Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

4 August 2017

By E-mail - DGR@Treasury.gov.au

Your Ref
Our Ref PMS
File No. 011802938

Senior Adviser
Individual and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Contact
Peter Seidel
Direct 61 3 9229 9769
Facsimile 61 3 9916 9355
pseidel@abl.com.au

To whom it may concern,

Arnold Bloch Leibler's Submission: Tax Deductible Gift Recipient reform opportunities

Please find enclosed Arnold Bloch Leibler's Submission in response to the Tax *Deductible Gift Recipient Reform Opportunities* Discussion Paper.

Could you kindly acknowledge receipt at your earliest convenience.

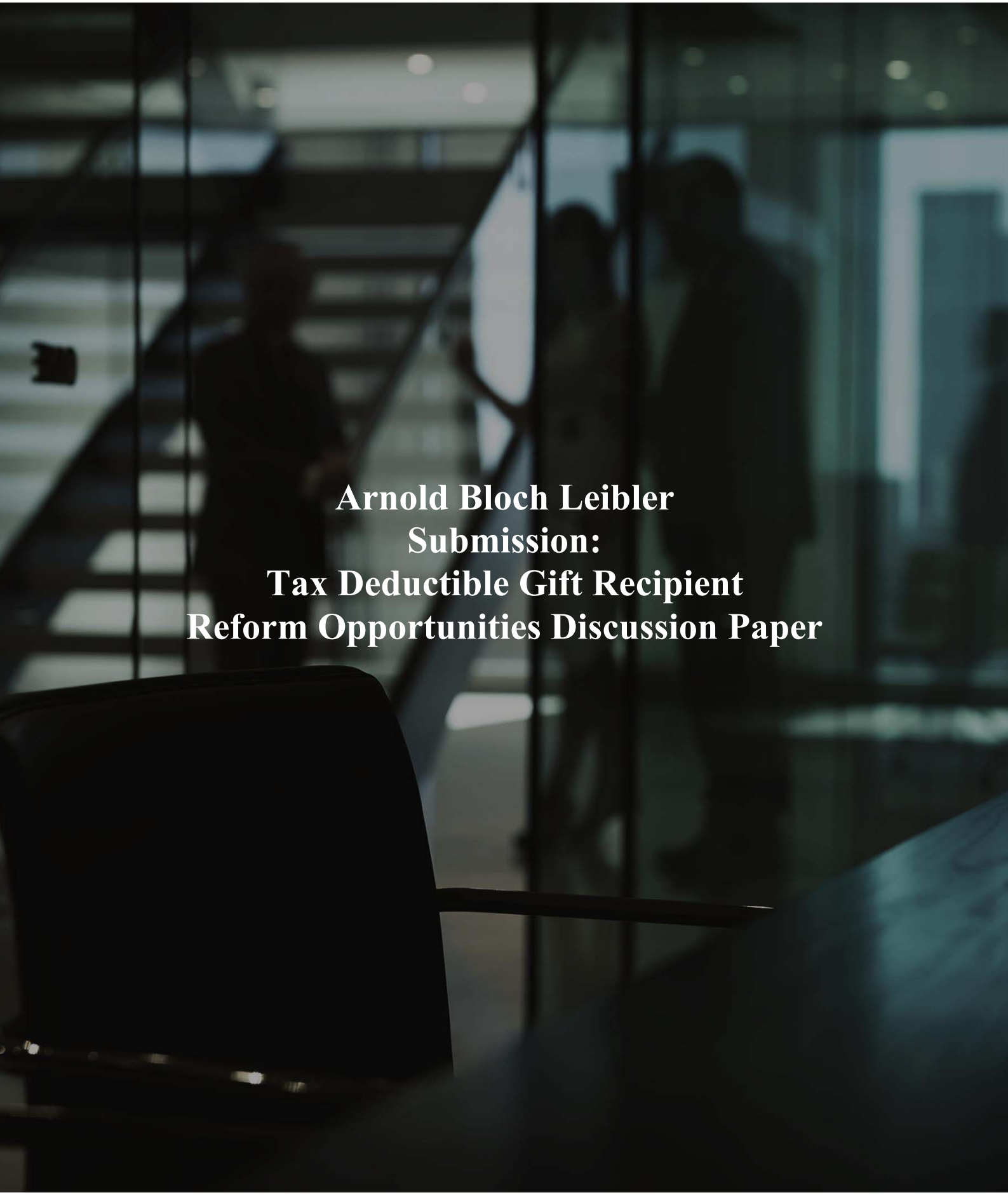
Yours sincerely

Peter Seidel
Partner

Enc

ABL/6048050v1

Arnold Bloch Leibler
Lawyers and Advisers



Arnold Bloch Leibler
Submission:
Tax Deductible Gift Recipient
Reform Opportunities Discussion Paper

Arnold Bloch Leibler
Level 21 333 Collins Street Melbourne Victoria 3000 Australia
Level 24 Chifley Tower 2 Chifley Square Sydney NSW 2000 Australia

Arnold Bloch Leibler Submission: Tax Deductible Gift Recipient Reform Opportunities Discussion Paper

1 Thank you for the opportunity to comment on the proposals outlined in the Tax Deductible Gift Recipient Reform Opportunities Discussion Paper (**Discussion Paper**).

