

4 August 2017

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

via email to DGR@treasury.gov.au

Dear Ms Bultitude

Tax Deductible Gift Recipient Reform Opportunities

The Australian Institute of Company Directors (**AICD**) welcomes the opportunity to provide a submission to the Treasury's consultation on Tax Deductible Gift Recipient (**DGR**) Reform Opportunities (**consultation paper**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit (**NFP**) sectors.

The NFP sector is a major focus of the AICD's work; we estimate that two thirds of our membership are involved in the work of an NFP in some way. The AICD is committed to advocating for a fit-for-purpose regulatory regime for the NFP sector that is streamlined, nationally-consistent and that will reduce red tape for this important sector.

We welcome the government's initiative to review and streamline the administration of the DGR system. To this end, we welcome proposals to:

- Require all DGRs that are non-government entities to become registered with the Australian Charities and Not-for-profits Commission (**ACNC**);
- Bring the administration of the four DGR registers under the Australian Taxation Office (**ATO**); and
- Verify the integrity of the existing DGR stock, especially those that are specifically listed under the *Income Tax Assessment Act 1997* (Cth) (**tax law**).

The AICD believes these proposals will reduce red tape for charities, provide a greater level of transparency and public accountability about the activities of DGRs and, in doing so, support charitable giving.

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However, the AICD is concerned that proposals to limit or require additional reporting about advocacy activities undertaken by DGRs would create significant additional regulatory burden without providing public benefit to offset such an increase.

Bringing all non-government DGRs under the regulation of the ACNC will ensure that they are subject to a specialist regulatory regime and a standardised reporting framework. The AICD believes that this will be sufficient to address the concerns raised in the consultation paper regarding DGRs that undertake advocacy activity.

Our detailed responses to the consultation questions are included in **Attachment A**.

We hope our comments will be of assistance to you. Should you wish to discuss any aspect of this submission, please contact our Senior Policy Adviser, Lucas Ryan via lryan@aicd.com.au or (02) 8248 6671.

Yours sincerely



LOUISE PETSCHLER
General Manager, Advocacy

ATTACHMENT A: Responses to consultation questions

Question 1

What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?

The AICD supports the proposal (**paragraph 21**) that all DGRs (other than those DGRs that are government entities) be required to become registered charities with the ACNC.

This would:

- Bring greater consistency to the regulation of NFPs that receive tax concessions and benefits from the Australian Government;
- Reduce red tape for DGRs that have to report to multiple regulators (such companies limited by guarantee that may report both to the Australian Securities and Investments Commission as well as to a DGR register, or those entities that are endorsed as DGRs across multiple categories);
- Increase oversight of specifically-listed entities that may currently have no reporting obligations concerning activities they undertake in furtherance of the purpose for which they receive DGR status;
- Provide a higher level of public accountability and transparency of DGRs through bringing them onto the ACNC register, and requiring that they submit an Annual Information Statement (**AIS**) and, where appropriate, financial report; and
- Further consolidate the ACNC as the national, specialist regulator of charities.

The AICD does not perceive there to be any issues that would prevent all DGRs from becoming registered charities. The AICD recommends that consideration is given to an appropriate transitional period to provide DGRs and the ACNC with sufficient opportunity to facilitate the registration process.

Question 2

Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?

The AICD does not perceive any obstacles that would prevent any of the non-government entities with DGR status from becoming registered charities with the ACNC. If a DGR is not eligible to become a registered charity for whatever reason, the government may consider specifically listing such entities in the tax law if it is merited.

Question 4

Should the ACNC require additional information from all charities about their advocacy activities?

The AICD does not support requiring additional information from charities about their advocacy activities. This would create a significant regulatory burden without public benefit.

Under the *Australian Charities and Not-for-profits Commission Act 2013* (Cth) (**ACNC Act**), the ACNC has the power to collect information from charities provided that it falls under the definition of 'recognised assessment activity'.

This enables the ACNC to collect, among other things, information concerning a charity's:

- Entitlement to registration;
- Compliance with the ACNC Act and its regulations; and
- Compliance with tax law.

Under this framework, the ACNC requires charities to describe their 'main activities' for a given reporting period as part of preparing an AIS. The AICD does not consider there is a need for registered charities with DGR status to provide additional information concerning advocacy activities.

Information about how a charity pursues its charitable purpose, including through any advocacy activities, is already required through the AIS. This information is likely to be sufficient for the purposes of determining whether an entity is maintaining its entitlement to access DGR status.

