Submission

Tax Deductible Gift Recipient (DGR) Reform Opportunities

Submitted to:

Australian Government Treasury

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I am happy the Australian Government is abiding by democratic principles and is asking for public opinion. It is most essential that it does this when a controversial legislation is imminent and this is one such case.

This proposal the proposal to require all environmental DGRs to spend at least 25 per cent of public donations on 'environmental remediation' as well as proposals for additional reporting and supervision of environmental organisations over and above other charities or lose tax concessions. In other words a loss of tax deductibility on donations unless the proposed threshold are met.

I disagree totally with the implied assertion behind this law that it is the task of environmental groups to be undertaking environmental remediation at any Government decreed level. There is a healthy diversity of environmental groups in Australian society. Some of these groups do participate in environmental remediation along with other environmental pursuits while others fulfil alternatively vital roles in the community including that of public informant, advocacy, legal advice and campaigning against and prevention of environmental destruction.

It is most commonly State Governments that are the biggest developers causing the greatest environmental destruction. Next to them comes the Australian Government itself with its support for large environmentally destructive enterprises such as the Ord River Scheme or the opening up the Galilee coal basin in Queensland or the rail line for the Adani mine. Alongside them with near equal rating come the environmentally destructive Mining fraternity (in particular the Coal mining industry), the large industrial scale farming enterprises and urban developers. Clearly it is these groups which should be spending 25% of their taxation revenues or profit margins on environmental remediation since they cause the destruction in the first place.

It is petty and fundamentally unfair to effectively try to enforce all environmental groups do the remediation for the perpetrators through the requirement of 25 per cent of public donations on 'environmental remediation' to gain tax free status.

This proposal would essentially be taking up the arguments made by the mining and resources lobby, including the Queensland Resources Council and the Energy Resources Information Centre (funded by the gas industry). How is it that the Government is so persuaded by such bodies that it is their doing and persuasion that has the ear of Government to the detriment of the environmental groups and thereby the environment and by extension the health and vitality of the Country.

Currently these tax concessions recognise the public benefits and services that Conservation groups and the EDOs provide across Australia – to farmers, Landcare and conservation groups, Aboriginal people, urban and rural communities.

The whole concept of a certain percentage is fanciful. Why not 26% or 15%? It is an arbitrary figure concocted by politicians doing the bidding of the groups causing the environmental destruction and plainly seeking to hobble the environmental groups so that they can have far more opportunity to cause yet more environmental destruction

For decades, environmental organisations on the Register of Environmental Organisations (REO) have been eligible for tax-deductible donations – encouraging private funding for the public good. But in 2016, half the members of an Australian parliamentary inquiry on the REO proposed that to remain eligible, all environmental groups must spend at least 25 percent of their public donations revenue on 'environmental remediation work'. They said remediation would include tree-planting and similar activities, but exclude environmental research, community education, overseas environmental protection, and the free community legal services provided by Environmental Defenders Offices around Australia. The proposal split the Committee, while other administrative changes received broader support.

Why should environmental research, community education, overseas environmental protection, and the free community legal services be excluded from tax free status when it goes to protecting and arresting the devastation wrought upon the natural world by developers in all shapes and forms such as the minerals industry or industrial scale farming or urban developers or industrial scale fishing. It has been demonstrably shown that a healthy environment ensures healthy humanity. Environmentally sustainable development, the need to balance environmental and social capital and the absolute need to maintain 'sustainable wellbeing' for present and future generations is arguably far more important than a single fixation on tree planting.

In short what the 2017 Treasury consultation paper is now proposing various changes to the administration of all Tax Deductible Gift Recipients (or DGRs) reveals a complete lack of concern for other valid environmental activities which should attract and be eligible for tax-deductible donations.

Imposing a minimum spend on remediation would single out environmental charities and divert more of their limited resources to administrative reporting. It would also require many well-established environmental charities – including EDOs – to either radically alter the way they operate; inefficiently divert money to other groups at the Government's direction; or lose eligibility for tax-deductible donations altogether. It would do all of this based on an arbitrary and narrow interpretation of protecting the environment.

I would be surprised and disappointed if more weight were given to the resources lobby than to the hundreds of environment groups, community members, donors and governance experts who made submissions to the REO inquiry. Many pointed out the pitfalls of artificially distinguishing 'on-ground' rehabilitation from other important things that environmental charities do in pursuing their public purpose. Their evidence led to half the parliamentary committee – one Liberal and five Labor members – rejecting the minimum 25 per cent spending proposal.

Of course, restoring our land and waters is worthy of tax-deductible status. But it's not sufficient if the overall public purpose is to protect the environment. Remediation attempts to fix damage done to the environment. But it's far preferable to prevent damage in the first place, and that's where law reform, public education, research, advocacy and professional legal services all play their vital role.

Environment groups provide an essential window for collaboration on public policy development. Their established grassroots links and experience create a dialogue between local communities and central policy-makers, where local voices may not otherwise be heard. For example, since 1985, EDO

NSW has developed extensive networks with local communities through our legal outreach, advice and casework, policy and law reform expertise and our free legal advice line. Two-thirds of the people who call us with environmental and planning law problems are from regional or rural areas.

