

24 July 2017

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Dear Sir/Madam,

**Submission regarding the the ‘Tax Deductible Gift Recipient Reform Opportunities Discussion Paper’  
 (“Discussion Paper”)**

Thank you for the opportunity to make a submission.

The Australian Youth Climate Coalition (AYCC) is an independent, nonprofit and nonpartisan organisation. Our primary purpose is to benefit the Australian community by building a generation-wide movement to solve the climate crisis.

We believe that to solve the climate crisis we need a social movement led by those with the most at stake. That is why the AYCC educates, inspires, empowers and mobilises young people across Australia to protect our natural environment by creating a safe climate future. Our vision is of a world in which current and future generations inherit a safe climate.

The AYCC is pleased to provide responses to specific consultation questions that are outlined in the Discussion Paper. The AYCC would welcome the opportunity to provide any further information relating to the consultation questions and proposals outlined in the Discussion Paper.

Kind regards,



Gemma Borgo-Caratti  
National Director, Australian Youth Climate Coalition

## **Comment on the focus on charitable activities rather than purpose in the Treasury discussion paper**

The AYCC is pleased to provide information to the Treasury to assist in response to its discussion paper. In doing so, the AYCC does not support any attempt to curtail the work of not-for-profit groups by calling into question activities that the Treasury does not consider to be 'remedial'.

In the discussion paper both charitable purpose and charitable activities are raised. The common law of charity law focuses on purposes and not activities, and the DGR framework generally has a focus on purpose rather than activity. Purposes, as stated in the organisation's formal documents, such as its constitution, are the starting point for inquiries as to whether it is charitable. Activities are deemed to be a second tier enquiry—used as indicators or signposts as to the purpose of an organisation. Activities are not the initial starting point of inquiry. This has been accepted by the ACNC legislation where the principal charity registration section<sup>1</sup> is expressed in terms of purpose with one exception<sup>2</sup>.

A purposes approach allows the governors of charities to devote charitable resources to the most efficient and effective way of achieving their purposes. This allows flexibility that a pure activities approach might not allow. Further, a focus on activities can easily descend into a complex and unsatisfactory rules based exercise rather than a principles based inquiry that is far more suited to the classificatory task.

As such, and in the absence of strong and compelling reasons to the contrary, the focus of DGR reform should likewise focus on purposes – such strong and compelling reasons do not exist and therefore no shift in focus towards activities such as advocacy is warranted. Furthermore, the regulatory environment does account for other, relevant laws, which further specifies prohibitory conditions on DGRs in pursuing their purpose<sup>3</sup>.

We therefore strongly oppose the activity-level focus in the review (as suggested in questions 4-6; 12-13 of the discussion paper) as such an approach:

- Casts doubt and uncertainty over what activities a DGR entity can lawfully undertake resulting in a chilling effect;
- Insufficiently establishes that the current regime of 'charitable purpose' is not robust for regulating the sector.

### **Responses to Specific Consultation Questions**

#### ***4) Should the ACNC require additional information from all charities about their advocacy activities?***

At the AYCC, we know that advocacy and community engagement are important approaches integral to creating the political and cultural change needed to address the causes of social and environmental problems, rather than just the symptoms. Australian charities undertaking advocacy to further their charitable purposes, for example through supporting or opposing relevant government policies and decisions, have been recognised as both a legitimate activity and one essential to our system of parliamentary democracy. The importance of this was recognised by the High Court in the *Aid/Watch*<sup>4</sup> decision of 2010, where the Court held that charities undertaking advocacy was essential to Australia's constitutional system of parliamentary democracy. This decision was subsequently legislated in the Charities Act 2013.

[1] S 25-5 Australian Charities and Not-for-profits Commission Act 2012

[2] The one exception is Harm Prevention Charities which have a principal purpose test.

[3] In regards to OAGDS, for example, organisations must demonstrate compliance with the 2006 Anti-Money Laundering/Control of Terrorism Financing Act, and the Criminal Code vis-à-vis extraterritorial powers in relation to child sex tourism.

[4] See *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2010/42.html>

It is precisely to ensure that organisations like the AYCC can continue their important work that the High Court of Australia decided in *Aid/Watch Incorporated v Commission of Taxation*<sup>1</sup> (***Aid/Watch***) that organisations that engage in public debate about legislation and policy concerning charitable matters should still be entitled to tax privileges, as these activities are beneficial to the community.

*Aid/Watch* settled a long line of judicial debate concerning the compatibility of the charitable status and the political objects of an organisation. The High Court confirmed that *‘there is no general doctrine which excludes from charitable purposes ‘political objects’, and that charitable purposes and political objects are not mutually exclusive*<sup>2</sup>.

