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Re: TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES

Find enclosed our submission to the discussion paper *Tax Deductible Gift Recipient Reforms Opportunity*.

Although the Australia Christian Lobby is not a DGR, we make this submission as it is apparent that several questions within the discussion paper relate to advocacy of charities more broadly than those classified as DGRs. Considering this, we have restricted our submission to questions 4, 5 and 6.

I also want to acknowledge upfront that this submission has been prepared with assistance from Dr Matthew Turnour of Neumann & Turnour Lawyers.

Sincerely

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Managing Director

Enc. - Submission to the Tax Deductible Gift Recipient Reforms Opportunity Discussion Paper



Submission to the
Tax Deductible Gift Recipient Reforms
Opportunity Discussion Paper
dated 15 June 2017
limited to
Questions 4, 5 and 6

Table of Contents

Introduction	3
Thanks.....	3
The Australian Christian Lobby.....	3
ACL is not a DGR.....	3
Only questions 4, 5 and 6 are addressed.....	3
Summary of submission.....	3
Question 4. Should the ACNC require additional information from all charities about their advocacy activities?.....	4
Background information on Christian faith-based charities.....	4
Faith-based charities and the problem of reporting advocacy	5
Environmental and other advocacy organisations.....	6
A problem with less than 5% of charities should not lead to burdening the other 95%.....	7
Compliant charities and the challenges of resource allocation.....	7
Question 5. Is the Annual Information Statement the appropriate vehicle for collecting this information?.....	7
The Annual Information Statement.....	7
Consider the AEC	7
Targeting environmental charities.....	8
Question 6. What is the best way to collect the information without imposing significant additional reporting burden?.....	8
The best way to collect information depends on the risk to be managed?.....	8
If the problem is a lack of alignment between activities and purposes in eco-charities	8
If the problem is access to tax deductibility	8
If the problem is lack of regulatory oversight of political activities	9
If the problem is honesty and transparency in fundraising for political purposes	9
If the problem is politicisation of the charity sector or part of it	9
Another matter	10
The effect of the 50-50 Amendments	10
Conclusion	11
Acknowledgement.....	11

Introduction

Thanks

The Australian Christian Lobby Ltd ('ACL') thanks Treasury for the opportunity to make a submission in relation to *Tax Deductible Gift Recipient Reform Opportunities*. Advocacy by civil society organisations is a critical issue affecting millions of Australians, particularly those involved in faith-based organisations. As faith-based organisations comprise the largest group of charities on the Australian Charities and Not-for-profits Commission ('ACNC') register, they are the largest group to be affected by any proposed changes.

After introducing ACL and the questions to be addressed, considerable information is provided about Christian institutions and their advocacy. Some information is also provided about environmental organisations and advocacy organisations. Answers are then given to the three questions asked that focus on charities only, as distinct from Deductible Gift Recipients ('DGR'). The submission closes with some more general observations.

The Australian Christian Lobby

ACL's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 90,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments. It is a religious charity advancing the Christian faith through advocacy.

ACL is not a DGR

ACL is not a DGR. It is drawn to make this submission because it is apparent that three of the 13 questions related generally to advocacy by charities, as distinct from DGRs, and advocacy is a topic of importance, not only to ACL, but to faith-based charities generally, particularly those belonging to the Christian community in Australia.

Only questions 4, 5 and 6 are addressed

This submission therefore addresses only three questions, namely:

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?

Summary of submission

In Answer to Question 4: The ACNC should not require additional information from all charities about their advocacy activities. Religious charities are the largest class of charities and there is not evidence of non-compliance warranting reporting by religious charities. Such

reporting is likely to be deeply problematic if not practically impossible to do accurately. If there is a problem with non-compliant advocacy by charities it is likely to be with environmental charities which comprise less than 5% of the charity sector and less than ½ of 1% of the workforce. It is inappropriate to differently regulate the whole sector when any alleged breaches seem to relate to such a small sub-sector. Further, additional reporting imposed upon the whole sector will require reallocation of resources from charitable purposes to reporting which should be avoided wherever possible. When regard is had to the information set out in answer to this question there is not an adequate basis, if there is any basis, for requiring additional information from all charities.

