FUNDRAISING INSTITUTE AUSTRALIA

THE TREASURY
Tax Deductible Gift Recipient Reform Opportunities

SUBMISSION COVER SHEET

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July 2017

ABOUT FIA

With over 1500 members, Fundraising Institute Australia is the largest representative body for the $12.5 billion [1] charitable and not-for-profit fundraising sector, which is supported by some 14.9 million Australians. FIA members include charities and NFPs operating domestically and internationally, as well as the organisations and professionals that provide services to them. FIA advocates for the interests of the sector, administers a self-regulatory Code, educates fundraising professionals, promotes research and creates forums for the exchange of knowledge and ideas.

FIA supports maintaining the autonomy of charities through self-regulation. To this end, FIA has recently overhauled its Code and instruments of self-regulation in consultation with government, FIA members, consumer representatives and other stakeholders, ensuring its relevancy to best practice. The Code now contains provisions for compulsory training for anyone engaged in fundraising (professional or volunteer) on behalf of an FIA member. The Code is to be administered by a Code Authority whose responsibilities will include proactive compliance monitoring as well as complaints handling.

FIA has participated in several government reviews of DGR tax matters in recent years including:

2015	House Of Representatives Standing Committee On The Environment Inquiry Into The Register Of Environmental Organisations
2012	The Treasury's Not-For-Profit Tax Concession Working Group
2012	The Treasury's Charitable Fundraising Reform Discussion Paper Infrastructure, Competition and Consumer Division
2012	Tax Laws Amendment (Special Conditions For Not For Profit Concessions) Bill 2012

[1] Source: Giving Australia 2016

THIS SUBMISSION

FIA welcomes the opportunity to provide comments on the Discussion Paper on Tax Deductible Gift Recipient Reform Opportunities. We strongly support the Paper's stated aim to address "…the complexity of DGR application processes."

Issue 1. Transparency in DGR dealings and adherence to governance standards.

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?

An overwhelming majority of FIA members 'approved' the proposition that the ACNC regulate all DGRs with annual certification being included as part of their Annual Information Statement.

To assess stakeholders' views FIA asked its members to approve or disapprove of the basic proposition that DRGs be required to be registered charities and regulated by the ACNC to be eligible for DGR status provided the additional regulatory impost would be balanced and proportionate.

Given the unfortunate timing around the 30 June tax and ACNC annual information statement deadlines, FIA condensed the relevant questions to facilitate a statistically valid response and comply with the original July closing date for submissions.

In the circumstances, FIA decided to seek a response to a specific proposition. Significantly the number of 'disapprove' responses was very low.

Members were told that the ACNC had always been intended as a 'one stop shop' and the proposal would streamline administration of DGR with its multiple categories and registers.

They were also told that the Discussion Paper included several additional regulatory options but FIA's recommendation would, subject to member feedback, be for once-a-year certification as part of the Annual Information Statement coupled with random audits.

FIA believes this approach is consistent with the ACNC's 'Report Once, Use Often' framework for charities using the Commission's Charity Passport. In addition to FIA members there is considerable support in the sector as a whole for the basic proposition in Consultation Question 1. As highlighted by the Community Council of Australia (CCA), this will have resource implication for ACNC.

If the Government decides to moves forward with this 'Reform Opportunity' there will be a number of matters arising for both existing ACNC-registered charities and those entities with DGR status who are not registered with the ACNC.

A Review of the ACNC has already been foreshadowed and FIA suggests that further consideration of DGR Reform Opportunities be included in that process.

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

Yes.

There are certain organisations with DGR status who do not consider themselves to be charities and may well **not** have a charitable purpose. Conversely there are government entity DGRs who would welcome the opportunity to be deemed to serve a charitable purpose. This would qualify then for ACNC registration, which they see as a benefit.

There are entities with DGR status that have incomes above (but not far above) the $250,000 'small charity' threshold who would find the need to register with the ACNC and comply with the Annual Information Statement reporting requirement extremely onerous and unnecessary. Small charities are required to register with the ACNC but the reporting requirements are optional.

This aspect needs further research. If possible it would be preferable for a solution to be devised in which all DGRs, both government and non-government, are at least registered with the ACNC.

