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Greenpeace Australia Pacific Submission Relating to the Tax Deductible Gift Recipient Reform Opportunities Discussion Paper

Dear Senior Adviser,

Greenpeace Australia Pacific (GPAP) welcomes the opportunity to comment on the proposals outlined in the Tax Deductible Gift Recipient Opportunities Discussion Paper (Discussion Paper).

As a registered charity with tax deductible gift recipient status, representing over 500,000 supporters across Australia and the Pacific, we are well-placed to comment on the Discussion Paper.

Our comments are in two parts: Part One provides some general comments in relation to the discussion paper, and Part Two responds directly to the thirteen consultation questions outlined.

Summary and Recommendations

1. We are concerned with the disproportionate emphasis in the Discussion Paper on the advocacy activities of charities, and on environmental organisations in particular.
2. We are also concerned with the overemphasis on the activities of an entity rather than its purpose, which seems inconsistent with Australian charities law.
3. Overall we recommend that the Australian Government and Treasury:
    a. (Questions 1 and 2) Do not support the recommendation that all DGRs be required to be registered as charities;
    b. (Questions 4 to 6) Do not support any requirement that charities provide additional information relating to advocacy activities;
    c. (Question 8) Do support the removal of the public fund requirement;
    d. (Question 12) Do not support the proposal that all environmental organisations must divert at least 20-25%, or any specifically prescribed amount, of their annual expenditure from their public fund to 'environmental remediation works'; and
    e. (Question 13) Do not support any additional sanctions related to Environmental DGRs, and indeed reject the premise of the question.

Part 1 – General Comments

A disproportionate emphasis on advocacy

The Discussion Paper has an unjustified focus on charities' advocacy, and in particular on the advocacy conducted by those on the Register of Environmental Organisations.

Advocacy is an absolutely legitimate means by which charities, including GPAP, further their charitable purposes. As the Chief Justice of the High Court of Australia noted in the *Aid/Watch* case:

> *It could scarcely be denied, these days, that it may be necessary for organisations… to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes.*[1]

Any move to curtail the advocacy work of charities would be to disregard the rational development of charity law in Australia, and would sit uneasily with the law's recognition that advocacy and public debate are a vital component of charity work that aims to better society.

Confusing activities and purpose

The Discussion Paper seems to confuse the activity of a charity with its purpose.

Paragraph 8 in 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.*

Under Australian charity law, it is the purpose of an organisation, not its activities, which is relevant to determining eligibility for DGR status.

It is both expected & right that the activities of a charity should change over time as it develops more efficient and effective ways to achieve its charitable purpose. It is only where the purpose of an entity changes that its eligibility for charity and/or DGR status should be called into question.

Activities are relevant to determining an entity's purpose in exceptional circumstances, wherein a significant proportion of time and resources are expended to carry out certain activities over an extended period of time. The Explanatory Memorandum to the Charities Bill 2013 states:

> *[1.27] In determining or substantiating an entity's purpose, it is the substance and reality of the purpose that must be identified. To substantiate - that is, to confirm or corroborate or demonstrate - the entity's charitable purposes, the activities of an entity may be considered. It is the role of its activities and the extent to which they further, or are in aid of, the entity's purpose that is relevant, not the nature of the activities. In considering activities to substantiate the charitable purpose, it may be necessary to go*

[1] *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539, 564 (Kiefel J).

> *beyond governing rules to operating rules and activities to substantiate its stated objectives.*
>
> *[1.28] Other relevant factors may include elements of the governing documents, such as powers, rules, not-for-profit and winding up clauses, clauses governing who can benefit from the entity's activities and in what ways, the entity's policies and plans, administration, finances, origins, history and control, and any legislation governing the entity's operation.*

An additional Explanatory Memorandum was circulated "to provide further clarity and certainty regarding charitable purposes, disqualifying purposes and the assessment of whether a purpose is for the public benefit."[2] Paragraph 1.102B of that Addendum provides:

> *[1.102B] In general terms, the purposes of an entity are usually the aims listed in the entity's constitution, and the activities will be the methods by which the entity achieves those purposes. However, not all purposes will necessarily be listed in the entity's constitution. If an entity spends a large portion of its time and resources carrying out certain activities over extended periods of time, these activities may, in fact, amount to a purpose in their own right. Whether the activities have amounted to a purpose will be determined on a case-by-case basis, considering all relevant factors, including but not limited to the factors listed in paragraphs 1.27 to 1.28.*

These Explanatory Memoranda are clear that:

1. The activities of an entity may be considered to determine its purpose, but that;
2. It is the role of the entity's activities and the extent to which they further its purpose which is relevant, rather than the nature of the activities.