2 Arnold Bloch Leibler Lawyers and Advisers (**ABL**) acts for a range of philanthropic families and foundations, not-for-profits and charities doing exceptionally important work in the community. We are involved in setting up and administering organisations and trusts, in seeking charitable tax concessions, in helping them to fundraise and in generally assisting them to fulfil their governance responsibilities.

3 ABL acts for a number of environmental charities with DGR status. We are therefore well-placed to comment on the Discussion Paper, particularly as it seems to focus disproportionately on such charities, for reasons that are not objectively clear to us at all.

4 We have organised our submission in two parts. Part One provides some general comments in relation to the Discussion Paper and Part Two responds directly to the 13 consultation questions outlined in the Discussion Paper.

Executive Summary

5 We are fundamentally concerned with the disproportionate and inexplicable focus within the Discussion Paper on both Environmental Organisations and the advocacy activities of charities.

6 While we agree that reducing the administrative complexity and simplifying the processes and procedures to obtain DGR endorsement will benefit the charity sector as a whole, we do not agree that all of the measures suggested in the Discussion Paper will achieve that goal.

7 We are also concerned that in the Discussion Paper there appears to be an overemphasis on the activities of an entity rather than its purpose, in a manner inconsistent with Australian charities law.

8 We have set out our considered responses to each discussion question in Part Two. In summary, we:

(a) do not support the recommendation that all DGRs be required to be registered as charities (questions 1 and 2).

(b) do not support any requirement that charities provide additional information about advocacy activities (questions 4 to 6).

(c) do support changes that would lead to the streamlining and simplification of the administration of the four DGR registers. In our view, the ACNC is a more appropriate regulator than the ATO (question 7).

(d) do support the removal of the public fund requirement in principle (question 8).

(e) do not support 5 year sunset periods for specifically listed DGRs (question 11).

(f) do not support a universal requirement that environmental organisations commit a specifically prescribed 25 per cent, or any specifically prescribed amount, of their annual expenditure from their public fund to environmental remediation (question 12).

(g) do not support any additional sanctions in relation to Environmental DGRs and reject the premise of the question (question 13).

Part One: General comments

An unwarranted focus on advocacy

9 On any objective view, the Discussion Paper has an unjustified focus on advocacy carried out by charities, and in particular by entities on the Register of Environmental Organisations. As outlined in paragraphs 51 to 59 and 106 in Part Two below, advocacy is an absolutely legitimate means by which a charity can further its charitable purposes. As the present Chief Justice of the High Court of Australia expressed in the *Aid/Watch* case:

> *it could scarcely be denied, these days, that it may be necessary for organisations ... to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes*.[1]

10 As advocacy rights are clearly enshrined democratic and legal rights, we strongly object to any move to curtail the advocacy work of charities. Such a move would amount to a flagrant disregard of the principled and rational development of charities law in Australia. It would also sit uneasily with Australia's constitutionally prescribed system of representative government for reasons further articulated in paragraphs 51 to 59 below.

Confusing activities and purpose

11 On multiple occasions the Discussion Paper seems to confuse the relevance of the activities of a charity with its purpose. This is obviously troubling, as it is completely inconsistent with Australian law.

12 For example, paragraph 8 of the Discussion paper states that:

> *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*

13 Except in the case of Health Promotion Charities and Harm Prevention Charities, where DGR status is determined by reference to a principal activity test, the purpose of an organisation, and not its activities, is relevant to determining its eligibility for DGR endorsement.

14 It is inevitable and essential that the activities of a charity should change over time as it develops new, more relevant, more effective and efficient ways of achieving its

[1] *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539, 564 (Kiefel J).

charitable purpose. It is only where the purpose, in furtherance of which those activities are undertaken, changes that an entity's continued eligibility for charity and/or DGR status may be called into question.

15 As a further example of this focus on activities in the Discussion Paper, the entire premise of Question 4, addressed below, approaches the question of eligibility for charitable status solely through the prism of the organisation's activities. According to Australian charities law this is approach is fundamentally wrong.

16 Activities are relevant to determining an entity's charitable purpose, but only in exceptional circumstances. Activities will only be relevant to a determination of an entity's purposes if the entity spends a large portion of its time and resources carrying out certain activities over extended periods of time.