In Answer to Question 5: The Annual Information Statement is not an appropriate vehicle for collecting information related to advocacy by environmental or other charities. If political advocacy information is to be collected then it should be as a part of reporting to the AEC and should apply whether or not the entity takes charity status. Further, as it seems the government has already come to the conclusion that advocacy information by environmental charities can, and should be obtained by targeting those entities only, the ACL submits that is preferable to require the information from all charities, although ACL does not support this either.

Commented [JA1]: ?

In Answer to Question 6: The best way to collect the information without imposing significant additional reporting burden depends on the reason for collecting the information. ACL identifies the five reasons for collecting information and offers suggestions on the collection of information for each reason. ACL does not support the gathering of information but offers these comments to be of assistance if the government is committed to the gathering of information.

ACL closes the submission reminding the government that the sector wishes the repeal of the '50-50 amendments'.

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

No. Increasing the burden on charities generally is not appropriate.

The focus of the discussion paper seems to be on political advocacy by environmental groups and 'concerns that some charities and DGR's undertake advocacy activity that may be out of step with the expectations of the broader community, particularly ... Environmental DGRs'.¹ In setting out reasons for the answer given above, this context informs the information supplied to assist in this discussion.

Background information on Christian faith-based charities

The 2015 Report of the Curtin University Not-For-Profit Initiative into the study of Australian faith-based charities noted among other things:

1. Faith underpins the charitable engagement of one in three reporting charities with 48% nominating one or more charitable purposes in addition to their religious purposes.²

¹ Discussion paper paragraph 15.

² Penny Knight and David Gilchrist (2015), *Australia's Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profits Commission, Melbourne. 3.

2. Faith-based organisations are ‘more than four times the size of the next largest category of activity’ and those organisations that list religion as their main activity comprise one quarter of all charities.³
3. Faith-based charities have ‘a significantly higher ratio of volunteers to employees than other charities’ and marshalled almost a half a million (467,000) volunteers.⁴
4. In terms of being community service focused ‘62% of all reporting charities with a religious purpose nominated the general community as the beneficiary of their services’ and ‘approximately a quarter of faith-based charities support other charities’.⁵

Faith-based charities also dominate the large-charity landscape.

5. Brian Lucas and Anne Robinson report that:

Twenty-three of the 25 largest Australian charities by income are Christian. If you exclude those charities that are focused on education, they are almost all focused upon social services, and the number that are Christian is still very high: 19 out of the top 25.⁶

Any decision to change the law or practice regarding charities including DGRs, be it in relation to advocacy or anything else, will have therefore, its greatest impact on faith-based charities. All decisions regarding advocacy should therefore have regard to the impact of any proposed changes on faith-based charities.

Faith-based charities and the problem of reporting advocacy

Advocacy for the Christian faith is considered an integral part of Christian witness by large segments of the Christian community. The ECHR has recognised that ‘bearing Christian witness ... corresponds to true evangelism, which ... the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church’.⁷

ACL is but one expression of that. Advocacy by Christian organisations is most evident in the larger Christian welfare organisations, and in the work of denominational representatives, but it also is deeply integrated throughout all aspects of the expression of Christian witness in many if not most organisations. Religious welfare organisations are both consulted by, and consult with, members of local, state and federal politicians. Some are actively and regularly involved in advocacy to improve the law, and many only incidentally.

³ Penny Knight and David Gilchrist (2015), *Australia’s Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profits Commission, Melbourne. 6. See also Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra 66 ‘Measured by organisation numbers, the largest sector is religion.’

⁴ Penny Knight and David Gilchrist (2015), *Australia’s Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profits Commission, Melbourne. 13. See also Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra 66.

