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2 August 2017

Dear Sir/Madam

Submission in relation to Tax Deductible Gift Recipient Reform Opportunities Discussion Paper - 15 June 2017

Thank you for the opportunity to provide a submission in relation to the Discussion Paper *"Tax Deductible Gift Recipient Reform Opportunities Discussion Paper 15 June 2017"* (Discussion Paper).

ACF's submission addresses the issues raised in the Discussion Paper and makes the case that non-partisan advocacy in pursuit of a charitable purpose is lawful; that the government should not restrict free speech or lawful activities of environmental organisations to meet their charitable purpose; and that both advocacy and on-ground activities are essential to improve the natural environment.

The Australian Conservation Foundation (ACF) is Australia's oldest national environmental organisation, being founded in the mid-1960s with the support of eminent Australians, the Australian community and the Australian government. Since that time, ACF has committed itself to promoting conservation causes throughout Australia and to the promotion of sustainable living, and has been honoured and privileged to be supported in its activities by eminent persons such as HRH Prince Philip, Malcolm Fraser, Gough Whitlam and Sir Garfield Barwick.

ACF has been, since its creation some 50 years ago, the leading national advocate for the environment. ACF protects, restores and sustains Australia's environment through research, consultation, education, partnerships and advocacy. ACF works with the community, business and government and is strictly non-politically partisan.

ACF is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC) and has been a deductible gift recipient (DGR), listed by name, since 1966. ACF is governed by a Board and guided by a group of democratically elected Councilors. ACF is supported by approximately 12,000 members, 44,000 donors and over 450,000 active supporters.

Approximately 90 percent of ACF's funding comes from donations made by the public, which are tax deductible. Without these donations, it would be impossible for ACF to carry on its activities. ACF's status as a DGR is absolutely vital to its continuing success.

PART A - INTRODUCTION

Comment on Discussion Paper context

We note that the stated purpose of the Discussion Paper is to outline proposals to strengthen the DGR governance arrangements, reduce administrative complexity and ensure that an organisation's eligibility for DGR status is up to date.

ACF is concerned that there is political motivation behind this process. This concern is underpinned by public statements made over the past three years by the Federal Council of the Liberal Party,[1] Coalition MPs[2] and representatives from the Minerals Council of Australia (MCA) and the Institute of Public Affairs (IPA),[3] all of which have targeted the advocacy role of Australia's environmental organisations. There have been calls for the removal of tax deductible status for these organisations, and for changes to the Competition and Consumer Act[4] and the Corporations Act[5] to restrict their advocacy. This all culminated in 2015 in the Australian Government launching a parliamentary committee inquiry – the House of Representatives Standing Committee on the Environment Inquiry into the Register of Environmental Organisations 2015/16 (HoR DGR inquiry) - that threatened to strip environmental advocacy organisations of their DGR status.[6] The commencement of the inquiry followed a motion that was unanimously endorsed by the Federal Liberal Party to strip environmental organisations of their DGR status. During one inquiry hearing, Queensland Liberal MP George Christensen tweeted about cancelling DGR status: "Time to get the donations in. I can't see it continuing longer once we report".[7] Sure enough, after extensive public hearings, a majority of that Committee recommended in May 2016 that the advocacy activities of these groups be limited[8] and the efforts of these groups be focused on 'on ground' environmental remediation work. In the absence of any evidence before the Committee supporting such a recommendation and due to the comments made publicly by Committee members before the public hearings had even started, it is clear to ACF that this recommendation was a foregone conclusion and motivated by a desire by government members of the Committee to reduce and silence scrutiny of the government's poor environmental performance and to appease industry lobby groups like the MCA and the IPA. Opposition members issued a dissenting report and one government member opposed this recommendation.[9]

Further, the majority of the Committee recommended that the Australian Tax Office impose administrative sanctions on environmental organisations that support, promote, or endorse illegal or unlawful acts such as blocking access, trespass, destruction of property and acts of civil disobedience.[10] Again, there was no evidence before the Committee that supported the making of such a recommendation and again this recommendation was rejected by opposition members and one government member. The right of community organisations to engage in peaceful protest is fundamental to our democracy and is a major feature that distinguishes countries like Australia from authoritarian regimes.

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[1] ABC News (30 June 2014) http://www.abc.net.au/news/2014-06-29/andrew-nickolic-moves-to-strip-charity-status-from-some-environ/5557936?WT.ac=statenews_tas

[2] Daily Mercury http://www.dailymercury.com.au/videos/christensen-sets-his-sights-green-political-activi/22865/

[3] Sinclair Davidson for Minerals Council of Australia 'A Critique of the Coal Divestment Campaign' (2014) (http://www.minerals.org.au/file_upload/files/reports/A_critique_of_the_coal_divestment_campaign_Sinclair_Davidson_Jun_2014.pdf

[4] A review of competition law has the parliamentary secretary for agriculture, Richard Colbeck, talking about repeal of Section 45DD of the Competition and Consumer Act. http://www.theaustralian.com.au/national-affairs/companies-to-get-protection-from-activists-boycotts/story-fn59niix-1226724817535

[5] Sinclair Davidson for Minerals Council of Australia 'A Critique of the Coal Divestment Campaign' (2014) (http://www.minerals.org.au/file_upload/files/reports/A_critique_of_the_coal_divestment_campaign_Sinclair_Davidson_Jun_2014.pdf

[6] See terms of reference at http://www.aph. gov.au/Parliamentary_Business/Committees/ House/Environment/REO/Terms_of_Reference (accessed 5 July 2017)

[7] Paul Carter, "Former Greens leader Bob Brown says Liberals out to get green groups," The Mercury, 21 July 2015, available at http://m.themercury.com.au/news/tasmania/formergreens-leader-bob-brown-says-liberals-out-toget-green-groups/story-fnj4f7k1-1227450553713 (accessed5 July 2017)

[8] Environment Committee, Report into the Register of Environmental Organisations, May 2016, Recommendation 5

[9] Environment Committee, Report into the Register of Environmental Organisations, May 2016.