17 Relevantly the Explanatory Memorandum to the Charities Bill 2013 states that:

> *[1.27] In determining or substantiating an entity's purpose, it is the substance and reality of the purpose that must be identified. To substantiate - that is, to confirm or corroborate or demonstrate - the entity's charitable purposes, the activities of an entity may be considered. It is the role of its activities and the extent to which they further, or are in aid of, the entity's purpose that is relevant, not the nature of the activities. In considering activities to substantiate the charitable purpose, it may be necessary to go beyond governing rules to operating rules and activities to substantiate its stated objectives.*
>
> *[1.28] Other relevant factors may include elements of the governing documents, such as powers, rules, not-for-profit and winding up clauses, clauses governing who can benefit from the entity's activities and in what ways, the entity's policies and plans, administration, finances, origins, history and control, and any legislation governing the entity's operation.*

18 Supplementing the Explanatory Memorandum an Addendum to the Explanatory Memorandum was circulated "to provide further clarity and certainty regarding charitable purposes, disqualifying purposes and the assessment of whether a purpose is for the public benefit".[2] Paragraph 1.102B of that Addendum provides:

> *[1.102B] In general terms, the purposes of an entity are usually the aims listed in the entity's constitution, and the activities will be the methods by which the entity achieves those purposes. However, not all purposes will necessarily be listed in the entity's constitution. If an entity spends a large portion of its time and resources carrying out certain activities over extended periods of time, these activities may, in fact, amount to a purpose in their own right. Whether the activities have amounted to a purpose will be determined on a case-by-case basis, considering all relevant factors, including but not limited to the factors listed in paragraphs 1.27 to 1.28.*

19 These extracts from the Explanatory Memoranda make clear that:

(a) To demonstrate an entity's charitable purposes the activities of the entity may be considered;

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 2013, 6121 (David Bradbury, Assistant Treasurer and minister Assisting for Deregulation).

(b) It is the role of the entity's activities and the extent to which they further the entity's purposes that is relevant, not the nature of the activities; and

(c) If an entity spends *a large portion of its time and resources* carrying out certain activities over time these activities may, in fact, amount to a purpose in their own right.

20 These extracts from the Explanatory Memoranda are entirely consistent with the following Australian common law principles:

(a) It is the entity's purpose in furtherance of which activities are carried out, and not the character of the activities themselves, that is determinative of purpose; and

(b) Regard may be had to the activities of an entity to determine its purpose where its governing rules do not clearly establish its purpose.[3]

21 These principles were summarised succinctly by Maurice C Cullity QC, when he wrote:

> *The distinction between ends and means is fundamental in the law of charity. It is the ends, or purpose, not the means by which they are to be achieved, which determine whether a trust or corporation is charitable at law.*[4]

22 A focus on activities, other than in the limited case of Health Promotion Charities and Harm Prevention Charities, is simply an incorrect approach, according to Australian charities law.

Strengthening governance

23 The reforms suggested in the Discussion Paper are stated as intended to strengthen DGR governance arrangements, reduce administrative complexity and ensure that an organisation's eligibility for DGR status is up to date.

24 We welcome any reforms that will appropriately reduce administrative complexity. We entirely agree that it is very important for DGRs to be transparent in their dealings and have strong governance in place. But as outlined in our response to question 1 below, in our view registration with the ACNC is not the only way, nor necessarily the most effective way, to achieve this.

25 In our view to imply that unless DGRs are required to be registered charities they will not have adequate governance is to fundamentally misrepresent the current Australian regulatory environment.

26 Entities with DGR endorsement, if not registered as charities, will be subject to oversight from other regulators and laws, which could include the Office of the Registrar of Indigenous Corporations the Australian Securities and Investments Commission, the various state-based association regulators such as Consumer Affairs Victoria and a range of trustee laws. They are also, as the Discussion Paper notes, variously accountable to government departments, including the ATO

[3] *Commissioner of Taxation v Word Investments* (2008) 236 CLR 2014; *Royal Australasian College of Surgeons v. Federal Commissioner of Taxation* (1943) 68 CLR 436; A*uckland Medical Aid Trust v. Commissioner of Inland Revenue* [1979] 1 NZLR 382.
[4] 10 Est. & Tr. J. 7 1990-1991, page 10.

depending on the category of their DGR endorsement, as well as to government and non-government funding bodies and their reporting requirements.

27 We agree that not all DGR entities have the same governance requirements because they are not all subject to ACNC oversight, but that does not mean their governance is any less robust or that they are subject to 'minimal governance'. In our vast experience the governance standards of other regulators and funding bodies are generally comparable with those set by the ACNC.

A need for simplification

28 We agree that the process for applying for and obtaining DGR status is unnecessarily complicated. This is surely in part because of the gradual increase in the number of DGR categories over time. However it is also in part because the jurisprudence dealing with charitable purposes is in some respects unhelpfully unclear[5] and therefore difficult to apply when determining whether entities appropriately fit within certain categories of DGR endorsement.

29 The Discussion Paper puts forward some suggested changes to the DGR framework which, in our view, have some merit.

Taxation concessions a cost to the Commonwealth?

30 We do not agree with the suggestion in paragraph 20 of the Discussion Paper as well as other similar suggestions throughout the Discussion Paper that charitable taxation concessions are a significant burden on the Commonwealth. To paraphrase WEH Stanner, this is akin to deliberately placing a window to exclude a whole quadrant of the landscape. Paragraph 20 notes a cost to the Commonwealth of the deductions from donations to DGR entities. We have not seen the basis for these calculations but we query how the figure of $1.31 billion in 2016-2017 was determined and whether it takes into account the savings the Commonwealth makes from the existence and work of entities that have DGR status.

