



Australian Government



Australian
Charities and
Not-for-profits
Commission

13 July 2017

EXT2017/102

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SUBMISSION TO THE CONSULTATION ON TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES

The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide a submission to the consultation on tax deductible gift recipient (DGR) reform. This submission outlines the role of the ACNC and the ACNC's responses to the consultation questions relevant to the ACNC.

Summary of the ACNC's submission

The ACNC supports measures that will simplify the DGR application process and reduce red tape for charities. Furthermore, we expect that a streamlined and transparent regulation of DGRs will enhance public trust and confidence in the not-for-profit sector.

The ACNC's role

The ACNC was established on 3 December 2012 by the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (ACNC Act). The objects of the ACNC Act are to:

- maintain, protect and enhance public trust and confidence in the Australian not-for-profit (NFP) sector;
- support and sustain a robust, vibrant, independent and innovative Australian NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the Australian NFP sector.

The ACNC's regulatory responsibility currently extends to registered charities only, and not all DGRs or not-for-profits.¹

¹ Organisations eligible for registration with the ACNC are those that meet the definition of 'charity' in the *Charities Act 2013* (Cth). In short, these organisations must be not-for-profit, have only charitable purposes that are for the public benefit, and not have a disqualifying purpose (among other requirements).

Requirement for a DGR (other than a government entity) to be a charity.

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?

The ACNC can register entities with DGR endorsement that meet the eligibility requirements for charity registration as set out in the ACNC Act.

Requiring DGRs to be registered charities (other than government entity DGRs and specially listed DGRs) would bring the majority of DGRs within the ACNC's regulatory framework.

Initially, processing the applications of the existing DGRs not currently registered with the ACNC would require a significant transitional period. The ACNC estimates that the initial period for registration of these DGRs could take place over a period of approximately 18 months.

This will have resource implications for the ACNC; the details of which are described following the ACNC's responses to the consultation questions under 'Other relevant issues'.

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

The ACNC understands that approximately 8 per cent of DGRs are neither registered charities nor government entities. This represents approximately 2,200 DGRs that will need to apply for charity registration. However, further analysis will be needed to clarify this figure.

An ACNC review of the DGR table indicates that most of the DGRs currently not registered as charities with the ACNC (other than government entity DGRs and specific listed DGRs) are likely to be eligible for registration. To be eligible for registration as a charity, some DGRs may need to make changes to their constituent documents (such as non-profit and winding up clauses). A transitional period must allow time for DGRs to make required changes.

It may be that in the process of registering these DGRs unforeseen issues arise which may prevent their registration as charities. Consideration needs to be given to how such instances would be addressed as there is no doubt that potential loss of long-standing DGR entitlements would be of concern to existing DGRs.

Privacy concerns for private ancillary funds and DGRs

3. Are there particular privacy concerns associated with the proposal for all DGRs to be registered charities, for private ancillary funds and DGRs more broadly?

Once registered with the ACNC, each charity is required to submit an Annual Information Statement and (with the exception of Basic Religious Charities² and small charities³) annual financial reports. The ACNC Act mandates that the Commissioner must publish this information on the ACNC Charity Register.

As provided for in the ACNC Act, and in accordance with the ACNC's policy, charities can apply to the ACNC to have information withheld from the public ACNC Charity Register.

The ACNC can withhold information from the Charity Register:

- where the information is commercially sensitive and has the potential to cause detriment to the charity, or former charity, to which it relates, or to an individual;
- where the information is inaccurate, likely to cause confusion or likely to mislead the public;
- where the information is likely to offend a reasonable individual; and
- where the information could endanger public safety.

However, the Commissioner may decide to publish the information if the public interest in its publication outweighs the likely adverse effect(s).

There are additional provisions in *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (the ACNC regulations) that provide for private ancillary funds.⁴ The ACNC must, on request, withhold information relating to the fund if the information identifies an individual donor. The information that can be withheld for a private ancillary fund includes:

- its legal name and Australian Business Number (ABN);
- its contact details, including its Address For Service;⁵
- its governing rules; and
- the names of its Responsible Persons.

