



National Environmental Law Association

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Dear Sir / Madam

Tax Deductible Gift Recipient Reform Opportunities: Discussion Paper 2017

The National Environmental Law Association (**NELA**) welcomes the opportunity to provide comments to Treasury in response to the *Tax Deductible Gift Recipient Reform Opportunities: Discussion Paper*.

NELA is Australia's leading national environmental law organisation. NELA's members are professionals in environment and resources law and related disciplines, including practising and non-practising lawyers, academics and law students. NELA's vision is that ecological sustainability is a guiding principle in regulating energy and resources, utilities, pollution, protecting biodiversity and cultural values, and land use planning and infrastructure.

NELA engages in advocacy focused on environmental aspects of the rule of law, and does not currently engage in on-ground environmental works. NELA seeks to protect the environment by shaping the law through information sharing, analysis and debate.

This submission responds to selected consultation questions only:

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?*

NELA supports the use of DGR provisions¹ to enable non-for profit (**NFP**) civil society organisations to receive funds that entitle donors of those funds to claim a tax deduction. NELA also supports the public good incentive that DGR status provides that encourages private and philanthropic support for organisations in the NFP sector, particularly in an environment in which government support for such work is increasingly limited and competitive.

NELA agrees with the suggestion in the Discussion Paper that the eligibility criteria for DGR status ought to be better harmonised and simplified, and that diverse registers should be consolidated and administered by one entity, preferably the *Australian Charities and Not-for-profits Commission (ACNC)*. Further consultation with the NFP sector should occur regarding any proposed changes to definitions, eligibility criteria, or governance requirements.

¹ Division 30 of the *Income Tax Assessment Act 1997* (Cth) (Gifts and Contributions)

In particular, NELA considers there is a need to review the definitions currently applicable to NFP environmental organisations to improve consistency and capture the broad range of activities legitimately conducted by such organisations.

The *Income Tax Assessment Act 1997 (ITAA)* defines ‘environmental organisation’ in [s 30-260](#), [30-265](#) and [30-270](#) and these definitions must be met for an environmental organisation to be entered into the Register of Environmental Organisations, currently administered by the Department of the Environment and Energy.

NELA does not object to the application to charitable NFP organisations of the governance standards in the *Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC Act)*.

However, NELA regards the definition of charity used in the ACNC Act, relying on the definition in the *Charities Act 2013 (Charities Act)*² to be too narrow. The 12 charitable purposes listed in the Charities Act include:

- (i)... *preventing or relieving the suffering of animals;*
- (j)... *advancing the natural environment; and*
- (k) *any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the [other] purposes mentioned in paragraphs (a) to (j).*

As outlined further below, NELA considers that “advancing the natural environment” necessarily encompasses advocating for laws and policies that require and facilitate protection or sustainable use of the environment. However, the terms in (j) and (k) may not be sufficiently broad to capture social and cultural aspects of the environment, particularly in relation to indigenous connection to country, the intrinsic value of nature, or heritage aspects of the built environment.

This is in contrast to the broad definition of “environment” used in s.528 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)*:

- ecosystems and their constituent parts, including people and communities; and*
- natural and physical resources; and*
- the qualities and characteristics of locations, places and areas; and*
- heritage values of places; and*
- the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), or (c).³*

NELA recommends the adoption of broader definitions of charitable purposes to ensure that aspects such as climate change, Aboriginal and Torres Strait Islander cultural heritage (including maintenance, and evolution, of traditional practices), and environmental regulation would be activities and purposes that would qualify an environmental organisation for charitable status.

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| <p>4. <i>Should the ACNC require additional information from all registered charities about their advocacy activities?</i></p> |
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NELA does not support accountability reporting requiring organisations to details their advocacy activities – provided the activities of the organisation are in furtherance of its

² ‘Charity’ is defined in section 5 of the *Charities Act 2013 (Cth) (Charities Act)* and ‘charitable purpose’ is defined in section 12 of the Charities Act.

³ section 528: Australian Government, Department of Sustainability, Environment, Water, Population and Communities, *Environment Protection and Biodiversity Conservation Act 1999 (Cwlth), Policy Statement (2013)* <http://www.environment.gov.au/resource/epbc-act-policy-statement-definition-environment-under-section-528-epbc-act>.

objectives, such reporting is an unnecessary constraint on lawful political engagement, and an excessive administrative burden.