Where insufficient information has been provided, or where additional information concerning a charity's advocacy activities is required to assess compliance (including with tax law), the ACNC Act creates regulatory powers to enable collection of such information. The commissioner of the ACNC has the power to obtain information and documents (section 70-1) from registered charities related to their entitlement to registration (section 75-5(f)(i)).

Additional information about a charity's advocacy activities could be obtained through the use of this regulatory power, if required. The AICD considers that this should continue to be done as part of the ACNC's proportionate, risk-based approach to their regulatory function.

The role of advocacy in charities

The AICD recognises that advocacy is both a legitimate charitable purpose under charity law as well as an important part of the contribution made by the NFP sector to the community.

The introduction of the *Charities Act 2013* (Cth) (**Charities Act**) established an explicit charitable purpose for advocacy. It is charitable to "[promote or oppose] a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country" (section 12(1)(l)) provided it is in furtherance of another charitable purpose.

The AICD is concerned that proposals to impose limitations or additional reporting burdens regarding advocacy activities may diminish the capacity of the sector to perform its important role in public life.

Advocacy activity must be undertaken within the limits of the law (for example, it is unacceptable to promote or encourage unlawful activity) and the AICD supports regulatory intervention where a charity's advocacy activities are in contravention of the law.

The AICD notes the work already done by the ACNC in providing detailed guidance about the limits of advocacy activity by charities¹ which is a useful resource in assisting charities to understand how the law applies to advocacy activities.

¹ Australian Charities and Not-for-profits Commission, 'Advocacy by charities', <http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx> (accessed 7 July 2017)

Question 5 and 6

Is the Annual Information Statement the appropriate vehicle for collecting this information?

What is the best way to collect the information without imposing significant additional reporting burden?

As outlined in response to **Question 4**, the AICD does not support requiring additional information from charities about their advocacy activities.

Notwithstanding this view, if such information were required, the AIS would provide a streamlined reporting framework that would minimise the additional reporting burden imposed by such a requirement.

Question 7

What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

The AICD supports the proposal (**paragraph 38**) to transfer the administration of the four DGR registers to the ATO.

The fragmentation of the registers across multiple government departments results in unnecessarily delays, complexity and inconsistency between regimes. Centralising the registers within the ATO would significantly improve the administration of these aspects of the DGR regime and reduce costs for government.

The AICD supports the use of the AIS to collect information necessary for the administration of the registers (**paragraph 41**). As a further step, the AICD recommends that the ATO work together with the ACNC to identify how the information required by the registers could be harmonised and streamlined to create further opportunities for red tape reduction.

Question 9 and 10

What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?

What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this?

The AICD considers that there is no barrier preventing the ACNC or the ATO from conducting a review of eligibility entitlement for DGR stock. DGR status is a significant benefit provided to entities that meet specific eligibility criteria and the AICD welcomes initiatives to review the integrity of the DGR stock. As outlined in the consultation paper, this should be done in a risk-based way and could be included as part of a broader review into the general integrity of the charity register.

The ATO encourages DGR entities to regularly self-evaluate their entitlement to DGR status as good practice.² If a formal review is to be undertaken, the AICD recommends that the ATO communicate with DGRs to encourage them to undertake a self-evaluation and to advise them of the upcoming review. This will provide DGRs with the opportunity to opt out of their status voluntarily and thus avoid any penalties that may result from a review.

Use of the Annual Information Statement to self-certify DGR eligibility

The consultation contemplates whether DGRs should be required to provide an annual certification as part of the AIS filing process (**paragraph 59**), and notes that penalties under tax legislation may be applied for false certifications.

As a matter of good practice, the AICD believes that boards should regularly review their entitlement to access tax concessions as part of the key governance responsibility of overseeing their entity's compliance with the law. However, we are concerned about the use of the AIS as a method to certify a charity's ongoing entitlement to access DGR status.

There are a wide variety of roles and authorities that can sign off on the AIS, many of whom would not be in a position to make a certification about a charity's eligibility to access DGR. Requiring a certification could interrupt the AIS submission process, potentially giving rise to errors and negatively influencing compliance.

The AICD considers that there is scope to include a question about DGR eligibility in the AIS which is educational in purpose and in nature. The question should be voluntary, visually distinct as an 'education question', and supported by guidance explaining that a review of DGRs is forthcoming and penalties may apply where an entity has not notified the ATO of changes to its eligibility to receive DGR status.

