de-limiting advocacy (for instance in the PBI).

### **3. ATO, ACNC and DGR, Consultation Question 7**

It is not clear that moving the administration of DGR funds from Departments to the ATO would necessarily make the process of applying DGR status any more efficient. To the contrary, the ATO has a direct role in maximizing tax revenue, as against supporting the charitable and DGR sector. The ATO, as outlined in its ‘Statement of Expectations’, is ‘the Australian Government’s principal revenue collection agency’. This may make it more, not less, difficult for otherwise

eligible organisations to gain or retain DGR status. A better option, if the administration of DGR is to move from Departments, is to move it to the ACNC. This would make more sense insofar as the ACNC has a specific mandate to ‘support and sustain a robust, vibrant, independent and innovative not-for-profit sector’.

More generally, the Treasury should consider the possibility that, given the strong oversight role of the ACNC and the clear definition of the public benefit purposes of charities as defined in legislation, whether DGR status should become an automatic entitlement for all charities. Given the public benefit of all charities, extending access to DGR status to the whole sector would by definition be in the public interest. The impacts in terms of lost revenue would likely be more-than compensated-for through a resultant expansion in economic activity associated with the charitable sector. The impacts in terms of enhanced community well-being would clearly be extensive. We believe the ACNC would be the appropriate authority to investigate the potential costs and benefits of such a proposal.

#### **4. Public Fund and Multiple Endorsement, Consultation Question 8**

We would support the removal of the public fund requirements for charities that hold DGR status, and permitting charities to be endorsed in multiple DGR categories.

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