



Australian Government

Tax Deductible Gift Recipient Reform Opportunities

Discussion Paper
15 June 2017

NOTES TO PARTICIPANTS

This paper is for consultation purposes only. Comments are due by 14 July 2017.

This commentary has been prepared to assist organisations making a submission to this Discussion Paper. It is not a submission itself. Prepared by Prof. Myles McGregor-Lowndes m.mcgregor@qut.edu.au

ACNC resources

- [Charities, elections and advocacy \(a must read!\)](#)
- [Legal meaning of charity](#)
- [Charitable purpose](#)

Others

- [Inquiry into the Register of Environmental Organisations 2016](#)
- [Productivity Commission 2010](#)
- [Not-for-profit Sector Tax Concession Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector: Final Report, May 2013](#)
- [Australian National Audit Office, Audit Report No. 52 2010–11, Administration of Deductible Gift Recipients \(Non-profit Sector\): Australian Taxation Office](#)
- [Canadian Advocacy Report 2017 \(Report on the Charities Program 2015-2016\)](#)
- [Report of the Consultation Panel on the Political Activities of Charities 2017](#)
- [Defending Democracy: Safeguarding independent community voices, Human Rights Law Centre, 2017](#)
- [NFP Sector Freedom to Advocate Act 2013 \(Cth\)](#)
- [Charities Act 2013 \(Cth\)](#)
- [Commonwealth Electoral Act 1918 \(Cth\)](#)

Comments due

The consultation period is too short for genuine consultation and should be extended to three months. The main reasons for this are:

- CFOs are usually the officer tasked with DGR issues and the end of the financial year is the busiest period of their operational year.
- The time period is also too short to meaningfully consult in membership bodies and come to a consensus view.
- Other significant Productivity Commission Report responses due are National Disability Insurance Scheme (NDIS) Costs on 12 July and Reforms to Human Services on 14 July.

CONTENTS

Consultation Process	iii
Request for feedback and comments.....	iii
Tax Deductible Gift Recipient Reform Opportunities	1
Introduction/Background.....	1
Issues.....	4
Summary of proposed reforms	7
Strengthening Governance Arrangements.....	8
Reducing complexity.....	13
Integrity	18
Parliamentary Inquiry into the Register of Environmental Organisations.....	21
Summary of consultation questions	27

No comment.

CONSULTATION PROCESS

Request for feedback and comments

This consultation paper considers potential reforms to the Deductible Gift Recipient (DGR) tax arrangements.

DGR status allows an organisation to receive gifts and contributions for which donors are able to claim a tax deduction. The DGR tax arrangements are intended to encourage philanthropy and provide support for the not-for-profit (NFP) sector. Along with other tax concessions to the NFP sector, DGR status encourages the delivery of goods and services that are of public benefit. The DGR provisions can be found in Division 30 of the *Income Tax Assessment Act 1997 (CT)* (Gifts and Contributions).

This paper outlines a number of proposals to strengthen the DGR governance arrangements, reduce administrative complexity and ensure that an organisation's eligibility for DGR status is up to date.

Interested parties are invited to comment on the proposals outlined in this paper.

Electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

If you would like part of your submission to remain in confidence, you should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982 (Cth)* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Refer to previous comment on the length of the [consultation period](#).

Closing date for submissions: 14 July 2017

Email: DGR@treasury.gov.au

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

Enquiries: Enquiries can be initially directed to Susan Bultitude.

Phone: 02 6263 4413

No comment.

TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES

INTRODUCTION/BACKGROUND

1. The purpose of this paper is to consider possible reforms to the Deductible Gift Recipient (DGR) tax arrangements. In particular, it will examine the governance of DGRs and the complexity of DGR application processes, as well as to consider ways to ensure an organisation's eligibility for DGR status is up to date.
2. The Australian not-for-profit (NFP) sector is large and diverse. It consists of approximately 600,000 organisations across a number of different entity types. As of 17 February 2017, around 54,800 charities were registered with the ACNC.¹ There are around 28,000 organisations endorsed as DGRs², of which around 18 per cent are not registered charities – under 10 per cent are government entities (and therefore not eligible for charity registration) and over 8 per cent could seek charity registration with the ACNC.
3. DGR status allows an organisation to receive tax-deductible gifts and contributions. Donors are able to claim a tax deduction for gifts and contributions. The DGR tax arrangements are intended to encourage philanthropy and provide support for the NFP sector. Along with other tax concessions available to the NFP sector, DGR status encourages donations to organisations and encourages the delivery of goods and services that are of public benefit. The DGR provisions can

¹ According to the ACNC, 38.4% of registered charities have DGR status (Australian Charities Report 2016).

² Australian Taxation Office, *Taxation Statistics 2013-14* (2016).

Para 1:

No comment, but note that other pressing DGR issues such as 'in Australia', unrelated business income (UBIT), and section 50-50 reforms have not been addressed.

Para 2:

- Suggest that the 600,000 organisations be omitted due to the age of that 'guestimate' and replaced by the number of NPOs that the ATO is aware of from its and the ACNC's records.

- It is worth noting for regulatory risk purposes that the aggregate DGR figures hide some significant movements in DGR sub-categories over the last decade. Over the last decade the number of PBIs in aggregate has dropped by 1,000 entities due to ATO special audits on employment DGRs and the ACNC de-registering non-operating PBIs in more recent years. Most other categories are relatively stable with only slight growth. Exceptions to this are school building funds, scholarship funds, Health Promotion Charities, environmental organisations and animal welfare charities. In order to properly establish a regulatory risk profile, the amount of deductible donations is required and this is not presently available. See later comments about a review of the register strategy.

Para 3:

Note that this paragraph has resisted using the adjective describing tax concessions as 'generous' which is welcome, but this discipline is not evident in following paragraphs. The use of the adjective 'generous' is not warranted given similar OECD countries' concessions to all charities: refer [Not-for-profit Sector Tax Concession Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector: Final Report](#), May 2013.

be found in Division 30 of the *Income Tax Assessment Act 1997* (Gifts and Contributions).

4. In recent times, two reviews have examined aspects of the DGR tax arrangements and made recommendations. Some recommendations remain under consideration. The reviews are:
 - the House of Representatives Standing Committee on the Environment's inquiry on the Register of Environmental Organisations (REO inquiry³) – April 2016; and
 - the report of the NFP Sector Tax Concession Working Group⁴ – May 2013.
5. Under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act), registered charities (except basic religious charities) must meet a set of governance standards to be registered and remain registered with the ACNC (the national regulator of charities established in December 2012)⁵. Compliance with the standards and the ACNC Act help charities to retain the public's trust and confidence.
6. The *Charities Act 2013* (Cth) (Charities Act) introduces statutory definitions of 'charity' and 'charitable purpose'. To be a charity, the organisation must have a charitable purpose or charitable purposes that are for the public benefit⁶. The Charities Act lists 12 charitable purposes which apply for the purposes of all Commonwealth legislation. The ACNC provides information, guidance and support

³ See <http://www.aph.gov.au/reo>

⁴ See

<http://www.treasury.gov.au/~media/Treasury/Access%20to%20Information/Disclosure%20Log/2014/1447/Downloads/PDF/NFP%20Sector%20WG%20Final%20Report.ashx>

⁵ The governance standards do not apply to a limited class of charities called 'basic religious charities'.

⁶ 'Charity' is defined in section 5 of the Charities Act 2013 (Cth) (Charities Act) and 'charitable purpose' is defined in section 12 of the Charities Act.

Para 4:

Noted, but reports such as ANAO report [Administration of Deductible Gift Recipients \(Non-profit Sector\)](#) are not mentioned: see [initial comment page i](#).

Para 5:

The ACNC governance standards are minimal standards with many charities, particularly corporations, having higher standards before the advent of the ACNC. They are defective and require amendment to be effective and beyond legal challenge: see 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45(2) *Australian Business Law Review* 127-158 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943842>

Para 6:

Note that the Charity statute is all in terms of 'purposes' not 'activities'. The two words/concepts are quite different. 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.

Refer [ACNC Guidance Fact Sheet](#).

See annexure 1 further on Charity and DGR purposes, their overlap and differences.

for registered charities in meeting their obligations under the ACNC legislation, as well as monitoring and managing non-compliance.

7. To be eligible to be registered as a charity with the ACNC, the organisation must also:
- be an NFP entity;
 - have an ABN;
 - comply with ACNC governance standards⁷;
 - not have a 'disqualifying purpose' (which means the purpose of engaging in or promoting activities that are unlawful or contrary to public policy, or the purpose of promoting or opposing a political party or a candidate for political office); and
 - not be an individual, political party or government entity.
8. The changes under consideration in this paper do not seek to change the existing eligibility criteria, as this is beyond the scope of this paper. 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. This discussion paper seeks feedback on how to manage compliance burdens associated with the process of more effectively assessing and monitoring ongoing DGR eligibility.

⁷Except for basic religious charities.

Para 7:

Note that the word 'purpose' is used in the legislation, not 'activity'. The two should not be conflated or confused. Note also it is a 'disqualifying purpose' not 'activity'. A few DGRs have an activity basis – refer Annexure 1.

Para 8:

Note that this paragraph already starts a slide into 'activities' and has neglected the matters identified in [para 6](#) above. The second sentence is problematic in several ways. Is it referring to charities or DGRs?

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.

Charity activities are the activities that a charity undertakes in support of its overarching purpose. A charity may only conduct activities that further its charitable purposes.

