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Re: Submission in relation to Tax Deductible Gift Recipient Reform Opportunities Discussion Paper - 15 June 2017

Thank you for the opportunity to provide a submission (attached) in relation to the Discussion Paper "Tax Deductible Gift Recipient Reform Opportunities Discussion Paper 15 June 2017" (Discussion Paper).

The Royal Australasian Ornithologists Union (this organisation prior to changing its name to BirdLife Australia) was formed in 1901 as a highly respected science-based conservation organisation. Over the years we have maintained that reputation, with currently more than 110,000 supporters and over 30 local community branches across the country. We are the national partner of BirdLife International, the world's largest nature conservation Partnership, with 13 million supporters. Through our unique local-to-global approach, we deliver high impact, long-term conservation for the benefit of nature and people.

BirdLife Australia comprises professional scientists and ornithologists, amateur ornithologists, keen birders and nature conservation lovers. We use a range of tools to improve conservation outcomes for Australia's birds. These include citizen science through bird-watching, regular and scientifically rigorous surveys and monitoring and recording of bird health and movement, as well as other science and research, community engagement and education, including an active interest in local bird conservation issues, and on-ground conservation works.

This particular mix of activities, among other things, provides structured data to inform conservation priorities throughout Australia, supports threatened species nominations and recovery actions and provides important information to the Australian Government for policy development and production of significant documents such as its *State of the Environment* reports.

The particular mix is required because some of the most important threats to birds and nature in Australia cannot be addressed by on-ground action alone. The mix also reflects the expertise and interest within BirdLife Australia. The set of activities is unique to BirdLife Australia and is not replicated in any other Australian environmental organisation.

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Any narrow focus on remediation and limitation on community engagement and advocacy as noted in the Discussion Paper would have a substantial adverse impact on these current activities and a consequent detrimental impact on BirdLife Australia's conservation output. Diverting scarce resources from important science activities to meet a narrow and arbitrary on-ground remediation target (and the increased regulatory burden associated with reporting requirements) will have the perverse outcome of making BirdLife Australia less effective in securing good conservation for Australia's birds and their habitats.

While generally supporting reforms to reduce complexity in Deductible Gift Recipient arrangements, BirdLife Australia strongly opposes the proposals on remediation and advocacy, and their increased reporting requirements. If implemented, they would most likely have serious unintended adverse consequences for nature conservation in Australia as well as civil society.

Civil society has a legitimate role to play in making the case for change in an open and democratic society. Governments are often unable to lead reform in the long-term public interest. The environmental and societal issues we face are too large and complex to be solved by governments on their own.

We thank you for the opportunity to provide a submission on this important issue.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paul Sullivan', written over a circular stamp or seal.

Paul Sullivan
Chief Executive Officer



BirdLife Australia submission to the Tax-Deductible Gift Recipient Reform Opportunities Discussion Paper - 15 June 2017

BirdLife Australia, Australia's oldest national conservation organisation, is a highly respected science-based conservation organisation with more than 110,000 supporters across the country. BirdLife Australia is the national partner of BirdLife International, the world's largest nature conservation Partnership, with 13 million supporters. Through our unique local-to-global approach, we deliver high impact and long-term conservation for the benefit of nature and people.

BirdLife Australia is also made up of over 30 local community branches and highly active network of volunteers across the country, many engaged in a range of activities including regular bird-watching, monitoring, on-ground conservation works and community education, as well as an active interest in local bird conservation issues.

General comments:

BirdLife Australia uses a range of tools to improve conservation outcomes for Australia's birds.

BirdLife Australia currently manages around 30 bird conservation projects nationwide, and many more have been successfully completed over our long history. Projects range from site-specific, on-ground works to national-scale surveys involving thousands of volunteers. They are run by highly dedicated, experienced people, who are passionate about protecting our birds and their habitats. Guided by our Bird Conservation Strategy, BirdLife Australia runs an extensive and diverse array of activities centred on research, conservation and community engagement.

Examples of our on-ground conservation works include fencing thousands of hectares of vital breeding habitat for Carnaby's Black-Cockatoos, coordinating the planting of 28,000 trees in just one year to revegetate Red-tailed Black-Cockatoo habitat in western Victoria and south-eastern South Australia and protecting some of the most important declining woodland bird habitat through covenants on private land.