There are many other organisations providing equally important services such as research, environmental education and public advocacy, who would not meet a new test for 'on-ground environmental remediation'.

CSIRO research on Australian attitudes to mining also shows that the public wants environmental accountability. While no sector is trusted absolutely, information from non-government organisations (NGOs) is often more highly regarded than information from government or industry.

It is worth investing in groups and services like these because NGOs can provide them at low cost, and at arms-length from government decision-making or ministerial direction. Allowing for tax-deductible donations is an efficient way to strengthen public participation, access to justice and the rule of law.

It may suit some narrow private interests to ask the Government to constrain environmental voices, to restrict community access to legal services, and place new administrative burdens on the charity sector. But it's not in the public interest, nor what the broader community would expect of our charity and tax laws. That's why our current laws and comparable overseas countries focus on charities' purposes – rather than attempt to define their activities.

This year, all organisations on the REO are for the first time ever being required to report the amount (in a percentage) they have expended on 'on-ground environmental remediation'. But that will only ever capture a narrow part of what it means to protect the environment – a public purpose that requires so much more.

I refer as well to the submission made by the EDO NSW office. I agree with the cogent arguments presented by them and I add the essential parts below as part of my submission. It is important that Treasury does not adopt any mandatory funding diversion or limit, or related proposals targeting environmental organisations, for the following five reasons:

1. Conservation work is vitally important, but the Australian community recognises that not all environmental problems can be solved reactively. That is why there is no such limitation in the existing tax rules.

2. The proposed limitation contradicts the weight of evidence to the inquiry into the Register of Environmental Organisations (**REO inquiry**) of 2015-16.3. That is why half the members - 1 Liberal and 5 Labor members - rejected the proposal.4

3. A mandatory 25 per cent funding diversion would have perverse outcomes for environmental protection and inefficient administration. It would force established charities, including EDOs, to divert money away from their recognised areas of expertise and public benefit – or remove their DGR status altogether. This would diminish EDOs' unique role in upholding the rule of law.

4. There is a clear recognition in Australian charity law that a wide range of advancement, improvement and support services are of public benefit to the environment, and that advocacy is 'indispensable' to an informed democracy.

5. Additional limits on environmental charities would reflect poorly on Australia's international reputation and be out of step with comparable jurisdictions.

I also endorse thoroughly the following argument also made in the NSW EDO submission.

This section is divided into three parts:

A. Why charitable status and tax concessions are important to EDOs

B. How environmental charity status and tax concessions provide public benefits

C. Responses to Questions in Treasury's DGR Reform Discussion Paper.

A. Why charitable status and tax concessions are important to EDOs

The first EDO opened its doors in NSW in 1985, and EDOs were first listed on the Register of Environmental Organisations from 1993. Subsequently, EDOs across Australia have obtained charitable or DGR status to encourage individual donors to help protect the environment through the law. Our unique legal services include:

☐ free community advice lines on environmental law problems;

☐ community legal education programs to help people understand the law and participate in environmental and planning decisions that affect them;

☐ an expert policy and law reform role, via submissions to address systemic environmental issues and to achieve ecologically sustainable development;

☐ legal advice and representation on public interest environmental matters in the courts, including reviewing decisions or enforcing compliance with the law.

These services are fundamental to providing 'access to justice' to individuals and groups across the spectrum of federal and state environmental and planning laws. EDOs also support the rule of law by ensuring that companies and decision-makers comply with their environmental obligations, and can be held to account if they don't.

Historically, EDOs have relied less on charitable funding and more on other public sources.[5] However, in December 2013 the Attorney-General announced all federal funding for EDO legal services would be withdrawn. This has placed significant strain on each office's capacity to assist the community on public interest environmental law matters – services which are not covered by Legal Aid or the private sector

Until December 2013, many EDOs relied almost exclusively on federal funding to assist communities across Australia, with an 18-year track record of bipartisan support. This funding enabled communities in every state and territory to access high quality legal advice, representation and expertise to protect the environment – where significant environmental and heritage values are under threat; where legal processes have not been followed; or where justice for local communities have not been served.

In the current climate of diminished government funding, EDOs are reorienting their funding sources in good faith to include more private charitable donations. Through our ongoing DGR status and tax-deductible donations, our work delivers equitable access to justice,[7] provides an important public check on executive decision-making,[8] and creates opportunities for positive and enduring environmental outcomes.

5 This has included annual funding from federal, state and territory governments and state Law Societies (particularly in NSW); project-specific or grant-based funding from governments (such as environment departments and grant agencies); and for some public interest case work, payment by clients (individuals or groups) who have the means to do so.

6 The sudden withdrawal of all annual Community Legal Service Program (**CLSP**) funding, and almost $10 million in expanded funding over four years, has raised the real prospect of closure for some offices and staff.

7 See Productivity Commission, *Access to Justice Arrangements* (2014), pp 711-13.

8 See for example, ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) regarding appeal rights.

9 See National Association of Community Legal Centres, *Environment Matters* (2013), at www.naclc.org.au/resources/naclc_edo_web.pdf.

B. How environmental charity status and tax concessions provide public benefits

The current tax concessions for charities and not-for-profits, including provision for DGR status and income tax exempt status, are appropriate and should be retained.