⁵ Penny Knight and David Gilchrist (2015), *Australia’s Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profits Commission, Melbourne. 16.

⁶ Lucas and Robinson (2010) ‘Religion as a head of charity’ in *Modernising Charity Law: Recent Developments and Future Directions* Eds. Myles McGregor-Lowndes and Kerry O’Halloran, Edward Elgar publishing Ltd UK 190.

⁷ *Case of Kokkinakis v Greece* (European Court of Human Rights Application No. 14307/88, 25 May 1993) at para 48.

In smaller organisations volunteers do lobby government but usually only incidentally. For example, they will express their views on same-sex marriage or town planning or refugees to politicians. Capturing this data on information transactions will be extremely difficult. ACL has more than 90,000 supporters and it would be impossible to know when those supporters were advocating for a cause and whether it was on the individual's behalf or as a part of something ACL organised such as a 'meet the candidates' forum, unless the supporter was also a staff member.

To require ACL or any Christian organisation to identify which of these engagements amounted to advocacy, and then to form an assessment of the time allocated to what was considered to be advocacy, would be a massive undertaking and impossible to do in an accurate way. This challenge is compounded for religious organisations with no paid staff.

There has only been one challenge, of which ACL is aware, regarding advocacy and religious organisations. In the one case, it appears that a religious charity might have breached the law in relation to advocacy, they were honest about it, disputing the law not the facts and were deregistered by the ACNC.⁸ So there does not appear to be an unmanageable problem in relation to religious entities engaged in advocacy.

Environmental and other advocacy organisations

The actual number of both environmental organisations, and organisations that are described as engaged in advocacy, is very small both as a percentage of the total number of charities and more generally. They are certainly very small compared to religious charities.

The ACNC Commissioned report: *Australia's Faith-based Charities 2013* by Penny Knight and David Gilchrist, 2015 Edition found the number of charities identified in that data as having the environment as their main purposes was just 2% and those identifying civic and advocacy as the main purpose just 1%.⁹ Turning to 'other purpose', as distinct from main purposes, only 10% of charities on the ACNC register list civic and advocacy as another purpose. As to employees, the 2014 ACNC data discloses:

Charities whose main activities involved environmental activities, civic and advocacy activities, animal protection, international activities, sports, grant-making and philanthropy each accounted for less than 0.5% of charities' total employment.¹⁰

Reduced to actual numbers, charities that reported their main activity as environmental employed only 1,789 staff, had a mean average number of employees of 2.8, had 1,248 part-time staff with a mean average number of part-time employees of 1.9 and contributed to the sector only 0.4% or 4,257 persons. The data in relation to charities that reported their main activity as Civic and advocacy were similarly insignificant with employed staff of only 1,825, a mean average number of employees of 5.6, 1,118 were part-time staff with a mean average number of part-time employees of 3.4 and contributed to the sector only 0.3% or 3 593 persons.¹¹

⁸ Catch The Fire Ministries Inc. Charity ABN 64503474895. See also: <http://www.abc.net.au/pm/content/2016/s4605215.htm>

⁹ Penny Knight and David Gilchrist (2015), *Australia's Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profits Commission, Melbourne. 12.

¹⁰ Cortis, N., Lee, I., Powell, A., Simnett, R. and Reeve, R. (2015) *Australian Charities Report 2014*. Centre for Social Impact and Social Policy Research Centre, UNSW Australia.43

¹¹ Cortis, N., Lee, I., Powell, A., Simnett, R. and Reeve, R. (2015) *Australian Charities Report 2014*. Centre for Social Impact and Social Policy Research Centre, UNSW Australia. 44

A problem with less than 5% of charities should not lead to burdening the other 95%

These small percentages and numbers attributable to environmental charities and advocacy organisations suggest the whole sector should not be regulated differently because of their activities, even if this small subsection is behaving unlawfully.