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

FIA's membership does not include private ancillary funds therefore FIA does not have any comment on this consultation question.

Issue 2: Ensuring that DGRs understand their obligations, for example in respect of advocacy.

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

No.

FIA asserts its members' right and need to advocate without restriction or impediment such as additional reporting requirements. From a fundraising perspective, many donors expect the organisations they support to be advocates and their continued support can be conditional on such advocacy.

This is entirely consistent with the guidance document issued by the ACNC *Advocacy by Charities:*

"The charitable purpose of 'advancing public debate' is set out in Section 12 (1) (l) of the Charities Act 2013 (Cth).
"Some charities undertake public advocacy to work towards achieving their charitable purposes.
"A charity can promote or oppose a change to any matter of law, policy or practice, as long as this advocacy furthers or aids another charitable purpose. However, a charity must not have a 'disqualifying purpose'. The two purposes which will disqualify an organisation from being a registered charity are:

- engaging in, or promoting, activities that are unlawful or contrary to public policy, and
- promoting or opposing a political party or candidate for political office."

This definition of advancing public debate in relation to charities has been settled by the High Court of Australia. FIA believes the definition establishes a practical, acceptable benchmark for fundraising activities.

There is no case for adding to the burden of red tape and requiring charities to provide additional information of this nature to the ACNC.

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

No.

See answer to Consultation Question 4.

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

There is no case for requiring the collection of such information.

Issue 3: Complexity for approvals under the four DGR registers.

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?

Streamlining the DGR administration is clearly a desirable and overdue reform. FIA notes the common sense proposal in the Discussion Paper to allow the ATO to refer to the old DGR Registers department when necessary.

A specific issue FIA would like to see addressed in the Treasury's response to this consultation is the perceived conflict of interest of the ATO. A strong argument for the establishment and retention of the ACNC was to remove Commonwealth administration of charities from the ATO because there was a perceived conflict of interest with its primary role as collector of revenue. Is this proposal to increase the role of the ATO consistent?

Issue 4: Complexity and red tape created by the public fund requirements

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?

See answer to Consultation Question 7 above.

Issue 5: DGRs endorsed in perpetuity, without regular and systemic review

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?

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

Treasury is referred to the Henry Report 2010, para B 32. Income tax concessions for NFPs are not detrimental to charities or the economy. Income tax exemption is not necessarily a concession, as implied in the Treasury paper. For example, churches, religious organisations and charities have never been subject to payment of income tax. Therefore, the tax has not been foregone or conceded; it has never been collected. Mutuality is not equivalent to tax expenditure.

Given the small cost of gift deductibility compared to the productivity of the not-for-profit sector, there is no good economic reason to reduce this level of subsidy, waive tax deductibility or reduce the number of DGRs. Rather, there is a solid argument for government support to be increased for a sector which is so valuable to the Australian community, both economically and socially.

FIA's view is contained in the answer to Consultation Question 1 above. As approved by an overwhelming majority of responding members, reporting requirements should be consistent with the ACNC's "Report Once, Use Often" Charity Portal framework in combination with random compliance audits.

Issue 6: Specific listing of DGRs by Government

11. What are stakeholders' views on the idea of having a general sunset rule of no more than five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every, say, five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

Under the proposed FIA model, DGR status will be, in effect, reviewed annually as part of the ACNC Annual Information Statement and be consistent with the "Report Once, Use Often" Charity Portal framework. In these circumstances, FIA believes the five year review is unnecessary.

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?

An 'activity' test carries significant regulatory burden as it would force each DGR into an artificially constrained resource allocation decision. That is, it would prevent a DGR from deciding that all or more than 75% of its activity is best directed to combinations of education, or research, or advocacy, or preventative activity or anything else besides "remediation". In this sense, the regulation would be economically inefficient.

In the case of environmental organisations, FIA submits that:

- the current combined legislative framework of the Charities Act 2013 and the Income Tax Assessment Act 1997 (ITA) provide ample regulation of environmental organisations and their deductible gift recipient status; and
- further regulation or restriction of the activities of environmental organisations would be unduly onerous and would prevent environmental organisations from providing benefits to the community in accordance with their various purposes.

