Submission to:

Tax Deductible Gift Recipient Reform Opportunities Discussion Paper, 15 June 2017

Australian Treasury

I make this submission as a businessman (Director of three companies), environmental scientist and researcher with over 40 years of experience in my fields of expertise. I have worked in mining and oil and gas and other industries, major and minor developments, land clearing proposals, community projects, agriculture and tourism. I am a Councillor on the Ecosystem Science Council, a Director of the Ecological Society of Australia, a Certified Environmental Practitioner (CEnvP), and an Environmental Lead Auditor. I am also an Adjunct Principal Research Fellow at James Cook University, and a University Fellow at Charles Darwin University. I hold a PhD and a Master of Science degree.

I appreciate the opportunity to make a submission on review options for Tax Deductible Gift Recipient (DGR) status, particularly proposals to reduce administrative burden on charitable organisations.

The preamble to the discussion paper states: *The DGR tax arrangements are intended to encourage philanthropy and provide support for the not-for-profit (NFP) sector. Along with other tax concessions to the NFP sector, DGR status encourages the delivery of goods and services that are of public benefit.* These are important points, which bear further scrutiny. Philanthropy for non-profitable and non-commercial activities has been a mainstay of Australian governance for over a century, and is a vital element of our society. Philanthropy comes from both business and individuals, some with interests in the beneficiaries of their largesse, some with little or no direct interest, other than the intention to support worthy public benefit causes. The evidence of membership and contributions to environmental charities demonstrates clearly that many people support the purposes of these organisations, and consider them to be able to undertake research, education, advocacy and on-ground works which they support. In many cases, concerned citizens as contributors have little expertise in environmental matters, so expect that the organisations they support will represent their views and concerns, otherwise they will withdraw their support. The environmental charities provide great public good, and are sometimes the only responsible alternative voices to executive excess and undesirable proposals put by government and profitable businesses.

Main concerns

I am concerned about several aspects of the proposals, and trust that the committee that reviews submissions takes my concerns into account.

1. Item 15 of the Discussion Paper suggests that there are '*concerns that some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community, particularly by environmental DGRs which must have a principal purpose of protecting the environment*'. We live in a democracy in Australia which places

value on the rights of people to make reasonable representations on matters that are important to them. Just because some people may object to the views of others does not de-legitimize either or any views. Although the concept of a 'broader community' is not quantified in the discussion Paper, it is not the role of the broader community to determine what is right and what is not. Our laws and rules provide voice and rights to all members of the Australian community, and it is the role of government and its instrumentalities to govern for all. The broader community may not have a full or adequate understanding of how the environment should be protected. Advocacy groups have a legitimate role in challenging proposals and developments, and alerting the broader community, to impacts of and to incorrect or misleading information on proposals that can have detrimental effects on the environment. Part of the role of environmental organisations is to provide a counter argument to those who are arguing for projects that otherwise may have a detrimental impact.

2. Item 20 states in part: '*The Government provides a substantial financial contribution to NFP entities through tax concessions. The cost to the Commonwealth of deductions from donations to DGR organisations is $1.31 billion in 2016-17 rising to an estimated $1.46 billion in 2019-20.*' I think this is a misleading representation of the situation. Equating DGR status to a subsidy from the taxpayer or an expenditure by the Commonwealth is incorrect. Tax deductions allow an individual or business to keep more of their, not the Government's, money. They are not an expenditure by the government, and as such, it is mistaken to conflate this status with a form of subsidy, as was rightly pointed out by the Australian Taxpayers Alliance in 2016 in their submission to the Inquiry into Environmental Organisations. In fact, identifying possible or real problems in advance can avoid significant expenditure by Governments, in the order of billions of dollars. Tens of thousands of abandoned mines without any funds to remediate are a prime example.
3. the proposal to require environmental organisations to commit 25-50% of annual expenditure on remediation activities does not fit the legitimate purposes of many environmental organisations. I object strongly to this proposal as it imposes unfair rules on activities which fit the legitimate rules for registration as an environmental organisation, and those for Deductible Grant Recipient (DGR) status.
4. I am particularly concerned about proposed restrictions on the ability of environmental organisations to advocate for their legitimate charitable purposes, and to advocate against actions which militate against these purposes, including protection of and enhancement of the Australian natural environment. I consider this to be contrary to our rights as Australians enshrined in the Australian Constitution, and to Acts and policies, High Court determinations, and findings of Senate investigations, Commissions of Inquiry and so forth. I am concerned that removal of this capacity will further enable development interests with their powerful lobby groups to develop projects that are likely to affect Australian ecosystems and the natural environment. It is often that the Australian public is able to provide the scrutiny that Government is unable or unwilling to provide (through constraints imposed from within) only through the advocacy of environmental organisations.