² A 'Basic Religious Charity' is a registered charity that has the sole purpose of advancing religion and meets five other requirements. Only a small number of charities that advance religion meet all of these requirements. More information available at acnc.gov.au/basicreligiouscharity.

³ For ACNC purposes, charity size is based on annual revenue. A small charity is a registered charity with annual revenue of less than \$250,000.

⁴ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) Subdivision 40-B.

⁵ An 'Address For Service' is the primary address to which the ACNC will send a charity all correspondence. The Address For Service can be an email address, or a physical or postal address in Australia.

A private ancillary fund can also request to have its contact details withheld from the Charity Register if the publication would create an ‘unreasonable administrative burden’.⁶

Accordingly, unless an existing DGR applying for registration as a charity comes within the withholding provisions, its information will be displayed on the Charity Register.

Information about advocacy

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

The ACNC asks questions in the Annual Information Statement that relate to a charity’s ‘recognised assessment activities’.⁷ These are activities that relate to: a charity’s eligibility to be registered as a charity, its compliance with the ACNC Act and the regulations made under the ACNC Act, and its compliance with taxation law.

It is critical to note, however, that promoting the reduction of unnecessary regulatory obligations on the sector is a legislated object and a strategic focus of the ACNC. Given this legislated object, the ACNC does not want to unnecessarily increase the reporting requirements for registered charities. Any additional questions in the Annual Information Statement must be considered in that context.

The ACNC has published guidance concerning the nature and scope of advocacy for registered charities,⁸ including political advocacy.⁹ This has assisted the charity sector to understand the boundaries of advocacy.

Section 12 of *Charities Act 2013* (Cth) (the Charities Act) provides that advocacy is a charitable purpose if it is in furtherance or in aid of one or more of the other charitable purposes listed in the Charities Act. Section 12 of the Charities Act establishes that one charitable purpose is:

- (l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
 - (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or

⁶ *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) Subdivision 40-B.

⁷ *Australian Charities and Not-for-profits Act 2012* (Cth) s.55-10.

⁸ Australian Charities and Not-for-profits Commission, ‘Advocacy by charities’, http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx

⁹ Australian Charities and Not-for-profits Commission, ‘Charities, elections and advocacy’, [acnc.gov.au/politicaladvocacy](http://www.acnc.gov.au/politicaladvocacy)

(ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.¹⁰

To be eligible for registration as a charity, an entity cannot have a ‘disqualifying purpose’. Section 11 of the Charities Act defines a ‘disqualifying purpose’ as:

(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or

Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.

Note: Activities are not contrary to public policy merely because they are contrary to government policy.

(b) the purpose of promoting or opposing a political party or a candidate for political office.

Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).

Note: The purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose (see paragraph (l) of the definition of **charitable purpose** in subsection 12(1)).

If reform meant that all DGRs (except government entity DGRs and specifically listed DGRs) were required to be registered charities, these provisions in the legislation would apply to them.

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

The Annual Information Statement is one of the means by which the ACNC collects information from charities about their recognised assessment activities.

As stated in the response to consultation question 4, any additional questions in the Annual Information Statement must be considered in the context of reducing unnecessary regulatory obligations on the sector.

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

¹⁰ *Australian Charities and Not-for-profits Act 2012* (Cth) 3 Div. 2 12(l).

As stated in the response to consultation question 4, any additional questions in the Annual Information Statement must be considered in the context of reducing unnecessary regulatory obligations on the sector.

Transfer of administration of four DGR Registers to the ATO

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?

The ACNC supports a simplification of the DGR application process and the reduction of unnecessary regulatory obligations on the sector.

It is important to consider what information currently collected by the four Registers will still be required, and how this information will be collected by the ACNC and transferred to the ATO. The ACNC supports a streamlined approach and sees benefit in collecting the required information through the existing ACNC charity registration form and Annual Information Statement.

The existing arrangements for data sharing between the ACNC and the ATO should assist in a smooth transfer of information between the two agencies in relation to the DGRs that are currently on the four Registers.