The purpose of the question should be to identify charities that have not undertaken a review of their entitlement to access DGR status, and to support them to do so. For example, the question might be worded as follows:

Has this charity undertaken a self-evaluation of its entitlement to access DGR status in the past 12 months?

Charities that answer 'no' could receive an automatically generated email with a guidance note including the worksheet for self-review of DGR status³, or a call from an ATO or ACNC staff member to help assist them to undertake a review.

Question 11

What are stakeholders' views on the idea of having a general sunset rule of five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

As there has been little oversight of specifically listed DGRs to date, the AICD supports an initial review of specifically listed DGRs to assure the integrity of this component of the DGR stock.

² Australian Taxation Office, 'Review your DGR endorsement', <www.ato.gov.au/Non-profit/Your-organisation/In-detail/Review-your-DGR-endorsement/> (accessed 2 July 2017), 20 July 2015

³ Australian Taxation Office, 'Worksheet 1: review of a DGR endorsed as whole', <<https://www.ato.gov.au/Calculators-and-tools/Worksheet-1--review-of-a-DGR-endorsed-as-a-whole/>>, (accessed 7 July 2017), 5 December 2012

The AICD considers that there is no barrier preventing the government from conducting a review of specifically listed DGRs, or from imposing a sunset rule at the time of making a listing.

However, applying a general sunset rule across all specifically listed DGRs would represent a significant regulatory burden for these entities with little public benefit. Many specifically listed DGRs receive their endorsement in this way as a recognition of the critically important role they play and will continue to play in the community. The AICD recommends that the decision to sunset the endorsement of a specifically listed DGR should be made on a case-by-case basis.

In undertaking a review of the specifically-listed DGR stock, the AICD recommends that entities that are eligible to be registered as DGRs under an existing DGR category should be required to do so.

The AICD does not consider there is a need to undertake a regular review every five years. Ongoing reviews of specifically listed DGRs should be undertaken as part of the ATO's broader risk-based regulatory framework.

The AICD also considers that the regime for specifically listed DGRs would benefit from improved transparency. To this end, we recommend consideration be given to the establishment of an independent panel to review applications for specific listing and to make recommendations to the relevant minister.

Part of the function of this panel could be to consider whether a specifically listed DGR should be endorsed in perpetuity, or whether its endorsement should include a sunset.

Question 12

Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered? In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?

The AICD does not consider there to be a need to prescribe a proportion of annual expenditure to be directed towards environmental remediation for environmental organisations that have DGR status.

This proposal would create significant regulatory burden for these entities without public benefit. Instead, we note in response to **Question 13** the additional regulatory requirements for charities which we consider are sufficient regulatory oversight for environmental organisations.

In addition, this proposal may require some DGRs to make substantial changes not only to their operations, but also to their governance. For example, if an organisation's purpose was to advocate on a particular environmental issue, the purpose of the organisation would need to be changed to incorporate the required element of environmental remediation.

For some environmental organisations, this may present significant operational challenges. For example, a small DGR with the purpose of preserving the natural environment of the arctic region may be incapable of meeting the operational requirements of undertaking environmental remediation in this area.

The AICD does not believe that this level of interference in the governance of DGRs is necessary, desirable or appropriate.

Question 13

Stakeholders' views are sought on the need for sanctions. Would the proposal to require DGRs to be ACNC registered charities and therefore subject to ACNC's governance standards and supervision ensure that environmental DGRs are operating lawfully?

One of the benefits of requiring DGRs (except those that are government entities) to be registered charities is that it will bring them under the specialist regulatory regime established under the ACNC Act. Further, because they will be required to have a charitable purpose under the Charities Act, they will not be permitted to have a 'disqualifying purpose' such as "engaging in, or promoting, activities that are unlawful or contrary to public policy" (section 11 (a)).

In addition to this, the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) establishes the 'Governance Standards' which, among other things, aim to ensure that a "[charity] is governed in a way that ensures its ongoing operations and the safety of its assets, through compliance with Australian laws" (regulation 45.15(1)).

These regulatory instruments provide the ACNC with a wide range of powers to address misconduct relating to unlawful activity where it causes a charity to be noncompliant with the Charities Act or the ACNC Act and its regulations. The regulatory powers available to the ACNC in this regard are broad, but as they include the power to revoke an entity's charity registration and by extension (under the proposal outlined in **Paragraph 21** of the consultation paper) its DGR status, the AICD considers that this is a sufficient regulatory framework to ensure the lawful activity of DGRs.