31 According to the 2015 Australian Charities Report, the total income of the charity sector, of which DGRs comprise 38.4 per cent, is equivalent to 8.3 per cent of Australia's GDP. In addition, the sector is one of Australia's largest employers, accounting for approximately 10 per cent of Australia's total workforce. Unless the total economic contribution of the sector is taken into account in determining the cost to the Commonwealth of the deductions from donations to DGRs, we submit that the $1.31 billion figure quoted is likely to mislead.

32 In addition, any suggestion that tax deductible donations are a gift from the taxpayer ignores the benefits to taxpayers and the reality of the tax system's architecture. DGR status is also a gift *to* the hundreds of thousands of donating taxpayers who receive a tax deduction for making donations to DGRs.

[5] See for example: A Parachin, *The role of fiscal considerations in the judicial interpretation of charity* (2014) in 'Not-for-Profit Law Theoretical and comparative Perspectives' page 113.

Part Two - Answers to Discussion Paper Questions

Question 1: What are stakeholders' views on a requirement for a DGR (other than a government entity DGR) to be a registered charity in order for it to be eligible for DGR status. What issues could arise?

33 We submit that it is not appropriate to require all DGRs to also be registered as charities to be eligible for DGR status.

34 The Discussion Paper contains support for this proposed requirement in the statements that it is consistent with Recommendation 2 of the House of Representatives Standing Committee on the Environment's REO Inquiry Report (**REO Report**), and also with Recommendation 6.5 of the Not-For-Profit Sector Tax Concession Working Group's May 2013 report (**Working Group** and **Working Group Report**).

35 It is clear, in our view, that the Working Group's recommendations are taken out of context here in the Discussion Paper. In addition to recommending that DGRs should generally be required to seek registration as a charity to retain their DGR status, the Working Group recommended that there should be a review of those entities that fall outside the accepted DGR framework to determine whether they still merit DGR status.[6] Importantly, these recommendations were in the context of an additional recommendation that DGR status be extended to all charities that are registered with the ACNC.[7] The Discussion Paper does not include any proposed reforms that would extend the categories of DGR status or considerably simplify the process for DGR endorsement. This proposed selective implementation of the recommendations in the Working Group Report is likely to undermine the effectiveness of the proposed reforms.

36 Implementing one aspect of the Working Group's recommendation without simultaneously dramatically reducing the complexity of the DGR framework by extending DGR status to almost all registered charities would not be a reform that would assist the sector or improve its productivity. Nor is it necessary to improve the sector's accountability or governance.

37 Recommendation 2 of the REO Report was that registration as an environmental charity through the ACNC be a prerequisite for environmental organisations to obtain endorsement as a DGR by the ATO. The basis for this recommendation was essentially that it would streamline and simplify the process for environmental organisations to achieve DGR status. However, in our view regulatory burden can more easily be reduced by regulators coordinating with one another with that specific purpose in mind – as was addressed in paragraph 3.48 of the REO Report. There is no logical basis for increasing the regulatory responsibilities of environmental organisations, by requiring them to meet the definition and requirements of a registered charity, to streamline and simplify processes.

38 Strengthened governance does not require that all DGRs be registered as charities. Consistency of governance *might* be achieved by such a requirement; however, the fact that registered charities currently have different and inconsistent, but generally no less exacting, governance requirements suggests that even consistency of regulation will not necessarily be achieved. What is more likely from implementing

[6] Working Group Report, Recommendation 6.6.
[7] Working Group Report, Recommendation 6.1. The Working Group felt this should only be limited by restricting deductible gifts for purposes and activities that are solely for the advancement of religion or education through child care, primary and secondary education.

this recommendation is that there will be an unnecessary and inefficient regulatory doubling up for those entities that are currently DGRs and not registered charities. In other words, more bureaucratic red tape will be the most likely outcome!

39 In addition, while we are unaware of the numbers involved, this recommendation would presumably mean many hundreds, if not thousands, of new charity registrations. We are unaware whether the ACNC is currently resourced to process and manage this potential new administrative function.

40 Finally, in our view there are policy reasons against requiring all DGRs to be registered charities.

41 Charitable status is a recognition of the public benefit of an organisation. The taxation concessions that attach to charitable status - most importantly income tax exemption - are a recognition of this public benefit.

42 DGR endorsement is intended to achieve the related but distinct policy purpose of encouraging philanthropy. It confers a benefit on both the DGR-endorsed entity and on individual taxpayers who make donations to the endorsed entity. Often, and logically, there is overlap between the desire to increase the availability of donations to an entity and its having a purpose that is understood at law to be charitable. But this is not always necessarily the case.

43 If the government does want to move to require all DGRs to be registered as charities, this should be based on a clear and declared policy objective that DGR status should only be afforded to entities that have a charitable purpose. It should then only be done after an analysis of the financial impact such a move would have on philanthropic giving. We submit that such a fundamental shift in legal requirements for DGR status should not be based on any objective to strengthen governance requirements for DGR entities, which objective would not, in any event, likely be achieved through this means.