The Register of Environmental Organisations (**the Register**) under the *Income Tax Assessment Act 1997* (**ITA Act**) has recognised the 'public good' of environmental purposes for over 20 years. By allowing tax-deductible donations, the Register encourages Australians to give to charities with the principal purpose of protecting, researching, educating and informing people about the natural environment. Similarly, income tax exemptions for charities themselves reflect their 'public good' purposes, [10] as well as their often significant reliance on government grants and/or charitable donations.

A strong and diverse environmental sector – including charities and other not-for-profits – is vital to ensure that Australia's environment is protected, and that governments and businesses comply with their legal obligations and the rule of law. This is in the interests of all Australians, and is particularly important at a time when Australia's environment and native species are under increasing stress. [11] Systemic challenges include waste and pollution prevention, climate adaptation and emissions reduction, biodiversity protection and water security. In many such areas, advocacy, behavioural change and improved regulation is more efficient than 'remediation'.

Protecting the environment also has important flow-on benefits to other sectors of society and the economy. As The Hon. Robert Hill articulated as Environment Minister in 2001, integration of environmental considerations is an essential element of planning for economic growth. This requires a significant rethink of priorities that are attuned to the concept of *ecologically sustainable development* (**ESD**).[12]

A decade later, the then Treasury Secretary, Dr Martin Parkinson emphasised that to maintain 'sustainable wellbeing' for present and future generations, there is a need to balance *environmental and social capital* – in addition to traditional notions of physical, financial and human capital.[13] Similarly, in 2013 the National Sustainability Council noted that: 'A healthy natural environment with functioning ecosystem processes is… an economic and social imperative'.[14]

The clear message is that environmental protection for the public benefit goes well beyond environmental remediation, and requires collaboration and expertise in a range of fields, including the NGO sector. For this reason the *Guidelines on the Register of Environmental Organisations* (2003 p 9) recognise that protecting the natural environment includes, among other things, promoting the principles of Environmentally Sustainable Development ESD.

10 See for example, The Hon Ian Sheppard AO QC, Robert Fitzgerald AM, and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), chapter 22, pp 186-187.

11 See *State of the Environment 2016*; and *State of the Environment 2011* reports to the Australian Government.

12 Statement by Senator the Honourable Robert Hill, Minister for the Environment and Heritage 22 May 2001, *Investing in Our Natural Heritage — Commonwealth Environment Expenditure 2001-02*; Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), sections 3-3A, *ecologically sustainable development* has been defined as: 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. See: www.environment.gov.au/resource/national-strategy-ecologically-sustainable-development.

13 Dr Martin Parkinson, '*Sustainable Wellbeing- An Economic Future for Australia'*, Address for the Shann Memorial Lecture Series (August 2011), available at www.treasury.gov.au.

14 *Sustainable Australia Report 2013*, 'Reducing the environmental impact of economic growth', p 81.

The amount of donations that environmental charities receive from the public is small, but very important. Environmental DGRs reported a total of $147 million in tax-deductible donations in 2014-15. This would equate to about 6% of the federal Environment Portfolio budget.15 Tax revenue forgone would be less than this, yet the environmental outcomes and other public benefits are recognised as significant.[16]

Deductible gift recipients often have limited paid staff (if any) and rely on hard-working volunteers to further their charitable aims. Yet charities and NGOs can be more nimble and responsive than centralised government agencies, and their networks are often more in touch with 'on the ground' issues. For example, local community groups may rely on peak environmental charities for a two-way flow of information or advocacy. Environmental charities therefore provide an important public benefit by facilitating informed democratic engagement to advance environmental protection.

Non-government organisations are also an essential source of independent information. CSIRO research (focusing on perceptions of mining) found that the Australian public does not trust information from any one sector absolutely. Yet on average, NGOs were more trusted than government or industry sources.[17]

By presenting a different perspective to government and industry, environmental charities can assist, improve and complement government and business activity (without always agreeing with it). They facilitate dialogue with community members, and provide a voice for the environment in public policy debates, where that voice may be otherwise overlooked. Recent trends in public policy-making and reductions in departmental resourcing have also increased the importance of environmental and other charities.

All of these factors increase the need for environmental charities to engage in service delivery, advocacy, policy development and public dialogue for environmental protection. Tax-deductible donations are an important enabler for charities to do this. Overall, the evidence suggests that the range of public benefits that environmental charities provide strongly justifies their tax-concessional status. [18 7]

15 Department of Environment and Energy, *Annual Report 2015-16*, p 302; *Portfolio Budget Statements 2014-15* No. 17, Environment Portfolio (2014), p 7. We understand that charities on the Register of Environmental Organisations make up about 1 in 1000 not-for-profit organisations in Australia, and about 1% of charities. See Treasury *Re:think Tax Discussion Paper* (2015), p 121: 'There are around 600,000 NFPs in Australia' and 'around 60,000… registered charities'. There were around 600 registered environmental organisations in 2015.

16 See the Hon Ian Sheppard AO QC, Robert Fitzgerald AM, and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), pp 15-16 and Chapter 22. See also the Productivity Commission *Access to Justice Arrangements* (2014), pp 708-709.