[10] Environment Committee, Report into the Register of Environmental Organisations, May 2016, [5.95]-[5.102].

For several years now environmental groups in Australia have been facing off against threats to strip them of their DGR status and, sadly, we see this Discussion Paper as the next chapter of these attacks. We are incredibly disappointed to see the unsupported and blatantly political recommendations of the HoR DGR Inquiry be carried through and form discussion questions in this Discussion Paper. We will detail our objection to these in turn but first we seek to provide some background on advocacy, ACF's activities and charity law.

The Discussion Paper misunderstands Australian charities law by confusing activities with purpose

ACF is concerned that the Discussion Paper focusses on the activities of an organisation rather than its purpose. On multiple occasions within the Discussion Paper the relevance of the activities of a charity with its purpose becomes confused. This is troubling as it does so in a manner in a manner inconsistent with Australian charities law.

For example, paragraph 8 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." This is incorrect and represents a misunderstanding of Australian law. The purpose of an organisation, and not its activities, is relevant to determining its eligibility for DGR endorsement.[11]

Further, the entire premise of Question 4 in the Discussion Paper 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. See in particular the Explanatory Memorandum to the Charities Bill 2013 and also common law principles in Australia.[12] The Treasury should proceed with great caution if it intends to continue down this path.

Advocacy in pursuit of a charitable purpose is lawful

ACF activities involve advocacy. By 'advocacy' we simply mean influencing decision-making in the interests of conservation and sustainability. These activities inevitably involve generating public awareness and debate over an issue and through that, encouraging legislative and/or policy change to protect the environment and the people, plants and animals that depend upon it. Indeed, while on-ground activities such as tree planting and the conservation of national parks are of course also of value to the environment, advocacy is fundamental to our success in driving large scale positive impacts to protect the environment. In other words, 'on the ground' benefits are impossible to achieve without advocacy activities. The only way that these systemic changes can happen is if there is vibrant, robust and open public discussion and debate about the issues affecting the environment. Advocacy leads to on-ground environmental, societal and economic outcomes; and prevents the loss of environmental, societal and economic value.

Fortunately, environmental organisations are permitted at law to conduct both 'on the ground' activities and advocacy activities in pursuit of their charitable purpose to protect and enhance the natural environment. More importantly, it is the choice of each organisation which activities they pursue to achieve their purpose.

[11] Except in the very narrow case of Health Promotion Charities and Harm Prevention Charities, where DGR status is determined by reference to a principal activity test.
[12] Commissioner of Taxation v Word Investments (2008) 236 CLR 2014; Royal Australasian College of Surgeons v. Federal Commissioner of Taxation (1943) 68 CLR 436; Auckland Medical Aid Trust v. Commissioner of Inland Revenue [1979] 1 NZLR 382

The High Court of Australia in the *Aid/Watch Incorporated v Commissioner of Taxation*[13] (**Aid/Watch**) left no doubt that advocacy activities aimed at policy or legislative change may be charitable as they are, in themselves, activities beneficial to the community. The High Court held that activities by which entities 'agitate' for legislative or policy change support the operation of the Constitution of the Commonwealth of Australia, which mandates a system of representative and responsible government. Accordingly, there can be no doubt that the advocacy activities of environmental organisations are beneficial to the community and there can be no basis for singling out those activities as compared to advocacy activities conducted by organisations in other areas (e.g. the application of government spending to foreign aid or other environmental activities such as 'remediation work').

Subsequent to the Aid/Watch decision a definition of charity, one that permits advocacy activities, was legislated in the *Charities Act 2013* (Cth) (**Charities Act**). It is important to note that this statutory definition clearly contemplates that an organisation whose purpose is to influence law, policy or practices in Australia or overseas (i.e. engage in advocacy) has a charitable purpose if that advocacy relates to a recognised charitable purpose such as advancing education, advancing culture or advancing the environment. That this statutory definition was implemented following Aid/Watch is a clear sign that the government understands and accepts the importance of advocacy activities and the benefits that they provide to the community.