Question 2: Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement (that is to be a registered charity) and, if so, why?

44 According to the Discussion Paper approximately 8 per cent of DGRs currently are not registered as charities.

45 We express no general view as to how many of these DGRs would likely be eligible to be registered as charities. However, we recognise there are potential negative implications for the DGRs concerned.

46 Currently, if an organisation's charitable status is revoked by the ACNC, but that organisation is not required to be a charity to be eligible for DGR endorsement, it might still retain its DGR status. If all DGRs were required to be registered charities this would no longer be the case, as loss of charitable status would mean loss of DGR status. In our view this would be an unfair and inexplicable diminution of the existing rights of those DGRs.

47 As such, should this reform be implemented, then as a matter of procedural fairness, any measure taken to require all DGRs to be registered as charities must not have retrospective effect.

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

48 Many Public and Private Ancillary Funds are registered as charities and currently take advantage of the ability to withhold information from the register to protect, in particular, the identity of donors. This is an important protection that could be simplified.

Question 4: Should the ACNC require additional information from all charities about their advocacy activities?

49 This question is posed for all charities, not only those with DGR status. Accordingly, we respond in relation to advocacy for all charitable purposes.

50 We strongly submit that a requirement for additional reporting about advocacy activities is entirely unnecessary, unworkable and would place undue burden on charities, thereby limiting their effectiveness and productivity. It also wrongly focusses on activities when the law of charities is concerned primarily with purpose as we have addressed in paragraphs 11 to 22 of Part One of this submission.

An unnecessary measure

51 It is not in question that as a matter of fundamental Australian law Australian charities can undertake advocacy to further their charitable purposes. They may do this by supporting or opposing relevant legislation, government policies and decisions or the actions of individuals and corporations. The importance of such advocacy was recognised by the High Court in the 2010 *Aid/Watch* decision, where the Court held that the 'political purposes' doctrine does not apply in Australia and that the ability for charities to undertake advocacy was essential to Australia's constitutional system of parliamentary democracy.

52 Furthermore, under the *Charities Act 2013* (Cth) a charity can have a charitable purpose of promoting or opposing a change in law policy or practice relevant to other charitable purposes.[8]

53 Accordingly, the singling out of one type of legitimate charitable purpose for additional reporting and oversight is of grave concern to us.

54 If the intention of singling out advocacy is a desire to restrict the ability of charities to undertake advocacy activities or purposes, then such a retrograde move would be entirely out of step with the nature of Australian civil society in the 21st century. It would also be completely contrary to Australian law. Charities law in Australia, now more than ever, recognises that advocacy and public debate play a vital role in allowing charities to effectively and efficiently contribute to the betterment of society.

55 According to the High Court in the *Aid/Watch* decision:

> … *generation by lawful means of public debate … itself is a purpose beneficial to the community*.[9]

56 This High Court principle reflects a recognition of the reality that in 21st century Australia:

[8] *Charities Act 2013* (Cth), section 12(l).
[9] *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539, 557 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

political speech by charities enriches the political process by encouraging political debate, facilitating citizen participation and engagement and promoting political pluralism.[10]

57 Any efforts to restrict the ability of charities to participate in public debate would significantly impoverish Australian civil society and democracy.

58 Furthermore, the constitutionally implied freedom of political communication protects exactly the kind of activity that was proscribed by the now defunct political purposes doctrine. There is no principled rationale for limiting the speech of charities. Any attempt to partially reintroduce this doctrine by burdening the free speech of charities risks likely successful constitutional challenge, particularly if there is unjustified discrimination between different charity sub-types.

59 We respectfully urge Treasury to proceed with extreme caution in its deliberations and recommendations to avoid compromising these fundamental legal and democratic principles.

Unworkable and burdensome

60 Not only does this proposal suggest an unacceptable threat to the right of charities to advocate, the Canadian experience has demonstrated that it is almost entirely unworkable.

61 Between 2012 and 2016 the Canadian Revenue Agency spent millions of dollars to establish a new political activity audit program and undertake audits of charities in relation to political activity. By the time the costly political activity audit program was wound down it had only managed 54 audits, several of which were not completed. As reported in the Report of the Consultation Panel on the Political Activities of Charities in Canada, the response from the charity sector in Canada was that the audits were expensive and stressful.[11] Of significant concern was the 'chilling' effect of the audits. During the audit period many charities, uncertain as to the scope and effect of the audit process, took an overly cautious approach and ceased legitimate advocacy. This restricted the legitimate and important work of charities and their freedom of political speech.

62 Not only was the expensive audit in Canada stressful, administratively burdensome and silencing for charities, it was abandoned with recommendations that a focus on activities was unhelpful. It is hard to resist the conclusion that the Canadian Revenue Agency's political activity audit program was fundamentally wasteful.