   The proposal to restrict advocacy has been made by opponents of public opposition, in

particular several Minerals Councils and advocacy groups[1], and some business and taxation advocacy groups, each of which is supported and funded by vested interests. The concerned public's only recourses are to make their voices heard individually, or through environmental organisations that are able to give a counter-voice to proposals that may not be wise or sound, or indeed be based on incorrect assumptions or false information. In fact, proposals and developments that will or may have an effect on the environment require a social licence to carry out their proposals. Their social licence includes full transparency to the public about the consequences and effects of their proposals, and it is often only the environmental organisations that have the skill to identify inadequacies in proposals and to challenge them. The social licence should extend to the public's right to know and be assured that proposals will not be unacceptable.

Discussion

In short, it is clear that some of the submissions to the inquiry into Environmental Organisations, such as the Minerals Council of Australia, NSW Minerals Council, and the Australian Taxpayers' Alliance have the clear intention of reducing opposition to their proposals from the public, who funds these organisations. Removal of this status is likely to reduce the capacity of the organisations to attract funding from the public and businesses.

I make the point that as a businessman of 30 years, having been Director of three firms, I am only too aware that businesses have many deductible expenses. Membership of and contributions to professional organisations, such as Minerals Councils, Business Councils and the Environment Institute are considered to be business expenses, or tax-deductible expenses. In many cases the effectiveness and success of business depends on the capable advocacy of the organisations that represent their interests, to Government, Politicians, and the public to implement or change the rules that favour or protect business. As a long-term (30+ years) member of the Environment Institute, I am aware of the advantages.
But I note also that contributions to environmental organisations, where tax-deductibility is available, makes it more attractive to donate to environmental organisations (and others), because Corporate Social Responsibility (CSR) is dependent on the good will, and profitability of the company making those contributions. Donations are often made at the expense of profits to the company. The public does not have the opportunity to make business expenses to environmental organisations as the latter are mostly not legitimately linked to contributors' work or professions, so their only option is to make donations to organisations that they support, and tax deductibility makes these more attractive. Removing tax deductibility would reduce the ability of these organisations to attract funding, clearly a goal of those organisations that want to impose the restrictions on environmental organisations' activities or remove their DGR status.

Removing DGR status from environmental groups goes against the principle espoused in the Discussion Paper, Item 3, of encouraging philanthropy and providing support for the NFP sector.

[1] See for example Minerals Council of Australia submission (497) to the House of Representatives Standing Committee on the Environment Enquiry into Register of Environmental Organisations 2015.

Environmental activity, including advocacy, research, education, and restoration works are all essential for the Australian environment and society. It is better and more cost-effective to prevent unnecessary or avoidable harm to the environment than to try to rehabilitate through on-ground works after the fact. The Taxation rules for environmental organisations were established recognizing these principles. I consider that Australian Taxation and charity law was established to recognise and support a wide range of services for the public good, and restrictions on the types and scope of activities are sufficient as they stand.