Section 30.60 ITA also limits deductible gifts to environmental institutions (in table items 6.2.1 to 6.2.12 or 6.2.22) to two very strict criteria, both of which must be fulfilled. These are:

(a) if the institution is not a registered charity--the institution has agreed to give the Environment Secretary, within a reasonable period after the end of the income year in which you made the gift, statistical information about gifts made to the institution during that income year; and

(b) the institution has a policy of not acting as a mere conduit for the donation of money or property to other entities.

FIA is not aware of any circumstances where gifts to these environmental organisations have not met the ITA criteria. The restrictions in section 30.60 ITA are far greater than restrictions on other non-environmental charities with DGR status.

The definition of "environmental organisation" under section 30.260 ITA is also very restrictive as it requires an environmental organisation to satisfy each requirement in sections 30- 265 and 30-270. These are worth detailing for convenience.

Section 30 – 265 requires that the organisation's principal purpose must be protecting the environment in particular ways ie:

(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.

Further, under section 30 – 265 (2), the organisation must maintain a public fund that meets the requirements of section 30-130, or would meet those requirements if the environmental organisation were a fund, authority or institution.

Finally, under section 30 – 265 (4) the organisation must have agreed to comply with any rules that the Minister and the Environment Minister make to ensure that gifts made to the fund are used only for its principal purpose.

In addition, section 30 – 270 has other restrictions on environmental organisations with DGR status, including:

(1) No payment of profits to its members
(2) No acting as a conduit for the donation of money or property to other organisations, bodies or persons;
(3) Surplus assets to be transferred on winding up to another fund on the register;
(4) Statistical information to be provided to the Environment Secretary about gifts made to the public fund for each income year.

Entry on the Register is subject to approval of the Minister and the Environment Secretary (section 30-280 ITA) and removal on the Register is also subject to their direction (section 30-285).

The ITA restrictions on DGR status for environmental organisations exceed the requirements in the Charities Act 2013 and do not need to be increased. It is worth noting that the notes to section 11 of the Charities Act specifically state that **: "Activities are not contrary to public policy merely because they are contrary to government policy"** and further that: "**The 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 may be a charitable purpose." These notes indicate the government's intention to encourage the creation of charities for the benefit of the Australian public, while recognising that such charities, in the fulfilment of their purpose, may challenge government policy or legislation legitimately. This is the nature of democracy in Australia which has contributed to the Australian way of life, including its prosperity and stability.

Section 12 (j) of the Charities Act specifically defines "advancing the natural environment" as a charitable purpose within the Act. This includes "protecting, maintain, supporting, researching and improving" the natural environment. Section 12 (j) is entirely consistent with section 30-265 ITA, which further reinforces FIA's submission that the existing legislation is sufficient and does not need to be made more restrictive.

Deductible Gift Recipient (DGR) status merely enables donors to claim a tax deduction for their gifts. While tax deductibility is an inducement to give, it is not the only reason donors give to charities. Many donors give for non-material reasons such as altruism, affirming identity, affiliation and reciprocity (Giving Australia, *Research on Philanthropy in Australia*, 2005, p 30). There are many not-for-profits which legitimately raise funds for such non-material reasons without qualifying for DGR status.

FIA submits that the recommendation of the House of Representatives Standing Committee on the Environment to require environmental DGR's to spend 25 percent of annual expenditure from public funds on environmental remediation is in conflict with recent decisions of the High Court in this area. The Court has ruled that it is the 'purpose' not the 'activity' of the organisation that determines its DGR eligibility.

As both the High Court of Australia and Full Federal Court of Australia has pointed out in several recent cases, the correct test is what is the **purpose** of the NFP, not the **activity** of the NFP. Both the High Court and Full Federal Court have consistently applied this test, which is not an invention of the courts, but is grounded in the exemption provisions of the Income Tax Assessment Act 1997 (Cth). The courts' interpretation has not extended or stretched the meaning of these exemptions, but has applied their ordinary meaning to modern methods of fundraising and activities carried out by NFPs.