It is recognised that the intention of this review is not to outlaw advocacy, and that there is not any suggestion in the review papers that the intent is to constrain advocacy in any way. Having said that, the discussion paper makes express reference to environmental organisations. It also follows close upon the heels of, and makes reference to, the House of Representatives Standing Committee on Environment's inquiry on the Register of Environmental Organisations. Environmental activism has been a topic of concern within the Australian community for quite some time. The fact that questions in relation to advocacy of charities generally appears in a DGR styled inquiry, further suggests that it is advocacy by some DGRs, not advocacy by charities, that prompts the Inquiry. If that is so, then again the only DGRs known to be of concern regarding advocacy are Environmental DGRs. This suggests that the only problem in need of a solution is advocacy by environmental DGRs. If that is the problem, it is a very small problem that should not lead to burdening all DGRs, let alone all charities, into a more complex regulatory environment.

Compliant charities and the challenges of resource allocation

Resource allocation is always contested space and it is difficult to see why the government would want to allocate resources to analysing advocacy behaviour by charities other than those DGRs with conduct that warrants investigation. Equally it is difficult to see why the government would want to burden the rest of the sector with providing more information in relation to its advocacy activities when those resources could be much better spent in pursuit of its charitable purposes.

Every hour or dollar spent in assessing whether or not an activity is advocacy, and every hour or dollar spent reporting on that, is another hour or dollar that could have been spent in pursuit of the actual charitable object.

This of course reduces the effectiveness of the charitable sector, burdening the government with the reduced support of the general community.

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

The Annual Information Statement

No. The Annual Information Statement (AIS) is not the appropriate vehicle. Reasons set out above make it clear that if there is a problem it related to a very small section of the charity community and the AIS is not the appropriate vehicle as it should be kept for reporting information of a general nature applicable to the whole sector.

Consider the Australian Electoral Commission

Charities that are appropriately engaged in advocacy, like the ACL already report to the Australian Electoral Commission ('AEC') on funding raised and expended on advocacy. Australian Charities should not be singled out separately from private individuals or businesses / commercial corporations, or for that matter entities operating from overseas. The same standards should apply to all entities engaged in political advocacy. The substance of what is occurring, not the legal form (charity or otherwise), should determine the risk profile and the regulatory response. The AEC is the proper forum to collect information on and supervise political advocacy.

Targeting environmental charities

Lenore Taylor has reported in *the Guardian*,¹² that the government is already seeking to obtain information regarding advocacy from environmental organisations. ACL is not supportive of this targeting of subsectors of the charity sector but it observes that if there is a need to obtain this information, then it can be done by targeting a subsector not requiring it in the AIS from the sector as a whole.

It is appropriate to mention as an aside at this point, seeking this information from environmental charities at the same time as conducting this inquiry into how information is to be collected, could be read by some as suggesting that the government has prejudged the outcome of this inquiry.

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

The best way to collect information depends on the risk to be managed?

For increased regulation to be justified there must be a mischief to be addressed or an ill to be cured or a risk to be managed. The discussion paper does not adequately identify these. Furthermore, it is well-established that regulation should go no further than is necessary to address the risk or provide the remedy. There is not an evident connection between any perceived risk and the proposed remedy.

It will be evident from the submissions made so far that ACL is of the view that the information should not be collected. It will also be evident that if the information is to be collected then the AEC is the appropriate regulator for that purpose. If the AEC is not to be the regulator then ACL has observed that it seems the government may have decided to target just environmental organisations as a part of a separate reporting process. Whilst ACL does not support that separate reporting process, it is preferable to imposing burdens on the whole charity sector through the Annual Information Statement.

ACL can perhaps be most helpful in the remainder of the answer to this question by seeking to identify what the issue to be addressed is and proposing a way forward for the particular issue. The underlying principal is that if the real issue is clearly identified, then it can be squarely addressed with minimum unnecessary collateral impact.