It is clear from Aid/Watch and the *Charities Act* that, as long as organisations have a purpose of promoting the enhancement and protection of the natural environment, then the fact that they carry out activities which promote change at a policy level or influence political decision-makers should not in any way whatsoever impact their entitlement to be endorsed as a charitable institution.[14]

The practice of environmental advocacy is supported by other case law. For example, Santow J (in the case of *Public Trustee v Attorney-General (NSW)*[15]) said the following in support of allowing charities to advocate for legislative action:

> "Persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance. Much will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end. It is also possible that *activities* directed at political change may demonstrate an effective abandonment of indubitably charitable objects. But if persuasion towards legislative change were never permissible, this would severely undermine the efforts of those trusts devoted to charitable ends that ultimately depend on legislative change for their effective achievement."[16]

Advocacy to influence policy and decision-makers is lawful and essential

There are of course some limits in charity law in relation to political activity and illegal activity. The *Charities Act* provides that the following purposes would disqualify an organisation from charitable purpose:

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

(b) the purpose of promoting or opposing a political party or a candidate for political office.[17]

The legislation itself explains these rules by way of notes. In the notes it is explained that the concept of public policy (see paragraph (a) above) is restricted to fundamental issues of public policy (such as the rule of

[13] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

[14] The New Zealand Supreme Court judgement in Re Greenpeace of New Zealand Incorporated [2014] supported the view taken by the Australian High Court in *Aid/Watch*, finding that advocating for environmental protection fits the definition of charitable. The judgement noted that "the Board has accepted that Greenpeace's object to 'promote the protection and preservation of nature and the environment' is charitable. Protection of the environment may require broad-based support and effort, including through the participatory processes set up by legislation, to enable the public interest to be assessed."

[15] *Public Trustee v Attorney-General* (NSW) (1997) 42 NSWLR 600.

[16] *Public Trustee v Attorney-General* (NSW) (1997) 42 NSWLR 600 at 621.

[17] *Charities Act 2013* (Cth), s.11.

law) and 'activities are not contrary to public policy merely because they are contrary to government policy'. The note also gives clarity to paragraph (b) above as follows:

> "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)." [18]

Crucially, in both cases, these rules only apply if an organisation has one of these disqualifying 'purposes'. Under charity law, there is a crucial distinction between the 'purposes' of an organisation and its 'activities'. The charitable status of an organisation rests on the latter, not the former.[19]

ACF is strictly politically non-partisan and advocates for the environment widely to all decision-makers regardless of political affiliation. In fact, one of our goals is to see all political parties hold good policy and make good decisions to protect our environment and move Australia towards sustainability. To achieve this we generate awareness and debate over environmental issues and through that, encouraging policy change to protect the environment and the people, plants and animals that depend upon it. While we may seek to influence the views of politicians, business leaders and communities, we remain strictly non-partisan. We base our views on the color of the policy and not the color of the party behind it. It is important to note though, even though ACF choses to remain non-partisan, environmental organisations and all charities do not need to *avoid* affiliation with a political party or candidate, as long as this affiliation is genuinely linked to its charitable objects, and as long as it is not so extensive as to suggest that it is a main purpose to elect the party or candidate.

Limiting the ability of environment charities to advocate will not only damage Australia but will limit free speech and democratic debate. It will deprive the Australian community of a voice for the environment and a voice that provides a balance to the views of powerful and organised economic interests. There is a reason why the NGO sector is also called the third sector, with government and business being the first and second sectors. All three make up a democracy, and all are needed. The independence of environment charities stems from their independent funding, through donations. It means that our views are not unduly influenced by government or business funders and we can have a true democratic debate. It is clear that limiting the ability of environment charities to conduct advocacy will impact Australia's principles of democracy and free speech.

The recently released Canadian Report to Minister of National Revenue by the Consultation Panel on the Political Activities of Charities makes some important points about the role of advocacy and the benefits of charities playing an active role in public policy:

> *"Charities have long played a critical role in our society. Along with providing much-needed programs and services, they serve all Canadians by pressing for positive social and environmental change. Charities bring commitment and expertise to the formulation of public policy, develop innovative solutions to issues and engage a diverse group of stakeholders, many directly affected by the matters under discussion. This is particularly valuable in an era of complex social and environmental challenges and constrained government budgets, where all informed perspectives and ideas are vital.*
>
> *To enable and maximize the contributions of charities, we need a regulatory environment that respects and encourages their participation in public policy dialogue and development."*[20]

Advocacy activities are necessary to protect the environment

[18] *Charities Act 2013* (Cth), s.11.

[19] GE Dal Pont, The Law of Charity (2010), [13.19].

[20] (Canada Revenue Agency; Report of the Consultation Panel on the Political Activities of Charities 31/3/17: http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html)

If changes are made that have the result of limiting environmental advocacy in Australia, this will have a significant and detrimental impact on the sector and on the environment. In many cases, the larger more established groups or alliances of groups have, through advocacy, achieved a policy outcome which has then enabled on-ground nature conservation efforts to follow (usually by smaller groups or local community groups). One creates the setting for the other and together the overall outcome is achieved. This is illustrated by many examples of environmental protection outcomes achieved over the course of ACF's 50 year' history, some of which are summarized at Appendix 1 to this submission.

Each example in Appendix 1 demonstrates how advocacy activities more often than not create the funding, resource or policy space in which environmental organisations, governments and local communities can then do hands-on nature conservation work. Both advocacy and on ground activities are essential, but groups but be permitted to decide for themselves (as all other DGR and charities currently are) which activities best achieve their charitable objectives.

Environmental advocacy has made Australia a better place to live

Environmental advocacy has made Australia a safer, more prosperous and enjoyable place to live. Environmental advocacy has led to cleaner energy, less pollution and associated illness, natural places for recreation and holidays, more sustainable cities and transport, less waste and congestion, more recycling and healthier rivers providing water for cities and agriculture.

