Environmental Justice Australia

4 August 2017

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

Email: DGR@Treasury.gov.au

Dear Sir or Madam

Submission in relation to "Tax Deductible Gift Recipient Reform Opportunities" discussion paper.

I refer to the above discussion paper.

Environmental Justice Australia is a not for profit legal practice providing legal services and representation and undertaking policy and law reform advocacy in relation to the environment. We are a charity and have Deductible Gift Recipient (DGR) status, being listed on the Register of Environmental Organisations.

We enjoy generous support from a large number of donors, big and small, many of whom we assume value our ability to receive tax-deductible donations. We also benefit from the support of trusts and foundations, many of whom are restricted to funding organisations with DGR status.

Rather than responding to your specific questions on proposed reforms, this submission offers some general comments on the significance of DGR status for environmental organisations to our democratic system, and addresses three related matters which we believe provide critical context for your review:

1. The value and importance of legal expertise in relation to environmental protection.
2. The importance of access to tax deductibility being determined by reference to an organisation's purpose rather than the activities undertaken to give effect to that purpose.
3. The unworkability and undesirability that a dedicated proportion of donated funds be allocated to "environmental remediation" as a condition of DGR status.

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General comments

It is disappointing that Treasury in its discussion papers has uncritically adopted recommendations from the House of Representatives Standing Committee on the Environment's inquiry on the Register of Environmental Organisations. The majority report of the inquiry, and the submissions the majority seem to have uncritically adopted, are plainly politically motivated and intended to curtail the right of environmental organisations to undertake advocacy, something that the High Court has endorsed as an important feature of democratic participation in the *Aidwatch* case.

One would have thought that the well-reasoned dissenting views of the Committee, together with the strong advocacy by vested interests and particularly the mining industry, would have provided at least some pause for thought before making those recommendations the basis for your discussion paper.

Policy debate, including dissenting voices, are a critical feature of our democracy. The very fact that the policy proposals now advanced for discussion by Treasury are based on views uncritically adopted by government members of a politically motivated inquiry, that itself adopted proposals advanced by powerful vested interests, provides ample demonstration of the need for the strong and independent civil society organisations that these proposals would undermine.

An important and missing perspective when it comes to the reforms under discussion is the right of Australian citizens to form organisations to advance purposes of their choosing and also to provide financial support to those organisations.

The ability to provide this financial support from pre-tax income is an important incentive and recognises the limitations of relying on government funding for such support, something our organisation is only too familiar with, as a substantial amount of our public funding for environmental legal services to the Australian community was abruptly terminated by Attorney-General George Brandis in December 2013.

Arguments adopted by the House of Representatives inquiry majority, and pushed by the NSW Minerals Council,[1] that the tax deductibility of donations to environment groups amounts to revenue foregone are specious and ignore the reality that public-spirited donors would support other causes with deductibility status if their ability to support environmental organisations was restricted. The arguments are also duplicitous, given the very substantial subsidies, rebates and deductions available to the same vested interests who are suggesting that the opportunity of citizens and philanthropic organisations to support environmental organisations from their pre-tax income should be curtailed.

[1]NSW Minerals Council: activist groups like Greenpeace get $18m tax break, The Australian, 14 July 2017

The value and importance of legal expertise in relation to environmental protection

EDOs of Australia have written an excellent submission outlining the work that they do as environmental lawyers. We commend their submission to you and support their views on your discussion paper.

We would also emphasise just how fundamental the law is to environmental protection and the public benefits that environmental regulation seeks to secure. Having recognised this, facilitating effective public participation in environmental legal processes is crucial to the effectiveness of these regulations. Further, advocacy in relation to the development of new laws or reform of existing laws, or better enforcement of implementation, is critical, an inextricable part of public interest environmental law work and entirely consistent with support for the rule of law within a democratic society such as ours.

Although the restraining and redistributive effects of environmental laws means that this work is often controversial and liable to put offside powerful economic interests and those in government who champion these interests, these features merely emphasises the value to organisations such as ours of the independent financial support facilitated by tax-deductible donations from members of the public moved to support our work.

A further point to emphasise here that the legal work that we do is in a very specific niche and requiring a particular skill set, which practically and from the point of view of our professional responsibilities is unsuited to combining with other activities that others in the environment sector are much better placed to specialise in and deliver – whether that be environmental education activities or "on the ground works". We return to this point under the discussion of the proposal to require a proportion of activities to be "environmental remediation" below.

We are not alone in occupying a particular niche amongst environmental and civil society organisations. This diversity ought to be embraced and encouraged and recognised for what it is – a broad array of opportunities for publicly minded citizens to join with others and, through financial support and extensive voluntary contributions, strive to make the world a better place. Activity-based restrictions, and particularly the proposal that a fixed minimum proportion of activities for all organisations should fit the category of environmental remediation, undermines this diversity and restricts the public's choice.

Tax deductibility should be determined by reference to an organisation's purpose

The reforms put forward for discussion demonstrate a general trend to move away from the current approach of determining eligibility by reference to an organisation's purpose to one which involves continuous scrutiny of an organisation's activities.

The comments above in relation to the value of a diversity of activities and the importance of supporters of environmental organisations having the freedom to choose which organisations (and so their activities) they wish to support are applicable here also. Insistence on greater scrutiny of activities through

restrictions on eligibility for DGR status beyond those which presently apply, or through a requirement for self-surveillance given effect to through reporting requirements, undermines this diversity and freedom.

It should be remembered that the vast majority of environmental organisations, even those with large revenues and many paid staff, rely on voluntary boards for governance. Members of these boards, typically accountable to a membership through one means or another, ought to be entrusted with making decisions about what activities an organisation should do to best fulfil its purpose rather than being burdened and restricted by prescriptive regulation.

Insofar as the stated motivating concern behind some of the changes is to ensure that funds are not spent on activities that are illegal or beyond any recognised purpose (impermissible support for a political party or candidate for instance), there are laws to deal with these issues already.

Requiring a proportion of funds be allocated to "environmental remediation" is unworkable and undesirable

This is the most egregious of the suggestions that the Treasury not only seems to have uncritically adopted, but also exacerbated by suggesting extending the 25% requirement proposed by the House of Representatives majority report, to an extraordinary 50%. In reality any proportion is unworkable and such a blunt policy mechanism can be understood as nothing other than an attempt to stymie the diversity of work undertaken by environmental organisations – not just advocacy, but also a range of other activities that are presumably also not to be characterised as environmental remediation such as uncontroversial environmental education work.

The proposal is unworkable. How can a non-profit organisation governed by a voluntary board really be expected to confidently determine what they can or must do to satisfy such a requirement? While presumably Treasury is familiar with tax laws that involve fine and somewhat arbitrary distinctions, the introduction of such regulation must surely require a compelling policy rationale and careful analysis of the regulatory burden entailed.

Suggesting that a legal practice such as ours should be required to undertake a designated proportion of environmental remediation work is ridiculous. This not because environmental remediation work is not critically important, but rather because the best way to encourage and support this work is to allow those who have the necessary expertise and experience to form organisations dedicated to this purpose – which is what happens now and works well.

Requiring a fixed proportion of deductible gifts to all environment groups to be devoted to environmental remediation will only complicate things for those which do specialise in such works. If the government really were concerned to increase support for environmental remediation it would be far better advised to

increase the amount and duration of public funding to the many organisations who do great work in this area.

We hope that these submissions are of assistance.

Yours faithfully

Brendan Sydes
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