63 Finally, the practical challenges of requiring charities to declare advocacy activities cannot be overlooked. How are advocacy activities defined, and by whom? Where is the line between public education and advocacy? Is a charity established to promote the safety of children to account for every letter it writes about a dangerous school crossing as advocacy activities? What about a tweet by a volunteer sharing an opinion piece about government decision making? For whose activities do charities have to account?

[10] Chia, Joyce, Harding, Matthew and O'Connell, Ann, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation'* (2011) 35 *Melbourne University Law Review* 353, 365.
[11] Report of the Consultation Panel on the Political Activities of Charities in Canada < http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html> accessed 10 July 2017.

64 We are of the strong view that there is no justifiable basis for requiring charities to provide additional information about their advocacy activities. Further, any such requirement would be unworkable.

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

65 There is absolutely no justification for the information to be collected.

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

66 It would impose a significant burden, as expressed above at paragraphs 60 to 64, and should not be collected.

Question 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?

67 We agree that the delays in decision making regarding DGR endorsement on a register are unduly long. In our experience, endorsement on some DGR registers can take 12 to 18 months. We support changes that would lead to the streamlining and simplification of those processes.

68 However, we are mindful and respectful of the fact that the integrity of some of the registers is strengthened by their relationship with the relevant government department.

69 As a general proposition if regulation of DGR endorsement is to move from the registers, a more appropriate regulator would be the ACNC, which is not charged with raising revenue like the ATO. The ACNC was intended as a regulator for charities and not-for-profits, not only charities. It would be an appropriate regulator for entities on one of the four registers, whether or not they were also charities.

70 We understand there are in excess of 2000 entities currently registered across the four registers. While this constitutes only four categories of DGR endorsement, it is a considerable number of entities. Time savings will only be achieved if the appointed regulator is properly resourced to carry out this role. What is surely uncontroversial is that any shift from administration of the four registers within the relevant government departments to administration by the ATO, or the ACNC, would require a considerable increase in resourcing to either regulator.

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?

71 The public fund requirements are overly complicated and not assisted by the fact that the relevant taxation ruling refers to legislation that is no longer current.

72 We support the removal of the public fund requirement. We recommend that this reform be implemented. Clear information about the changes and any new requirements for charities and DGRs must also be provided to the philanthropic sector to ensure that there is no negative impact on donor confidence.

73 If the public fund requirement is not removed then the categories of 'responsible person' should certainly be modernised and widened.

74 We also support moves to reduce the inevitable pigeon-holing of organisations that occurs when they achieve DGR endorsement in a particular category. Changes that enable organisations to pursue multiple charitable purposes all of which could attract DGR endorsement, without requiring the establishment of separate funds and subsidiary institutions, would be most welcome.

75 However, achieving this will be extremely difficult if not impossible while the principal purpose requirements of most DGR categories and the principal activity test of others remain.

76 One possible solution would be to implement the Working Group Report recommendation to afford DGR status to most charities and to enable them to have multiple charitable purposes, as is currently the case for charities.

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?

77 Paragraph 53 of the Discussion Paper raises a concern that DGRs are endorsed in perpetuity and gain access to generous tax concessions without sufficient governance oversight and review. In our view, that concern is almost entirely unwarranted.

78 We do not accept the characterisation of DGR tax concessions as "generous" given similar OECD countries' concessions to *all* charities. As already noted above at paragraphs 30 to 32, we also do not accept as fair a focus on government concessions and financial contributions to DGRs that does not provide any concomitant acknowledgement of the significant value DGRs contribute to governments directly and to the Australian community more broadly.

79 According to the statistics quoted at paragraph 18 of the Discussion Paper, the source of which is unknown, over 90 per cent of DGRs are registered charities subject to the ACNC Governance Standards and regulatory regime.

80 The remainder of DGRs are subject to ATO or Departmental oversight as well as regulation by their relevant corporate regulator and/or trustee law.

81 We therefore question the objectives of further oversight and whether the additional cost to the ACNC, ATO, taxpayers and the charity sector can be justified. In our view it cannot.

82 As a general concept we have no objection to annual certification. Annual self-assessment to ensure an organisation's purposes continue to fulfil DGR requirements is best practice for all DGRs in any event. But depending on how this requirement is implemented, it has the potential to unreasonably increase the administrative burden on DGRs.

83 The suggestion that annual certification statements could attract penalties where a DGR is subsequently found not to be eligible for DGR endorsement is of further concern to us. The Discussion Paper provides no detail about the penalties involved or the framing of the offence. We reasonably assume that the authors of the Discussion Paper are only concerned with deliberate or intentional

misrepresentations by officers of a DGR, in which case the appropriate target of any disciplinary action is not the DGR entity, but rather the individual officers.

84 We are also very concerned that a rolling review program could be unduly influenced by incorrect or deliberately inaccurate views about the permitted purposes and activities of charities and DGRs, resulting in an unwarranted focus on environmental DGRs. Question 10, addressed below, directly opens a window for members of the public and industry organisations to undermine a fair and reasonable risk assessment driven review process.