It is too limiting in a rapidly and continuously changing economic environment to specify what activities an NFP is allowed to conduct in pursuit of its objects, as this may cause the NFP to miss a valuable opportunity to raise funds for its cause. It is simply common sense that an NFP may engage in practical activities to raise funds, rather than relying solely on donations or other passive forms of fundraising such as bequests.

Commissioner of Taxation v Wentworth District Capital Ltd [2011] FCAFC 42. The Full Federal Court agreed with the trial judge that a bank established in the town of **Wentworth** was exempt from paying income tax under ss 50-1 and 50-10 of the Income Tax Assessment Act 1997 (Cth) because the main or dominant **purpose** for which it was established was a community service, ie the facilitation of face-to-face banking services which provided a substantial benefit to the community of Wentworth that was both real and tangible. As the Commissioner agreed, "service imports delivery of some practical help, benefit or advantage", in this case, operation of a community bank on a not-for-profit basis.

Commissioner of Taxation v Co-operative Bulk Handling Ltd [2010] FCAFC 155

In effect, the Full Federal Court decided that financial success alone does not disqualify a NFP for claiming a tax exemption. The Full Federal Court acknowledged that Co-operative Bulk Handling had grown and expanded considerably since its inception in 1933, but it still remained a co-operative dedicated to the **purpose** of promoting the development of agricultural resources in Australia and was therefore entitled to exemption under s 50-1 of the Income Tax Assessment Act 1997 (Cth). By retaining its co-operative structure, it fulfilled the special condition that it was not carried on for the profit or gain of its individual members.

See also: **Commissioner of Taxation v Word Investments Ltd [2008] HCA 55**

FIA supports the current legislation as interpreted by the High Court, in particular the exemption provisions of the Income Tax Assessment Act 1997 (Cth).

As all charities, including those with an environmental purpose, are regulated by the Charities Act and ITA, it should be sufficient for compliance purposes for charities to comply with those acts and also to comply with the reporting requirements of the ACNC and ATO.

Unduly onerous regulation on charities is unnecessary. Most charities, except for very large charities, find that the costs of compliance adversely affect their budgets and ultimately, their ability to pursue their charitable purposes. Charities do not operate the same way or with the same overheads as commercial enterprises and therefore cannot be treated in the same way.

With respect to the Register,

- the requirements in section 30-270 ITA are consistent (except for reporting to the Environment Secretary) with the usual structural and reporting requirements for charities. These are not controversial; and
- the requirements in section 30-265 ITA are consistent with section 12 (j) of the Charities Act.

FIA urges policy makers, in deciding how far to regulate environmental charities, to take note of the notes in sections 11 and 12 of the Charities Act about the broader charitable purposes and the acceptable actions that charities may conduct in pursuit of their purpose. To attempt to restrict organisations from exercising their right to challenge government policy or legislation in pursuit of their charitable purpose is to ensure that such organisations become ineffectual. As the High Court of Australia has determined, there is an implied right in the Australian Constitution for all Australian voters to engage in political debate. The Constitution allows voters to communicate directly with legislators through referendums in order to bring about changes in the Constitution. This means that the Constitution itself allows advocacy for legislative and political change and for this reason, the traditional common law must be adapted to be consistent with the requirements of the Constitution. The outcome for charities in Australia is that there is no general doctrine which excludes political objects from charitable purposes. (Aid/Watch Incorporated v Commissioner of Taxation [2010] HCA 42). The notes in the Charities Act reflect the High Court determination.

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?

There are two separate propositions in this Consultation Question. FIA disagrees with the first sentence on the need for sanctions, but agrees with the second sentence that requiring DGRs to register with the ACNC will ensure that all DGRs are operating lawfully.

There is no need to single out environmental organisations. Neither is there any need for specific sanctions.

The second sentence outlines one of the reasons why the basic proposition of requiring DGRs to be ACNC registered is a reform opportunity which should be embraced. One of the 'disqualifying purposes' for a charity under the Charities Act 2013 is "engaging in, or promoting, activities that are unlawful".

Thus ACNC registration will ensure lawful operation by DGRs under the proposal and no extra sanctions are needed.

– End of Submission –