The ACNC gives the following example:

A charity holds a cake sale to raise funds for its homeless accommodation. The activity – baking cakes and selling them to the public – is not the same as its overarching purpose – advancing social and public welfare. The cake sale would simply be an activity the charity undertakes to further its charitable purpose of advancing social and public welfare. ([ACNC Fact Sheet](#))

An activity not in furtherance of a charitable purpose of itself, without more, does not mean the charity has abandoned its purposes. The ACNC says: 'In determining whether a charity has a disqualifying political purpose, the ACNC will consider all the relevant circumstances of the charity, including its governing rules and its activities. Assessment of these matters will be a question of fact and degree.'

The first response of regulators should be to bring the organisation back to its founding purposes. If this is not possible, the second response is working to reform the purpose of the organisation to again be charitable: see [Annexure 1](#) CCEW's Review of the Register for an effective regulatory response to such situations.

ISSUES

9. DGR concessions were first provided in 1915. The DGR system has evolved over the years and it is timely and appropriate to consider whether the system is as simple and transparent as it could be, so that DGRs can easily understand and meet their obligations. There are now 51 general categories (which includes the four registers).
10. There are concerns that the application process for obtaining DGR status is too complex. There are different processes for organisations that are already registered as charities and those that are not. Organisations that are seeking registration as charities can apply to the ACNC, and indicate on the ACNC's charity registration form that they want the ATO to assess their eligibility for one of 47 general DGR categories. Organisations that are not registered as charities can apply directly to the ATO for DGR endorsement.

Organisations can apply for entry to one of four DGR registers – there are over 2,500 organisations on these registers. These registers are administered by four different Government departments:

- The Department of Foreign Affairs and Trade administers the Overseas Aid Gift Deduction Scheme and register⁸.
- The Department of Social Services administers the Register of Harm Prevention Charities⁹.
- The Department of the Environment and Energy administers the Register of Environmental Organisations¹⁰.

⁸ <http://dfat.gov.au/aid/who-we-work-with/ngos/Pages/tax-deductibility.aspx>

⁹ <https://www.dss.gov.au/our-responsibilities/communities-and-vulnerable-people/programmes-services/register-of-harm-prevention-charities#1>

¹⁰ <https://www.environment.gov.au/about-us/business/tax/register-environmental-organisations>

Para 9:

No comment.

Para 10:

Reference should be had to the Auditor-General's [ANAO report](#) that clearly identified the blockages and areas for improvement. The report contains a very useful assessment of the DGR registration process and regulatory scrutiny.

- The Department of Communications and the Arts administers the Register of Cultural Organisations¹¹.
11. The categories and registers have evolved over time, broadly seeking to align the activities of DGRs with community expectations and to ensure the tax concessions deliver clear public benefits. When first developed, it was considered that the registers required subject specific assessment of eligibility by their respective departments. But in practice, the four registers adopt a more involved process for DGR applicants and obtaining DGR status under the register arrangements can take over a year for some applications.
 12. Organisations that do not fall within one of the 47 general categories or four registers may apply to be considered for specific listing with the Minister for Revenue and Financial Services. There are currently only around 190 specifically listed organisations as they have been granted DGR status in 'exceptional circumstances'. DGR organisations with a specific listing may not be subject to a sunset clause or registered with the ACNC and are effectively granted DGR status in perpetuity, without being subject to governance standards or the other requirements of the ACNC legislation.
 13. The majority of DGRs are endorsed without a sun-setting date, and they are not subject to regular review of their eligibility status. With the growing stock of DGR organisations, the system would benefit from regular reviews to ensure an organisation's DGR status is up to date.
 14. Certain types of DGRs are also required to establish a public fund to receive tax deductible gifts and contributions. Public funds added additional governance requirements to address risk particular to certain categories. The establishment of a public fund requires the

¹¹ <https://www.arts.gov.au/what-we-do/cultural-heritage/register-cultural-organisations>

Para 11:

- Again, note the word 'activities' – suggest that it should be 'purposes'.
- I suggest that the prime motive of departmental registers was to monitor and allocate the tax expenditures of deductible gifts. Various cabinets adopted the principle that they would only approve new deductible categories if a Department would bear the cost of such tax expenditure and could cap it if circumstances required. It is suggested that this is why each of the Departmental registry legislative provisions has a clause to the effect of 'The Minister and the [Department Name] Minister must have regard to the policies and budgetary priorities of the Commonwealth Government in deciding whether to give a direction.' (Refer [ITAA 1997](#) sections 30.280(4); 30.289b(4); 30.305(4); 30.280(4)).
- Agree with observation about more involved process and the [ANAO report](#) referred to above documents some applications that took many years.
- The extraordinary delays often came about because it involved not just the specific department but also Treasury. Treasury's stated criteria were often diametrically opposed to the specific department – a classic example is overseas aid.

Para 12:

Agreed. Most of these organisations have little formal accountability to ATO/ACNC and are open to tax abuse. Some appear simply not to exist.

Para 13:

It is not a matter of the various regulators undertaking investigatory actions under their current legislation with adequate resources? The difficulty is with specifically named entities.

Para 14:

Agreed.

nomination of a 'responsible person' as defined by the ATO¹² and there is some confusion with the ACNC's different definition for 'responsible person'¹³. DGR organisations in regional and rural parts of Australia often face difficulties in nominating a responsible person. This creates an additional procedural barrier for these types of DGRs, without necessarily improving governance. The public fund requirements may therefore be unnecessary for DGRs that are charities and subject to ACNC governance standards.

15. There are also concerns that some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community, particularly by environmental DGRs which must have a principal purpose of protecting the environment.¹⁴
16. Broadly, the various requirements for DGR eligibility are directed at ensuring the activities of DGRs deliver benefits to the Australian community. However, requirements may be overlapping and inconsistently applied across organisations. Transparency and accountability regarding the eligibility of DGRs, which can change the scope of their activities over time, is also lacking.

Para 15:

Note again here the use of 'activities' instead of 'purposes'. In the administration of the law the issue is not community expectation as to activity, but the purposes of the organisation. It is first a question for the governance body as to whether the activities further its charitable/DGR purposes, not whether they are within community expectations. Regulators should not be concerned with replacing a board's view with their view about 'furtherance of purpose' unless there is clearly no reasonable connection. There are a limited number of exceptions for DGRs with an activity basis (refer Annexure1).

Doubt whether environmental organisations are out of step with their donors and members. Is this more important than being out of step with the broader community?

Para 16:

- Note again here the use of 'activities' instead of 'purposes' in most cases - refer annexure 1.
- Agree that requirements overlap and are inconsistent.

¹² According to ATO website - 'Responsible Person - The rules must reflect that the majority of individuals, who are one of the following, must have a degree of responsibility to the community: a trustee; a member of any committee or other controlling body of the fund; or a director of a trustee'.

See https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Public-ancillary-funds/?anchor=Public_ancillary_funds#Public_ancillary_funds

¹³ The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) defines the concept of a 'responsible entity'. The responsible entities of a registered charity are the people in the organisation that have one of the positions described in s.205-30 of the ACNC Act. The ACNC refers to the 'responsible entities' of charities as 'responsible persons'.

¹⁴ Subsection 30-265(1) of the *Income Tax Assessment Act 1997* - Its principal purpose must be: (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.

Summary of proposed reforms

17. To strengthen the governance arrangements, reduce administrative complexity and to help ensure an organisation's DGR status is up to date, this paper considers a number of possible reforms:
- All DGRs could be required to be charities registered and regulated by the ACNC (other than government entities, which cannot be charities).
 - The ACNC's guidance for registered charities (and subsequently for DGRs) help these organisations to understand their obligations, particularly for certain types of advocacy. The ACNC has already developed guidance on advocacy so DGRs that are not currently registered charities should refer to this resource.
 - The ACNC could revoke an organisation's registration status, and consequently the ATO would revoke the organisation's DGR status, if one of the grounds for revocation under the ACNC Act were to exist.
 - To simplify the application process for DGRs, the administration of the four DGR registers could be transferred to the ATO. Those organisations that do not fall within the four registers would still be able to apply to the Minister Revenue and Financial Services for specific listing.
 - The public fund requirement for DGRs that are charities could be removed and DGR entities could apply to be endorsed across multiple categories.
 - Regular reviews could be undertaken by the ACNC and/or ATO to ensure an organisation's DGR status was up to date and to provide confidence to donors wishing to claim tax

Para 17:

An alternative would be abolishing DGR status altogether and giving DGR-like concessions to all charities. This has been discussed and recommended by the [Productivity Commission 2010](#) and [Not-for-profit Sector Tax Concession Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector: Final Report, May 2013](#).

Dot point 1: Agree, but this would require additional ACNC resources. Those that are DGR funds may have a higher regulatory burden with new AIS filing etc. Establish whether each fund would convert to a charity or merely be amalgamated with its host/parent charity (contra para 21). Would this require extra reporting for separation of DGR funds? Also similar transition of PBIs that were not separate entities to an entity a few years ago was marked with difficulties for both ATO and PBIs.

Dot point 2: Noted.

Dot point 3: Noted, but see comments about this as a last regulatory resort, better proportionate regulatory tools to use first, Para 28.

Dot point 4: Noted.

Dot point 5: Agreed, would this apply to PBIs ?

Dot point 6:

- Agreed, but this would require additional ATO/ACNC resources.
- Note that it would be an officer of the DGR that makes the compliance statement. More detail is required as the penalties for 'false' statement and whether it would be strict liability or an element of intention would be required. I suggest that 'stick and carrot' regulation might work most effectively where best efforts to comply with a demonstrated checklist of status can mitigate any breaches (e.g. [s87B TPA](#)).

deductions for donations. In addition, DGRs could be required to certify annually that they meet the DGR eligibility requirements, with penalties for false statements.