17 Moffat K, Zhang A and Boughen N, (2014), *Attitudes to Mining in Australia,* CSIRO, p11.

18 For more information see EDOs of Australia, *Submission to the House of Representatives Inquiry into the Register of Environmental Organisations* (May 2015), pp 7-9. Available at: www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO or by request after publication.

C. Responses to Questions in Treasury's DGR Reform Discussion Paper

The Treasury Discussion Paper sets out 13 questions for feedback on seven issues:

- *Transparency in DGR dealing and adherence to governance standards*
- *Ensuring DGRs understand their obligations, for example in relation to advocacy*
- *Complexity for approvals under the four DGR registers*
- *Complexity and red tape created by the public fund requirements*
- *DGRs endorsed in perpetuity, without regular and systemic review*
- *Specific listing of DGRs by Government*
- *Parliamentary Inquiry into the Register of Environmental Organisations (REO)*

As noted, we have major concerns with certain recommendations arising from some members of the REO Inquiry. These are addressed at questions 12 and 13 below.

Issue 1: Transparency in DGR dealing 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?* [Discussion paper p 11]

We support this recommendation. Registration as a charity regulated by the ACNC provides an appropriate baseline for governance, support and oversight to relevant NGOs. It should also make for simpler registration processes and more consistent reporting and oversight. We support an ability for the ACNC to coordinate or assist charities to apply for DGR status.

On the other hand, issues of fragmentation and inconsistency could arise if attempts are made to unduly constrain which environmental charities can seek DGR status, such as by requiring all DGRs to do 'remediation' work (see 12 below). This could unreasonably bar EDOs and other environmental charities that provide legal services, information, education, research or overseas capacity-building from receiving DGR status.

At present the environment-related categories under the *Charities Act 2013* (**Charities Act**) and the *Income Tax Assessment Act 1997* (**ITA Act**) are broadly aligned (see **Attachment C**). It is very important that 'the purpose of advancing the natural environment' under the Charities Act, and DGR eligibility under the ITA Act, continue to encompass a broad and consistent range of activities. In particular:

☐ 'protection, maintenance, support, research, improvement or enhancement';[19]

☐ environmental protection, information, education and research (as under the ITA Act) and similar purposes; [20]

☐ promotion of ecologically sustainable development principles (precautionary principle, ecological integrity, intergenerational equity and full costing); [21] and

☐ 'natural environment' should be interpreted to include urban and non-urban environments.[22]

19 The Hon Ian Sheppard AO QC, Robert Fitzgerald AM, and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), recommendation 13, pp 15-16; Ch. 22.

20 A broad interpretation is consistent with the *Charities Act 2013* (Cth), s. 12 (1)(j) and (k). The latter prescribes 'any other purpose beneficial to the general public…. analogous to or within the spirit of' purposes (a) to (j). See also s. 12(1)(l) of the Charities Act, which notes that advocating to reform or support a law or policy related to a charitable purpose provides a public benefit, and is in itself a charitable purpose.

21 Australian Government, *Register of Environmental Organisations – Guidelines* (2003), p. 9. On ESD principles see the Intergovernmental Agreement on the Environment (1992) and the EPBC Act 1999 (Cth), ss. 3-3A.

22 For example, protection of the environment should include urban parklands, given their public benefits to wellbeing, recreation, wildlife habitat and ecosystem services. See further the inquiry into the definition of charities (Sheppard et al. 2001) and EDOs of Australia submission to the REO inquiry (2015) p 12 [PDF 583KB].

2. Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why? **[Discussion paper p 11]**

Environmental Defenders Offices are already registered as charities via the ACNC, and as tax-deductible gift recipients. However, it is important that DGR organisations who are *not* registered with the ACNC are properly consulted with and assisted to address any complicating factors. From the Discussion Paper's statistics (p 9) there may be over 2000 organisations in this position – described as mainly registered environmental, cultural, emergency services-related organisations or ancillary funds.

3. Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly? **[Discussion paper p 11]**

N/A. No comment.

Issue 2: Ensuring DGRs understand their obligations, for example in relation to advocacy

4. Should the ACNC require additional information from all charities about their advocacy activities? **[Discussion Paper, p 12]**

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

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

In our view, annual information statements from charities to a single regulator (the ACNC), along with annual financial statements from 'larger' charities, provide sufficient, proportionate and public information about charities' activities and purposes.

Transparency and legal safeguards have increased since the ACNC was established in 2012. Charities and DGR organisations are already subject to various registration checks, reporting, transparency and compliance safeguards under charity and tax laws (some of which overlap). Charities also communicate directly with the public to raise awareness of their activities and to raise funds directed to their charitable purpose. [9]

Anyone can complain if they are concerned that a charity is acting outside of their charitable purpose or if they have evidence of the misuse of charitable funds. For example, the UK Charities Commission states it has a 'fair and open procedure' to deal with complaints. We agree this is an appropriate compliance approach:

> *Where complainants simply disagree with the political or campaign stance taken by a charity, we will not generally become involved. As the charity regulator, our central concern is that charities should operate at all times within their own charitable purposes.*[23]

23 UK Charities Commission, *Speaking out* (2008), at 7.1.

24 Australian Charities and Not for Profits Commission (ACNC): http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx

25 See Charities Act ss. 11 and 12 – the important distinction is that a charity does not exist for the purpose of supporting or opposing a political party or candidate, or an unlawful purpose.