Where charities engage in unlawful activities, or activities that are inconsistent with their approved charitable objectives, disciplinary provisions already exist within the criminal law and accountability provisions in the ACNC Act.

As outlined in response to Q12 below, NELA considers that the advocacy activities of environmental organisations are a critical component of environmental protection. NELA considers that the Australian Government should protect the right of Australians to enjoy a safe, clean, healthy and sustainable environment, and the substantive and procedural rights that enable that overarching right to be realised. As noted by the UN Special Rapporteur on the issue of such human rights obligations, John H. Knox, in a 2017 report:

*The procedural human rights obligations of States in relation to the environment include duties: (a) to assess impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm (see A/HRC/25/53, para. 29). They are supported by provisions in international environmental instruments, including principle 10 of the 1992 Rio Declaration on Environment and Development.*⁴

This was echoed by the Australian Panel of Experts on Environmental Law in its paper on Environmental Democracy:

*Australia needs improved procedural environmental rights, including rights to information, to public participation, and to accessible and just remedies in circumstances of demonstrated environmental harms and/or breaches of environmental laws. These improvements would extend the effectiveness of environmental protections and facilitate the involvement of communities in advocacy for clean and healthy environments.*⁵

Given the important role of environmental advocacy, NELA considers that advocacy is a legitimate activity of NFP environmental organisations in pursuit of their objectives and a separate accountability mechanism for that aspect of an organisation's activity is unwarranted.

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?*

NELA supports the removal of the public fund requirements for charities and for the ACNC definition of 'responsible person' to apply, as this will simplify requirements in relation to accounting for tax deductible donations.

NELA's view is that the current requirement that NFP charities maintain a separate public fund is unnecessarily burdensome (particularly for small organisations) given professional regulatory requirements, directors' legal obligations, and accessible reporting under modern e-banking.

Reform is also needed so that the definition of 'responsible entity' does not differ across several Acts, such as the ACNC Act and as used by the ATO for DGRs.

⁴ United Nations General Assembly, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretariat*, Human Rights Council, Thirty-fourth session 27 February-24 March 2017, UN Doc A/HRC/34/49, 19 January 2017, para 27.

⁵ Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017).

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?

NELA strongly opposes any requirement for registered environmental organisations to commit a minimum proportion of their donated funds to environmental remediation. While remediation activities are an important component of environmental protection, advocacy for regulatory frameworks that set standards, prevent or manage harmful activities, require monitoring and enforcement, and provide for public participation are also critical.

Requiring all NFP environmental organisations to engage in remediation activities could unreasonably divert resources in those organisations specialising in environmental advocacy, education, research and litigation. Given the limited resources available across environmental organisations, allowing for specialisation is an efficient use of funds directed towards environmental goals.

Many of the human rights instruments that Australia has ratified protect democratic participation, and NELA is concerned that a proposed limitation on advocacy activities would be inconsistent with those instruments.⁶

Imposing such an obligation on only one type of charitable civil society organisation (environmental organisations) could also be regarded as burdening freedom of association and freedom of expression in a way that other charitable civil society organisations are not subject to. Such a regulatory burden could be construed as an impediment or constraint on advocacy activities that fails the 'proportionality test' of whether the purpose of a statutory constraint on the implied constitutional freedom of political communication is suitable, necessary and adequate, and therefore compatible with Australia's system of representative government. There is no compelling public benefit in limiting lawful advocacy aimed at better protecting the environment.

The High Court of Australia by majority in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 held that Aid/Watch, an organisation that pursued political campaigns and public debate focused on changing Australia's foreign aid policies, was a charitable institution for the purpose of tax exemptions and concessions. The High Court held that Aid/Watch was a charitable institution notwithstanding that it sought to influence government policy through its activities. A majority of the High Court recognised that promoting public debate can contribute to the efficacy of government policies, and affirmed the view that free communication on matters of government and politics is an indispensable incident of the system of representative and responsible government established by the Constitution. Just because an organisation has a political object and engages in political activities that does not negate its capacity to contribute to charitable outcomes and public welfare.

In its later decision in *McCloy & ORS v State of New South Wales & Anor* [2015] HCA 34, the High Court upheld a cap on political donations from property developers as an appropriate means of pursuing the legitimate objective of removing the risk and perception of corruption and undue influence in New South Wales politics. That case concerned legislative restrictions on business entities and individuals who were property developers rather than civil society organisations.

