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Senior Adviser
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The Treasury
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4 August 2017

Dear Sir/Madam

Submission in relation to the Tax Deductible Gift Recipient Reform Opportunities Discussion Paper

The Australian Marine Conservation Society (AMCS) is a leading Australian NGO working towards the conservation of Australia's unique and diverse marine environments and the biodiversity they support. Our mission is to help protect Australia's oceans for the sake of current and future generations.

AMCS is not-for-profit charity listed on the Register of Environmental Organisations (REO) and with Deductible Gift Recipient status. AMCS has over 200,000 supporters who contribute to our work financially, by undertaking volunteer activities, and through online action and social media.

AMCS has a long-standing involvement in improving the protection and management of Australia's marine environment. We formed in 1965, initially named the Queensland Littoral Society and subsequently the Australian Littoral Society, then the Australian Marine Conservation Society.

Over more than 50 years, AMCS has played a significant role in many of the main advancements for marine conservation in Australia. Throughout our history, we have worked through science-based research, policy development and advocacy, on ground activity, community engagement and education to take effective action to protect Australia's marine environment. We work with and empower individuals, volunteers and communities to be voices for marine conservation. Further, we work with industry and stakeholder groups to identify solutions to unsustainable use of marine resources. We also seek to work with and persuade government to make long term, precautionary and ecosystems-based decisions founded on the principles of ecologically sustainable development.

Thank you for the opportunity to make a submission on the Discussion Paper *Tax Deductible Gift Recipient Reform Opportunities*.

Overview

AMCS supports reform of the Deductible Gift Recipient (DGR) system that would reduce administrative complexity and red-tape burden on charities in relation to complying with DGR requirements. Reform presents opportunities to improve the efficiency and effectiveness of the administration of the DGR system, notably bringing its administration under a single body, the Australian Charities and Not for Profits Commission (ACNC).

As recognised in the Discussion Paper, the DGR tax arrangements play a vital role in encouraging donations to the charity (not for profit) sector and are, therefore, crucial in supporting and enabling the important work that Australian charities undertake. Nevertheless, there are proposals in the Discussion Paper that, if implemented, would run counter to the purpose of the DGR system and potentially discourage donations and philanthropy to legitimate charities undertaking legitimate activities for the public good.

Australia has benefited greatly from the work of environmental charities stretching back over many years. Our seas, our coasts, our land, air and water are healthier, better managed and better protected because of their work, yet environmental organisations are singled out in the Discussion Paper.

The motivation for this is unclear given that neither the Federal environment department nor the ACNC raised significant concerns regarding the regulation or oversight of environmental organisations in their evidence to the House of Representatives Standing Committee on the Environment inquiry into the Register of Environmental Organisations. Furthermore, the inquiry generated a huge weight of evidence highlighting and supporting the important role of environmental charities and the advocacy work they undertake in Australia.

Our specific comments on individual questions in the Discussion Paper follow. We restrict our responses to questions and issues of most interest and/or concern to AMCS.

In summary, AMCS has significant concerns about those measures proposed for discussion, which appear to be seeking to:

- a) single out and target environmental organisations,
- b) limit the legitimate ability of DGR listed organisations to undertake advocacy work in pursuit of their charitable purpose, and
- c) impose increased, unnecessary and unjustified administrative and financial burdens on DGR listed organisations.

Responses to individual questions in the Discussion Paper

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?

AMCS supports the proposal that an organisation be required to be a registered charity to be eligible for DGR status.

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

No.

Charity law focuses on the ‘purposes’ of the organisation in determining whether or not the organisation qualifies as a charity. In other words, the purposes of an organisation are the primary test of whether an organisation is charitable, not its activities which are secondary. This ‘purposes’ approach empowers charities to determine what the most efficient and effective activities are for achieving the charitable purpose, within the constraints of conducting activities that are both lawful and are being conducted to further its charitable purpose.

At times, the Discussion Paper appears to confuse or conflate the purposes of a charity and its activities in relation to eligibility requirements for DGR status. It does this primarily in relation to proposals for reporting on advocacy activities (questions 4-6) and requiring minimum levels of public fund expenditure on “environmental remediation” activities by environmental DGRs (question 12). AMCS does not support the focus on activities rather than purposes in considering DGR reform.

These proposals undermine the legitimacy of advocacy activities and generate confusion over the types of activities that charities can undertake. It treats advocacy as different to other types of activities by proposing different information reporting requirements for such activities.

To be clear, advocacy is and has been recognised as a legitimate activity for charities to undertake in pursuit of their charitable purpose as established in the High Court case of *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42. This is also reflected in the ACNC guidelines “Charities, elections and advocacy” (April 2016) which set parameters around what constitutes acceptable advocacy activities.

The Discussion Paper does not present evidence or a compelling argument as to why a change to the current reporting regime is needed to require specific reporting of advocacy activities, least of all a change that would impose considerable additional administrative burdens on charities.

The Paper asserts, without supporting evidence, that “some charities and DGRs undertake advocacy activities that may be out of step with the expectations of the broader community”. A counter view to this assertion was expressed strongly in public submissions to the House of Representatives inquiry. Many submissions affirmed the importance of and necessity of advocacy activities by charities as part of a healthy democracy. Many held the expectation that charities should be free to lawfully pursue activities, including advocacy, to best achieve their purpose without threat to their DGR status. The broader community also has an expectation that government will not, without evidence, impose extra time and financial costs on a sector that is already poorly resourced.

