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Ms. Susan Bultitude
Senior Adviser, Individual and Indirect Tax Division
The Treasury
Langton Crescent
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By email: DGR@Treasury.gov.au

Dear Ms. Bultitude,

Tax Deductible Gift Recipient Reform Opportunities

The Law Institute of Victoria (**LIV**) is grateful for the opportunity to provide comments on the Treasury's Discussion Paper on Tax Deductible Gift Recipient Opportunities (**Discussion Paper**).

Introduction – LIV submission process

The LIV is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas. The fundamental purpose of the LIV is to foster the rule of law and to promote improvements and developments in the law as it affects the public of Victoria. Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues. The LIV also assures the standards and professionalism of lawyers, including accreditation and specialisation in contemporary legal disciplines.

This submission was drafted by members of the LIV's Not-for-profits & Charities Committee, and reviewed by members of the Tax & Revenue Committee, Sports Law Committee and Environmental Issues Committee. LIV Committees are constituted by expert volunteer members who regularly practice in these discrete practice areas.

General comments

The LIV is concerned with the use of the terms 'purpose' and 'activities' within the Discussion Paper. The Common Law test for the classification of an organisation as 'charitable' focuses on the 'purpose' of the charity as the starting point for determining an organisation's charitable status. Inquiries into the 'activities' or an organisation are secondary considerations. This is reflected in the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**), which directly requires entities to have a 'purpose' under s 25-5(5) to be entitled to registration and in the *Charities Act 2013* (Cth) (**Charities Act**). The Discussion Paper refers to 'charitable purpose' and 'activities of charities', the LIV submits that, in the absence of strong and compelling reasons otherwise, any reform should be focussed on 'purpose' and not 'activity' to avoid casting undue uncertainty over what activities DGR entities can lawfully undertake.

The LIV queries the focus of the discussion paper on environmental charities and the advocacy activities of charities. The focus on limiting advocacy activities of charities appears to be at odds with the High Court decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 (***Aid/Watch***) as well as sub-section 12(1) of the Charities Act.

Finally, the provision of DGR status provides a wider benefit to the economy and society than has been recognised by the Discussion Paper. The tax deductions allowed through the DGR regime allow the wider society a tangible incentive to donate to organisations with a charitable purpose that they wish to support which in turn allows the diverse charitable and not-for-profit sector in Australia to thrive.

Responses to consultation questions

For ease of reference, the following responses will follow the numbering system used 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?*

The LIV does not support this requirement.

The Discussion Paper justifies the requirement for DGRs to be registered charities as a means to improve accountability and governance. However, the LIV does not consider that such a requirement will achieve this, or that it is the correct basis for the proposed changes.

Current laws and government policies regarding DGRs do not support an objective to require DGRs to be registered as charities. The LIV's view is that any intention to introduce such a requirement should be supported by a declared policy objective.

If government seeks to introduce a requirement for all DGRs to be registered charities, the LIV suggests that a comprehensive cost-benefit analysis of the impact of such a requirement on philanthropic contributions would be necessary.

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

It is submitted that the introduction of such a requirement will adversely impact on, *inter alia*, advocacy organisations, sporting clubs and community houses, as they are not generally captured under existing definitions of charitable organisations.

Clubs or associations that provide sporting activities as part of achieving a recognised charitable purpose, such as advancing education or social or public welfare, may be eligible to register with the ACNC. However, many sporting and recreation clubs or associations do not meet the legal definition of charity as their purposes are generally not recognised as charitable (and therefore cannot be registered with the ACNC). At present, while such clubs or associations are not considered charities, they may still be eligible for tax benefits as DGRs, mostly likely through specific listing.

The LIV would like to draw attention to the following materials:

- ACNC Factsheet: Sporting clubs or associations and the ACNC[1];
- ATO Guide: Tax basics for non-profit organisations[2]; and
- Guide to Deductible Gift Recipient Status (Justice Connect, March 2014)[3].

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

The LIV provides no comment in relation to this question.

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[1] Australian Charities Not-for-profit Commissioner, *Factsheet: Sporting clubs or associations and the ACNC* <https://www.acnc.gov.au/ACNC/FTS/Fact_Type_Sporting.aspx>.
[2] Australian Taxation Office, *Tax basics for non-profit organisations* <https://www.ato.gov.au/uploadedFiles/Content/SME/downloads/Nonprofit16966Tax_basics_for_non_profit_organisations.pdf>.
[3] Justice Connect, *Guide to Deductible Gift Recipient Status* (March 2014) <https://nfplaw.org.au/sites/default/files/media/Guide_to_Deduct ble_Gift_Recipient_Status_3.pdf>.