Australia's native plants, animals, habitats and magnificent natural icons are better off because Australians spoke up for them through advocacy. This has flow on benefits for tourism, fishing and agriculture. For example, the CSIRO assessed the value of free services provided by nature within the Goulburn-Broken catchment, including the services provided by wetlands, native vegetation, rivers and land (all better off through advocacy) was estimated at between $200 and $400 million per annum.[21]

The health and safety of Australians are better off because of emissions standards placed on smokestacks and tail pipes for example, both a result of advocacy. This has and will continue to have flow on benefits for health costs. For example, health costs from Australian coal-fired power emissions are estimated at $2.6 billion a year.[22] In comparison, health cost savings estimated from a 20 percent emissions reduction target for the European Union are estimated to be 52 billion euro a year by 2020, increasing by 10 to 30 billion euro a year under a 30 percent reduction target.[23]

Studies have shown that mental health indicators in communities are better through connection with natural places such as the green areas surrounding our cities (these were also protected after advocacy efforts).[24] For example, in a study of people suffering from mental illness, 90 percent indicated that 'green' exercise activities had benefited their mental health and boosted their self-esteem and quality of life.[25]

There are new clean-tech job, industry and economic opportunities in Australia because of advocacy. Jobs in clean energy, smart and sustainable manufacturing, clean investments and eco-tourism are some examples.

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[21] Binning, Cork, Parry and Shelton (2001) Natural Assets: An Inventory or Ecosystem Goods and Services in the Goulburn Broken Catchment, CSIRO

[22] Australian Academy of Technological Sciences and Engineering. *The hidden costs of electricity: Externalities of power generation in Australia, 2009*

[23] Health and Environment Alliance and Healthcare without harm and health. *Acting now for better health: A 30 percent reduction target for EU climate policy,* 2010

24 Townsend and Weerasuriya, *Beyond Blue to Green: the benefits of contact with nature for mental health and well-being*, Beyond Blue Limited (2010), https://das.bluestaronline.com.au/api/prism/document?token=BL/0817

25 Mind (2007), *Go green to beat the blues*, Press release. National Association for Mental Health, www.mind.org.uk/News+policy+and+campaigns/Press/Mind+Week+ecotherapy.htm, cited inThe Parks Forum, *The Value of Parks*, http://www.parks.tas.gov.au/file.aspx?id=7046

Numerous reports by the ACF and the ACTU for example have identified millions of potential new jobs in clean energy alone if the government took decisive action on climate change.[26]

Advocacy is preventative. It prevents unsustainable environmental impacts, health impacts and loss of jobs and economic value. None of this can be achieved through on-ground action. Surely no-one would suggest that environment charities spend their funds of something as inefficient as waiting for harm to occur before we take on-ground action to rectify it.

The simple truth is that our environment is not separate from the wellbeing of our society or the prosperity of our economy, in fact it underpins it. Environmental advocacy has, and should be able to continue to, advance all aspects of Australian society and our economy and it should not be limited.

The key role of environment organisations in contributing to democracy

The role played by environment groups is invaluable in maintaining the health of democracy in Australia. As noted by the High Court in Aid/Watch:

> "The provisions of the *Constitution* mandate a system of representative and responsible government with a universal adult franchise… Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitution system."[27]

The generation by lawful means of public debate can itself be a purpose beneficial to the community. This is demonstrated by ACF's historical successes outlined in this submission. It is clear that ACF has played a critical role in achieving real, tangible, positive and 'on the ground' reform through advocacy.

Like all charitable organisations that advocate for outcomes of public benefit, the contribution made by environmental organisations enriches public debate in Australia and contributes to good policy-making by both government and business. Environmental organisations like ACF and those on the Register are uniquely placed to support long term goals or policy, as opposed to a Government that reacts to a 3 or 4 year electoral cycle or a business which considers how policy decisions impact its immediate bottom line. ACF and organisations listed on the Register have the ability to take a considered long-term approach in formulating policy asks and desired outcomes which is indisputably in the public interest.

Any reform limiting the advocacy activities of environmental organisations rejects Australia's long-held model of democracy in which many voices contribute to public policy.

HoR Standing Committee on the Environment Inquiry into the Register of Environmental Organisations 2015/16

In examining the submissions and transcripts from the HoR DGR Inquiry[28] it is clear that the overwhelming weight of evidence presented to the Committee points to the vital importance of maintaining the tax deductibility of donations to environmental organisations, without imposing further conditions or constraints on the operation of those organisations. An analysis of these submissions and the transcripts will reveal that no objective evidence was adduced in support of the proposition that a distinction should be drawn between 'on ground' (remediation) environmental activities on the one hand, and advocacy on the other. In fact, the recommendation to incorporate a 25 per cent remediation requirement was inconsistent

26 Australian Conservation Foundation and the Australian Council of Trade Unions, *Creating Jobs – Cutting Pollution* (2010), http://www.acfonline.org.au/be-informed/climate-change/jobs-clean-economy

[27] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at [44].

