



Senior Adviser  
Individuals and Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

3 August 2017

Dear Sir/Madam,

The Australian Environmental Grantmakers Network (AEGN) is pleased to provide a submission to Treasury's consultation on the *Tax Deductible Gift Recipient Reform Opportunities Discussion Paper*. The AEGN also endorses the submission prepared by Philanthropy Australia.

Our members are trusts, foundations and generous individuals who provide grants and donations to environmental organisations. They have a strong interest in this review as the outcomes will impact upon the charitable organisations which they support. Depending upon the nature of the reforms, philanthropic funders may also be impacted. In addition, the AEGN itself may be subject to changes which may result from this consultation.

We note that in recent weeks organisations on the Register of Environmental Organisations received their annual return form from the Department. Unlike in recent years, environmental organisations on the Register are required to report on their activities. The AEGN would be concerned if this in some way pre-empts the consultation Treasury is currently undertaking.

Thank you for the opportunity to participate in this consultation. The AEGN consulted extensively with our members in the preparation of this submission.

Yours sincerely,

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## **1. Introduction to the AEGN**

The Australian Environmental Grantmakers Network was established in 2009, in response to a need identified within philanthropy for a range of educational and networking functions to support environmental grantmaking. The AEGN plays an important role in growing well informed philanthropy and encouraging effective grantmaking in the environmental area. We currently have 115 members and most of those members are obliged to only make grants from their foundations to organisations holding deductible gift recipient (DGR) status.

The AEGN has been listed on the Register of Environmental Organisations since November 2009. Our Constitution outlines a number of objects that give effect to our primary purpose, namely “to improve the conservation, protection and functioning of Australia’s natural environment and ecological processes”. The objects are:

- (a) educate and increase environmental grantmakers’ understanding of how to effectively support the environment
- (b) coordinate collaboration among environmental grantmaking organisations and persons for the purposes of and in pursuit of activities which support conservation and protection of the environment in Australia
- (c) improve efficiency and effectiveness of those organisations and individuals whose purpose is to make grants in Australia in support of the environment
- (d) increase the level of philanthropic funding to environmental issues both from within Australia and from overseas
- (e) establish a gift fund to support the operations of the Company and research into environmental grantmaking issues; and
- (f) conduct research into and develop educational programs to expand the scope and effectiveness of environmental grantmaking in support of the environment in Australia

## **2. General comments about the consultation paper**

The AEGN appreciates the opportunity to comment on the consultation paper. We offer the following general comments and then address the questions raised in the paper directly.

*Focus on removing complexity, not increasing red tape*

There are a number of recommendations in the discussion paper which are commendable as they will lead to less complex, more streamlined arrangements for charities which seek or hold DGR status. For instance, it makes sense that all environmental DGRs are registered as charities and subject to the regulatory oversight of the ACNC. There are also benefits associated with removing the obligation for DGR organisations to establish and manage public funds.

Philanthropic trusts and foundations support reductions in complexity for DGRs as there is strong public benefit in well designed regulatory arrangements for charitable organisations. Most environmental organisations are small and volunteer led. Philanthropy seeks to ensure that the

resources gifted to them are used in advancing their purposes, rather than navigating complex regulatory arrangements and meeting onerous reporting requirements. On this basis, we strongly encourage the Government to use this opportunity to make streamlining reforms and reject proposals which increase complexity and red tape.

*In accordance with charity law, focus on charity purposes, not activities*

There are a number of instances where the consultation paper focuses on charity **activity**. This is inconsistent with the approach taken by the Charities Act 2013. At law, **purposes** define charitable status, not **activities**. The DGR framework has also generally focused on purposes rather than activities. Charity law is very clear on what constitutes charitable purposes and what is a disqualifying purpose. We caution against taking an activities focus, as this approach tends to lead down a path of complex and unsatisfactory rules for charities.

*Don't adopt failed Canadian regime for environmental DGRs*

A few years ago the Canadian Government increased regulatory requirements to exert pressure on advocacy groups. Canadian charities are subject to a legal limitation on the amount of advocacy they can undertake (10%). This restrictive approach to charity activity was amplified through the addition of more burdensome reporting requirements with the high risk of sanctions for non-compliance, plus an audit program targeting advocacy (the political activity audit).

To comply with the regime, charities were required to redirect funds from their charitable purposes to administrative work related to reporting on activity levels and filling in forms. The Canadian Government allocated \$13.4 million to fund the audit program, which targeted environmental advocacy organisations. Those organisations which were subjected to audits expended thousands of dollars to comply. Some organisations were financially broken. At the termination of the program, 54 audits had been completed and only 2 organisations had their charitable status revoked (with revocation for seven organisations pending objection or appeal).