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

The LIV does not support this requirement.

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 by the High Court of Australia in *Aid/Watch*.

In *Aid/Watch*, High Court held that advocacy activities are essential to Australia's constitutional system of parliamentary democracy. This decision was subsequently legislated in the Charities Act, which provides that a charity can have a charitable purpose of promoting or opposing changes in law, policy or practice relevant to its other charitable purposes. The Charities Act also prescribes limits to the charitable purpose where advocacy is concerned.

The LIV is extremely concerned that singling out advocacy activities for additional reporting and oversight, because of a desire to restrict the ability of charities to undertake such activities, is contrary to current charities law, as well as the Australian Constitution. Singling out advocacy activities is unjustified as advocacy activities are like any other routine activities carried out by a charity in support of its charitable purpose.

There are significant problems with allocating activities to advocacy and other general activities. One example of this is the fine line between 'public education' and 'advocacy'. The delineation between the two depends largely on detailed definitions and this will exacerbate compliance burdens in reporting. Any requirement along these lines would create an unnecessary burden on charities and allocation of purpose for these activities would be problematic.

It is noted that, when an audit of political activities was introduced and implemented in Canada, it imposed considerable burdens on charities for no ultimate benefit[4]

Therefore, in the absence of evidence supporting the need for new reporting obligations for advocacy activities, beyond those already in place, the LIV opposes the proposed measures on the basis that they would impose new and unjustified red tape on charities.

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

The LIV opposes the introduction of an Annual Information Statement on the basis that it does not support requirements for additional reporting regarding advocacy activities (see above response to question 4).

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

The LIV opposes any collection of additional information on the basis that it does not support requirements for additional reporting regarding advocacy activities (see above response to question 4).

[4] Consultation Panel of the Political Activities of Charities (Canada), *Report of the Consultation Panel on the Political Activities of Charities* (2017) <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/resources-charities-donors/resources-charities-about-political-activities/report-consultation-panel-on-political-activities-charities.html>.

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?

Consideration should be given to the ACNC as the regulator with sectoral knowledge, rather than the ATO, being the managers of these registers.

Further, the LIV is of the view that the current application process already involves undue delays (with some applications taking up to 6 months) and migration of the registers would cause significant further delays. This may require additional resources for both the ACNC and the ATO during the transition period.

Finally, it is submitted that for international development charities and DGRs, the proposal to migrate the registers to the ATO could undermine the current standards and confidence in international non-government organisations (**INGOs**), which the Department of Foreign Affairs and Trade (**DFAT**) administered process for registration as an Overseas Aid Gift Deductibility Scheme organisation currently provides. Allocation to the ATO could lead to the unintended consequence of lowering the bar for international DGRs. Again, if for simplification migration is desired, consideration should be given to migrating this register to the ACNC with additional resources to enable ACNC to link into the expertise at DFAT.

If the ATO is to become the sole administrator of the four DGR registers they ought to be subject to the usual administrative review and appeal mechanisms.

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?

It is well established that charities must have a main, dominant or predominant purpose,[5] and in addition, organisations must fulfil a 'principal activity' or 'principal purpose' test under tax legislation. For example, harm prevention charities, animal refuge/rehabilitation charities and health promotion charities are required to have a 'principal activity',[6] whereas registered environmental organisations are required to have a 'principal purpose'.[7] In determining the 'principal activity' the ACNC has indicated that this must be the 'main purpose' even where that may not constitute 50% of the collective activities.[8] In the LIV's view, there will be difficulties in determining the charitable purpose of an organisation that has multiple DGR categories.

In relation to the regulatory compliance savings that this measure may afford, the LIV notes that section 30-130(3) of the *Income Tax Assessment Act 1997* (**ITAA97**) allows for public funds to be consolidated into a single bank account of an entity, which assists to reduce complexity and red tape.

The LIV is otherwise amenable to a review and, ultimately, streamlining of the 'responsible person' definitions used by the ATO and ACNC. However, it suggests that such a review would also be an opportunity to expand and modernise the categories of responsible persons.

[5] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204.
[6] *Income Tax Assessment Act 1997* (Cth) ss 30-289, 30-45.
[7] Ibid s 30-265.
[8] Australian Charities Not-for-profit Commissioner, *Commissioner's Interpretation Statement: Health Promotion Charities: CIS 2015/D1* (29 March 2017) <http://acnc.gov.au/ACNC/Publications/CIS_HPC.aspx>.

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?