- The reforms outlined above would address many of the issues identified by the House of Representatives Standing Committee's REO inquiry¹⁵. Further discussion of the REO inquiry recommendations are detailed below under the heading – *Parliamentary Inquiry into the Register of Environmental Organisations*.

Strengthening Governance Arrangements

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

18. Around eight per cent of the current stock of 28,000 DGRs are not registered charities or government entities. These organisations are not necessarily subject to robust reporting and governance standards¹⁶.
19. The four DGR registers, which are not administered by the ATO, have separate reporting requirements. Not all organisations on the environmental and cultural registers are charities, so organisations on the same register can have different reporting requirements and governance standards. This also means that there are organisations which report both to the register and the ACNC.
20. The Government provides a substantial financial contribution to NFP entities through tax concessions. The cost to the Commonwealth of

¹⁵ See <http://www.aph.gov.au/reo>

¹⁶ They are comprised primarily of some registered environmental and cultural organisations, some ancillary funds, public funds for persons in necessitous circumstances, some public ambulance committees, volunteer based emergency service public funds, some museums, and some school building funds.

Dot point 7: Noted.

Para 18: Surprisingly low figure of non-charities. Requires further investigation.

Para 19:

- All organisations will be nonprofit and could be engaged by extending ACNC jurisdiction to specified nonprofit organisations as well as charities as originally intended.

Para 20:

- The cost to government does not include offsetting gains by many eligible taxpayers not claiming the deduction in their tax returns.
- The gain by government in relief of activities otherwise requiring government funding is not calculated or included.
- The use of the adjective 'generous' is not warranted given similar OECD countries' charity concessions – see earlier comment.
- Agree with proportionate reporting.

deductions from donations to DGR organisations is \$1.31 billion in 2016-17 rising to an estimated \$1.46 billion in 2019-20. Once an entity is a DGR, it is generally for life, and is subject to minimal governance unless it is an ACNC regulated charity. Given the generous tax concessions they receive, it is appropriate to require DGRs to be transparent in their dealings and to adhere to appropriate governance standards.

Proposed Action

21. To address transparency issues and improve DGR governance, DGRs (other than government entities) could be required to become charities registered and regulated by the ACNC. This would be consistent with recommendation 2 from the House of Representatives Standing Committee on the Environment's REO inquiry. The Committee recommended requiring environmental organisations to be registered with the ACNC as a prerequisite to obtaining endorsement as a DGR by the ATO.
22. The proposal is also consistent with recommendation 6.5 of the NFP Sector Tax Concession Working Group Report of May 2013¹⁷, which expected that the majority of current specifically listed or endorsed entities would fit within the proposed framework.
23. For specific listing as a DGR in the tax law, a Treasury Minister would have the discretion to propose to Cabinet an organisation that is not a charity.
24. For existing DGR organisations, the requirement could commence 12 months after passage of the amending legislation or from Government announcement to give organisations and the ACNC sufficient time to register the new charities.

Para 21:

Noted, and if could be a charity, then a NPO with ACNC extended jurisdiction to cover them. These new charities will have added red tape burdens compared to being 'public funds' (filing an AIS etc) – it could mean several thousand new charity registrations, but unclear as to the exact number.

Para 22:

Noted.

Para 23:

Noted, but as discussed above these organisations require greater regulation than currently applies. If they are Not-for-Profit then the ACNC jurisdiction could be engaged.

Para 24:

Given the state of the Parliament, it is suggested that this is 12 months from the passage of the amending legislation.

¹⁷ <http://www.treasury.gov.au/~media/Treasury/Access%20to%20Information/Disclosure%20Log/2014/1447/Downloads/PDF/NFP%20Sector%20WG%20Final%20Report.ashx>

25. The ACNC's registration team would work with existing DGR organisations to help them apply for charity registration status. They would engage with applicants to ensure that only organisations that are genuine charities are registered.
26. ACNC registration would mean that DGRs would be required to lodge an Annual Information Statement, and in the case of medium and large charities¹⁸, also lodge annual financial reports with the ACNC, which are publicly accessible through the ACNC Charity Register (ACNC Register). Registration as a charity would enhance transparency in the use of taxpayer funds.
27. The ACNC Register includes core information on all registered charities, including name, contact details, governing documents, names and positions of people on their governing bodies, and financial reports (for medium and large charities). The ACNC can withhold or remove information from the ACNC Register in prescribed circumstances. Private ancillary funds can ask the ACNC to withhold or remove some information from the ACNC Register, such as information likely to identify individual donors.
28. DGRs, once registered as charities, would also have to adhere to the ACNC governance standards. If any DGR entities were not adhering to the standards, they could face revocation of their registration status, which would mean that their DGR status could be revoked by the ATO and also impact other tax concessions.

Para 25:

Agreed, but this would require additional ACNC resources. Should implement learnings from non-entity PBI transition that did not go smoothly several years ago.

Para 26:

Noted.

Para 27:

Noted.

Para 28:

- Noted, but there is also the option for remedial action to be taken to place the charity back into good standing. Once a charity is appropriately registered with charitable purposes, there are no bad charities, only bad people who administer them. Charitable assets should be protected rather than merely deregistered to be used for non-charitable purposes. Past donors funds should be protected (and sunk tax expenditures). De-registration should be an option of last resort and State Attorneys General should be proactive in working with the ACNC in respect of failing charities: refer [Annexure 1](#) CCEW Review of the Registry.
- Regulatory action should be focussed on 'bad' people controlling charities as this is the logical locus for regulatory action.

¹⁸ The charity's size is based on its revenue for the reporting period. Medium registered charities are those whose annual revenue is \$250,000 or more but less than \$1 million. Large registered charities are those with annual revenue of \$1 million or more (section 205-25 of the ACNC Act).

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?
2. Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?
3. Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?

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

29. There are concerns that charities and DGRs 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.¹⁹
30. With the ACNC's establishment, charities were given time to transition to a new system. Noting the ACNC's ongoing role has been confirmed and given the proposal to require all DGRs to become registered charities, the ACNC would work with the new registered charities to assist them to understand their obligations.

Proposed Action

¹⁹ Subsection 30-265(1) of the Income Tax Assessment Act 1997 - Its principal purpose must be: (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.

Para 29:

It appears to be that some Members of Parliament, their advisors, mischievous members of the public and some industry organisations are unsure or incorrect in their views on the extent of advocacy by charities and environmental organisations. Concerns by charities and environmental organisations are stoked by inaccurate statements and dog whistles by those who object to their activities. By and large charity trustees and boards are risk-averse when it comes to such matters and can be 'chilled' in relation to their public advocacy to the detriment of free expression of ideas in a democracy.

Further I suggest that donors are not misled in the main about the use of their donations to environmental and other advocacy charities.

Also refer M. McGregor-Lowndes, [Nonprofit Speech in the 21st Century: Time for a Change? - An Australian Perspective](#) for a comparison of the tax concessions available to political parties compared to NPOs.

Refer *Regulating Charities: The Inside Story* Routledge at <http://bit.ly/2oLil8F> for a discussion of charity and political activities and regulatory options in Australia, New Zealand, UK, USA and Canada over the last 25 years.

Also refer **annexure** 12 for regulatory strategies and suggest CCEW review of the register is a more appropriate strategy.

Para 30:

Noted.

31. The ACNC would clearly set out the rules applying to registered charities for the DGRs that become new registered charities, helping to ensure that they understand their obligations, particularly for certain types of advocacy. As with all registered charities, if an organisation does not meet its obligations, the ACNC would be able to take steps to facilitate compliance and where appropriate enforce proportionate sanctions which could include the revocation of registration status leading to the loss of their DGR status.
32. The ACNC give smaller charities²⁰ additional support to help them comply with their reporting and other obligations. It should be noted that the majority of registered charities are small, and do meet their obligations. A set of template governing documents and model rules for unincorporated associations has been developed with associated guidance and explanatory notes to assist smaller charities meet certain legal requirements.

Consultation questions

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

Para 31:

Noted, guidance already exists. Again, deregistration should be the last option for the reasons discussed above. ACNC Guidance [here](#).

Para 32:

Noted.

Reporting Advocacy Activities

Note that the consultation questions 4-6 about AIS containing questions in order to report advocacy activities is not covered in the preceding text.

As illustrated graphically by the Canadian experience there are significant problems with allocating activities to advocacy and other general activities. One example is the line between public education and advocacy which will depend on detailed definitions that will in turn exacerbate compliance burdens in reporting. Also see issue of Canadian accounting for episodic volunteers who attend rallies - annexure 2 - a useless burden on charities.

It would probably also require a reporting of how such activities were in furtherance of the purposes of the charitable organisation.

As charities may have more than one purpose, allocating advocacy to one purpose or the other could be problematic.

²⁰ Small registered charities are those with annual revenue of less than \$250,000 (section 205-25 of the ACNC Act).