85 Finally, if this rolling review is to include the ACNC then, in our view, there is a real misalignment between the proposed rolling reviews and the ACNC's regulatory policy/focus on proactive and front end assistance and support, and preparing materials to assist charities to comply with their governance obligations and maintain charity status.

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

86 This is a regrettable question as the only possible consequence that could flow from the answers to be provided it is to risk creating unnecessary division within the charity sector.

87 Any reviews should be based on a strong evidence-based risk assessment process. This will require providing the ACNC or ATO with further resources.

88 Relevant factors in a risk assessment may include the number of years of endorsement without any assessment, missing information, referrals from other government agencies, legitimate and substantiated complaints from the public and potential exposure to money laundering or terrorist financing.

Question 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?

89 We are entirely opposed to sunset periods for specifically listed DGRs.

90 Sunset periods are likely to undermine long-term planning, impose significant and unnecessary administrative burdens and damage public trust and confidence in the charity sector.

91 Sunset periods also contribute to a culture of suspicion and risk hyper-politicising the specific listing process.

92 If 5-yearly re-applications are assessed by a Government Minister and require government support to pass legislation, specifically listed entities will be subject to the political cycle. A vague "exceptional circumstances" condition does not rectify this concern.

93 Furthermore, there is no need for additional review powers or procedures. Specifically listed DGRs are accountable under Schedule 1, section 353-20 of the *Taxation Administration Act 1953* (Cth) (**TAA**).

94 Under that section, the Commissioner of Taxation can enquire into whether a specifically listed DGR:

(a) has failed or ceases to use gifts and contributions solely for its principal purpose;

(b) has changed its principal purpose; or

(c) has failed to comply with the relevant rules or conditions of its listing.

95 If the Commissioner of Taxation is not satisfied of these things then he or she must notify the Minister. Once notified, the Minister could then seek to pass a Bill to revoke an entity's specific listing.

96 The only element of this system that may be lacking is adequate resourcing for the ATO. We submit there is no need for any regulatory change.

Question 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?

Unjustified

97 In our view there is simply no justification for universally requiring environmental organisations to commit a specifically prescribed 25 per cent, or indeed any specifically prescribed amount, of their annual expenditure from their public fund to environmental remediation.

98 Considering the summary of submissions to the REO Inquiry, it is difficult to see how this recommendation was supported in the REO Report.

99 The REO Report provided no reasoning to support the Committee's concluded view at paragraph 4.79 that:

> *[h]aving regard to the terms of reference of the inquiry the Committee is of the view that the purpose of granting DGR status to environmental organisations should be to support practical environmental work in the community.*

100 We agree with the separate dissenting report of the five Labour members of the Committee that this conclusion is inconsistent with views expressed in the vast majority of submissions to the REO Inquiry that it would increase red-tape and treat environmental organisations differently from all other not-for-profits.

101 As the dissenting members of the Committee, correctly noted, businesses are able to claim deductions in respect of the costs of lobbying activity without any limitations of the kind recommended to apply to environmental organisations.

102 We also endorse the views of Mr Wood in relation to this remediation recommendation, who noted in his dissenting report to the REO Inquiry that many important environmental organisations would not meet the 25 per cent target, and that trying to find ways of meeting it would increase reporting burdens and be counter-productive and cumbersome.

103 The *Income Tax Assessment Act 1997* (Cth) recognises explicitly that an environmental organisation can have a principal purpose of providing information or

education or of carrying out research about the natural environment.[12] In this context any proposed minimum spending on remediation work, which is not encompassed by the legislated principal purpose of an environmental organisation, is completely illogical.

Inappropriate

104 It is not generally for the courts or a regulator to determine the merits of the means by which a charity should further its purposes. Environmental organisations and their members are best placed to determine how to effectively achieve their purposes. That the government would attempt to interpose itself in the decision making of charities as to how to achieve their purpose is a completely unacceptable interference in the independence of charitable organisations.

105 While it was stated in the REO Report that this recommendation would not impede the ability of environmental organisations to undertake other work, including advocacy, this would simply not be so in our view. Mandating expenditure necessarily impacts upon an entity's ability to undertake other activities and significantly adds to the regulatory and reporting burden of such entities.

106 Implementing this recommendation will restrict charities' ability to undertake advocacy activities. Accordingly, we again respectfully urge Treasury to avoid compromising the legal and democratic principles as outlined at paragraphs 51 - 59 in our response to question 4. In our view, the discriminatory focus on environmental organisations cannot be coherently justified and this raises the risk of likely successful constitutional challenge.[13]

107 An environmental organisation only benefits from its DGR status if members of the community decide it is worthy of their support. Accordingly, if as alleged, environmental organisations are out of step with community expectations, this would likely be reflected in donations and gifts. We are not aware of any evidence of low or even reduced donor confidence in environmental organisations.