26 French CJ, Gummow, Hayne, Crennan and Bell JJ *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at 44.

27 Productivity Commission, *Access to Justice Arrangements* (2014), p 709.

28 Ibid p 708.

Guidance on advocacy, and the public benefit of informed debate

The ACNC continues to provide important assistance to the sector, including useful guidance on charities and advocacy. [24]

The Charities Act makes clear that advocacy directed towards a charitable purpose is lawful and acceptable (s. 12). This can include advocacy that is 'political' – in that it may well intersect with issues of concern to the electorate, the policies of a political party, or laws passed by a parliament. [25] The Charities Act also makes clear that advocating for policy and law reform is in itself a legitimate charitable purpose (for example, reform to better address homelessness or environmental protection).

This reinforces the High Court's view in the *Aid/Watch* case (2010) that advocacy is of public benefit, and is 'indispensable' to an informed democracy and public debate.[26] The Productivity Commission has also found that systemic advocacy provides a public benefit and improves community access to justice:

> *the Commission considers that in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources.* [27]

The Productivity Commission also found that publicly-funded advocacy work fills an important gap, including on environmental law, because:

> *Strategic advocacy, law reform and public interest litigation are areas where there are few incentives for private lawyers to act. … [Private lawyers] are less interested in achieving broad-based reforms that could result in positive outcomes for the wider community.* [28]

For these reasons – coupled with existing legal safeguards, ACNC guidance and reporting requirements – it is not necessary or beneficial to require DGRs or charities to provide specific additional information on their advocacy activities.

Issue 3: Complexity for approvals under the four DGR registers

The four DGR registers relate to environmental, cultural, harm prevention and overseas aid organisations respectively, and are currently administered by related portfolio agencies.

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? **[Discussion Paper, p 14]**

EDOs of Australia agree that administration of the four DGR registers could be more efficient. Under current arrangements that require ministerial sign-off, there is also a risk that decisions to accept or reject DGR applications could be unduly politicised.

We continue to support the ACNC's role as an independent regulator to ensure consistent and efficient governance across the charity and not-for-profit sectors. An independent regulator reflects best practice.[29] We also support an ability for the ACNC to assist charities to apply for DGR status, either by administering this directly, or by liaising with the ATO.

29 See for example https://www.gov.uk/government/organisations/charity-commission; http://www.oscr.org.uk/.

30 See for example UK Charities Commission, *Speaking out* (2008), at 7.1.

Whether DGR administration in any of these four areas is transferred to the ACNC or the ATO, it is important that guidance, reporting and regulatory approaches take into account the sector's capacity and limited access to professional advice. It is also vital that registration, compliance investigations and responses to complaints have expert input and are separated from political processes. For example, a minister or member of parliament should not be permitted to 'lean on' a regulator to investigate (or not investigate) a particular organisation, outside of normal complaint-handling, compliance and risk management processes.[30] This is important to preserve the integrity of, and public confidence in, independent regulatory processes.

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?*** **[Discussion Paper, p 15]**

The Discussion Paper queries whether it is still necessary to require charities to have a separate public fund for donations, or whether this need has been superseded. Community trust in charities' management of donor funds is important to the sector. Maintaining a separate public fund for donations can be a useful component of efficient, accountable and transparent financial governance, provided that organisations have sufficient and appropriately trained staff and resources.

If evidence suggests that maintaining a separate fund is difficult or confusing for some small charities, the Government could consider alternative ways to maintain public confidence, good governance and oversight of those charities' funds. In either case, the regulator should be resourced to work with and guide regional, rural and smaller charities – to build their capacity and recognise and attract competent and ethical fund managers.

We agree that organisations should be permitted to be endorsed across multiple DGR categories (with a single public fund) where this aligns with legitimate charitable purposes. This would improve DGR access for organisations that work across multiple categories.

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? **[Discussion Paper, p 16]**

10. What are stakeholders' views on who should be reviewed in the first instance? What should be considered when determining this? **[Discussion Paper, p 16]**

The Discussion Paper (para 53) notes that a DGR is 'generally [endorsed] for life', and 'currently subject to minimal governance unless it is an ACNC regulated charity.' However, it also proposes that all DGRs *would* be required to register as an ACNC regulated charity (a proposal we generally support). We agree this is a useful step for ongoing public confidence.

In our view, ACNC registration, transparent reporting and governance requirements should negate the need for rolling reviews (and annual certifications) that an organisation continues to meet DGR requirements. In particular, the ACNC's reporting program requires an annual information statement from all charities and financial statements for larger charities. We also understand ACNC compliance and auditing includes a process of de-registering disbanded or dormant charities that fail to comply (DGR status would also be revoked as a result).

Currently, the REO Guidelines impose separate obligations on environmental DGRs to report similar information to the administrator (the Department of Environment and Energy). We would support administrative efficiencies to simplify these parallel processes into one annual submission to the ACNC. We also note the Government is endeavouring to simplify and speed up the initial DGR application process. However, these potential efficiencies may be lost if additional verification and annual certification processes are then required.