Reducing complexity

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

33. Organisations in certain fields can qualify for DGR status by being included on one of the four DGR registers - the Register of Environmental Organisations (REO), the Register of Cultural Organisations (ROCO), the Register for Harm Prevention Charities (RHPC) and the Overseas Aid Gift Deduction Scheme (OAGDS).
34. The separate portfolio registers were established to draw on the subject-matter expertise within each agency when assessing applications against the requirements of the *Income Tax Assessment Act 1997*.
35. It can take over a year for an organisation to be included on a DGR register. An organisation that applies for DGR status under one of the DGR registers must firstly apply to the government agency which administers that register. Once the application has been assessed to meet the requirements of the particular register, the portfolio Minister must approve the addition and also seek a Treasury Minister's agreement. For the OAGDS register, the Treasury Minister must also gazette the organisation's public fund. Once an application has been through the Ministerial processes, the ATO can then officially endorse them as a DGR.
36. These arrangements are time consuming and add little value to supporting a robust process for assessing an applicant's eligibility for DGR status. Furthermore, all the DGR registers have different annual reporting requirements, adding unnecessary complexity. If all DGRs are required to be a registered charity, reporting could be simplified. The time taken to apply for DGR status could also be significantly reduced.

Para 33:

Noted.

Para 34:

I have contested this notion – see above.

Para 35:

Noted, but refer to comments made above and the [ANAO report](#) which reported longer time delays.

Para 36:

Noted and agreed. The one exception to value creation is the OADGS register that builds a complex web of accreditation and codes of conduct into the regulatory regime. Careful consideration needs to be given to new regulatory arrangements if this proposal proceeds for OADGS. Action on providing ACNC external governance standards may be a partial solution and would be of public benefit in covering non-OADGS entities operating internationally.

37. These issues were highlighted as recommendations in the recent REO inquiry and the 2011 Mitchell report on Private Sector Support for the Arts.²¹

Proposed Action

38. It is proposed to transfer the administration of the four DGR Registers to the ATO. This proposal is consistent with recommendation 1 of the REO inquiry by the House of Representatives Standing Committee on the Environment. The Committee recommended that REO be abolished and that the administration process for endorsement as a DGR for environmental organisations be transferred wholly to the ATO.
39. Transferring the administration of the four DGR Registers to the ATO is expected to reduce the compliance burden for the NFP sector, reduce government administration and reduce the application processing time, as Ministers would no longer be required to agree to DGR applications.
40. An organisation must already be a registered charity with the ACNC to be added to the RHPC and OAGDS registers. If all DGRs (other than government entities) were charities, there would be one process for all non-government entities to apply for DGR status under all general DGR categories. It would also mean that all organisations on the four DGR registers would need to complete an Annual Information Statement and where required, lodge annual financial reports for public scrutiny. This would also mean that DGRs, as registered charities, would need to adhere to the same ACNC reporting and governance standards.

Para 37:
Noted.

Para 38:
Noted, but this would require additional ATO resources.

Para 39:
ATO should be subject to the usual administrative review and appeal mechanisms. Initial endorsement/registration burdens may decrease for both government and DGR, but for ongoing paperwork burden to decrease, it would require lapse of any special DGR reporting and adoption of ACNC reporting.

Para 40:
Agreed, this may require additional ACNC resources.

²¹<https://www.arts.gov.au/publications/building-support-report-review-private-sector-support-arts-australia>.

41. If there were additional questions that were needed on the Annual Information Statement, the ACNC would consult on their content with stakeholders, the ATO, Treasury and the relevant government agency.
42. Under this proposal all new applicants would need to apply once to the ACNC for registration status and nominate to be considered for endorsement under one of the general DGR categories, which includes the four DGR registers. Once registration status is approved, the ACNC would pass the information to the ATO to assess an organisation's eligibility against the requirements of the tax law in respect of that general DGR category. It is expected that this process could be completed within a month of the correct information being supplied in the application. A Treasury Minister would continue to have oversight of administration.
43. When the four DGR Registers were established, it was considered that each agency should administer their specific register as they would have the expertise to assess applications against the requirements of the *Income Tax Assessment Act 1997*²². Under the proposed transfer, the ATO would assess applications against the requirements of the tax law. The ATO would be able to call on the expertise in the relevant government agency on a case by case basis, if required.
44. The ATO would work with the relevant Government agencies to affect a smooth transfer of the administration functions from the agencies to the ATO.

Para 41:

Noted, again what would the burden of such extra information be - would it be like the Canadian example in annexure 2?

Para 42:

Agreed, but this would require additional ACNC resources.

Para 43:

This explanation is contested (see above) but process is appropriate.

Para 44:

Noted past lesson from non-entity PBI transfer need to be heeded.

Consultation question

7. What are stakeholders' views on the proposal to

²² For example, for environmental organisations see section 30-290 of the ITAA 1997 http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s30.250.html

transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

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

45. Various DGR general categories require entities to establish a public fund to receive tax deductible donations. Public funds need to reflect the purpose of the fund, be managed by a committee which has a degree of responsibility to the general community and the funds kept separate from other funds of the entity. With the introduction of ACNC governance standards, the development of more sophisticated accounting systems and electronic banking, the requirement for a charitable DGR entity to maintain a public fund is potentially unnecessary.
46. Under the existing law, a separate public fund is required for each general category if an organisation wishes to seek DGR status in more than one general category. Some organisations apply for DGR specific listing to avoid applying for multiple categories. The creation of separate funds can increase the complexity of financial statements and add to the regulatory burden when applying for more than one general DGR category.
47. There is also confusion and added complexity for DGRs because of the difference in the definition of 'responsible person' used by the ATO for DGRs and the ACNC for charities.
48. Under the ACNC Act, the term 'responsible entity' refers to those who have one of the positions described in the Act.²³ The ACNC refers to 'responsible entities' of charities as 'responsible persons'.

²³ ACNC Act, s.205-30.

Para 45:
Agreed.

Para 46:
Agreed.

Para 47:
Agreed, not only should these be standardised but also updated. The categories of responsible persons are too restrictive and should be widened.

Para 48:
Noted and this issue of confused terms of responsible entities and responsible persons was raised by the sector and others prior to the passing of the primary legislation to no avail. No good reasons were ever given for the choice of terms. Note that the ACNC in its education materials often uses other terms to avoid misunderstandings.

Generally, a charity's responsible people are its board or committee members, or trustees (including insolvency trustees or administrators)²⁴.

49. In addition, DGR entities in regional and rural Australia have problems in identifying committee members for public funds because of the tighter definition of 'responsible person' in the tax area.
50. The removal of the public fund requirement would lead to the definition of responsible person having less significance to the ATO in relation to DGR entities and remove the confusion over the two different definitions in the tax and ACNC legislation.

Proposed Action

51. It is proposed to remove the public fund requirements for charities and allow DGR entities to be endorsed in multiple categories.
52. As a result, the ACNC definition of 'responsible person' would apply as the DGR must be a registered charity.

Consultation question

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?

Para 49:
Agreed.

Para 50:
Agreed.

Para 51:
Noted.

- Consideration might be given to transition of funds in to their DGR parent for unintended consequences.
- Disclosure should be made by Treasury if there will be accounting conditions imposed on such funds such as separate bank accounts or audit trails in lieu of the public fund. This may give rise to burdens which are unnecessary or not proportionate to risk.
- Need clarification of whether the public fund itself would be a separate charity as implied previously in para 21 ff.

Para 52:
Noted.

²⁴ See https://www.acnc.gov.au/ACNC/FIS/FS_RespPers.aspx

Integrity

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

53. The Government provides a substantial financial contribution to NFP entities through tax concessions, but once an entity is a DGR, it is generally for life. Currently, a DGR is subject to minimal governance unless it is an ACNC regulated charity. It is important to have appropriate measures in place to ensure an organisation's DGR status is up to date, to reassure donors, given the generous tax concessions available.
54. The majority of DGR entities have been endorsed in perpetuity. Unless the ATO undertakes a review or audit of a specific DGR organisation, it is difficult for the ATO to identify if the organisation remains eligible to retain its DGR status.
55. While the ATO encourages DGR entities to self-review annually, or when their circumstances change, in practice the ATO does not know if an entity is undertaking this review. An entity may have evolved over many years into a different organisation that no longer meets the criteria for their general DGR category, or for any category.

Proposed Action - rolling reviews to address existing DGR stock

56. Consideration could be given to a rolling review by the ACNC and/or ATO to ensure that each DGR organisation is still eligible for DGR status. Each DGR could be reviewed at least once within a specified period, for example five years. To determine which general categories could be reviewed in the first instance, a risk assessment could be developed based on the likelihood of changes in purpose over time.
57. These reviews could commence with a desk top review by the ACNC and the ATO. Those organisations identified as high risk from the

Para 53:

- In the same vein, DGRs often relieve governments of burdens that they would have otherwise to spend funds on to alleviate and to contribute to the public benefit.
- This is not necessarily accurate as it could be argued that some DGRs have other fiduciary duties that well exceed that of the ACNC minimal standards.
- Note the use of 'generous' again: see above.

Para 54:

Noted, but risk-based proportionate audits or other regulatory tools could adequately deal with the issue. Note [ANAO report](#) found a lack of resourcing of ATO sector intelligence in such matters as a example. The question that needs to be posed is: does the regulator need to have all DGRs report at cost to them or could the ATO source intelligence to inform their regulatory program from other sources less costly to the sector?

Para 55:

Noted, and an avoidance of the 'activity' trap is welcome.

Para 56-58:

This would require additional ACNC/ATO resources.

An alternative approach which may be more cost effective would be to implement a process whereby stakeholders were engaged in a clarification of each of the DGR categories through consultation (prioritised on a risk basis) with the production of rulings and educational material. Then a desk audit is conducted based on a risk assessment of organisations within that cohort. This is similar to a Charity Commission of England and Wales strategy for their Review of the register. This is a far more cost effective solution (for both charities and the regulator).