[28] The submissions and transcripts can be viewed here: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Submissions (accessed 6 July 2017)

with the vast majority of the submissions before the Inquiry. In reading the majority report from this Inquiry ACF is particularly troubled by the apparent reliance on the submission and evidence of Senator Matthew Canavan in support of contentious recommendations in preference to expert views and submissions given by those actually working in or with environmental organisations.[29]

Similarly, there was no evidence of unlawful activities conducted by environment groups, that is, an environmental group at board or committee level making the decision to use violence or damage property. There was evidence given that for many years through peaceful assembly and protest Australians have joined together to communicate their views and push for change on nature protection, Aboriginal rights, environmental conservation, climate change and much more. As noted by Mr Jason Wood MP (dissenting government member of the HoR DGR Inquiry Committee):

> "…it was due to environmental activists, through their efforts and through the use of a blockade, that major environmental disasters have been prevented. An example would be the Franklin River in Tasmania, where many activist groups openly supported campaigns to stop the damming of the river. These protests, which were actively supported by environmental groups, would be prohibited under this recommendation and history would now show that, if it was not for these protests and national awareness, the World Heritage Franklin River would have been dammed."[30]

PART B – RESPONSE TO CONSULTATION QUESTIONS

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

On the face of it ACF has no objection to the proposal that an organisation must be a registered charity to be eligible for DGR status, ACF already being a registered charity. It may be that some organisations are DGRs that do not for a legitimate reason do not qualify to be charities and thus such a recommendation could be problematic for these organisations. An audit should be done of which organisations are in this situation before any recommendations are made in this regard.

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

See response to question 1.

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

ACF is not a private ancillary fund (**PAF**) and has no privacy concerns regarding the requirements of the ACNC to publish information of its public register. However, we understand some PAFs are registered as charities and currently take advantage of the ability to withhold information from the register to protect the identity of donors. This is an important protection that should be considered.

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

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 incorrectly focusses on activities when the law of charities is concerned primarily with purpose, as we have address above. Advocacy rights are clearly enshrined

[29] Environment Committee, Report into the Register of Environmental Organisations, http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Report (accessed 6 July 2017)
[30] Environment Committee, Report into the Register of Environmental Organisations, p87-88 http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Report (accessed 6 July 2017)

democratic and legal rights, there should be no curtailing the advocacy work of charities including additional reporting. Such a move misunderstands current charity law in Australia and would amount to a disregard of the principled and rational development of that law.

The current legal regime is robust in outlining the purposes for which charities can legitimately be established as well as in ensuring charities must demonstrate that they do not have a 'disqualifying purpose.'

We therefore strongly oppose the activity-level focus in the review (as suggested in questions 4-6; 12-13 of the discussion paper) as such an approach:

a) Casts doubt and uncertainty over what activities a DGR entity can lawfully undertake resulting in a chilling effect;[31] and

b) Insufficiently establishes that the current regime of 'charitable purpose' is not robust for regulating the sector.

The Discussion Paper states that "there are concerns that charities are unsure of the extent of advocacy they can undertake without risking their DGR status. This is a particular concern for environmental DGRs, which must have a principal purpose of protecting the environment." The implication is that advocacy is not an appropriate activity for a charity to undertake for the purpose of protecting the environment. This is clearly incorrect and is addressed further in Part A of our submission. Advocacy is a legitimate activity for charitable organisations in furtherance of their charitable objects, and as a purpose in its own right if it furthers another charitable purpose, as established in the High Court case of **Aid/Watch** and referred to in the ACNC Guidance Note "Charities, elections and advocacy" issued in April 2016 (ACNC Guidance Note).

The Discussion Paper states "Scrutiny of an organisation's continued eligibility is appropriate as the scope of activities undertaken by an organisation can change over time, potentially making them ineligible for DGR status." This again misunderstands the law in a fundamental way. The issue relevant to the retention of charity and DGR status is not whether the scope of activities undertaken by an organisation can change over time, but whether the organisation's purposes have changed to be outside the charitable purposes set out in the legislation.

The Discussion Paper seeks to treat advocacy as different to other activities undertaken by charities by seeking views regarding a proposal for new reporting obligations for advocacy activities. In regard to this position, we comment as follows:

a) Charities undertaking advocacy has been recognised as both a legitimate activity and one essential to our system of parliamentary democracy.

b) Advocacy is an important approach which charities can use to address the causes of environmental and social problems, rather than just the symptoms – this often requires policy change. For example, if a coal mine is polluting a river because of poor regulation, environmental remediation work to treat affected wildlife downstream will have little impact if the mine can keep polluting the river – this will require advocacy to ensure the mine complies with regulations or adequate regulations are introduced.

c) No evidence has been put forward for the need for new reporting obligations for advocacy activities – they are strongly opposed on the basis that they would impose new and unjustified red tape on charities.

d) The Discussion Paper asserts that "some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community". This assertion is made

[31] Where uncertainty causes charities to take an overly cautious approach and become inefficient and ineffective in achieving their legitimate charitable purpose.

without any supporting evidence. Unsubstantiated and speculative statements about the expectations of the broader community should not serve as a basis for making public policy.

e) Requiring that a certain proportion of an environmental organisation's activities be directed towards environmental remediation represents an intrusion on the autonomy of environmental organisations and amounts to government trying to 'pick winners' in terms of what approaches charities should use to achieve their charitable purpose. Charities and their supporters are in the best position to determine what approaches are most appropriate to achieve their charitable purpose – therefore any new restrictions and limitations are strongly opposed on the basis that they would impose new and unjustified red tape on environmental charities which will make it harder for them to achieve their charitable purpose.

f) Well targeted and proportional approaches to maintain transparency and accountability for charities are supported and this can be achieved by ensuring all DGRs are registered as charities under the purview of the ACNC, as the Discussion Paper proposes.

g) Existing charity law sets appropriate boundaries for what advocacy activities by charities are acceptable, and the ACNC guidance for charities is helpful and reflective of the law. Accordingly, no further changes are justified or necessary.