These principles are consistent with the following Australian common law principle:

1. It is the entity's purpose in furtherance of which activities are carried out, and not the character of the activities themselves, which is determinative of purpose; and
2. Regard may be had to the activities of an entity to determine its purpose where its governing rules do not clearly establish it.[3]

Maurice C Cullity QC summarised this approach in writing:

> *The distinction between ends and means is fundamental in the law of charity. It is the ends, or purpose, not the means by which they are to be achieved, which determine whether a trust or corporation is charitable at law.*

The Discussion Paper's apparent confusion between charities' activities and purpose is therefore an incorrect approach under to Australian charities law.

Taxation concessions as a cost to the Commonwealth?

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[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 June 2013, 6121 (David Bradbury, Assistant Treasurer and minister Assisting for Deregulation).

[3] *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

We question the explicit suggestion in paragraph 20 of the Discussion Paper, as well as a thread of suggestion throughout the rest of the Discussion Paper, that charitable tax concessions are a significant burden to the Commonwealth. Without seeing the basis for the for the calculations, it is hard to believe the $1.31bn (2016-2017), especially without explanation as to whether it incorporates any calculation of the savings that the Commonwealth makes from the existence and impact of entities that have DGR status.

Part 2 – Answers to Discussion Paper Questions

Question 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?

It is not appropriate to require all DGRs to also be registered as charities to be eligible for DGR status.

The Discussion Paper contains support for this proposed requirement in the statements that it is consistent with Recommendation 2 of the House of Representatives Standing Committee on the Environment's REO Inquiry Report (REO Report), that registration as an environmental charity through the ACNC be a prerequisite for environmental organisations to obtain DGR status. However, it is our contention that the regulatory burden can be more easily reduced by regulators coordinating with each other – as was addressed in paragraph 3.48 of the REO report – rather than requiring environmental organisations to meet the definition and requirements of a registered charity simply to streamline process.

There are additional policy reasons to decide against requiring all DGRs to be registered charities. Charitable status is a recognition that an entity has public benefit, and the taxation concessions attached to this charitable status are an additional recognition of this public benefit.

DGR endorsement is intended to achieve a distinct policy purpose of encouraging philanthropy. It confers benefits on both the entity with DGR endorsement, and the individual taxpayers who choose to make a donation. Entities with DGR endorsement often have a purpose that is understood at law to be charitable – but this is not necessarily always the case.

Question 2: Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement (that is to be a registered charity) and, if so, why?

We hold no general view as to how many of the 8 per cent of charities without charitable status mentioned in the Discussion Paper would likely be eligible to register. However, we recognise the potential negative implications of the proposal for the DGRs concerned.

As it currently stands, if an entity's charitable status is revoked by the ACNC but its DGR endorsement does not require it to be a charity, it might retain its DGR status. If all DGRs were required to be registered charities, this would no longer be the case. This is an unnecessary diminution of the existing rights of DGRs.

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

We strongly submit that a requirement for additional reporting on advocacy activities is not only absolutely unnecessary, but in addition is totally unworkable and would place an enormous burden on charities thereby impacting their efficiency and effectiveness.

As addressed in Part 1 of this submission, it also wrongly focuses on activities when charity law is concerned primarily with purpose.

An unnecessary measure

As a matter of fundamental Australian law, it is not in question that charities can undertake advocacy to further their political purposes – including by supporting or opposing relevant legislation, government policies and decisions, or the actions of individuals or corporations. The importance of such advocacy was recognised by the High Court in the 2010 *Aid/Watch* decision, where the Court held that charities' ability to undertake advocacy was essential to Australia's constitutional system of parliamentary democracy, and that the 'political purposes' doctrine does not apply.

Additionally, under the *Charities Act 2013*, a charity can have a charitable purpose of supporting or opposing a change in law policy or practice relevant to charitable purposes.

It holds therefore that singling out one type of legitimate charitable purpose for additional reporting and oversight is of significant concern.

If the intention is to restrict the ability of charities to undertake advocacy, such a move would be entirely out of step with the nature of 21st Century civil society in Australia (and indeed, elsewhere). It would also be completely contrary to Australian law, which recognises, as stated in Part 1 of this submission, that advocacy and public debate are vital components of charities' contribution to the betterment of society.