Refer [annexure](#) and *Regulating Charities: The Inside Story* Routledge at <http://bit.ly/2oLil8F>

desk top review would be investigated further. Organisations confirmed as no longer eligible for DGR status would have their status revoked, and may also lose some of their other tax concessions if their charity registration status is also revoked.

58. The reviews would be undertaken in a way to minimise the burden on DGR organisations, with the ACNC or ATO only seeking information from organisations after conducting a desk top review and assessing them as high risk or seeking missing information.

Proposed Action - Annual certification by DGR

59. As part of completing their Annual Information Statement as a registered charity, DGRs could also be required to certify that they meet the DGR eligibility requirements. Penalties, under the tax legislation, could apply if an organisation certified it met the eligibility criteria and, through the review or otherwise, it was subsequently found not to be eligible for DGR endorsement.

Consultation question

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?

Para 59:

- Agreed, but this would require additional ACNC resources.
- Note that it would be an officer of the DGR that makes the compliance statement.
- More detail is required as the penalties for 'false' statement and whether strict liability applies or whether an element of intention is required.
- I suggest that 'stick and carrot' regulation might work most effectively where best efforts to comply with a demonstrated checklist of status can mitigate any breaches (e.g. [s87B TPA](#)). This would follow logically from the current ATO regulatory strategy of an annual self-assessment check list.

Issue 6: Specific listing of DGRs by Government

60. A specifically listed DGR entity has DGR status in perpetuity, unless there is a special condition that restricts its listing period. As DGR entities can evolve over time, there may come a time when the 'exceptional circumstances' that justified their specific listing no longer applies.

Proposed Action

61. A sunset period of no more than five years could be introduced as a general rule for all specifically listed DGRs. After five years, the organisation would need to reapply for endorsement. This would give the Government of the day and Parliament the opportunity to decide whether the organisation still met the 'exceptional circumstances' requirement.

Consultation question

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?

Para 60:
Noted.

Para 61:

This is not necessary if these organisations reported to the ACNC as either a charity or a not-for-profit organisation. If the 5 year reapplication was dealt with by politicians it may result in significant disruption. Frankly, the process is often a political one and the consequence is that with the turn of the political cycle specified DGRs may be revoked.

Two examples illustrative of this assertion are the listing of Nursing Mothers and the political research organisations of major political parties. Championed by the Australian Democrats (a minor party of the Australian Senate), the initial attempt to amend legislation to include Nursing Mothers failed. During the debate, Senator Walsh the Minister for Finance conceded that 'there is an element of semi or quasi-arbitrariness in the selection' of such organisations (Australia, Senate Hansard, 1989, p. 3766) whilst Senator Stone, former Head of the Treasury admitted that: 'It has been one of the most contentious, time-consuming and difficult areas of tax law for many years.' (Australia, Senate Hansard, 1989, p. 3766). Nursing Mothers initiated a grassroots political campaign to alter the decision. After six months of association members lobbying their members of Parliament, 10,000 letters, and personal representations by wives of members of Parliament who were members of the organisation (they reported went on 'strike'), the Senate agreed to Nursing Mothers being listed. Another example is the listing of the Evatt and the Menzies Foundations that are commonly referred to as the 'think-tanks' of the major political parties. They would not qualify for donation deductibility status under any other category in the taxation legislation. On the first of April, 1998, Hansard records the following in relation to a question without notice asked by Mr Crean of the Prime Minister, Mr Howard:

Mr Howard: ... The honourable member comes to a decision that was taken on 1 October 1996 by the government to grant \$100,000 to the Menzies Foundation and also grant \$100,000 to the Evatt Foundation.

Mr McLachlan: The Evatt Foundation!

Mr Howard: Hang on, it gets better. We also granted tax deductible status to the Menzies Research Centre. Let me say a couple of things about that and then I will come to the issue of declaration which has been asked by the Member for Hotham. The first thing I would report to you is that, on the day cabinet met, I happened to ring the Leader of the Opposition. I rang the Leader of the Opposition and I said, "Kim, we have it in mind to give \$100,000 to the Menzies centre. In the interests of political balance, we will give \$100,000 to the Evatt Foundation and grant tax deductibility to the Menzies Research Centre because Evatt has already got it.' I might add in parenthesis that I was the Treasurer who, in 1981, granted tax deductibility to the Evatt Foundation (Australia, Senate Hansard, 1989, p. 3766).

Parliamentary Inquiry into the Register of Environmental Organisations

62. On 4 May 2016, the House of Representatives Standing Committee on the Environment tabled its report of its inquiry into the Register of Environmental Organisations (REO)²⁵. Consistent with the terms of reference for the inquiry, the Committee considered the administration and transparency of the REO, which enables eligible environmental organisations to become a DGR in order to obtain tax-deductible donations from taxpayers.
63. The focus of the inquiry was on the effectiveness of the REO in supporting communities to undertake practical action to improve the environment. The Committee made recommendations designed to strengthen the integrity of tax-concessional arrangements for environmental organisations. The Committee also identified scope to streamline the administration of the REO system.
64. The Committee made nine recommendations many of which can be applied to the DGR system as a whole and to the other DGR registers - the Register of Cultural Organisations, the Register for Harm Prevention Charities, and the Overseas Aid Gift Deduction Scheme.

Recommendation 1

65. **The Committee recommended that the Register of Environmental Organisations be abolished and that the administration process for**

²⁵ <http://www.aph.gov.au/reo>

Para 62:

Noted, but not unanimous as strong dissenting report, even a government member provided a dissenting report.

Para 63:

Noted, but not unanimous as strong dissenting report, even a government member provided a dissenting report.

Para 64:

Noted, but not unanimous as strong dissenting report, even a government member provided a dissenting report.

Para 65:

Noted.

endorsement as a DGR for environmental organisations be transferred wholly to the ATO.

66. The action proposed in paragraph 38 would give substantive effect to this recommendation.

Recommendation 2

67. **The Committee recommended that registration as an environmental charity through the ACNC be a prerequisite for environmental organisations to obtain endorsement as a DGR by the ATO.**
68. The action proposed in paragraph 21 would give effect to this recommendation.

Recommendation 3

69. **The Committee recommended that the Treasurer and the Minister for the Environment pursue amendments to the *Income Tax Assessment Act 1997 (Cth)* to remove environmental DGRs listed individually by name in the Act.**
70. The discussion in paragraph 61 proposed that new specific listings continue to be considered by Government and put to the Parliament in the usual way. For specific listing, organisations would need to meet the 'exceptional circumstances' policy requirement and not be eligible to be listed in one of the general DGR categories. There are several environmental organisations that were specifically listed prior to the commencement of the REO that could be eligible for the REO, which would reduce the number of specifically listed DGR entities in the environment section of the tax law.

Recommendation 4

Para 66:
Noted.

Para 67:
Noted.

Para 68:
Noted.

Para 69:
Noted.

Para 70:
Noted, but refer to discussion above about the process to specifically list DGRs. Organisations should be removed because of not complying with their conditions of endorsement, and not by ministerial discretion unless it is properly specified, fettered and subject to review.

71. **The Committee recommended that the ATO maintain a publicly available list of organisations that receive DGR endorsement as an environmental charity.**
72. As noted in paragraph 26, the proposal to require DGRs to become charities registered and regulated by the ACNC would give some effect to this recommendation. When charities are registered with the ACNC, they appear on the ACNC Register. This is publicly available on the internet and is maintained by the ACNC.

Recommendation 5

73. **The Committee recommended that legislative and administrative changes be pursued by the ATO to require that the value of each environmental DGR's annual expenditure on environmental remediation work be no less than 25 per cent of the organisation's annual expenditure from its public fund.**
74. In making this recommendation, the Committee acknowledged the benefits of a diverse range of environmental work and said it wished to ensure that the concessions conferred on environmental DGRs were directed, at least in some part, to environmental work that achieves clear on-ground environmental outcomes. On the other hand, several stakeholders raised concerns with Committee that it could be difficult for charities to determine whether a particular activity would be considered charitable or political and that resources may be diverted away from charitable work to reporting and compliance activities.

Consultation question

Para 71:
Noted.

Para 72:
Noted.

Para 73:
The paperwork for recording what was and was not an activity of interest would be a burden. There is also a substantial problem of definition and allocation, as discussed above, and as shown by the Canadian experience.

Para 74:
Again, confusion between 'purposes' and 'activities'. It is best not to refer to 'charitable activities' but rather 'activities in furtherance of the purposes of the charity'. Any significant implementation of this policy would require legislative amendment.

Percentage of Activities

- Percentages should not be pursued as a regulatory strategy as the Canadian experience illustrates (refer annexure 2)
- Issues of definition, appointment and recording make the exercise costly and do not usually produce good regulatory intelligence.
- Issue confounded when a charity has more than one purpose.
- The governance of charities is in the best position to determine how best to achieve their particular charitable purpose, not the government or its administration.
- Donors can act as a regulatory lever in such situations.

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?

Recommendation 6

75. **The Committee recommended that administrative sanctions be introduced for environmental DGRs that encourage, support, promote, or endorse illegal or unlawful activity undertaken by employees, members, or volunteers of the organisation or by others without formal connections to the organisation.**
76. The Committee considered that requiring DGRs to be registered charities would provide greater assurance to members of the public that environmental DGRs are operating lawfully and in the public interest. Under the committee's recommendation, the decision to apply sanctions would be the responsibility of the Commissioner of Taxation.
77. The proposal in paragraph 21, (which is consistent with recommendation 2 of the REO inquiry report) would require all DGRs to be charities registered and regulated by the ACNC. Under the proposal, environmental and other DGRs must not have a disqualifying purpose, which includes the purpose of engaging in or promoting activities that are unlawful or contrary to public policy, or the purpose of promoting or opposing a political party or a candidate for political office.