108 The Discussion Paper includes a question about the potential benefits of a requirement that environmental organisations commit no less than 25 per cent, or even 50 per cent, of their annual expenditure on remediation work. We cannot identify any clear benefits associated with this suggestion. Even if the ultimate outcome was that more remediation work was undertaken, there is no way of calculating whether this would be more advantageous than other ways of achieving the charitable purposes of environmental organisations. In addition, expecting environmental organisations to achieve this result is to shift the burden of environmental degradation from industry and government to the charity sector. This is completely unacceptable.

Question 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?

109 We are very concerned that environmental DGRs are made the sole target of this question.

[12] ITAA, s 30-265(1).
[13] See e.g. *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *Unions NSW v NSW* (2013) 252 CLR 530.

110 The unsubstantiated imputation carried by this question that environmental DGRs regularly or more frequently engage in unlawful operations may open the Australian government to legal liability, particularly if intended to cause injury to the reputation or financial position of environmental DGRs.

111 The question also confuses the fundamental distinction between purposes and activities. As we have already outlined, purposes are determinative when assessing charitable status, whereas activities are relevant only as facts from which inferences about purposes might be drawn in exceptional circumstances.[14]

112 The Governance Standards require a charity to, in summary:

(a) be not-for-profit and work towards its charitable purposes;

(b) be accountable to its members;

(c) not commit an indictable offence or a serious civil wrong;

(d) take reasonable steps to ensure its responsible persons are suitable; and

(e) take reasonable steps to ensure its responsible persons are subject to, understand and carry out their duties.

113 In relation to unlawful activity the governance standards provide that if an entity engages in unlawful activity it risks being in breach of the Governance Standards, and therefore risks losing its charitable status.

114 Alleged unlawful activity is also relevant to charity status if the unlawful activity is engaged in, and is engaged in to the extent that it evidences a disqualifying purpose.

115 A "disqualifying purpose" includes the purpose of engaging in, or promoting activities that are unlawful or contrary to public policy.[15] However, unlawful or illegal activities do not necessarily indicate a disqualifying purpose.

116 Paragraph 1.102A of the Addendum to the Explanatory Memorandum to the Charities Bill 2013 makes clear the distinction between activities and purposes in assessing a disqualifying purpose. Paragraphs 1.102A states

> *[1.102A] There is a distinction between the purposes of an entity and the activities of an entity. This provision* [s 11] *is concerned with purpose. Individual instances of engaging in, or promoting, an unlawful activity would generally not cause an entity to be considered to have a purpose to engage in such activity. However, activities can be considered in determining an entity's purpose (see paragraphs 1.27 to 1.29) and an entity's engagement in, or promotion of, unlawful activities to an extent that they could be considered to constitute a purpose to engage in, or promote, such unlawful activities, would be disqualifying.*

117 Paragraph 1.102B of the Addendum, reproduced above at paragraph 18 of this Submission, also makes this very clear.

118 The non-binding but persuasive ATO Ruling TR 2011/4 similarly states:

---

[14] Matthew Harding, 'An Antipodean view of political purposes and charity law' (2015) Apr *Law Quarterly Review* 131, 185.
[15] Charities Act 2013 (Cth), s 11.

> *The issue turns on purpose. The mere fact that an institution or its employee has breached a law would not, in itself, show that the institution has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose. Toward the other extreme would be a planned and coordinated campaign of violence*.[16]

119 Requiring environmental DGRs to register as a charity to ensure they do not engage in unlawful activity in breach of the Governance Standards or such as to amount to having a disqualifying purpose seems a circuitous and inappropriate method of addressing alleged unlawful activity.

120 We can see no logical basis for the proposition put by question 13, which question, as noted already, carries the unsubstantiated imputation that environmental DGRs regularly or more frequently engage in unlawful operations.

121 Further, the regulatory response to unlawful activity, whether taken by the ACNC or other law enforcement agencies, is generally more appropriately targeted at individuals engaged in unlawful activity rather than charities. This is particularly the case where a charity is itself a victim of unlawful activity, such as an officer's fraud or misappropriation of funds. This approach rightly protects charitable assets so that they may be used for the original purposes for which they were donated or earned.

122 The note to section 11 of the *Charities Act 2013* (Cth) specifically clarifies that "activities are not contrary to public policy merely because they are contrary to government policy". Though this note also confuses the distinction between purposes and activities, it should serve as a clear reminder that charities law is not concerned with promoting only those public goods and policy objectives favoured by the government of the day.

123 Finally, the threat of revocation of DGR status where unlawful activities are undertaken by employees, members, or volunteers of an organisation or "others without formal connections to the organisation"[17] is so broad and difficult for charities to monitor that it is likely to have a silencing effect on public debate and advocacy, to the detriment of a robust public sphere.

Additional comment regarding the REO

124 As a minor point, Recommendation 4 from the REO Report is repeated at paragraph 71 of the Discussion Paper. There is no justifiable reason why this is required given that there already exists a publicly available list maintained by the Register, which is easily found on the Department of Environment and Energy website (http://www.environment.gov.au/about-us/business/tax/register-environmental-organisations/listed-organisations).

[16] Paragraph 270.
[17] REO Report, Recommendation 6.