The consultation paper suggests a similar approach is under consideration for environmental organisations, with a limit to the level of advocacy they can undertake (through the obligation to allocate 25-50% on environmental remediation), reporting on advocacy activities and a new review and audit approach. We are concerned that this runs the risk that the Canadian example will be played out in Australia, with significant waste of resources and its eventual abandonment. We also note the value of the other areas of activity undertaken by environmental organisation in pursuit of their missions and purposes.

### **3. Response to consultation questions**

#### **Consultation questions 1 – 3: DGRs required to be charities**

The AEGN supports the proposal that DGR organisations be required to register with the ACNC and subject to regulation as charities by the ACNC.

#### **Consultation questions 4 – 6: advocacy reporting requirements**

The AEGN is opposed to the proposal that charities be required to provide information about their advocacy activities. Advocacy is one of a range of legitimate activities that DGRs might use to further their charitable purposes. It is unclear why this particular activity should be singled out for special treatment.

AEGN members value advocacy for environmental protection, noting that nature and species other than humans have no say in the decisions of people and are reliant upon individuals and organisations speaking up on their behalf.

Environmental advocacy is, by its very nature, a public activity and organisations seek to gain publicity for their advocacy efforts. We are unaware of any donors seeking greater access to information about the advocacy their grantees undertake, leading us to conclude that there is no public demand for additional regulatory requirements. The discussion paper does not provide evidence that public demand exists to support a change in existing regulatory arrangements.

Such a reporting requirement would be practically difficult and expensive to implement. There is inherent complexity involved with delineating which activities should be described as advocacy as opposed to another activity like education, research, promotion or member communication. The regulator would need to allocate public funds to developing guidance and support for charities. Every charity would expend resources accounting for their activities and completing reports. There is no justification offered in the discussion paper to support the need for this resource allocation by charities and government.

We note the ACNC Guidelines on Charities, Elections and Advocacy (April 2016) and consider this to be a useful and clear guide for all charitable organisations.

#### **Consultation question 7 on the transfer of the DGR registers to the ATO**

The AEGN supports reforms which simplify the current arrangements for charities to access DGR. The AEGN supports all charities applying to the same entity for their DGR status and we understand that this could be undertaken by either the ATO or the ACNC.

The entity which undertakes the DGR assessment will require:

- A transparent approach to making assessments, in line with current legislation and case law and within a clear timeframe.
- Sufficient expertise to make assessments for environmental charities.
- Adequate resources to undertake the task.

As noted above, DGR status is very important to many AEGN members as they are legally obliged to only fund organisations with DGR status. There are many more environmental charities than environmental DGRs and AEGN members are sometimes frustrated by the limitations they experience with the current system, which seems to err in favour of restricting access to DGR rather than providing access to eligible organisations.

#### **Consultation question 8: the removal of public fund requirements**

The AEGN supports the proposal to remove public fund requirements. This reform will reduce complexity and lessen the governance burden for charitable organisations, which in most cases is borne by volunteers.

#### **Consultation questions 9 & 10: rolling reviews for DGRs**

The AEGN does not believe rolling reviews for DGR organisations are justified. The charitable sector has very high levels of integrity and is held in high regard by the Australian community. It is rare for the people entrusted to lead charities to behave in ways which break this trust. There is no evidence provided in the discussion paper of the need for this regulatory change.

Philanthropic organisations undertake their own due diligence processes before providing grants and monitor organisations which have been provided with funding. This 'helicopter view' of the charitable sector does not give rise to a belief that integrity is lacking or that rolling reviews are necessary.

Our members are also concerned that philanthropy will be expected to bear the cost of organisations responding to a rolling review program. Governments across the country have progressively reduced their funding of environmental organisations, resulting in greater demand for philanthropic funds. Grantmakers are very much concerned with efficient use of their funds. They want to see their donations making a difference to the issue that needs to be addressed, by organisations which are completely focused on advancing their charitable purpose.

The ACNC has powers to deal with charities which appear to be acting outside of their purposes or their legal obligations. The AEGN is in favour of continuing the practice which has been established by the ACNC, of working with the sector to develop appropriate compliance measures and striving for proportionate responses to charities in breach.