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

See response to question 4. There is no justification for this information to be collected and it should not be.

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

See response to questions 4 and 5.

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?

ACF supports the transfer of the administration of the four DGR Registers but we do not believe that the ATO is the appropriate body to undertake this task. The ACNC was purpose-built for regulating charities and to be a 'one stop shop' for the sector. It is an independent entity that can play the role of administering the DGR Registers without the conflicting objectives that the Tax Office has (being a revenue raising entity) and operates at arms-length from political decision-making. If the administration of the four DGR registers are to be transferred then the most appropriate entity to receive them is the ACNC. It will be important that the ACNC is adequately resourced to perform this role.

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 operation of a public fund brings complexity and can create an additional reporting, accounting and governance burden on some DGRs. However, the impacts of removing the public fund requirement needs further investigation before a recommendation is made so that potential complexities of doing so can be fully understood. If changes are made, it will be important that clear information about the changes be communicate to the philanthropic sector to ensure that there is no negative impact on donor confidence.

When organisations apply for DGR status within a particular category some inevitable pigeon-holing occurs. There may be some merit in changes that enable organisations to pursue multiple charitable purposes all of which could attract DGR endorsement.

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?

No. ACF welcomes and accepts that the transparency and accountability of DGRs is important. However, we believe reviews and audits should be conducted only at the point where systemic issues have been identified. Giving a regulator powers beyond this opens up a situation similar to what arose in Canada in 2014 under former Prime Minister Stephen Harper who launched politically motivated special tax audits on environmental groups to silence critique of his government. The Harper government made a special allocation to the Canadian Revenue Agency — during otherwise deep budget cuts — of $13.4 million to fund tax audits of "political activities" by non-profit groups that provide tax receipts for donations. The effect was at worse, a 'chilling' effect to frighten organisations from speaking out. At best, it tied up the resources of organisations in responding to audits and left them in limbo rather than pursuing their important work to protect nature and achieving environmental outcomes.[32]

The ACNC and the ATO already have the power to undertake reviews and audits where they believe they are warranted - new and costly formal review processes are necessary. We therefore strongly recommend a proportionate and risk-based response to this issue. Such a response would include requiring DGRs to be registered with the ACNC (as the Discussion Paper proposes), with the ACNC and the ATO using their existing compliance approach to ensure compliance with the law. This can involve undertaking reviews and audits using their existing powers where systemic issues have been identified.

The activities of charities are by their nature in the public domain and the public are vigilant in scrutinising these activities and raising concerns with the regulator. The ACNC is also vigilant and has appropriate powers to investigate a charity and taken appropriate action. This is evidenced by the ACNC Charity Compliance Report 2015 – 2016 which states:

> *"Over the last two years, we received 1,872 concerns about charities. This was a significant increase over the previous two years when we received 1,307 concerns. The additional concerns resulted in the ACNC opening 149% more investigations, and resulted in 28 compliance revocations."*[33]

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

This is a very unfortunate question as it seems intended to invite division within the charity sector. Any reviews should be based on a strong evidence-based risk assessment process as detailed above in the response to question 9.

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?

This is requirement is not necessary and may result in unnecessary administrative burdens and damage public trust and confidence in the charity sector. If the 5 year reapplication are assessed by a Government Minister and require Government support to pass legislation, specifically listed

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

[33] ACNC Charity Compliance Report 2015 – 2016, http://www.acnc.gov.au/ACNC/Publications/Reports/ComplianceRpt2015-2016.aspx

entities will be subject to the political cycle. This will open the whole process to politicisation and would be very undesirable.

Further, there is no need for additional review powers as specifically listed DGRs are accountable under Schedule 1, section 353-20 of the *Taxation Administration Act 1953 (Cth)*. Under that section, the Commissioner of Taxation can enquire into whether a specifically listed DGR has failed to use donations properly, has changed its principal purpose, or has failed to comply with the relevant rules or conditions of its listing.

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

Any move to implement such a requirement would be a direct attack on the legitimate and lawful advocacy activities of environmental organisations and fly in the face of the High Court's decision in Aid/Watch discussed above. Charities must be permitted to pursue their charitable purpose in the most effective and efficient way possible (while remaining lawful). How they achieve these purposes must not be dictated or limited by the government.

When it becomes a charity listed with the ACNC (a requirement which we support for environmental organisations), charities already have to meet the test in the *Charities Act* to become endorsed as a charity and then comply with the conditions of that endorsement. Additional conditions should not be added to this. This is a clear politicisation of an administrative task and would impose conditions on environmental charities that are not put upon any other charities.

As mentioned in the introduction above, courts are clear that advocacy is integral to achieving charitable purpose and that there is a foundation in the Constitution of the Commonwealth of Australia for advocacy. Any proposed changes having the effect of curtailing the lawful activities of environmental groups moves away from the law as it is currently understood. It follows that DGR status should be bestowed on charities, including charities whose purposes are advancing the environment, and that no additional conditions should be attached to this that limits advocacy in any way apart from the limitations already set out in the *Charities Act*.[34]

Creating discrepancies between the rules for being listed as a DGR for different charities is unfair and endorses (or 'cherry picks') some charitable purposes as more important than others. It is important to raise here that conducting advocacy activities is common place across the whole of the charitable sector to achieve a variety of charitable outcomes, not just environmental.