According to the High Court in the *Aid/Watch* decision:

> *… generation by lawful means of public debate … itself is a purpose beneficial to the community.*[4]

This High Court principle reflects a recognition of the 21st Century reality that:

> *Political speech by charities enriches the political process by encouraging political debate, facilitating citizen participation and engagement and promoting political pluralism.*[5]

It is clear that any efforts to restrict the ability of charities to take part in public debate would impoverish Australian democracy and civil society. Further, the implication in the constitution of freedom of political communication protects activity once proscribed by the now-defunct political purposes doctrine.

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[4] *Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 539, 557 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[5] Chia, Joyce, Harding, Matthew and O'Connell, Ann, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 *Melbourne University Law Review* 353, 365.

There is no rationale for limiting the freedom of speech of charities, and any attempt to do risks constitutional challenge, which would in turn be further exacerbated by differentiation between charity sub-types.

We urge the Australian Government and the Treasury to avoid compromising these fundamental legal and democratic provisions.

Unworkable and burdensome

This proposal is not only an unacceptable threat to the right of charities to advocate – international experience also suggests it is unworkable.

The Canadian Revenue Agency spent millions of dollars between 2012 and 2016 to audit charities in relation to political activity. By the time it was wound up, the program had undertaken only 54 audits, several of which were not completed.

As reported in the Report of the Consultation Panel on the Political Activities of Charities in Canada, the response from the charities sector was that the audits were expensive and stressful, and that some chose not to carry out political activities at all, even if they were confident of passing an audit – suggesting the provisions had a chilling effect, restricting charities' legitimate and important work.[6]

Canada's audit program was abandoned with the recommendation that a focus on activities was unhelpful.

Finally, the practical challenges for charities considering how to declare advocacy activities are significant, and cannot be ignored. How are advocacy activities, and by whom? Where is the line between public education and advocacy? In the case of a charity established to promote the safety of children, must it account for every letter it writes about a dangerous school crossing as advocacy activities? What about letters by its supporters? What about a tweet by a volunteer sharing an opinion piece about government decision-making? For whose activities must charities account?

We remain convinced that there is no justifiable basis for requiring charities to provide additional information about their advocacy activities, and judge any such requirement to be unworkable.

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

There is no justification for collecting the information.

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

[6] Report of the Consultation Panel on the Political Activities of Charities in Canada <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html> accessed 04 August 2017

There is no way to collect this information without imposing significant burden, and no justification for doing so, and therefore it should not be collected.

Question 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?

A more appropriate venue would be the ACNC, which unlike the ATO is not charged with raising revenue. The ACNC was intended as a regulator for not-for-profits as well as charities, and would therefore be an appropriate regulator for entities on one of the four registers whether or not they were also charities.

Question 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 public fund requirements are overly-complicated, and not helped by the fact that the relevant taxation ruling refers to legislation that is no longer current.

We support the removal of the public fund requirement, and recommend this reform be implemented.

Clear information about the changes and any new requirements for charities and DGRs must be provided to the philanthropic sector to ensure there is no negative impact on donor confidence.

If the public fund requirement is not removed then the categories of 'responsible person' should certainly be modernised and widened.

Question 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?

Paragraph 53 of the Discussion Paper raises a concern that DGRs are endorsed in perpetuity and gain access to generous tax concessions without sufficient governance oversight and review. In our view, that concern is almost entirely unwarranted.

We do not accept that DGR tax concessions are "generous" given similar OECD countries' concessions to *all* charities. As already noted in Part 1 of this submission, we do not accept as fair the focus on Government concessions and financial contributions to DGRS given there is no concurrent acknowledgement or concomitant calculation of the significant value added by DGRs to governments and the Australian community.

According to the statistics quoted at paragraph 18 of the Discussion Paper, source unknown, over 90 per cent of DGRs are registered charities subject to the ACNC Governance Standards and regulatory regime. The remainder of DGRs are subject to ATO or Departmental oversight as well as regulation by their relevant corporate regulator and/or trustee law.

We therefore question the objectives of further oversight, and ask whether the additional cost to the ACNC, ATO, taxpayers and the charity sector can be justified. Our view is that it cannot.

We are additionally concerned that the rolling review program could be unduly influenced by incorrect or deliberately inaccurate views about the permitted purpose and activities of charities and DGRs, resulting in an unwarranted focus on environmental DGRs. Question 10 appears to directly open a window for the public and industry organisations to undermine a fair and reasonable risk assessment-driven review process.