#### **Consultation question 11: sunset rule for specifically listed DGRs**

The AEGN does not believe a sunset rule for specifically listed DGRs is justified. It is very burdensome upon organisations which, in many cases, require specific listing because of the limitations of the taxation concession system. Given the proposal that all DGRs be registered charities, any concern that specifically listed charities could be deviating from their charitable purpose could be responded to using existing ACNC powers.

#### **Consultation question 12: environmental DGRs to commit 25%-50% expenditure on environmental remediation**

The AEGN is strongly opposed to the proposal that environmental DGRs commit any specified amount to environmental remediation (the remediation proposal). The remediation proposal if enacted would have detrimental impacts upon the non government environmental sector.

If this proposal became a requirement, the AEGN itself would need to redirect funds away from the advancement of our purposes to an activity which we were not established to undertake. We are strongly concerned about the risk this presents to our sustainability, given that we are completely reliant upon our members for support. We cannot assume that our members will provide more funding so that we can continue our current level of activities (all of which are directed towards achieving our purposes) and meet environmental remediation obligations.

We are further opposed to the remediation proposal for reasons as follow:

*a) The remediation proposal is inconsistent with current laws:*

The Charities Act 2013 defines a charity in relation to their purposes, not their activities. Charities are required to pursue their purposes, and it is the responsibility of the charity to determine the activities which will most effectively enable them to do this. Implementation of this proposal would require many environmental organisations to allocate substantial resources to activities which are inconsistent with their purposes.

Subsection 30-265(1) of the *Income Tax Assessment Act 1997* ('ITAA') defines the principal purpose for an environmental DGR as either (a) protecting the 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. The remediation proposal would require organisations which received DGR because they fit under provision (b) to use the donations they receive for an entirely different process.

*b) The remediation proposal will not improve environmental protection*

Environmental remediation is only one of many approaches used by environmental organisations to protect and enhance the environment. Most of the environmental gains which Australians enjoy – such as national parks, pollution laws, better access to solar energy - have been the result of policies and legislation, enacted by governments in response to the advocacy of citizens and environmental groups. While environmental remediation has an important role to play, it makes no sense for groups to be effectively directing funds to planting trees at the expense of protecting old growth forests, or removing marine pests at the expense of protecting the Great Barrier Reef from climate change and agricultural run-off.

*c) The remediation proposal is not welcomed by groups which specialise in environmental remediation*

As far as we are aware, the organisations on the ground which achieve their purposes through environmental remediation are not championing this proposal. This is because they understand that their work is increasingly complex and requires specialist skills and knowledge to do well. Having every environmental charity in Australia engaged in this activity will not lead to better environmental outcomes.

*d) The remediation proposal is not the most effective way of increasing environmental remediation*

If the Government is committed to increasing effective environmental remediation, a better approach would be to reinstate government funding to programs such as Landcare. In addition, damage to the environment should be subject to stronger regulation, aiming to prevent damage in the first instance and to oblige the responsible entity to remediate where damage has occurred. It is in the power of government to make such changes, and should not be the entire responsibility of environmental DGRs.

*e) The remediation proposal would make environmental grantmaking far less attractive and could lead to a loss of funding across the whole sector.*

At the 2016 AEGN conference, members were asked to respond to a survey on this issue, following the release of the majority report from the Parliamentary Inquiry into the Register of Environmental Organisations. There were high levels of concern about the potential for environmental DGRs to be required to expend 25% of their public fund on environmental remediation. Notably, their responses confirmed that the adoption of this recommendation would create substantial funding uncertainty for all environmental organisations.

Ultimately it should be the call of grantmakers and donors in the Australian public to determine which activities they will support with their funds. Restricting non-remediation activities to a percentage amount restricts the opportunities for philanthropists to fund in the most effective way possible in a particular set of circumstances.

### **Consultation question 13: sanctions for environmental DGRs**

As stated above, the AEGN welcomes the proposal that all DGRs are charities and subject to ACNC regulation and guidance. We have confidence in the current approach of the ACNC to deal with any material concerns of the public about individual charities that might arise.

### **Paras 81 – 83: clarification about what constitutes prohibited conduit behaviour**

The discussion paper suggests that the ATO could work with the DGR sector to further clarify what constitutes prohibited conduit behaviour. We agree that this could be useful as there is sometimes confusion over what constitutes legitimate partnership and what could be viewed as conduit behaviour.

A key shortcoming of our current system, which has not been addressed by this discussion paper, is that DGR status is not available to all charities. AEGN would be pleased to work with Treasury to explore solutions to this problem.