Consultation question

MML 03072017

Para 75:

Noted.

Para 76:

- I would argue that it is not the organisation itself that is the object of regulation here, but the persons who control the organisation and have committed illegal acts. Regulatory effort should be focussed upon those individuals and not the organisation. Charitable assets need to be protected for the original purposes for which they are donated and sunk tax expenditures.
- It will be very problematic to deal with 'by others without formal connections to the organisation' and their acts. Significant problems with proof and evidence without infringing on civil rights and liberties.
- This issue was discussed in the New Zealand case of [Greenpeace \[2012\] NZCA 533](#) Para 93-100 and criteria suggested was:

The question whether involvement by Greenpeace or its representatives or agents in an illegal or unlawful activity will be sufficiently material or significant to preclude registration or justify deregistration will be a question of fact and degree in each case. It is likely to be influenced by a range of factors such as: the nature and seriousness of the illegal activity; whether the activity is attributable to the society because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it ;whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity occurring again; whether the activity was inadvertent or intentional; and whether the activity was a single occurrence or part of a pattern of behaviour.

- Not sure that the Commissioner of Taxation is the right officer - would not this properly be the ACNC?

Para 77:

- Note previous comment above that the organisation with charitable purposes is not 'bad', it is those in control of it. Thus sanctions and regulatory action should be directed at the individuals, not the organisation.
- Note that the word 'purposes' not activities is used here and the difference with a mere activity.

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?

Recommendation 7

78. **The Committee recommended that environmental organisations with DGR status be required to submit an annual self-assessment to the ATO supporting their continuing eligibility for endorsement as a DGR.**
79. The proposal outlined in paragraph 59 above, would give effect to this recommendation.

Recommendation 8

80. **The Committee recommended that the Commonwealth Treasury, in consultation with the ATO, review the provisions in the *Income Tax Assessment Act 1997 (Cth)* prohibiting conduit behaviour, with a view to providing clear guidance to environmental DGRs, as to the types of activities that would constitute conduit behaviour.**
81. Under the *Income Tax Assessment Act 1997* charities wanting access to DGR endorsement need to show that they have a policy of not acting as a mere conduit for the donation of money or property to other organisations, bodies or people.
82. This policy is intended to stop registered organisations acting as collection agencies for tax-deductible donations intended by a donor to be passed on to another organisation or person.

Para 77 continued:

Regulation of conduct during the electoral process is more efficiently dealt with under electoral legislation. This model has been adopted in the UK after many years of fruitless regulatory attempts through the law of charities.

Further, organisations could just decide not to avail themselves of tax concessions and fall from the ACNC register. They could still carry on the same behaviours e.g. *Get Up*.

Refer chapter 3 and chapter 13 Lindsay Driscoll and concluding chapter in *Regulating Charities: The Inside Story* Routledge at <http://bit.ly/2oLil8F>

Para 78:

Noted.

Para 79:

Noted, see previous comments.

Para 80:

Noted.

Para 81:

Noted.

Para 82:

Noted.

83. ATO ruling (Taxation Ruling 2005/13) relates to this issue. The ATO could work with the DGR sector to clarify further what constitutes prohibited conduit behaviour.

Recommendation 9

84. **The Committee recommended that the ATO, in conjunction with the Commonwealth Treasury, investigate options for establishing annual reporting requirements for organisations to maintain deductible gift recipient status as an environmental organisation, where such reporting is to be made publicly available.**
85. The proposal outlined in paragraph 26 above would give effect to this recommendation.

Para 83:

Noted. There appears to be a particular issue with respect to specifically list DGRs operating overseas. Refer the doctoral thesis of [Natalie Silver pp 90, 105-106](#).

Para 84:

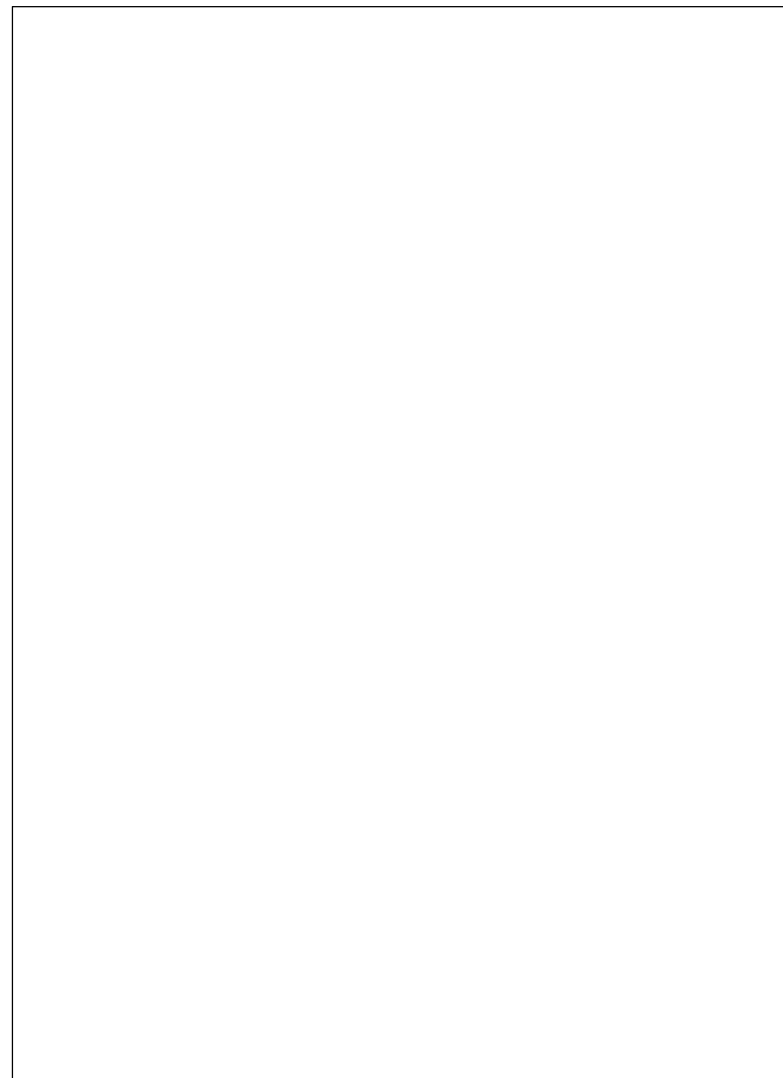
Noted.

Para 85:

Noted, refer comments above.

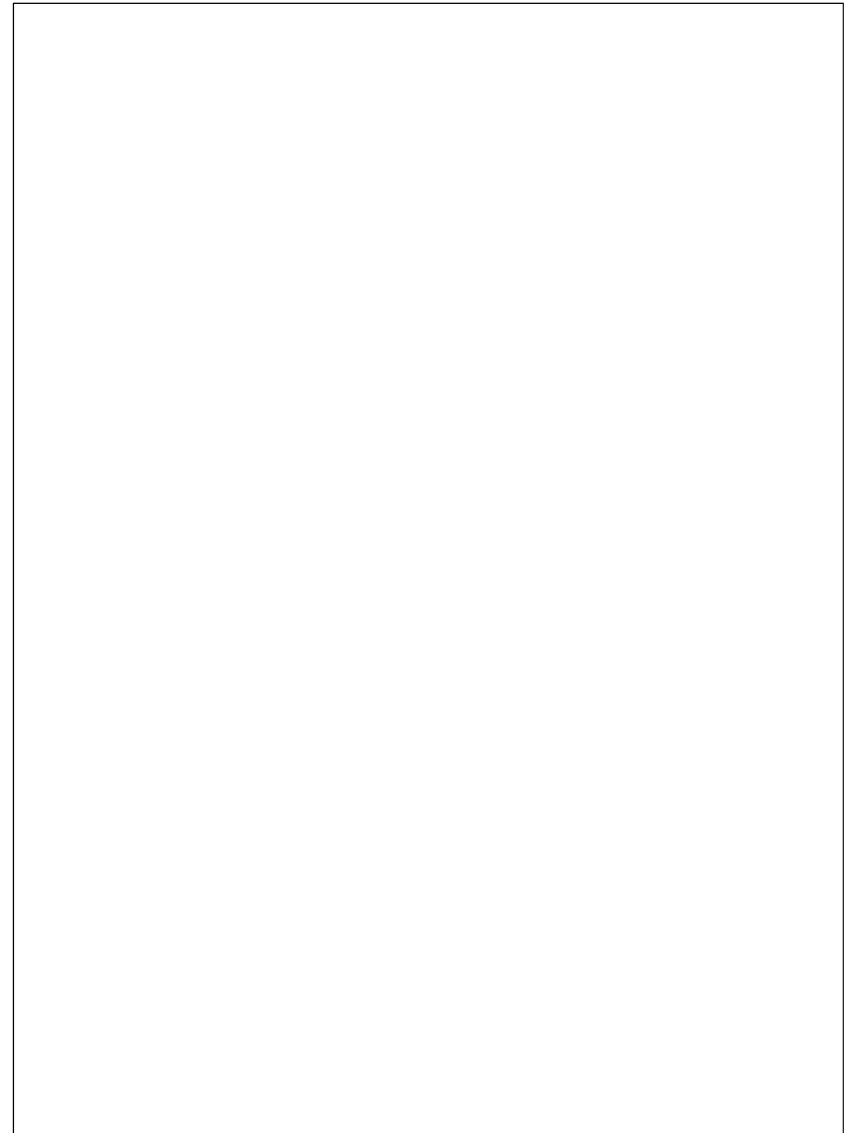
Summary of consultation questions

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?
2. Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?
3. Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?
4. Should the ACNC require additional information from all charities about their advocacy activities?
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?
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?
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?
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?
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?
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?
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?