AMCS believes that charities, including environmental charities, have the right, and need to advocate without restriction or impediment, such as additional reporting requirements.

On this basis, AMCS rejects the need for and strongly opposes new reporting obligations on advocacy activities.

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

See response to Question 4.

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

There is no case for requiring the collection of such information. See response to Question 4.

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?

With four DGR registers currently administered by different government departments AMCS supports the streamlining of DGR application processes and administration.

AMCS recommends the administration of the four DGR registers be transferred to the ACNC rather than the ATO. The ACNC is the most appropriate body – it was created with the specific purpose of regulating the charity sector, and being a one-stop shop for that sector. It is independent from government.

Transferring administration to the ACNC would enable streamlining of reporting, as there are many organisations, including AMCS, currently reporting both to the register and to ACNC. There are considerable reporting requirements on the charity sector and there is some duplication in the current system that would be removed, whilst maintaining effective regulation of the charity sector through the single, standardised Annual Information Statement covering all reporting requirements.

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?

See joint response to Questions 9, 10 and 11 below.

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

See joint response to Questions 9, 10 and 11 below.

11. What are stakeholders' views on the idea of having a general sunset rule of no more than five years for specifically listed DGRs? What about existing listings, should they be reviewed at least once every, say, five years to ensure they continue to meet the 'exceptional circumstances' policy requirement for listing?

AMCS strongly opposes the introduction of a formal rolling review program or a general sunset rule

AMCS recognises the importance of transparency and accountability for charities in maintaining the public trust in the charitable sector. It is important that there is appropriate public accountability for organisations with DGR status, in particular. However, we believe that the current system for monitoring charities and ensuring their compliance with the law through the ACNC is appropriate, adequate and working effectively. Requiring organisations to be a registered charity and therefore subject to the regulation under the ACNC (as proposed in Question 1.) would ensure an appropriate level of oversight and governance of DGRs.

With 28,000 DGR endorsed organisations, a periodic review or reapplication process would pose a considerable administration burden and cost upon charities, and on the government department or body processing applications. New and costly changes in requirements where considerable resources would be tied up rather than directed to pursuing charities' important work are not necessary or justified where charities are registered with and reporting to the ACNC. The current system under the ACNC includes a public complaints process and the powers to investigate charities and de-list non-compliant charities. We note that, in addition, the ATO already has the power to undertake audits where they believe they are warranted.

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?

AMCS strongly opposes the proposal to require environmental organisations to commit a percentage of public fund expenditure to environmental remediation.

AMCS submits that the legislative framework provided by the *Charities Act 2013* and the *Income Tax Assessment Act 1997 (ITA)* provide appropriate regulation of environmental organisations and their Deductible Gift Recipient status, and strongly opposes a requirement for such organisations to commit no less than 25% of their annual expenditure from the public fund to environmental remediation.

Environmental organisations play a vital role in securing a safer, cleaner, healthier environment upon which Australia's economic prosperity and the health and wellbeing of current and future generations of Australians is based. AMCS is concerned the proposal outlined in this question will be unduly onerous and impact the effectiveness of environmental organisations to play this role.

The proposal reflects a bias towards environmental remediation activities, and fails to reflect the value of the broader suite of activities carried out by environment groups towards their charitable purpose, and public benefit of environmental protection.

The current definition of 'environmental organisation' under the *Income Tax Assessment Act 1997* is clear and workable. It states clearly that the principal purpose of an environmental organisation must be:

(a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or

(b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.

The definition does not endeavour to prescribe the particular ways in which the organisation undertakes its work for the protection of the environment. It acknowledges that it is the *purpose* of the organisation that makes it eligible, subject to the broader considerations of being a charitable purpose, and in the public benefit.

It would be inconsistent with a range of practices already operating under taxation laws to attempt to prescribe to an environmental charity how it undertakes its activities for an environmental purpose. Seeking to direct, limit or curtail the lawful activities of environmental organisations on the Register of Environmental Organisations would go against the decision of High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, and current tax rulings.

Environmental remediation is only a subset, important in its own right, of all the activities needed to secure the protection of the environment for the long term. It is widely recognised that, for the sake of our environment, it is most efficient to take proactive steps to avoid environmental degradation and damage happening in the first place (for example through public education or advocacy), rather than having to deal with the problems through environmental remediation once the damage has happened.

It is of great concern, therefore, that the Discussion Paper advances the highly contentious 25% recommendation made in the Majority Report of the House of Representatives inquiry. We note that the Dissenting Report by opposition committee members and the Additional Comments paper by government committee member Mr Jason Wood MP both opposed and raised considerable concerns about the 25% recommendation.

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?

AMCS does not condone unlawful behaviour and takes very seriously the requirements under the *Charities Act (2013)* in relation to operating lawfully. (The *Act* identifies purposes would disqualify an organisation from charitable purpose, including: *the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy*).

AMCS stresses that the current system for ACNC registered charities is adequate and working effectively in monitoring the compliance of registered charities with the law. Requiring DGRs to be ACNC registered provides adequate assurance that DGRs are operating lawfully.

We note that in the ACNC's evidence to the House of Representatives inquiry, they reiterated that the ACNC has appropriate enforcement powers to regulate charities.

Lastly, it is important to note that the inquiry itself uncovered no evidence of unlawful conduct by environment groups.

On this basis, we believe that current charity law and criminal law adequately address unlawful activities by charities. We submit there is no need to single out environmental organisations. Neither is there any need for further regulations or sanction.

Please contact me if we can provide any further information in relation to this submission.

Yours sincerely



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