We consider ACNC governance and public reporting requirements are sufficient to maintain public confidence and regulatory oversight of charities. We note particular concerns about 'annual certification' in addition to existing reporting obligations. However, if the Treasury considers ACNC registration and oversight is not sufficient to ensure DGRs continued eligibility, there should be certain safeguards around rolling reviews. First, a presumption that DGR status will be retained unless there is clear evidence of ineligibility (to avoid undue volatility in funding); second, to acknowledge the sector has limited resources to seek external advice on charitable and tax obligations; and third, to protect a person acting with good faith and due diligence when certifying the charity remains eligible for DGR status.

Issue 6: Specific listing of DGRs by Government

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? **[Discussion Paper, p 16]**

Please refer to our response to question 9. Requirements for charitable registration and oversight by the ACNC may negate the need for additional reviews or sunset clauses. Any additional reviews should provide consistent safeguards relevant to DGR needs and capacity.

Parliamentary Inquiry into the Register of Environmental Organisations

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? **[Discussion Paper, p 18]**

EDOs of Australia strongly rejects the proposal that all environmental DGRs be required to divert a proportion of their expertise and funding to a narrow concept of 'environmental remediation' – as recommended by some members of the REO Inquiry.[31] It is unjustified on the evidence, and an inefficient use of resources, for the government of the day to single out environmental DGRs and define and direct what they do. It also sets an adverse precedent for other charitable and DGR sectors.

We acknowledge that this proposal does not originate with Treasury, but was initiated by a small number of private interest groups. [32] Their particular interests do not align with the broader public interest and benefits provided by environmental charities and DGRs.

We outline 5 main reasons for rejecting this proposal, and similar proposals, below.

Conservation work is vital, but environmental outcomes need proactive and systemic support

First, conservation work is vitally important, but Australians recognise that not all environmental problems can be solved reactively, by planting trees or cleaning up waste. That is why there is no such limitation in the existing tax rules. Proactive protection of the environment – such as raising environmental awareness, strengthening the effectiveness of environmental laws, overseas capacity-building and new research on species, ecosystems and environmental innovation – provides clear public benefits.

These systemic public benefits have been recognised by an independent inquiry into charities (2001):[33]

> *The benefits that flow from protecting the environment cannot be appropriated by any person or persons for their own private benefit. For example, improving the air quality in Sydney or the water quality in Adelaide is for the benefit of all people who live in those cities, whether they contributed directly to that improvement or not.*

The expert panel cited the benefits of protecting and sustaining the environment for 'economic performance, human health and social 'well being', aesthetic value 'particularly among highly urbanised populations', and as 'an area of active community involvement'. These broad benefits aren't possible via remediation alone.

31 See House of Representatives Standing Committee on the Environment, *Report of the Inquiry into the Register of Environmental Organisations* (**REO Inquiry**), April 2016, at www.aph.gov.au/reo.

32 REO Inquiry Report (2016), para 4.70-4.72. Namely the Queensland Resources Council; and the Energy Resources Information Centre, which 'promotes the natural gas industry' and is 'funded by the natural gas industry' (see http://www.energyresourceinformationcentre.org.au/about-us/). The Inquiry Report notes that the Minerals Council of Australia and the Australian Taxpayer's Alliance proposed similar restrictions.

33 The Hon Ian Sheppard AO QC, Robert Fitzgerald AM, and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), pp 186-187.

34 See Productivity Commission, *Access to Justice Arrangements* (2014), pp 711-13.

35 See House of Representatives Standing Committee on the Environment, Inquiry into the Register of Environmental Organisations (**REO Inquiry Report**), April 2016, at www.aph.gov.au/reo.

The Productivity Commission's 2014 *Access to Justice* inquiry further highlights the breadth of public benefits stemming from environmental law services. In relation to EDOs and environmental matters, the Commission noted:

The rationales for government support for environmental matters are well recognised. The impact of activities or actions that cause environmental harm typically extend beyond a single individual to the broader community.

…

[T]here are strong grounds for the legal assistance sector to receive funding to undertake strategic advocacy, law reform and public interest litigation including in relation to environmental matters.34

Just as there are 'strong grounds' for direct public funding, there is an equally strong rationale to recognise DGR status for environmental law and other support services – services that could not meet a narrow conception of 'environmental remediation'.

Weight of evidence to the REO Inquiry, and dissenting comments, support existing DGR eligibility

Second, adopting a minimum 25% 'funding diversion' would also contradict the overwhelming weight of evidence to the REO inquiry. [35] As hundreds of submissions demonstrated, Australia needs a strong and diverse charitable and DGR sector to protect our natural and cultural heritage, and our society, over the long-term.

EDOs of Australia and many other submissions demonstrated the diverse public benefits that registered environmental organisations (DGRs) provide – from public interest environmental law cases, to support and advice to individuals and groups, environmental education, public awareness, scientific research, advocacy and law reform. This work is absolutely essential to the environmental rule of law in Australia. This evidence led to six Labor and Liberal members of the Inquiry to rejecting any minimum funding diversion in dissenting reports.36

36 See further pp 85-94: Additional comments – Mr Jason Wood MP; and Labor Members' Dissenting Report, Mr Andrew Giles MP, The Hon. Mark Butler MP, the Hon. Mark Dreyfus QC MP, Ms Sharon Claydon MP and Mr Tony Zappia MP.