If the problem is a lack of alignment between activities and purposes in eco-charities

If there is a problem with entities being on the register as environmental charities when they are not entitled to be charities, then there is a need for de-registration and rectification of the register. An entity pursuing non charitable purposes should be de-registered.

If the problem is with environmental charities pursuing charitable purposes but not complying with their obligations as charities in relation to advocacy, then this is a matter for greater guidance targeted at non-compliant institutions. Targeted investigation and then guidance, not more general reporting, would have maximum impact for minimum effort.

If the problem is access to tax deductibility

Arguably the problem is not with advocacy by charities generally but with deductible fund raising being applied to political purposes by environmental organisations. This is a problem with the scope of entities entitled to DGR status not with advocacy. It may well be that the

¹² <https://www.theguardian.com/environment/2017/jul/15/governments-letter-to-conservation-groups-has-ominous-implications>

broader community, if there is concern, would accept advocacy by environmental charities if they enjoyed only the same status as charities for the advancement of education or the advancement of religion, that is exemption but not DGR status. The proper response in such a case is a public discussion around entitlement to DGR status followed by legislative amendment to the DGR categories to reflect community values.

If the problem is lack of regulatory oversight of political activities

If the problem is with regulation of advocacy then the best regulator, as has been mentioned, is the AEC. It is appropriate for that regulator to impartially decide what information should be obtained. Importantly the same rules should apply to all forms of advocacy not just advocacy by charities.

If the problem is honesty and transparency in fundraising for political purposes

If the risk to be managed, is not with being DGR but is with respect to fundraising from the public for non-charitable political purposes under the guise of charity, the proper regulatory regime is, in that context, around fundraising by charities not advocacy. If donors know that fundraising is for political purposes then they may choose not to donate.

Not all DGRs fundraise. Many welfare organisations, rely solely on government contracts or on their investments or religious denominational funding. There is little or no benefit in requiring these organisations to report on advocacy merely because they are DGRs. That would be an unnecessary burden if the purpose is to achieve honesty and transparency in DGR fundraising.

If the problem is politicisation of the charity sector or part of it

If the problem is politicisation of the charity sector or part of it then a natural response of the government of the day, or the senior bureaucracy, perhaps under direction, is to endeavour to remove the offending entities without damaging the rest of the sector. Such attempts have been unsuccessful and arguably adverse to those involved in Canada, the United States of America and in the United Kingdom.

Following a conservative government attack on environmental charities the Canadian Council of Churches sent a letter to then Prime Minister Stephen Harper raising concerns about the "chilling effect of threats to revoke the charitable status of organizations that draw attention to policies that harm our world."¹³ Over time it would seem there has been a complete reversal of attitude within Canada with the *Report of the Consultation Panel on the Political Activities of Charities* of March 31, 2017 recommending, as its first recommendation:

that the CRA [Canada Revenue Authority] proceed immediately to amend its administrative guidance to expressly permit a charity to engage in public policy dialogue and development, if it furthers a charity's charitable purposes, is subordinate to those purposes and is non-partisan in nature, and that charities should not have to quantify and report about the quantification of these activities.¹⁴

In the United States of America the consequences fell on a civil servant. There an Inland Revenue Service senior bureaucrat was held responsible for delay in approvals of charities

¹³ Dean Beeby, (5 August 2014) 'Canada Revenue Agency's political-activity audits of charities' The Canadian Press <http://www.cbc.ca/news/politics/canada-revenue-agency-s-political-activity-audits-of-charities-1.2728023>

¹⁴ Government of Canada (31 March 2017) *Report of the Consultation Panel on the Political Activities of Charities* <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/resources-charities-donors/resources-charities-about-political-activities/report-consultation-panel-on-political-activities-charities.html#bckgrnd>

thought to be Republican leaning. She lost her job, faced contempt of Congress charges but avoided criminal proceedings. The Treasury Inspector General for Tax Administration produced a report on 27 March 2015 titled: *Status of Actions Taken to Improve the Processing of Tax-Exempt Applications Involving Political Campaign Intervention* and reported among other things that:

The IRS has taken significant actions to eliminate the selection of potential political cases based on names and policy positions, expedite processing of Internal Revenue Code ... and eliminate unnecessary information requests.¹⁵

In the United Kingdom the Charity Commission for England and Wales is alleged to have provided favourable treatment to organisations that are 'left leaning or left supported' but 'when it comes to independent schools [presumably at the conservative end of the spectrum] it is suggested that the full force of charity law (as misinterpreted by the Commission) is directed against them'. This led to calls for its abolition.¹⁶

Australia can learn from those experiences. Endeavouring to remove the offending entities from the sector without damaging the rest of the sector may galvanise support from others in the sector such as the Christian religious sector as happened in Canada, or it may lead to allegations of improper conduct against the bureaucracy as occurred in the USA or the UK. This should be avoided.

Another matter

The effect of the 50-50 Amendments

There is increasing awareness and concern within the NFP sector of the impact of amendments made to the ITAA 1997 in 2013. It is understood that a number of charities have made recommendations to the Assistant Treasurer that seek the repeal of those amendments made by Schedule 11 of Part 5 to the *Tax Laws Amendment (2013 Measures No. 2) Act 2013*. Those amendments inserted two additional special conditions in sections 50-15, 50-50, 50-55, 50-65, 50-70 and 50-72 that have had the effect of depriving of income tax exemption and/or deductibility any charity that breaches its governing rules requirements or does not apply its assets solely to its charitable purposes. The Commissioner of Taxation has made it clear that he has no authority to excuse breaches, as the legislation operates as a guillotine to deny the tax concessions.¹⁷

The ACNC report mentioned earlier states that 'Approximately a quarter of faith-based charities support other charities'¹⁸ If a charity is supporting another charity it would seem at least arguably that it is not applying its assets 'solely' to *its* purposes. The issue does not engage the mind of the church leadership because they see helping others as an expression of Christian faith but the ATO could easily take a different view and TR 2015/1 is explicit:

30. The requirement that an entity must 'apply' its income and assets means that an entity must make use of all of its income and assets, solely for the purpose for which the entity is established. The word 'apply' does not mean 'substantially apply' or 'apply, on the whole'.

¹⁵ <https://www.treasury.gov/tigta/auditreports/2015reports/201510025fr.pdf>

¹⁶ Stanley Brodie QC; (2010) *The Charity Commission - Politicised and Politicising*, Economic Affairs, Blackwell publishing, Oxford 13

¹⁷ TR2015/1 and Ruling Compendium TR 2015/1EC at [5.1].

¹⁸ Penny Knight and David Gilchrist (2015), *Australia's Faith-based Charities 2013: A summary of data from the Australian Charities 2013 Report*, for the Australian Charities and Not-for-profits Commission, Melbourne. 16.

It is submitted that it is in the best interests of our community for charities where appropriate, to be supporting one another and there should not be fear of loss of tax exemption for doing so. As an understanding of the impact of the amendments filters through the community it may well have a chilling effect upon broader social engagement by religious institutions which is contrary to the common good. Accordingly, ACL adds its voice to those of others requesting the repeal of these amendments.

Conclusion

Many if not most Christians take seriously their obligation to advocate for their faith in public and private and Christian charities including ACL are vehicles for that advocacy.

Faith-based charities are the largest group on the ACNC register and so the impact on this group of changes to advocacy law should be uppermost in the government's mind if changes to the law are anticipated. The reporting of advocacy by Christian charities would not only be burdensome but virtually impossible to do accurately.

The concerns that environmental charities might not, or should not, be entitled to DGR status can, and arguably should, be approached from another direction. It should be addressed as a tax reporting or fundraising challenge. As the lessons from attempting to regulate fundraising by charities in the U.S., Canada and the UK are uniformly adverse, the Australian government should take note and not attempt to regulate advocacy by charities.

Acknowledgement

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