Whilst this on-ground work is important, it is supported by robust research and enabled by outreach, engagement and advocacy. Our Beach-nesting Birds project for example has overseen a 400% increase in breeding success of Hooded Plovers on some Victorian beaches in 2015/16. Protective fencing and shelters are erected by groups that we have connected with through our outreach and engagement, and targeted promotion of management options to stakeholders and decision makers.

Unintended consequences of narrow focus on 'remediation'.

BirdLife Australia's donors support our strong research and outreach heritage. If we could no longer receive tax deductible donations for research and education:

- who would collect and analyse structured data to inform conservation priorities, support threatened species nominations, or provide data to the Australian Government for production of their *State of the Environment* reports?



- who would fund non “remediation” activities in recovery plans and other Australian Government instruments, such as the Wildlife Plan for Migratory Shorebirds?
- who would identify and help fund government priorities, such as the translocation of the Norfolk Island Green parrot? Or other priority recovery actions identified in the Australian Government’s Threatened Species Strategy?
- who would continue previous conservation programs established by the Government, and now funded by BirdLife donors, including a strong research, education and engagement focus?

Some of the most important threats to birds and nature cannot be addressed by on-ground action alone.

BirdLife Australia’s core programs are designed using Conservation Action Plans (CAP); a global standard in outcomes-based adaptive management for conservation. The CAP includes remediation work but acknowledges the important role of research, education, advocacy and engagement in achieving conservation outcomes.

Laws and policies set the wider framework for our conservation efforts. While reform of legislation and policy is often challenging, it can have a much greater impact and be more far-reaching than work focused on a single site or a single species.

Even where strong policy commitments exist, advocacy, and monitoring are essential to ensure that policies are properly implemented.

Science-based advocacy is a means of achieving a science-based conservation outcome. BirdLife Australia has a strong history of using science-based advocacy to deliver policy and bird conservation outcomes, and this information is largely based on the organisation’s own primary research, as represented by our national database and the analytical products derived from it. This advocacy is undertaken through appropriate channels set out in national and state environmental and planning legislation. BirdLife Australia has never advocated, encouraged or endorsed any unlawful activity associated with environmental activism.

For example, recently BirdLife Australia’s national office advocacy and engagement has:

- Averted the imminent extinction of the Green Parrot on Norfolk Island, by raising awareness and successfully advocating for an emergency response (and co-financed the translocation program in partnership with the Australian Government).
- Assisted the Australian Government in updating the list of threatened species under the EPBC Act after advocating for the *Action Plan for Australian Birds*, to be considered a bulk nomination under the Act.
- Compiled detailed technical submissions regarding the proposal to dump dredge spoil in Caley Valley Wetlands in QLD, which is known to support seasonal congregations of over 40,000 waterbirds. In partnership with an alliance of environmental NGOs, scientists and the community we successfully argued against the destruction of the most important known breeding habitat for the Endangered Australian Painted Snipe.



- In partnership with our South-East Queensland Branch, residents and other local groups, secured a commitment to halt the inappropriate development of important shorebird habitat on the Gold Coasts Broadwater, including habitat of the critically endangered Eastern Curlew.
- Successfully advocated for a review of the State of Victoria's planned burning program to adopt a more strategic, risk-based approach to fire management that will better protect life and property and save birds.
- Successfully advocated for a review of Western Australia's Green Growth Plan to mitigate the impact on local populations of the Endangered Carnaby's Black-Cockatoo;
- Successfully engaged the local community to ensure the draft plan for a former salt works at Moolap, near Geelong, protects the Critically Endangered Curlew Sandpiper;
- Our current Key Biodiversity Areas in Danger campaign coordinates work on some of Australia's most threatened birds, including Carnaby's Black-Cockatoo, Swift Parrot, Abott's Booby, Eastern Curlew and Australasian Bittern. It advocates for better protection for Australia's globally significant Key Biodiversity Areas and showcases the importance community stewardship and structured monitoring for conservation.

In addition, our branches and special interest groups make representations to their local parliamentarians, councils and other decision makers on regional and local issues.

BirdLife Australia advocates for change for the benefit of people and nature.

By raising awareness and giving people an opportunity to voice concerns, advocacy creates opportunities for the Australian public to create change. Public participation is the cornerstone of good governance and decision-making, and BirdLife Australia strongly supports our democratic right to advocate. As noted, BirdLife Australia does not support illegal activity.

CONSULTATION QUESTIONS

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?*

BirdLife Australia supports the proposal that an organisation must be a registered charity to be eligible for DGR status. We support well targeted and proportional approaches to maintain transparency and accountability for charities. Such approaches can appropriately deal with all the issues raised in the Discussion Paper and can be achieved if all DGRs are registered as charities under the purview of the ACNC.