Finally, if the intention is for this rolling review to include the ACNC, then in our view there is a substantive misalignment between the proposed rolling reviews and the ACNC's regulatory policy/focus on proactive and front-end assistance and support, including the preparation of materials to assist charities in complying with their governance status and maintenance of charity status.

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

This is a badly-judged question, as the only possible consequence is unnecessary division within the charity sector.

Any reviews should be based on a strong evidence-based risk assessment process. This will require additional resourcing of the ACNC or ATO.

Relevant factors in risk assessment may include the number of years of endorsement without assessment, missing information, referrals from other government agencies, legitimate and substantiated complaints from the public, and potential exposure to money laundering or terrorist financing.

Question 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?

We are entirely opposed to sunset periods for specifically-listed DGRs.

Sunset periods are likely to undermine long-term planning, impose significant and entirely unnecessary administrative burdens, and damage public trust and confidence in the charity sector.

Sunset periods also contribute to establishing and maintaining a culture of suspicion and risk politicising the listing process. If 5-yearly re-applications are assessed by a Government Minister and require Government support to pass legislation, listed entities will be subject to the political cycle. The "exceptional circumstances" condition is vague and does not rectify this concern.

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

The measure is unjustified

In our view there is simply no justification for universally requiring environmental organisations to commit a specifically prescribed 25 per cent, or indeed any specifically prescribed amount, of their annual expenditure from their public fund to environmental remediation.

Considering the summary of submissions to the REO Inquiry, it is difficult to see how this recommendation was supported in the REO Report.

The REO Report provided no reasoning to support the Committee's concluded view at paragraph 4.79 that:

> *[h]aving regard to the terms of reference of the inquiry the Committee is of the view that the purpose of granting DGR status to environmental organisations should be to support practical environmental work in the community.*

We agree with the separate dissenting report of the five Labour members of the Committee that this conclusion is inconsistent with views expressed in the vast majority of submissions to the REO Inquiry that it would increase red tape and treat environmental organisations differently from all other not-for-profits.

As the dissenting members of the House of Representatives Standing Committee correctly noted, businesses are able to claim deductions in respect of the costs of lobbying activity without any limitations of the kind recommended to apply to environmental organisations.

We also endorse the views of Mr Wood in relation to this remediation recommendation, who noted in his dissenting report to the REO Inquiry that many important environmental organisations would not meet the 25 per cent target, and that trying to find ways of meeting it would increase reporting burdens and be counter-productive and cumbersome.

The *Income Tax Assessment Act 1997* (Cth) recognises explicitly that an environmental organisation can have a principal purpose of providing information or education or of carrying out research about the natural environment.[7] In this context any proposed minimum spending on remediation work, which is not encompassed by the legislated principal purpose of an environmental organisation, is completely illogical.

The measure is inappropriate

It is not generally for the courts or a regulator to determine the merits of the means by which a charity should further its purposes. Environmental organisations and their members are best placed to determine how to effectively achieve their purposes. That the Government would attempt to interpose itself in the decision making of charities as to how to achieve their purpose is a completely unacceptable interference in the independence of charitable organisations.

While it was stated in the REO Report that this recommendation would not impede the ability of environmental organisations to undertake other work, including advocacy, this would simply

[7] ITAA, s 30-265(1)

not be so in our view. Mandating expenditure necessarily impacts upon an entity's ability to undertake other activities and significantly adds to the regulatory and reporting burden on such entities.

Implementing this recommendation will restrict charities' ability to undertake advocacy activities. Accordingly, we again urge the Committee to avoid compromising the legal and democratic principles as outlined in our response to Question 4. In our view, the discriminatory focus on environmental organisations cannot be coherently justified and this raises the risk of likely successful constitutional challenge.[8]

An environmental organisation only benefits from its DGR status if members of the community decide it is worthy of their support. Accordingly, if as alleged, environmental organisations are out of step with community expectations, this would likely be reflected in donations and gifts. We are not aware of any evidence of low or even reduced donor confidence in environmental organisations, and certainly it is not an issue for GPAP.

The Discussion Paper includes a question about the potential benefits of a requirement that environmental organisations commit no less than 25 per cent, or even 50 per cent, of their annual expenditure on remediation work. We cannot identify any clear benefits associated with this suggestion. Even if the ultimate outcome was that more remediation work was undertaken, there is no way of calculating whether this would be more advantageous than other ways of achieving the charitable purposes of environmental organisations.