Annexure 1

Annexure A – Purposes and Activities

Charity Purposes and Activities

The common law of charity focusses on ‘purposes’ of the organisation for classification as a charity. Purposes as stated in the organisation’s formal documents are the starting point for inquiries as to whether it is charitable. Activities are relegated to a second tier enquiry of mere indications or signposts as to the purpose of an organisations and it is not the initial starting point of inquiry. This has been accepted by the ACNC legislation where the principal charity registration section²⁶ is expressed in terms of purpose with one exception.²⁷

Charity activities are the activities that a charity undertakes in support of its overarching purpose. A charity may only conduct activities that further its charitable purposes.

The ACNC gives the following example:


A charity holds a cake sale to raise funds for its homeless accommodation. The activity – baking cakes and selling them to the public – is not the same as its overarching purpose – advancing social and public welfare. The cake sale would simply be an activity the charity undertakes to further its charitable purpose of advancing social and public welfare. ([ACNC Fact Sheet](#))

A purposes approach allows the governors of charities to devote charitable resources to the most efficient and effective way of achieving their purposes. This allows flexibility that a pure activities might not allow. Further, a focus on activities can easily descend into a complex and unsatisfactory rules based exercise rather than a principles based inquiry that is far more suited to the classificatory task. The following annexure 2 of the Canadian experience that has gone down a activity path illustrates this point.

An activity not in furtherance of a charitable purpose of itself, without more, does not mean the charity has abandoned its purposes. The ACNC says: ‘In determining whether a charity has a disqualifying political purpose, the ACNC will consider all the relevant circumstances of the charity, including its governing rules and its activities. Assessment of these matters will be a question of fact and degree.’

²⁶ S 25-5 AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION ACT 2012

²⁷ The one exception is Harm Prevention Charities which have a principal purpose test.



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 first response of regulators should be to bring the organisation back to its founding purposes. If this is not possible, the second response is working to reform the purpose of the organisation to again be charitable: see Annexure 2 CCEW’s Review of the Register for an effective regulatory response to such situations.

DGRs – purpose and activities

The majority of DGRs like charities face a purposes based test. In fact, charitable purpose itself forms the basis for most of the DGR categories. It is suggested that this should be retained to avoid the ‘activity definition trap’.

Other methods of deciding primary DGR classification are status based. Example of this are a particular status granted by another body (eg TAFEs) or a Minister (eg OADGS).

A few and the more recent additions to the list have an activity or principal activity test as the principle means of classification, such as Harm Prevention Charities.

The table below gives a broad indication of DGR purpose and activity classifications.

Taxation Statistics 2017 - Number of DGRs by category of recipient²⁸ and class²⁹

Type of DGR	Number of DGRs	Purpose or Activity
Public benevolent institutions	9,907	Purpose-c
School or college building fund	4,850	Purpose-c
Public library	1,656	Purpose-c
Ancillary funds	1,634	Purpose-c
Public fund on the register of cultural organisations	1,601	Prin-purpose
Health Promotion Charity	1,542	Prin-activity
Private Ancillary Funds	1,449	Purpose-c
Public fund for persons in necessitous circumstances	639	Purpose-c
Public fund on the register of environmental organisations	619	Purpose
Public museum	612	Purpose-c
Scholarship fund	563	Purpose-for
Animal welfare charity	411	Purpose-c
Public fund for religious instruction in government schools	325	Purpose-for
Public hospital	297	Purpose-c
Overseas aid fund	247	Status
Government Special School	231	Purpose-for
A public fund for providing volunteer based emergency services	215	Purpose-for
Public art gallery	193	Purpose-c
Specifically Listed in the ITAA	186	Status

²⁸ Organisations with active DGR status as at 1 November 2016.

²⁹ The categories are sorted into those that must be charities (Purpose-c); those based on status of the organisation such as an approved by a Minister (eg OADGS), TAFE or research institution usually by given status by another regulatory regime; those tax classifications that don't use the word 'purpose' but rather use the word 'for' which indicated a purpose intention (purpose-for); and those determined solely on an activity analysis (activity) or principal activity (prin-activity).

Approved research institute	159	Status
Institution consisting of a public library, public museum and public art gallery or of any two of these bodies	118	Purpose-c
TAFE	104	Status
Public institution for research	89	Status
A public fund established and maintained for the purpose of providing money for the provision of public ambulance services	84	Purpose
Public fund on the register of harm prevention charities	84	Prin-activity
Charitable services institution	83	Purpose-c
Nonprofit hospital	71	Purpose-c
Public fund for Public Benevolent Institutions	71	Purpose-c
Residential educational institution	61	Purpose-c
Public university	56	Purpose-c
Other organisations ³⁰	345	Not applicable
Total	28502	

³⁰ Includes DGR types other than those listed.

Annexure 2

Case Study on Canadian Political Audits.

In the Canadian Budget of 2012 a sum of \$8 m was provided with to the Canadian Revenue Agency to establish a new political-activity audit program, with 10 such audits planned for the first fiscal year. Funding later increased to \$13.4 million over five years.³¹

It was widely reported in the Canadian press that:

The blitz began with the 2012 federal budget, shortly after several cabinet ministers – Joe Oliver, now finance minister, among them – labelled environmental groups as radicals and money launderers. The groups, able to attract donations by virtue of their charitable status, have sharply opposed the Harper government’s oilsands and pipelines policies.³²

The audits sent a “chill” through the sector with some charities reacting by stepping back from any political advocacy or public policy work, some becoming more strident and those affected by CRA audits spending up to a \$100,000 on legal fees to contest and manage the audit. You will see below how reporting and checking of advocacy activities led to these excessive costs.

The matter became an election issue and the new government promised to review the situation, ceasing the audits and issuing a Consultation Panel report policy on political activities of charities.³³ It is instructive to consider the report and recommendations and ask whether the public received value for money from the audits on any measure.

³¹ Refer to CBC News Politics for a time line of the audit program and surrounding events. Available at <http://www.cbc.ca/news/politics/canada-revenue-agency-s-political-activity-audits-of-charities-1.2728023>

³² <https://www.theglobeandmail.com/news/politics/study-cites-chill-from-tax-agency-audits-of-charities-political-activities/article19551584/>

³³ Report is available here - <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltbl-ctvts/pnlrprt-eng.html>

The Panel noted how going down the “activities’ path merely led to confusion and compliance burdens and despite several attempts to devise a workable system, it was never achieved. It served neither charity or regulator.

“Much of this confusion stems from the use of the words "activities" and "purposes" in the ITA and associated case law, and how the CRA and the courts have chosen to administer and interpret these provisions. A prohibition on "political purposes" was developed in the early 1900’s, and has been accepted into Canadian law³. It remains in force to this day, although the courts have generally acknowledged that a charity may use some political means to achieve its charitable ends.⁴ However, establishing the precise line an organization must cross to be considered as having a political purpose is a challenge, both at law and in practice.

Courts have grappled with the focus on activities, suggesting that it is an inherent weakness in the ITA’s approach:

"While the definition of "charitable" is one major problem with the standard in s. 149.1(1), it is not the only one. Another is its focus on "charitable activities" rather than purposes. The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. *In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature* (emphasis added)."⁵

The CRA⁶ released its first policy on the subject in 1978 (Information Circular 78-3), maintaining that, not only had the courts ruled against political purposes for charities, the ITA **also** prevented charities from carrying out political activities. The reasoning was that since the Act requires charities to devote all of their resources to their charitable work, and given the CRA did not consider political activities to be charitable, any charity devoting resources to political activities was not in compliance with the law. The Panel believes that the CRA’s interpretation was an unnecessary and incorrect extension of the statute and case law.

Information Circular 78-3 was quickly criticized by the charitable sector. The matter was raised in the House of Commons in 1978, with MPs noting the concern amongst charities, and suggesting that this was an attempt to stop charities from carrying out actions that might embarrass the government.⁷ The government of the day suspended the policy, while maintaining that it represented the law as established by the courts.

Until 1985, the CRA took the position that a charity could not carry out political activities, although exception was made for charities making representation directly to the government. Given the concern and uncertainty that had been created in this area, the government consulted with the charitable sector to determine a way forward. These consultations led to amendments to the ITA in 1986, adding new provisions intended to confirm that charities were permitted to carry out political activities, **provided that:**

- they devote "substantially all" of their resources to charitable work;
- any political activities are "ancillary and incidental" to their charitable purposes; and
- they do not engage in "partisan political activities", being any direct or indirect support of or opposition to a political party or candidate.

Some saw these new provisions as confirming that an activity in furtherance of a charitable purpose was a charitable activity, while others viewed them as imposing a limit on what charities could do.

The CRA released another Information Circular in 1987 to further explain how the new legislation might affect charities. Notwithstanding this attempt to clarify the matter, there remained confusion, and the series of court cases dealing with political activities and purposes that followed did not help to clarify the rules for charities. As noted in one submission to this consultation:

"...there is no judicial guidance addressing how activities can be characterized in isolation. Focusing on activities creates a fertile ground for arbitrary application of the rules. It enables the regulator to characterize an organization's operations by parsing them into artificial component parts, or to brand them entirely as unacceptable based solely on one of those parts."⁸

After a number of years of relative quiet on the issue, by the early 2000s, the charitable sector was again expressing uncertainty about where the lines were drawn.⁹ To address these concerns, and following discussion with charitable sector stakeholders,

the CRA developed its current Policy Statement CPS-022, Political Activities, published in 2003. However, it has become apparent that this policy too failed to rectify the continuing confusion and still left ambiguity regarding charitable and political activities.”