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

BirdLife Australia is not aware of any such DGRs.



3. *Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?*

BirdLife Australia has no privacy concerns regarding the requirements of the ACNC to publish information on its public register. It seems a reasonable requirement for public transparency.

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

No. In the Discussion Paper both charitable purpose and charitable activities are raised. Charity law focuses on purposes and not activities, and the DGR framework generally has a focus on purpose rather than activity. 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.

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.' The governance standards for charities and their reporting requirements to the ACNC already provide robust regulation and sufficient information to ensure public transparency.

Existing charity law sets appropriate boundaries for what advocacy activities by charities are acceptable, and the ACNC guidance for charities is helpful and reflective of the law. Accordingly, no further changes are justified or necessary.

We therefore strongly oppose the activity-level focus in the review (as suggested in questions 4-6; 12-13 of the discussion paper). Rather than clarifying obligations, such an approach would merely cast doubt and uncertainty over what activities a DGR entity can lawfully undertake, resulting in unnecessary red-tape and unwarranted interference in charitable activities and their governance.

BirdLife Australia disputes the assertion in the Discussion Paper that "there are concerns that charities are unsure of the extent of advocacy they can undertake without risking their DGR status. This is a particular concern for environmental DGRs, which must have a principal purpose of protecting the environment."

The implication is that advocacy is not an appropriate activity for a charity to undertake for the purpose of protecting the environment. This is clearly incorrect as demonstrated earlier in our submission. Advocacy is a legitimate activity for charitable organisations in furtherance of their charitable objects, and as a purpose in its own right if it furthers another charitable purpose, as established in the High Court case of *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 and referred to in the ACNC Guidance Note "Charities, elections and advocacy" issued in April 2016 (ACNC Guidance Note).

Furthermore, advocacy in the form normally undertaken by BirdLife Australia is often expressly provided for in Australian Government, state, territory and local government environmental and planning statutes and other provisions.

The Discussion Paper states "Scrutiny of an organisation's continued eligibility is appropriate as the scope of activities undertaken by an organisation can change over time, potentially making them ineligible for DGR status." The issue for retention of charity status is not whether the scope of activities undertaken by an organisation can change over time, but whether the organisation's purposes have changed to be outside the charitable purposes set out in the legislation.



The Discussion Paper seeks to treat advocacy as different to other activities undertaken by charities. This is nonsense. Is the Heart Foundation's or the Cancer Council's advocacy somehow different from their efforts to fund research or improve disease prevention? All three activities directly relate to their fundamental purpose.

Charities undertaking advocacy has long been recognised as both a legitimate activity and one essential to our system of parliamentary democracy. BirdLife Australia's supporters expect this organisation to advocate for the protection of birds consistent with its purpose.

Advocacy is an important approach which charities can use to address the causes of environmental and social problems, rather than just the symptoms – this often requires policy change. For example, if a coal mine is polluting a river because of poor regulation, environmental remediation work to treat affected wildlife downstream will have little impact if the mine can keep polluting the river – this will require advocacy to ensure the mine complies with regulations or adequate regulations are introduced.

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.

As noted earlier, BirdLife Australia supports well targeted and proportional approaches to maintain transparency and accountability for charities and this can be achieved by ensuring all DGRs are registered as charities under the purview of the ACNC, as the Discussion Paper proposes. Further interference in the legitimate and lawful activities of charities is neither desirable nor warranted.

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

See response to question 4. There is no justification for this information to be collected and it should not be.

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

There is no way the information can be collected without imposing a significant and unnecessary additional reporting burden.

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?

BirdLife Australia supports the transfer of the administration of the four DGR Registers but we wonder whether the ATO is the appropriate body to undertake this task. The ACNC was purpose-built for regulating charities and to be a 'one stop shop' for the sector. It is an independent entity that can play the role of administering the DGR Registers without any conflicting objectives that the Tax Office may have (being a revenue raising entity reporting directly to the Government).



8. *What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?*

BirdLife Australia recognises the operation of a public fund creates an additional reporting, accounting and governance burden. We believe, however, the oversight of tax deductible donations represents a good discipline that is important for community confidence as well as the confidence of our donors. We consider the impacts of removing the public fund requirement may need further investigation so that the impacts can be fully understood.