Environmental organisations that hold DGR status often have very limited numbers of people and resources and would find it impossible to undertake on-ground works as mooted in the Discussion Paper. They nevertheless provide a public benefit by enabling people with interest in the environment to hear and discuss environmental issues which otherwise would not be provided, not by government and not by private businesses. In many instances, environmental organisations have identified environmental impacts, such as pollution events, that government and industry failed to identify.

The not-for-profit environmental sector provides a public service in holding governments and statutory authorities accountable for their actions, and in some cases provides a level of scrutiny beyond that provided by hard-pressed public servants. Examples are rife of such scrutiny that identified mistakes and anomalies, and sometimes omissions of important information needed to make decisions that affect many or all Australians.

Finally, private businesses that support environmental organisations as well as their own business organisations and professional societies, may find that removing tax-deductible status was a dis-incentive for some businesses to donate to environmental organisations. The disincentive would apply also to private individuals who are not businesses, as there is incentive to donate to charities and environmental organisations if there is a tax-deductible benefit.

In summary, I suggest that Treasury:

- Continues to allow deductible gift recipient status for environmental organisations;
- Continues to recognize the broad nature of environmental organisations', including advocacy, research, education, and on-ground works (where the organisation's objectives include such) and not impose a requirement for 25-50 5 on-ground activity, and;
- Bring all charities under the administration of the *Australian Charities and Not-for-profits Commission* (ACNC) to streamline the process and improve consistency, and provide an arms-length determination role that reduces the potential for political interference; and
- Implement some limited changes to the administrative rules and procedures to improve efficiency.

<u>Responses to Discussion Paper Questions</u>

Q 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?

I generally support this proposal, but care should be taken on interpretation. The *Charities Act 2013* defines charities to include 'the purpose of advancing the natural environment'. The Income

Tax Assessment Act has a broader and more appropriate definition. For instance, the meaning of an 'environmental charity' in the *Charities Act 2013* is 'advancing the natural environment' and this could be used to advocate a narrow definition of 'advancing'.

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

I have no comment.

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

I make no comment on this question.

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

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

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

These questions are linked, so I have answered them together.

No, the ACNC should not require additional information about their advocacy activities, as the existing rules are adequate and it disadvantages environmental organisations over advocacy and lobby groups from industry and commerce, who are not restricted in their advocacy activities other than to act within the laws of Australia.

Registration through the ACNC as a charity establishes sound arrangements regarding administration, oversight, structure, reporting and governance. It also establishes an arms-length determination process from government departments which might otherwise frustrate registration of NGOs that have challenged or might challenge departmental or ministerial proposals and decisions.

Annual statements and reporting requirements are adequate in providing information on activities of environmental organisations. The information is public and accountable, and there are other checks and balances in the *ACNC Act* and the *Charities Act* and associated procedures.

The ACNC was established in 2012 to address some issues with the earlier procedures, and has improved and streamlined reporting, registration procedures and requirements, transparency, and compliance. These continue to serve the Australian public well.

Environmental organisations are accountable also to the public and their members, and anyone who feels that an environmental organisation is exceeding its mandated purpose is entitled to

register objections to the ACNC, their elected representatives and others. The ACNC web page[2] describes the scope of its powers to investigate complaints about a charity:

> 'The ACNC has the power to investigate and will be particularly concerned where it is alleged that a charity:
>
> - is not entitled to be registered as a charity or as a specific subtype (subtypes must match the charity's purpose)
> - has not met ACNC requirements to keep appropriate
> - has not met ACNC requirements to provide accurate information, such as financial information or details of its responsible persons (members of its board or committee, or trustee)
> - has used funds or assets for non-charitable purposes, such as for the private benefit of its members, or these have been stolen
> - has not been accountable and transparent to its members (it may have failed to hold an annual general meeting or similar)
> - has been involved with fraud or criminal activity (the person raising the concern will be asked if they have contacted the police)
> - has failed to ensure that its responsible persons (committee or board members, or trustees) are suitable and not disqualified
> - has failed to ensure its responsible people have complied with their duty to act in good faith, with a reasonable degree of care and diligence, in the charity's best interests and pursuing its purpose
> - has failed to ensure its responsible people have complied with the duty to disclose perceived or actual conflicts of interest and not to misuse their position or any information obtained in the performance of their duties. '

These checks and balances are sufficient to ensure that charities, specifically environmental charities, do not exceed their mandated purposes.