The concept of ‘charitable status’ has evolved with the *‘needs of society’*<sup>3</sup>. The High Court recognised that *‘public discussion, education and debate about aspects of the law and changes which might be made to it...reflects the reality of the greater involvement, nowadays, of citizens and organisations in the shaping of law and policy.*<sup>4</sup>’

Freedom of political communication is integral to Australia’s constitutional system of government. This freedom allows organisations to agitate for legislative and political changes that contribute to public welfare and advance the coherence of our system of law. In this context, we reiterate the words of the majority in *Aid/Watch* (French CJ, Gummow, Hayne, Crennan and Bell JJ), who emphasised the importance of Australia’s constitutional system of government and its foundation upon *‘[c]ommunication between electors and legislators and the officers of the executive, and between electors themselves, on matter of government and politics*<sup>5</sup>.

Any recommendations of the Treasury that inhibit the lawful activities of not-for-profit groups (by, for example, imposing conditions on DGR status that limit advocacy) would reflect a move away from the law as it is currently understood and enshrined by the Charities Act 2013 (Cth). Further, any move to limit an organisation’s ability to engage in public debate and advocacy would be considered a burden on the constitutionally enshrined freedom of political communication.

While *Aid/Watch* was concerned with the charitable status of an organisation and pre-dates the Charities Act, by obvious logical extension of the majority’s reasoning in the case, it is clear that so long as the AYCC and other groups ensure that their charitable activities further their principal purpose, the fact that they carry out activities which promote change at a political level should not affect their entitlement to DGR status. The notion that the Australian Government might seek to discourage the active political participation of citizens is anathema to the values that underpin the Australian Constitution and a healthy democracy.

At its most fundamental level, building a movement capable of finding and implementing solutions to address climate change involves the promotion of ecologically sustainable development principles. And to build this movement, we need to advocate, engage, educate and explain. Ultimately, the advocacy work of not-for-profit organisations enriches public debate in Australia and contributes to good policy-making by both government and business. Not-for-profit organisations are uniquely placed to take a considered long-term approach in formulating policy and goals, and this is ultimately in the public interest.

[1] (2010) 241 CLR 539

[2] *Ibid* at [48].

[3] *Ibid* at [66]

[4] *Ibid* at [71]

[5] *Ibid* at [44]

Any apparent reform that limits the advocacy activities of not-for-profit organisations flies in the face of Australia's long-held model of encouraging a diverse range of voices to contribute to public policy. The vital role of environment groups and other non-government organisations in enriching the political process by encouraging public debate is crucial to maintaining the health of democracy in Australia. Further, the discussion paper asserts that 'some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community'. This assertion is made without any supporting evidence. Unsubstantiated and speculative statements about the expectations of the broader community should not serve as a basis for making public policy.

No evidence has been put forward as to the need for new reporting obligations for advocacy activities, therefore they are strongly opposed on the basis that they would impose new and unjustified red tape on charities. It is the AYCC's respectful view that the Treasury should not recommend any changes to legislation or policies that restrict the activities in which organisations can engage to achieve their purpose.

***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?***

We welcome and accept that the transparency and accountability of DGRs is important. However, we believe reviews and audits should be conducted only at the point where systemic issues have been identified and/or certain risk thresholds amongst categories of charities and DGRs have been surpassed.

At present 92% of DGRs are registered with the ACNC. That means 25,760 of 28,000 DGR entities are already governed by the ACNC regulatory framework, which requires annual reporting. The discussion paper proposes to require all DGRs (except government entities) to be registered as charities, and this will bring in even more DGRs under the ACNC regulatory framework.

A rolling review and audit process is costly and the case has not been made that such a cost is justified given the current nature of the risk. The ACNC and the ATO already have the power to undertake reviews and audits where they believe they are warranted, and it is not apparent that introducing new and costly formal review processes is necessary.

We therefore strongly recommend a proportionate and risk-based response to this issue. Such a response would include requiring DGRs to be registered with the ACNC (as the discussion paper proposes), with the ACNC and the ATO using their existing compliance approach to ensure compliance with the law. This can involve undertaking reviews and audits using their existing powers where systemic issues have been identified and/or certain risk thresholds amongst categories of charities and DGRs have been surpassed.

The expertise of the ACNC and ATO should be respected, and they should be allowed to independently determine what types of reviews and audits are necessary, and in what circumstances. The government should not interfere with their independence and second guess their expertise in this regard.

***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 AYCC exists to benefit the whole of the Australian community by empowering young people to assist in reducing greenhouse gas emissions to ecologically sustainable levels. We do this by educating young Australians with accurate

information about climate science and solutions and providing them with the skills needed to lead sustainability projects and climate campaigns in their community.

We support young people to promote sustainable practices in their local school, university, workplace or community, for example, through switching to more sustainable energy or increasing energy efficiency. We also empower young people to be part of youth-led state or national campaigns that will have the greatest possible impact on reducing greenhouse gas emissions, for example, by influencing public climate and energy policy.

Many of the AYCC's activities involve advocacy. For the AYCC, advocacy includes anything from conversations between our volunteers with members of the public, to attempting to influence the decisions made by people in positions of power. These activities help us to achieve our charitable purposes. Our advocacy reflects the desire of our 120,000-strong membership to build a grassroots movement to address the risks posed by climate change. We advocate to achieve short-term impact and long-term cultural change. Like nearly all charitable organisations, advocacy cannot be disentangled from our core activities and purpose.