However, the application processes for the four current Registers have different requirements and varying degrees of complexity. Precisely how the four Registers would be consolidated is an important factor in considering the ACNC's role in collecting information.

It is not clear from the consultation paper how regulatory oversight of the consolidated Registers will be applied. Given the variations in application processes and auditing and reporting requirements in DGRs, any new regulatory framework must be considered carefully, and the drafting of legislation must reflect this.

Removal of public fund requirements

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

The ACNC has no comment in response to this consultation question.

Reviews of DGR eligibility

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?

The ACNC supports a systematic review of all registered charities. The ACNC also supports the proposal that DGRs be required to make annual certifications. Annual certification of DGR eligibility could be included in the Annual Information Statement.

The ACNC affirms its view that any review of the eligibility of DGRs to be registered as charities should come as part of a wider systematic review of the Charity Register.

With the ACNC's first legislated object being to maintain, protect and enhance public trust and confidence in the sector through increased accountability and transparency, it is critically important that any review by the ACNC includes all registered charities. It would be detrimental to public trust and confidence in the sector for the regulator to review only part of the Charity Register.

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

As stated in response to consultation question 9, the ACNC affirms its view that a review should extend to all registered charities. With matters that fall within its jurisdiction, the ACNC, as the regulator, should decide the priorities for review based on its risk assessments. Priorities may change from time to time and the ACNC should be responsible for implementing a review program based on its compliance program and its knowledge of the risks in the sector.

To clarify, once registration as a charity becomes a condition for endorsement as a DGR, the ACNC would review charities for their ongoing entitlement to registration. The ATO would review their DGR eligibility. Where a charity was found not to be eligible under either review, it would lose its DGR endorsement.

11. What are stakeholders' views on the idea of having a general sunset rule of five years for specially 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?

The ACNC has no comment in response to this consultation question.

Recommendations of the Parliamentary Inquiry into the Register of Environmental Organisations

12. Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered. In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?

The Charities Act provides that 'advancing the natural environment' is a charitable purpose.¹¹ Eligibility for registration as a charity for advancing the natural environment is based on the entity having this purpose. The ACNC's regulatory regime for charities applies to all subtypes. Accordingly, any conditions relating to activities would need to be specified in relevant tax or ACNC legislation.

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?

Registered charities are subject to the ACNC's regulatory regime. Environmental DGRs, like other DGRs, would need to meet ACNC requirements to maintain registration as charities, which includes the requirement to not have a disqualifying purpose.

The Charities Act states that a charity is ineligible for charity registration if it has a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy.¹² In determining eligibility for registration as a charity, the ACNC considers whether a disqualifying purpose exists.

Other relevant issues

External conduct standards

The ACNC wishes to affirm the need for external conduct standards. These standards would assist in ensuring the regulatory environment for DGRs is robust and covers the many charities that are operating as DGRs with activities overseas. The consolidation of the four DGR Registers is likely to remove the oversight of the Department of Foreign Affairs and Trade for overseas operations, and establishing external conduct standards for charities registered with the ACNC would mitigate this issue.

¹¹ *Charities Act 2013* (Cth) s. 12

¹² *Charities Act 2013* (Cth) s. 11

Resource implications

The ACNC will require additional resources to enable appropriate administration of the proposed reforms. In particular, the ACNC considers the significant cost implications of new charity registrations (transitional and then ongoing), a review of the DGRs on the Charity Register, and a systematic review of all registered charities. Furthermore, there will be significant costs associated with development of IT systems and additional human resources to provide this regulatory administration.

Conclusion

The ACNC supports measures that improve the application process and the regulatory environment for DGRs, and aid in reducing the regulatory burden on the charity sector.

Any reform of the DGR system that consolidates Registers will have significant effects on the ACNC's operations and these effects must be addressed with sufficient additional resources. The ACNC is willing to provide cost estimates to Treasury for the effects of the proposed changes on ACNC operations once there is greater clarity on the implementation of the reform.



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