37 Including the *International Covenant on Civil and Political Rights* (**ICCPR**), the *Rio Declaration on Environment and Development* (1992) and related *UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010) (UNEP Guidelines), available via www.unep.org.

Risk of inefficient administration and double-handling

Third, in addition to causing perverse outcomes for environmental protection, a mandatory 25% funding diversion would cause inefficient administration and double-handling of donations. It would force existing charities to conduit money away from their areas of expertise, or remove their DGR status altogether. In his additional comments to the REO Inquiry (2016), Mr Jason Wood MP expressed concerns that organisations that deliver environmental legal advice and services like EDOs would not qualify. Nor would researchers of endangered species, environmental education groups, or overseas orangutan protection.

Australian laws recognise diverse public benefits of advocacy and environmental protection

Fourth, the 25% funding diversion proposal undermines the clear recognition in Australian charity law (both at common law and in legislation) that advocacy and other diverse forms of environmental advancement, improvement and support services are of public benefit to the natural environment, and to an informed democratic society. This is explored under Parts A and B of this submission.

Additional limits on environmental charities would damage Australia's reputation and be out of step with comparable jurisdictions

Finally, we are concerned that adopting further proposals to limit or direct the activities of environmental organisations and charities would reflect poorly on Australia's reputation. This includes the openness of Australia's democratic and legal systems to public and judicial scrutiny, and Australia's commitment to international laws and principles that support the benefits of advocacy, information and informed public debate.37

It is also difficult for Australia to support the strengthening of democratic institutions elsewhere – such as the rule of law, public participation and freedom to advocate – when civil society groups feel threatened at home. [15]

Following a 2016 visit to Australia, the UN Special Rapporteur on Human Rights Defenders stressed the importance of advocacy and concerns about a range of efforts to reduce funding to environmental organisations in Australia. He noted:38

38 Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders, 'End of mission statement – Visit to Australia', 18 October 2016, available at http://un.org.au/files/2016/10/2016-10-18_Australia_SR-HRD-statement-final-3.docx

39 Further information on the UK, NZ and Canada can be found in our 2015 submission to the REO inquiry: EDOs of Australia, *Submission to House of Representatives Inquiry into the Register of Environmental Organisations*, 21 May 2015 [PDF 583KB] available at http://www.edo.org.au/justice1.

40 *Charities Act 2011* (UK), ss 3(1)(i) and 3(1)(m)(ii) respectively.

41 See: www.elflaw.org.

42 See for example, *Re Greenpeace [2014] NZSC 105*, Supreme Court of New Zealand, per Elias CJ, McGrath and Glazebrook JJ, [3].

43 For example, 'A charity may choose to focus most, or all, of its resources on political activity for a period.' UK Charity Commission, *Speaking out: guidance on campaigning and political activity by charities* (2008), at 1.1 and 3.1. See: https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-

and-political-activity-by-charities.

The opposition to environmental defenders [has] taken the form of funding cuts, threats to the deductible gift recipient status of environmental organisations and efforts to vilify advocacy by environmental organisations.

…

I encourage the Government to reject the flawed recommendations of the Committee, proposing new requirements to spend a quarter of donor funds on environmental remediation and introducing unnecessary restrictions on the type of work environmental organizations should conduct.

In addition to damaging Australia's international reputation, the proposed 'requirements to spend a quarter of donor funds on… remediation' would be out of

step with the legal trend of comparable jurisdictions. Countries such as the United Kingdom (**UK**), New Zealand (**NZ**) and Canada (see below) are joining Australia in moving away from narrow restrictions on *activities* to a focus on charitable *purposes*.

Our review of these countries in 2015 showed that the UK, NZ and Australia's laws are broadly consistent on what a charity is and the scope of charitable purposes.39 We are not aware of any requirements on environmental charities in these countries to apply a minimum amount of donated funds to 'environmental remediation'. For example, the *Charities Act 2011* (UK) is similar to Australia's legislation. Charitable purposes include 'the advancement of environmental protection or improvement' (and reasonably analogous purposes).40 The UK Environmental Law Foundation is an example of a registered charity with similar purposes and activities to EDOs.41

In recent years, the UK, NZ and Australia have also confirmed that charitable status is compatible with advocacy directed at achieving charitable purposes.42 For example, guidance from the UK's independent regulator makes clear that charitable activities may well include campaigning and 'political activities' (among other things) – provided that the activities further the charitable purpose.43 This recognises the evolving nature of democratic society and government, community expectations, and the necessary interplay between law and politics.

By contrast, recent Canadian experience serves as a cautionary example of eroded trust and costly overreach, rather than an experience to emulate. Canadian tax law 16

and policy significantly limit charities' spending on so-called 'political activities' (broadly defined).44 Canada has no independent charity regulator. Under the previous Government, environmental charities have been subject to extraordinary pressure and scrutiny from the Canada Revenue Agency (**CRA**).45 This has raised significant in-country concerns for free speech and democratic governance.46

44 Under the *Income Tax Act* (Canada) and Canadian Revenue Authority policy. See Environmental Law Centre University of Victoria (Canada), *Tax Audits of Environment Groups: The Pressing Need for Law Reform* (2015), pp 12-13.