The ways in which we achieve our charitable purpose to protect and enhance the natural environment are diverse. For the Treasury to best understand how the AYCC combines advocacy, education and 'practical' measures to inspire cultural change, we have set out below some recent examples of our work:

- In 2015, the AYCC trained 1000 young people through a national training summit, leadership training bootcamps and state based training camps. In these trainings, participants were educated on climate change, personal development and community action and built working groups to take sustainability projects back to their local communities. We held our first ever Climate Leaders program, a nine-month intensive training program for 85 young leaders from the AYCC. Over 15 days of training at three national retreats, these young people deepened their level of commitment in taking action to protect the natural environment and create positive change. These skills were strengthened through taking one-to-one mentoring and practical experience leading on sustainability solutions and programs in their community.
- In 2016, the Seed Indigenous Youth Climate Network, a branch of the AYCC, held one of Australia's first-ever Indigenous Youth Climate Summits in Sydney, bringing together 80 Aboriginal and Torres Strait Islander young people for three days of learning skills and making the connections they need to be leaders on climate solutions in their communities. Seed brings the AYCC's educational and leadership programs to a wider demographic of Aboriginal and Torres Strait Islander young people, providing opportunities to young people often missed by youth development programs. Seed participants engage in sustainability projects and climate campaigns in their communities to protect land, educate their peers and reduce greenhouse gas pollution.
- In 2016 the AYCC's national schools program, Switched on Schools, expanded to reach more students than ever before, with a specific focus on regional and culturally diverse communities. In conjunction with local councils, the AYCC ran seven school summits at which more than 1000 students came together for a transformational two-days of learning about climate change and how they can make a difference in their school and community. Switched on Schools went on to reach 20,000 young people through 130 in school workshops, high school presentations, and participant outreach in 400 schools nationwide. In 2015, AYCC launched a new online platform and a Student Climate Action Network (SCAN) where students can access educational resources, connect with peers, and start their own sustainability campaigns, year round.
- In 2014-15, the AYCC's Renewable Generation campaign, which aimed to protect the Renewable Energy Target from policy changes and cuts, mobilised people across the country to attend forums to talk to Senate crossbenchers and ask them to commit to blocking any cuts to the RET. We engaged 10 renewable energy

students to conduct a nationwide survey and draft a report that highlighted the concerns of students studying for a job in an industry that can build a clean energy future. These young people then travelled to Parliament House to deliver the results to key decision-makers in the Senate and House of Representatives.

Clearly, many of the AYCC's activities involve pursuing and achieving outcomes through advocacy and generating public awareness and debate. Sometimes that means agitating for legislative or policy change to ensure that governments and businesses account for the risks posed by climate change. While the AYCC recognises that remedial activities such as tree planting are important, large-scale systematic changes to protect the environment, especially to address climate change, are impossible to achieve without advocacy.

The AYCC recognises that Government will play an important role in the transition to a safe climate and in protecting the natural environment; a role that the AYCC aims to complement. As a nonpartisan organisation, we do not support one political party over another. Instead, we run our campaigns to advocate for the most effective climate policies and solutions based on community need, evidence and science.

Requiring that a certain proportion of an environmental organisation's activities be directed towards environmental remediation represents an intrusion on the autonomy of environmental organisations. Charities and their supporters are in the best position to determine what approaches are most appropriate in order to achieve their charitable purpose – therefore AYCC strongly opposes any new restrictions and limitations on the basis that they would impose new and unjustified red tape on environmental charities which will make it harder for them to achieve their charitable purpose.

***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?***

AYCC condemns any illegal behaviour but stresses that laws already exist to deal with these matters.

The recommendations proposed would create unnecessary red tape, overlap existing laws and provide implementation difficulties.

It is already the case that a registered charity with the ACNC has to meet the test in the Charities Act to become endorsed as a charity and then comply with the conditions of that endorsement.

The current legal regime is robust in outlining the purposes for which charities can legitimately be established, as well as, in ensuring charities must demonstrate that they do not have a 'disqualifying purpose.'<sup>[1]</sup>

The Charities Act provides that the following purposes would disqualify an organisation from charitable purpose:

- the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- the purpose of promoting or opposing a political party or a candidate for political office.

This is a requirement taken seriously by AYCC. If environmental DGRs are required to register and be regulated by the ACNC (a recommendation that AYCC supports), then nothing further is needed by way of regulation in this space.

Current charity law and criminal laws cover the field with regard to unlawful activities. Any move to impose additional regulation or sanctions for charities will be viewed as a step to discourage peaceful assembly and restrict peaceful protests in Australia.

[1] Disqualifying purpose includes: a purpose to promote/oppose political parties/candidates; a purpose to engage in or promote unlawful activity; a purpose to engage in or promote activities contrary to public policy (which does not include opposing specific policies of the Government). See ACNC Fact Sheet [http://www.acnc.gov.au/ACNC/Reg/Charities\\_elections\\_and\\_advocacy\\_.aspx](http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx)

Thank you for the opportunity to make a submission.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Gemma Borgo-Carratti'.

Gemma Borgo-Carratti  
National Director  
Australian Youth Climate Coalition