If changes were made so that conditions were imposed on environmental organisations to limit advocacy or otherwise dictate their activities, this would be an inconsistent and politically-motivated singling out of environment groups at a time where charities have called for consistent, independent regulation through the ACNC. Further, it creates significant compliance issues for existing environmental organisations as well as contributing to the inefficient allocation of government resources.

As discussed above environmental remediation is one way in which an environmental organisation may achieve its purposes, however, it is not the only way. Requiring that a certain proportion of an environmental organisation's activities be directed towards environmental remediation represents an intrusion on the autonomy of environmental organisations and amounts to government trying to 'pick winners' in terms of what approaches charities should use to achieve their charitable purpose. Charities and their supporters are in the best position to determine what approaches are most

[34] I.e. a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy or a purpose of promoting or opposing a political party or a candidate for political office - see Charities Act s.11.

appropriate to achieve their charitable purpose – therefore any new restrictions and limitations are strongly opposed on the basis that they would impose new and unjustified red tape on environmental charities which will make it harder for them to achieve their charitable purpose.

This imposition of such an arbitrary requirement would unnecessarily increase red tape on all environmental organisations and effectively remove vital tax concessions from groups legitimately focused solely on advocacy, education, research or legal cases.

To impose a limit on one category of DGR would appear to be singling out environmental. The requirements would call for a tracing of money, property or benefits either received or given by a DGR to the ultimate activity on which those things are applied. Practically, this is a very difficult if not impossible exercise requiring substantial resources going well beyond what is reasonable, or necessary, to ensure DGRs are accountable to the public and government.

The Aid/Watch case which went all the way to the High Court and was the result of the mobilisation of the charitable sector to ensure that the High Court provided clarity on the issue of advocacy and to ensure that the small incorporated association of Aid/Watch was not silenced. If the government were to make any move to reform laws to restrict advocacy as proposed, the government should expect the courts to be called upon again to scrutinise any such restriction.

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?

Firstly, we are very concerned and alarmed that environmental DGRs are made the sole target of this question. There is no justifiable reason for this.

ACF condemns any illegal behaviour but stresses that laws already exist to deal with these matters.

The recommendations proposed would create unnecessary red tape, overlap existing laws and provide implementation difficulties.

It is already the case that a registered charity with the ACNC has to meet the test in the *Charities Act* to become endorsed as a charity and then comply with the conditions of that endorsement.

The *Charities Act* provides that the following purposes would disqualify an organisation from charitable purpose:

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

(b) the purpose of promoting or opposing a political party or a candidate for political office.[35]

This is a requirement taken incredibly seriously by ACF. If environmental DGRs are required to register and be regulated by the ACNC (a recommendation that ACF supports), then nothing further is needed by way of regulation in this space.

As discussed above, the HoR DGR Inquiry uncovered no evidence of unlawful conduct by environment groups. Evidence did stress that peaceful assembly or protest has long been an important part of Australian democracy and it remains so today. Peaceful protests are a symptom of a healthy democracy. International law binds Australia to respect, protect and facilitate Australians' rights to assemble peacefully and associate freely.[36] This entails a positive obligation on the government to facilitate peaceful assembly and a presumption in favour of unrestricted and unregulated peaceful protests.[37]

[35] *Charities Act 2013* (Cth), s.11.

[36] Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, 24th sess, UN Doc A/HRC/RES/24/5 (8 October 2013) [2].

[37] OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly, 2010, 2.2

Further, a recommendation like this would be unhelpful when dealing with concerns about illegal behaviour by individuals within organisations or within the environment movement more widely. If criminal laws are broken by individuals in the course of these activities then those individuals are subject to those laws. We note the words of Mr Jason Wood MP (dissenting government member of the HoR DGR Inquiry Committee):

> *"I do have concerns about this recommendation. Firstly, drafting laws or regulations would be very complex and could only practically work if a DGR at the board or committee level made a decision to use violence or damage to property. In this case I would support sanctions against the DGR, however I also believe this scenario would be very unlikely and serious offences would more likely be made by individuals on a random basis. Also, for offences which are not sanctioned at the board or committee level, or do not involve violence or damage to property, current state laws would suffice."*[38]

Current charity law and criminal laws cover the field with regard to unlawful activities. Any move to impose additional regulation or sanctions for charities will be viewed as a step to discourage peaceful assembly and restrict peaceful protests in Australia.

We thank you for the opportunity to provide a submission in relation to the Discussion Paper.

Yours faithfully

Kelly O'Shanassy
Chief Executive Officer
Australian Conservation Foundation

[38] Environment Committee, Report into the Register of Environmental Organisations, p87-88 http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO/Report (accessed 6 July 2017)

APPENDIX 1

ACF Achievements through Advocacy

- Over 20 years ago an alliance between the ACF and National Farmers' Federation resulted in the creation of Landcare in Australia. ACF advocated for a national program to support regional and rural land and water conservation activities, which was eventually embraced by all major political parties. Today, the Landcare alliance consists of over 4000 community groups and thousands of volunteers across the country doing on-ground conservation activities; activities that would not be possible without the advocacy that created Landcare in the first place.
- During the Murray-Darling Basin Plan process, ACF was the leading independent environment advocate in the public arena and a leading consensus builder around the stakeholder table. ACF was integral in articulating the need for integrated and strategic framework for water reform in the first place, and then was key in developing the government response as a key stakeholder in the Murray-Darling Basin Plan process. As a result, 500GL was recovered for the Basin through the Living Murray Initiative during the era of the Howard Government, and a further (up to) 3200 additional GL under the Murray-Darling Basin Plan under the Gillard Government. This water will improve the health of the basin and secure water for the environment, farmers and urban communities. In other words, it will help secure the future for Basin communities.