The Panel has made a number of recommendations to redress this situation including administrative actions by DRA as well as legislative amendment.

The graphic below is taken from the Canadian tax authority’s charities annual return concerning their advocacy activities.³⁴ It requires an indication of the organisation’s resources used for advocacy. As indicated by the quotes from the CRA Guidance materials, the charity must keep records which quantify and identify these resources. This is a substantial burden for charities.

2 Identify the way the charity participated in or carried out political activities during the fiscal period.

		Resources used			
		Tick all the boxes that apply			
		Staff	Volunteers	Financial	Property
Media releases and advertisements	700	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Conferences, workshops, speeches, or lectures	701	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Publications (printed or electronic)	702	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rallies, demonstrations, or public meetings	703	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Petitions, boycotts (calls to action)	704	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Letter writing campaign (printed or electronic)	705	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Internet (website, social media (Twitter, YouTube))	706	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Gifts to qualified donees for political activities	707	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (specify):	708	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The CRA Guide to completing the form says this about the table:

“Table 2 – Identify how the charity participated in, or carried out, political activities (including funding political activities) during the fiscal period by reporting the types of resources used to carry out these activities. Tick all the boxes that apply. The term resource is not defined in the Income Tax Act, but we consider it to include the total of a charity’s financial assets, as well as everything the charity can use to further its purposes. This includes employees, volunteers, money, and property (such as buildings, equipment, land, and supplies). Example ABC charity organized a rally on Parliament Hill to urge the government to change the drug review process. It used staff to organize and plan the rally and financial resources to rent buses to transport supporters to the rally. In this scenario, in the column marked “Rallies, demonstrations, or public meetings,” tick the boxes under “Staff” and “Financial.” Charity XYZ’s only political activity was to gift bullhorns and money to ABC charity to support its rally on Parliament Hill. In this scenario, in the column marked “Gifts to qualified donees for political activities,” Charity XYZ ticks the boxes under “Financial” and “Property.””³⁶

And this requires records to be kept as the CRA Guidance on Political Activity indicates:

“An organization that is involved in political activities will be expected to identify any expenditures made on such activities in order to demonstrate that **substantially all** of its resources have been devoted to charitable activities.

Where expenditures relate in part to political activities and in part to other activities, a reasonable allocation should be made and the methodology should be consistent from year to year. Where **substantially all** (90% or more) of an expense is for charitable activities, then the whole expense should be considered a charitable expense. Similarly, if the expense relates substantially to a political activity, the whole expense should be counted as a political expense. In addition to its financial resources, any physical and human resources must be devoted substantially to its charitable purposes and activities.”³⁷

The CRA do not provide guidance about who is a volunteer (registered with the organisation formally or just turn up at a rally after a call to action) and this creates much angst for charities in ensuring that they comply with the books and records requirements of CRA. It illustrates the level of compliance burden for little regulatory impact of pursuing a strategy of activities rather than purposes. This is relevant to the Australian situation as the REO report recommendation mentioned episodic volunteers (see clause 75 above).

³⁶ Page 20 available at <http://www.cra-arc.gc.ca/E/pub/tg/t4033/t4033-17e.pdf>

³⁷ Section 12 available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html#14-3-6>

“The Committee recommended that administrative sanctions be introduced for environmental DGRs that encourage, support, promote, or endorse illegal or unlawful activity undertaken by employees, members, or volunteers of the organisation **or by others without formal connections to the organisation.**”³⁸

Limited Results of Audits

Page 21 of CRA Report on the Charities Program 2015-2016 available at

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/nlnrprt/2015/Charities%20AR.eng.pdf>

“Conclusion of the political activities audit program

Under the political activities audit program, the Directorate selected 60 charities for audit over four years, in addition to the roughly 800 audits it conducts annually. In January 2016, the Minister of National Revenue issued a news release announcing the Directorate would be winding down the program; at the time, 30 audits were completed and 24 were underway. The release also noted that the remaining six audits would not be started as part of the political activities audit program, as the results of the program had shown substantial compliance with the rules regarding charities’ involvement in political activities. As of September 30, 2016, the Directorate has concluded 42 audits. There are 12 audits for which the audit work has been completed and the Directorate is currently communicating the results to the charities, allowing appropriate time for them to respond.

CRA CHARITIES PROGRAM FACTS AND FIGURES – UPDATE MARCH 2017.

Available at <http://www.cra-arc.gc.ca/chrts-gvng/md-kt/fcts-fgrs-eng.html>

Political activities review as of March 31, 2017

Results	Total
Reminder letters sent to charities that were not audited	29
Total number of political activities audits*	54
• Audits currently underway**	5

³⁸ Emphasis added.

Political activities review as of March 31, 2017

Results	Total
• Audits completed	49
○ No further action	1
○ Education letters	12
○ Compliance agreements	24
○ Penalty/suspension	0
○ Notices of intention to revoke***	7
○ Revocation as a result of an audit	2
○ Voluntary revocation	1
○ Annulment	2

*While 60 audits were initially planned, the CRA will only have conducted 54 political activities audits as a result of the winding down of this program.

**The audit work is complete and the CRA is now communicating the results to charities, allowing appropriate time for responses from these organizations.

***This figure also includes situations where the audit is finished and the CRA has proposed to revoke the charity's registration, but has not yet done so because there is a pending objection or appeal.

A short basic primer on the Canadian charity law and political advocacy is available here <http://www.carters.ca/pub/bulletin/charity/2012/chylb286.htm>

Case Study of Charity Commission of England and Wales (CCEW) Project – Maintenance of an Accurate Register of Charities

This project by the CCEW commonly referred to as “The Review of the Register.” It sets out how the regulator deals with parts of the register that have a higher risk of inaccuracy and consequences for organisations. The process is that once an area is identified by risk analysis, the regulator releases a draft statement of their understanding and administration of the law for public and sector comment. This elicits behaviour from charities of checking their status and engaging with the regulator in a cost-effective manner. This broad engagement is far more efficient and effective than a one-off audit with a small portion of a part of the register. Once submissions have been considered, a final statement is published by the regulator with educational products. The regulator would then undertake specific audits on at risk populations identified by the experiences of the consultation. This is consistent with best regulatory practice using Prof Joh Braithwaite’s [regulatory pyramid](#) as the ACNC has done.

The Review was overtaken by the work on definition in the Charities Bill.

Links:

Project Description and overview: <https://www.gov.uk/government/publications/the-review-of-the-register-of-charities-rr1>

Individual Review : <https://www.gov.uk/government/collections/reviews-of-the-charity-register>

Further commentary is available from Chapter 3 by Lindsay Driscoll (former Charity Commissioner) in **Regulating Charities: The Inside Story** Routledge at <http://bit.ly/2oLil8F>.

Annexure 3

Do for profit businesses receive a tax deduction for their advocacy activities?

A levy paid by a tobacco manufacturer to an industry association to fight proposed legislation that would have restricted the advertising and sale of tobacco products and the sponsorship of sporting events was deductible (*Rothmans of Pall Mall (Australia)* 92 ATC 4508; TR 95/1). Taking into account *Rothmans* and the general law around deductibility of advertising expenses, it is likely that a mining company spending money on advertising against an environmental charity group would be able to claim it.

The general provision for deductibility is section 8-1 of the ITAA 1997 which allows a deduction for all losses or outgoings to the extent that they are incurred in gaining or producing assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. However, no deduction is allowed to the extent that the losses or outgoings are of a capital, private or domestic nature or are necessarily incurred in gaining or producing exempt income.

Losses or outgoings are incurred in gaining or producing assessable income where they are 'incidental and relevant to that end' (*Ronpibon Tin NL and Tongkah Compound NL v. Federal Commissioner of Taxation* (1949) 78 CLR 47; (1949) 8 ATD 431; (1949) 4 AITR 236). Where a taxpayer is carrying on a business for the purpose of gaining or producing assessable income, the commercial and practical implications of the term 'necessarily incurred' imply that voluntary expenditure incurred for business needs may be deductible. It is the **taxpayer** who decides whether the expenditure 'is dictated by the business ends to which it is directed' (*Federal Commissioner of Taxation v. Snowden & Willson Pty Ltd* (1958) 99 CLR 431; (1958) 11 ATD 463; (1958) 7 AITR 308 (*Snowden & Willson's Case*)). This was further supported in *Magna Alloys & Research Pty Ltd v. Federal Commissioner of Taxation* (1980) ATC 4542; (1980) 11 ATR 276, when the Court stated: For practical purposes and within the limits of reasonable human conduct, it is for the man who is carrying on the business to be the judge of what outgoings are necessarily incurred.

Another analogy may be sponsorship. In ATO ID 2005/285, the Commissioner states that where the taxpayer intends to provide sponsorship in the belief that the exposure from that sponsorship will benefit his business in the form of advertising and will generate future income. As it is the taxpayer who determines the nature of the expenditure to be undertaken in the conduct of their business (*Snowden & Willson's Case*) the expenses associated with the taxpayer's sponsorship of motor cycle racing are deductible under section 8-1 of the ITAA 1997. They are in the nature of advertising expenses and are directed to enhance the income producing activities of the taxpayer's business and are not excluded on the basis of being capital or of a private or domestic nature.