In addition, expecting environmental organisations to achieve this result is to shift the burden of environmental degradation from industry and government to the charitable sector. This is completely unacceptable.

Question 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?

We are very concerned that environmental DGRs are made the sole target of this question.

The unsubstantiated imputation carried by this question that environmental DGRs regularly or more frequently engage in unlawful operations may open the Australian Government to legal liability, particularly if intended to cause injury to the reputation or financial position of environmental DGRs.

The question also confuses the fundamental distinction between purposes and activities. As we have already outlined, purposes are determinative when assessing charitable status, whereas activities are relevant only as facts from which inferences about purposes might be drawn in exceptional circumstances.[9]

The Governance Standards require a charity to, in summary:

a) be not-for-profit and work towards their charitable purposes;

b) be accountable to their members;

[8] See e.g. *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *Unions NSW v NSW* (2013) 252 CLR 530.
[9] Matthew Harding, 'An Antipodean view of political purposes and charity law' (2015) Apr *Law Quarterly Review* 131, 185.

c) not commit an indictable offence or a serious civil wrong;

d) take reasonable steps to ensure its responsible persons are suitable; and

e) take reasonable steps to ensure its responsible persons are subject to, understand and carry out their duties.

In relation to unlawful activity the governance standards provide that if an entity engages in unlawful activity it risks being in breach of the Governance Standards, and therefore risks losing its charitable status.

Alleged unlawful activity is also relevant to charity status if the unlawful activity is engaged in, and is engaged in to the extent that it evidences a disqualifying purpose.

A "disqualifying purpose" includes the purpose of engaging in, or promoting activities that are unlawful or contrary to public policy.[10] However, unlawful or illegal activities do not necessarily indicate a disqualifying purpose.

Paragraph 1.02A of the Addendum to the Explanatory Memorandum to the Charities Bill 2013 makes clear the distinction between activities and purposes in assessing a disqualifying purpose. Paragraphs 1.02A states

> *[1.102A] There is a distinction between the purposes of an entity and the activities of an entity. This provision* [s 11] *is concerned with purpose. Individual instances of engaging in, or promoting, an unlawful activity would generally not cause an entity to be considered to have a purpose to engage in such activity. However, activities can be considered in determining an entity's purpose (see paragraphs 1.27 to 1.29) and an entity's engagement in, or promotion of, unlawful activities to an extent that they could be considered to constitute a purpose to engage in, or promote, such unlawful activities, would be disqualifying.*

Paragraph 1.102B of the Addendum, reproduced above at paragraph 18 of this Submission, also makes this very clear.

The non-binding but persuasive ATO Ruling TR 2011/4 similarly states:

> *The issue turns on purpose. The mere fact that an institution or its employee has breached a law would not, in itself, show that the institution has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose. Toward the other extreme would be a planned and coordinated campaign of violence*.[11]

Requiring environmental DGRs to register as a charity to ensure they do not engage in unlawful activity in breach of the Governance Standards or such as to amount to having a disqualifying purpose seems a circuitous and inappropriate method of addressing alleged unlawful activity.

[10] Charities Act 2013 (Cth), s 11.
[11] paragraph 270.

We can see no logical basis for the proposition put by question 13, which, as noted already, carries the unsubstantiated imputation that environmental DGRs regularly or more frequently engage in unlawful operations.

Further, the regulatory response to unlawful activity, whether taken by the ACNC or other law enforcement agencies, is generally more appropriately targeted at individuals engaged in unlawful activity rather than charities. This is particularly the case where a charity is itself a victim of unlawful activity, such as an officer's fraud or misappropriation of funds. This approach rightly protects charitable assets so that they may be used for the original purposes for which they were donated or earned.

The note to section 11 of the *Charities Act 2013* (Cth) specifically clarifies that "activities are not contrary to public policy merely because they are contrary to government policy". Though this note also confuses the distinction between purposes and activities, it should serve as a clear reminder that charity law is not concerned with promoting only those public goods and policy objectives favoured by the Government of the day.

Finally, the threat of revocation of DGR status where unlawful activities are undertaken by employees, members, or volunteers of an organisation or "others without formal connections to the organisation"[12] is so broad and difficult for charities to monitor that it is likely to have a silencing effect on public debate and advocacy, to the detriment of a robust public sphere.

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[12] REO Report, Recommendation 6.