We are acutely aware that those advocating for changes to these provisions, such as the Minerals Council, would like to restrict environmental organisations from opposing their activities, and have misrepresented (see footnote 4) the scope of charities to advocate. The *Charities Act 2013* is quite clear on advocacy in Section 12:

> (j) the purpose of advancing the natural environment
>
> (l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
>
> (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
>
> (ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

Therefore the *Charities Act* legitimizes advocacy for the approved purposes of the charity. It is also recognized as a fundamental right of Australian democracy and legal precedent, as in the High Court case Aid/Watch v Commissioner of Taxation 2010[3]. In particular, the High Court noted that a previous case that triggered the Aid/Watch case '*was decided in a context which did not take*

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2 http://www.acnc.gov.au/ACNC/Contact_us/Raise_Concern/ACNC/Adv/Raise_Concern.aspx?hkey=5fe0e51d-b2e3-4417-8de9-799d0f90b483; accessed 27 July 2017

3 http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/S82of2010/00001; accessed 27 July 2017

account of the Australian Constitution, and the inherent right of constituents for agitation and communication about matters affecting government, politics and policies'.

I also draw Treasury to the Productivity Commission's view that:

> Strategic advocacy, law reform and public interest litigation are areas where there are few incentives for private lawyers to act. Private lawyers are focused mainly on achieving outcomes for individual clients. They are less interested in achieving broad-based reforms that could result in positive outcomes for the wider community. There are good reasons for this. Where individuals are the principal beneficiaries of services, private lawyers can charge for the work that they undertake. But lawyers are unlikely to be able to charge for work that benefits the entire community.[4]

This extends to environmental organisations, whereby they often represent public good issues and advocate for or oppose change, sometimes ending up in Australian courts for resolution.

I oppose the collecting of additional information from registered charities about their advocacy activities. The existing ACNC reporting requirements are sufficient.

Q 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?

I support the proposal to transfer administration of the registers to the ATO in order to reduce administrative costs on organisations applying for DGR status. This proposal removes the opportunity for ministerial, political and governmental interference from decisions on DGR registration, status, performance, and compliance.

Q 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?

No comment.

Q 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?

No comment, other than I would urge that any actions in this area do not increase the burden on environmental organisations.

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

No comment.

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[4] *Productivity Commission, Access to Justice Arrangements*, 2014, Inquiry Report, Volume 2, No 72, 5 September 2014, p. 708.

Q 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?

No comment.

Q 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?

This proposal could require a number of environmental organisations to commit money and time to activities that are not part of their primary purposes nor within their capacity and expertise to do. Environmental protection and enhancement requires investigation and research, public education, capacity-building and on-ground activity, and advocacy for the purposes of the organisation and against actions which may be detrimental to the organisation. The proposal could restrict the ability and freedom of organisations to undertake their work in an effective manner. It will result in added and unnecessary burdens on environmental organisations, and wastage of resources. In many cases in my experience, environmental organisations have been established for worthwhile objectives, such as protecting species (e.g. the Tree Kangaroo and Mammal Group of Far North Queensland) but they, like many organisations, do not have the resources to commit to 'on-ground works'. The changes would also leave major representative organisations like the Ecological Society of Australia (of which I am a Director and member) in a difficult position as the Society does not do on-ground works, although many of its members, including myself, do.

I object strongly to this proposal.

Q 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?

I think that the current standards, policies, laws and regulations are sufficient.

Sincerely

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[redacted]

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4th August 2017