The LIV submits that implementation of the type of rolling reviews recommended in the Discussion Paper would involve unjustified costs and red tape.

In the first instance, the LIV queries the purpose of introducing such a review and certification program where the Discussion Paper has not identified any evidence that this is required.

Further, the LIV suggests that there are more efficient methods that could be implemented in the place of a rolling review program, such as resourcing the ACNC to undertake a risk-based review of its charities Register to ensure its integrity. Since the migration of registered charities from the ATO to the ACNC in 2012, there has not been a risk-based review of the Register. Such a review may reveal charities on the current Register that are unlikely to meet requirements and that have not yet had to demonstrate their ongoing eligibility to the ACNC to remain registered.

Alternatively, the LIV suggests the implementation of an approach that is similar to the one currently adopted by the Charity Commission of England and Wales (CCEW).[9] The CCEW uses a risk-management methodology for maintaining an accurate register of charities. CCEW identify an area by risk-analysis, release a draft statement of their understanding and administration of the law for public comment and this in turn encourages charities to engage with the regulator in a constructive manner. Once consultation is complete a final statement is released with education materials. This allows the regulator to undertake specific audits on at-risk charities identified by the consultation process.

Given the cost and compliance burden, any increase in reporting must be supported by evidence that identifies the harm and describes the benefit. Implementation of any measures to address an identified harm must be proportionate. The LIV notes that such review powers already reside with the ATO and ACNC, and the regulators have established proven records in using these powers to good effect to the extent that they have been adequately resourced.

It is also noted that, under current arrangements, relevant Ministers can make regulations that require entities with DGR status to report on the use of its tax-deductible donations. For example, the Minister responsible for the Register of Harm Prevention Charities can, under section 30-289 ITAA97, make rules "to ensure that gifts made to the fund are used only for its principal activity". The Minister has the power to make further rules around advocacy through a legislative instrument; however, such instruments are subject to Parliamentary scrutiny.

The LIV does consider that annual certifications, depending on the processes entailed, may prove useful in assisting charities to consider each year what their DGR obligations are.

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

The expertise of the ACNC and ATO should be respected, and they should be allowed to independently what types of reviews and audits are necessary, and in what circumstances.

If a review is conducted, any focus on a sector or organisation must be informed by an independent and transparent framework, such as the risk-based approach described in the LIV's response to Question 9, above, and through the review mechanisms which the ACNC and ATO can already employ. Reviews may be a resource-intensive process for the regulators.

The LIV recommends that a 'light touch' regulatory approach be adopted to enable the ACNC and ATO to carry out their functions

[9] The Charity Commission, *Reviews of the charity* register (1 December 2012) <https://www.gov.uk/government/collections/reviews-of-the-charity-register>.

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?

The LIV considers that a general sunset rule of five years for specifically listed DGRs, as contemplated in the Discussion Paper, is unnecessary.

A general sunset rule introduces uncertainty, and may cause significant disruption and unnecessary burden on organisations that are already listed. Sunsetting prevents DGRs from developing long-term strategic plans and, therefore, undermines the effectiveness of the sector and, ultimately, the ability for supporters and partners to have confidences in the sector.

Further, the process for the listing of specifically listed DGRs is often a political one, so organisations would risk revocation from the list in line with political cycles. Objective standards will need to be established to ensure that any review process is removed from political considerations, and can be subject to administrative review. This would, however, undermine the flexibility of the specific listing mechanism.

In respect of charities that are specifically listed and also registered on the ACNC website, reviews should only be triggered where, on a risk-based approach, evidence of disqualifying purposes are identified.

The LIV also queries as to what constitutes 'exceptional circumstances'. It notes that specifically listed DGRs are already accountable under section 353-30 of the *Taxation Administration Act 1953* (**TAA**), where a review mechanism is already in place.

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 LIV strongly opposes any requirement on environmental organisations to commit a proportion of their annual expenditure from their public fund to environmental remediation. Such a requirement has no justification under Australian law.

Autonomy and integrity of charitable organisations

In the LIV's view, such a requirement represents an unreasonable intrusion on the autonomy of environmental organisations to determine how they should go about achieving their purposes. Charities and their supporters are in the best position to determine what approaches are most appropriate in order to achieve their charitable purposes.

The ability for environmental organisations to fulfil their obligations depends less on the fact that it can direct its efforts to environmental purposes than 'what it does in pursuit of each of them': *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* [1943] HCA 34. There are many different activities that organisations utilise in order to achieve their purposes and these ought to not be curtailed through a legislative obligation to commit an arbitrary percentage of their public fund to one particular activity.