45 Environmental Law Centre University of Victoria, Canada, *Tax Audits of Environment Groups* (2015) pp 30-31.

46 Canada's Environmental Law Centre (2015, above, Part II) considers laws in Europe, UK, Australia and NZ as much clearer and more balanced than Canada.

47 See media reports of 4 May 2017, *The Star*: https://www.thestar.com/news/canada/2017/05/04/ottawa-urged-to-give-charities-more-freedom-to-speak-out.html; and *Canadian Broadcasting Corporation*: http://www.cbc.ca/news/politics/canada-revenue-agency-political-activity-diane-lebouthillier-audits-panel-report-suspension-1.4099184

48 The Panel specifically recommended removing the current restriction that a charity cannot spend more than 10 per cent of its resources on so-called political activities. See *Report of the Consultation Panel on the Political Activities of Charities,* http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html (Mar. 2017).

In 2016, the incoming Trudeau Government established a consultative panel on charity law reform, and the CRA's 'political activity audit program' has reportedly been suspended.[47] In March 2017, the consultative panel recommended a series of administrative and legislative changes, including that (among other things):

- the CRA focus on charitable purposes, rather than activities';
- charities be free to advocate on public policy to further their charitable purposes, as their participation in policy dialogue is essential to democracy;
- the specific spending limit on non-partisan 'political' activities be removed; and
- for clarity, such advocacy activities are better described as 'public policy dialogue and development'.[48]

In summary, the recent Canadian approach of subjecting environmental charities to disproportionate scrutiny, and constraining charities' advocacy activities generally, has been discredited – first by the charitable sector, and most recently by an independent review. Such a model cannot be held up as best practice.

The Treasury Discussion Paper seeks feedback on the potential benefits of the 25% (or more) mandatory funding diversion proposal. None of the five consequences outlined above would align with the public interest in environmental outcomes, or with community expectations of charity and tax laws.

We recommend that DGR status should continue to recognise the diverse public benefits of different organisations in protecting the environment, as it does now. Within the parameters of the legislation, registration processes and an independent charity regulator, it is organisations and their governing bodies who should determine how best to direct donated funds and organisational efforts for the public benefit. Donors can then determine which beneficial charitable causes they choose to support. [17]

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? **[Discussion Paper, p 19]**

We agree that requiring DGRs to be registered charities provides appropriate oversight and governance from the ACNC. We do not consider that any additional sanctions against DGRs are necessary or appropriate in these circumstances. As noted, public trust in charities' management of donor funds is important.

There are a range of registration, guidance, reporting and monitoring processes in place. First, when an organisation applies for charitable and DGR status, it is legitimate for the ACNC to examine the applicant organisation's purposes and how it operates in the community. Second, in addition to requiring a legitimate charitable purpose, the Charities Act requires that a charity cannot have a purpose that is illegal or against public policy. Third, it is appropriate for the regulator to advise and guide existing charities on ensuring that their activities are directed to charitable purposes. Fourth, each year the ACNC (and the REO administrator) currently ask charities to describe how their activities and outcomes help to achieve the charity's purpose.[49] Fifth, the ACNC has powers to investigate, manage and de-register charities (including relevant DGRs). During an audit or compliance investigation, it may also be appropriate to investigate how a particular charity is ensuring its legal requirements are met. Finally, further action can be taken against individuals including for fraud.

On this basis, there is no clear rationale for additional certification or sanctions targeted specifically at environmental organisations.

49 See ACNC, *2016 Annual Information Statement* template, item 11:

☐ 'Describe how your charity's activities and outcomes helped achieve your charity's purpose.'

See also Department of Environment and Energy, REO annual return template 2015-16, p 3, 'Environmental Outcomes':

☐ *Provide a brief statement on environmental outcomes for the financial year. This statement must contain information on how money (and/or property) donated to the Public Fund was used, and how this contributes to your organisation's principal purpose.*

Conclusion

Overall, we recommend that the Australian Government and Treasury:

☐ support a strong and efficient charity and tax deductible gift recipient sector, by maintaining existing tax concessions for registered organisations and donors;

☐ continue to recognise the diverse range of activities that contribute to on-ground environmental outcomes in Australia and internationally – including environmental law and support services, advocacy, research, education and information about the environment, overseas capacity-building and local conservation work;

☐ support the ACNC to assist and regulate all charities (and many DGRs); and

take opportunities for minor, well-planned changes to increase administrative efficiency and maintain the high level of public trust in NGOs and charities.

I reject and oppose the proposal arising from the 2017 Treasury consultation paper for various changes to the administration of all Tax Deductible Gift Recipients (or DGRs). The Tax deductibility status for environmental groups should not be conditional upon them all spending at least 25 per cent of public donations on 'environmental remediation' as well as proposals for additional reporting and supervision of environmental organisations over and above other charities or lose tax concessions. Australia needs a strong and diverse charitable and DGR sector to protect our natural and cultural heritage, and our society and this proposal will not achieve it. The current tax free arrangement should be maintained.

Ian Hill