9. *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?*

BirdLife Australia welcomes and accepts that the transparency and accountability of DGRs is important and we would have no problem providing an annual certification that we meet DGR eligibility requirements; however, we oppose a formal rolling review as being an unnecessary additional administrative burden.

The ACNC and the ATO already have the power to undertake reviews and audits where they believe they are warranted - new and costly formal review processes are unnecessary. 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 approaches to ensure compliance with the law. This can involve undertaking reviews and audits using their existing powers where systemic issues have been identified.

The activities of charities are by their nature in the public domain and the public are vigilant in scrutinising their activities and raising concerns with the regulator. The ACNC is also vigilant and has appropriate powers to investigate a charity and take appropriate action. This is evidenced by the ACNC Charity Compliance Report 2015 – 2016 which states:

"Over the last two years, we received 1,872 concerns about charities. This was a significant increase over the previous two years when we received 1,307 concerns. The additional concerns resulted in the ACNC opening 149% more investigations, and resulted in 28 compliance revocations."

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

See response to question 9. Reviews should be conducted as necessary by the ACNC or ATO and not part of a rolling program.

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 a charity of 116 years standing, BirdLife Australia sees no value in sunset rules. The ACNC and the ATO already have sufficient power to deal with DGRs not operating appropriately.



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?*

BirdLife Australia strongly opposes any move to implement a requirement that any proportion of annual expenditure from the public funds of environmental DGRs must be directed to environmental remediation.

Environmental remediation is one way in which an environmental organisation may achieve its purposes; however, it is not the only way. As noted above, BirdLife Australia is involved in some environmental remediation but our overwhelming focus is on the science, enabled by research, outreach, engagement and advocacy.

BirdLife Australia's activities are guided by a detailed Strategic Plan, approved by its Board, and developed in association with staff and its many branches throughout Australia. The Strategic Plan recognises that, with limited financial and other resources, BirdLife Australia needs to focus on its core strengths and capabilities to make the biggest impact on bird conservation outcomes. Those core strengths are research, outreach, engagement and advocacy, not on-ground remediation. Some environmental DGRs have particular expertise in environmental remediation and we tend to collaborate with them rather than compete in their area of expertise.

BirdLife Australia's activities are guided by Conservation Action Planning, a global standard in outcomes-based adaptive management for conservation. Our Conservation Action Plans are developed in collaboration with governments, experts and partners. Conservation Action Plans include remediation work but also recognise that, without robust science, community education and ongoing research for adaptive management, remediation works are unlikely to achieve optimum results. BirdLife Australia mobilises thousands of volunteers annually in research, education, on-ground protection and restoration works. While highly impactful in terms of bird conservation outcomes, in many cases this work would fail to meet the proposed remediation test.

Requiring BirdLife Australia to devote an arbitrary proportion of its activities to remediation would therefore have a substantial adverse impact on current strategic activities and thus on our overall conservation outcomes. Diverting scarce resources from important science activities to meet a narrow and artificial on-ground remediation target (and the increased regulatory burden associated with reporting requirements) would have the perverse outcome of making BirdLife Australia less effective in securing good conservation for Australia's birds and their habitats.

Requiring a certain proportion of an environmental organisation's activities to be directed towards environmental remediation is fundamentally bad policy in unduly directing organisations that rely overwhelmingly on voluntary community involvement through membership and other supporters. BirdLife Australia's members and supporters are attracted to the science basis of the organisation and wish to contribute on that basis. We strongly believe that our Board and our members and supporters are in the best position to determine the most appropriate, efficient and cost-effective approaches to achieve our charitable purpose.



Given the breadth and variety of Australian environmental DGRs, and the different levels of their expertise, there is no basis for a 'one size fits all' approach. Any attempt to regulate one will simply 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?*

BirdLife Australia has never advocated, encouraged or endorsed any unlawful activity and will not do so in the future. We condemn illegal behaviour. We take our responsibilities under the *Charities Act* incredibly seriously.

Nevertheless, we do not support special sanctions being introduced for environmental DGRs. We understand that laws already exist to deal with these matters.

For example, 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 *Charities Act* provides that the following purposes would disqualify an organisation from charitable purpose:

- (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- (b) the purpose of promoting or opposing a political party or a candidate for political office.¹

If environmental DGRs are required to register and be regulated by the ACNC (a recommendation that BirdLife Australia 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. Further, any move to impose additional regulation or sanctions for charities runs the risk of being viewed as a step to discourage peaceful and lawful assembly and restrict peaceful and lawful protest in Australia.

¹ *Charities Act 2013* (Cth), s.11.