An organisation's ability to use its powers to employ commercial methods to raise money for its purposes is not in contrast with its charitable activities, as noted in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 2014 (***Word Investments***), and 'to point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterisation of an institution as commercial and characterisation of it as charitable'.[10]

[10] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204, 219 [24].

In contrast with the decision in *Word Investments*, a fund allocation requirement restricts the ability for environmental organisations to determine what approaches are most appropriate in order to achieve their charitable purpose, and to adopt effective long-term fundraising strategies. Environmental organisations should be free to invite the community's support for their adopted approaches, and in keeping with the purpose for deductible gifts, should be encouraged to rely on such support.

Inconsistencies with tax law

A further increase on the percentage of the target – for example, a requirement that over 50 per cent of annual expenditure from public funds must be dedicated to environmental remediation – would also be inconsistent with requirements for environmental organisations under subdivision 30E of the ITAA97, which deals with the register of environmental organisations.

Section 30-265 of ITAA97 provides that an environmental organisation's "principal purpose" 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.

Increased red tape

Any unreasonable conditions on the expenditure of funds would impose new and unjustified administrative and reporting burdens on environmental organisations, and constrain their capacities to achieve their charitable purposes.

An increase in red tape was considered in the Report on the Inquiry into the Register of Environmental Organisations. In the Report, dissenting comments noted that many important environmental organisations with DGR status would not meet the 25 per cent target. It was suggested that in attempting to meet such a target, legitimate environmental organisations would face increased reporting burdens, which would be counter-productive and cumbersome.[11]

It was further noted that the remediation requirement is inconsistent with a vast majority of the submissions made to the Inquiry, suggesting that it would increase red tape and treat environmental organisations differently from all other not-for-profits without justification. These submissions note the ability for businesses to claim deductions in respect of the costs of their advocacy without any similar limitations of the kind recommended to apply to environmental organisations. Finally, the submissions characterise the recommendation in the Report as a deeply concerning proposal to restrict freedom of political speech.[12]

Shifting responsibilities

The LIV queries the justification of requiring environmental remediation to be conducted by charities. Such a requirement represents an inappropriate shifting of the responsibilities of environmental harm caused by businesses and government, to the not-for-profit and charities sector.

[11] Standing Committee of the Environment, House of Representatives, *Inquiry into the Register of Environmental Organisations* (April 2016) 86.
[12] Ibid 92.

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?

The LIV queries the focus of the Discussion Paper on environmental organisations and questions the need for the proposed measures where there does not appear to be evidence of such organisations carrying out unlawful activities.

The LIV submits that existing charity law already sets appropriate boundaries for the scope and extent of advocacy activities by charities, including environmental organisations.

There are sufficient sanctions in place to ensure, for example, environmental charities are operating lawfully. The issue of the use of sanctions or deregistration for illegal activities was discussed in the case of *Greenpeace of New Zealand Incorporated* [2012] NZCA 533. White J noted that:

> "*There is no dispute that a society that pursues illegal or unlawful purposes or activities is not entitled to registration as a charitable entity under the Act and that a registered society with lawful charitable purposes which pursues them through illegal or unlawful activities should lose its registration …The question whether involvement by Greenpeace or its representatives or agents in an illegal or unlawful activity will be sufficiently material or significant to preclude registration or justify deregistration will be a question of fact and degree in each case.*"[13]

This has been reflected in the ACNC's guidance materials in relation to Charities, Elections and Advocacy which states that: "[a] charity with a purpose of advancing the natural environment cannot have a purpose of encouraging its members to engage in illegal methods such as intimidation, trespassing or assault to promote a change to the law regarding logging."[14]

In addition to deregistration, organisations registered as charities are subject to governance standards. Non-registered charities that are incorporated as associations or corporations are also subject to state laws and their officer's subject to the duties and obligations under their incorporated association legislation or *Corporations Act 2001* (Cth) and are required to comply with regulatory bodies, tax law, electoral legislation and criminal law.

Further consultation and contact

The LIV would be pleased to discuss this submission with you in greater detail. Please contact Barton Wu, LIV Commercial Law Section Lawyer, on (03) 9607 9357 or at bwu@liv.asn.au, to arrange a time to meet together with representatives of the LIV Not-for-profits & Charities Committee.

Yours sincerely,

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[13] *Greenpeace of New Zealand Incorporated* [2012] NZCA 533, 569 [96].
[14] Australian Charities Not-for-profit Commissioner, *Charities, elections and advocacy* (April 2016) <https://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx>.