⁶ e.g. International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976 .

This argument was developed along similar lines in the Law Council of Australia's submission to the House of Representatives Environment Committee's *inquiry into the Register of Environmental Organisations*.⁷

NELA considers that Europe's approach to participation by civil society organisations in public policy debates and political governance is appropriate for democratic societies. The Council of Europe, for example, protects the political space within which civil society organisations are permitted to operate in many countries. Political freedoms are sourced in:

- the European Convention on Human Rights;
- Recommendation CM/Rec (2007)14 of the Committee of Ministers on the legal status of non-governmental organisations in Europe; and
- the *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention)*.⁸

A report of a debate in 2016 on the issue of civil society, money and political activities organised by the Council of Europe is attached as it is highly relevant to Australia's policy development. It refers to 'NGOs under threat' with freedom of association constrained. The report notes the need for more funds and capacity-building activities to be available to civil society NFP organisations to enable their democratic participation. The report notes the need for human rights defenders to be specifically protected (and this includes defenders of the right to a safe and healthy environment).

Thank you for the opportunity to comment on the Discussion Paper. If you wish to discuss any of the matters raised in this submission, or if you have any questions, please contact me via secretariat@nela.org.au. NELA would welcome the opportunity to appear at any public hearings held in relation to this issue.

Yours sincerely



Jess Feehely
NELA President

With thanks to Dr Hanna Jaireth for her assistance in preparing this submission.

⁷ Australian Parliament, House of Representatives, Standing Committee on the Environment, *Inquiry into the administration and transparency of the Register of Environmental Organisations (the Register) and its effectiveness in supporting communities to take practical action to improve the environment*, Submission 662, June 2015.

⁸ adopted 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001). Although a European-based instrument, the *Aarhus Convention* contains principles and rules similar to Principle 10 of the Rio Declaration on Environment and Development that Australia agreed to in 1992: www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1.



CONFERENCE OF INGOs
OF THE COUNCIL OF EUROPE

CONFERENCE DES OING DU
CONSEIL DE L'EUROPE

July 2016

**“Only a matter for politicians ? Civil Society, money and political activities”
Debate organised by the Conference of INGOs on 6-7 June 2016 at the Council of Europe**

Report

The debate considered three interrelated dimensions - freedom of association, political activities of NGOs and foreign funding for NGOs - which are essential in order for NGOs to play their role in a pluralist democracy and for the protection of human rights. The debate aimed at identifying the needs for protection, proposing changes to strengthen freedom of association and at taking preventive measures so that restrictions do not spread and human rights could be reinforced where the rights and freedoms recede. The overall aim is to ensure that NGOs are considered in their diversity as democratic actors and not only as agencies implementing governmental decisions. This is the concern of the Council of Europe: where human rights NGOs and human rights defenders are persecuted, collective efforts should be employed to usher those member states back to their commitments to the Convention on Human Rights.

General information

The debate gathered some 80 participants representing NGOs, governments, donors and international organisations under the chairmanship of Anna Rurka, President of the Conference of INGOs. It was transmitted live on the internet.

Intigam Aliyev, human rights defender from Azerbaijan and member of the Expert Council on NGO Law of the Conference of INGOs was the keynote speaker at the opening. Upon request of the Council of Europe and the Conference of INGOs, he had received authorisation to leave the country despite his travel ban.

Representatives of Council of Europe bodies chaired the three thematic sessions:

- first session on freedom of association: Nils Muižnieks, Commissioner for Human Rights
- second session on political activities: Yves Cruchten, Luxembourg, Socialist Group, Parliamentary Assembly of the Council of Europe
- third session on foreign funding: Cyril Ritchie, President of the Expert Council on NGO Law

Astrid E. Helle, Chairperson of the Ministers' Deputies Rapporteur Group on Democracy, participated in the opening session and Snezana Samardzic-Markovic, Director General of Democracy addressed the audience in the closing session. Speakers came from some 15 different countries. The multi-stakeholder setup facilitated a critical analysis of the situation and helped to identify possible solutions beyond the beaten paths. Participants appreciated that the Conference of INGOs offered a platform for open dialogue on major challenges faced by civil society and were grateful for the opportunity of sharing experience and networking.