  ACF played a key role (at the invitation of Government) in building a consensus across the community for support for a balanced policy that had a social licence and environmental credibility. Environment Victoria, Friends of the Earth and the Environment Defenders Offices (all environmental organisations on the Register) were also key players in this space and without the advocacy of these groups, the outcome would not have been achieved. The Basin plan was finalised in 2012 and ACF continues to put forward the case for repair of the Murray-Darling river system.
- ACF advocacy lead to the creation of the million dollar Biodiversity Fund which established the framework for environmental organisations to apply for funds to support their on-ground conservation activities. Without the environmental advocacy in the first place by an organisation with skills in this area, such as ACF, this outcome that then allowed for the on-ground conservation work to follow would not have been achieved.
- Radioactive waste is a major environmental management concern, both in Australia and around the world. The waste is hazardous and long-lived and poses significant human, environmental and security challenges. ACF has consistently argued for a transparent and evidence based approach to the long-term management of Australia’s radioactive waste and actively supports communities that have been looked at as possible sites for a national radioactive waste facility.
- In June 2013 a high conservation value Tasmanian forests area was granted official World Heritage protection by the United Nations World Heritage Committee. The protection of 170,000ha of old growth forests in Tasmania would not have been achieved if not for the high level advocacy activities of ACF, Environment Tasmania and the Wilderness Society (both environmental organisations on the Register). It is worth noting that this protection was supported by forestry industries and unions representing forest workers.
- In 2003 and 2004 ACF advocacy influenced the expansion of the Great Barrier Reef Marine Park. We supported the making of 3500 dedicated submissions by our supporters to the Marine Park Authority and achieved an increase of environmentally protected areas of the Reef from 5 per cent to one third of its expanse. ACF also advocated for the formation of a single dedicated body to oversee the Reef, which resulted in the establishment of the National Park and the Maritime Authority.

- A key example of wide-spread advocacy activities resulting in practical environmental outcomes is the creation of hundreds of national parks across Australia over the past 50 years. Hundreds of environmental organisations on the REO have contributed to these outcomes and continue to do so. The current campaign for The Great Forests National Park in the Central Highlands of Victoria is a perfect example of this. The purpose of the campaign is to preserve the important ecosystem functions that will save species such as the tiny Leadbeater's (or Fairy) Possum. The possum cannot be saved without the Victorian government protecting 355,000 hectares of forest. This policy outcome must come first, and this can only be achieved through advocacy.
- ACF advocated for the return of homelands to Traditional Owners on Cape York while negotiating conservation outcomes. The most recent handover of land in December last year was Olkola country where Commonwealth funding, largely secured through ACF advocacy in Canberra, resulted in the purchase of three out of the five pastoral stations returned to the Olkola. In total 676,140 hectares have been returned in 2010 and 2014. As a result of the handover, on-ground environmental, cultural, social and economic outcomes can be achieved by local communities on the Cape. Environmental outcomes include protection and management of threatened species such as the Golden Shouldered Parrot, control of pests such as Gamba Grass and feral pigs, and wetland restoration and protection.
- ACF had a key role in advocacy which lead to the world's largest network of marine parks in 2013. This has protected more than two million square kilometres of our oceans in reserves. Without these parks, there would be no place for on-ground marine conservation activities to occur. 85 million hectares of these reserves were to be fully protected as marine sanctuaries.
- ACF was instrumental to the creation of the Clean Energy Finance Corporation (CEFC). In 2009, the ACF began talking about the opportunities for Australia to prosper under a transition to a low-carbon future. The ACF proposed a "smart energy infrastructure fund". In 2010, the ACF continued to work with the finance sector and published a report titled '*Funding the Transition to a Clean Energy Economy*'. In the same year, the ACF presented to the Investor Group on Climate Change raising the opportunities discussed in the 'Funding the Transition' report. This report first called for, and named, the idea of a Clean Energy Finance Corporation. In 2011, the ACF continued to work with the finance sector and published a report titled '*The Clean Energy Finance Corporation: Helping Australia Compete in the Renewable Energy Race*' looking at the design parameters for such an institution. In 2012, the government at the time introduced the *Clean Energy Finance Corporation Act 2012* (Cth), making the Clean Energy Finance Corporation (CEFC) a reality. Between July 2013 and June 2014, its first full year of operation, the CEFC invested $931 million in partnership with private sector investment to achieve total investment of $3.2 billion. Once constructed, the project the CEFC has invested in will abate 4.2 million tonnes of CO2-equivalent annually while also generating a positive return of $2.40 per tonne. The CEFC's current portfolio is, over its lifetime, expected to generate a return of approximately 7 per cent, around 3.5 per cent above the cost of Australian government 5-year bond rates. The CEFC is in discussions with a further 30 project proponents seeking CEFC finance of over $1 billion. The sectors with the most opportunities in the pipeline are currently utilities, manufacturing and agriculture.