THE UNIVERSITY of ADELAIDE

Public Law & Policy Research Unit

Submission to Treasury on the Tax Deductible Recipient Reform Opportunities Discussion Paper 15 June 2017

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The Public Law & Policy Research Unit (PLPRU) contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. The tax law sub-group of the Regulation of Corporations, Insolvency and Taxation Research Unit (ROCIT) contributes an independent scholarly voice on issues of the regulation of tax law and policy and is primarily engaged in research that investigates the impact of the Australian tax system, particularly with respect to the income tax, excise and SGC regimes, upon the various industry segments in Australia and the various participants in each industry. Both Research Units provide expert analysis on government law and policy initiatives and judicial decisions and contribute to public debate through formulating their own law reform proposals.

1. Introduction

We thank the Australian Government Treasury for the opportunity to make a submission on the Tax Deductible Recipient Reform Opportunities Discussion Paper, 15 June 2017.

Our submission will focus on the following:

- The role of environmental organisations and the function of deductible gift recipient (DGR) status;
- The definition of environmental organisation under item 6.1.1 of subsection 30-55(1) of the *Income Tax Assessment Act 1997* (ITAA 1997);
- The role of charitable advocacy, with a focus on environmental organisations;
- The appropriate proportion of an environmental organisation's public fund that should be committed to environmental remediation; and
- The appropriateness of the imposition of sanctions for environmental DGRs that encourage, support, promote or endorse illegal or unlawful activities.

1. The role of environmental organisations and the function of DGR status

Environmental organisations engage in activities that are not for personal gain but are for the public good. Providing environmental organisations with DGR status serves the purpose of assisting organisations to develop a donor base, and thus have a pool of funds to further their activities. The provision of DGR status is a recognition that activity in the public realm is not the sole responsibility of government, and that there is value in encouraging others to contribute to the public good through their activities. This is an enlarged idea of the public realm that is possible in well-established and robust democracies such as in Australia.

A question necessarily arises for the government of what activities of private groups are pursued for the public good, and should receive the support of the government through grants and tax exemptions and concessions, including DGR endorsement. The choice of who to support involves careful consideration and a careful weighting of priorities. We submit that in a robust democracy, the government should construe the public good *widely*. There are some activities that clearly are not for the public good, and should not receive support from government. These include activities that are harmful to the community or a sub-section of the community, for example, advocating for the exclusion of or discrimination against a particular group in the community on the grounds of race, ethnicity, culture or religion, or advocating for the use of violence in the pursuit of an organisations activities. Outside these categories of activity, we submit that what is for the public good should be construed broadly.

Supporting environmental organisations (as well as other categories of DGRs) in their work is a recognition that the government cannot give voice to the needs and beliefs of all citizens, and that there is value in increasing the diversity of activities and ideas in the public sphere through supporting not-for-profit organisations established to pursue the public good. In a robust democracy, a government would expect that the role of these organisations will include the expression of opposition to the government's own policy agenda.

We submit, therefore, that apart from matters clearly falling outside the public good, the government should leave it to the people to decide what is and what is not of value and for the public good. This is consistent with two fundamental principles underpinning our democratic system – the principle of freedom of expression, and the principle of equality. It should be noted that an organisation only benefits from DGR endorsement if it can convince a member of the community that it is worth supporting through the contribution of a gift or a donation.

2. **The definition of environmental organisation under item 6.1.1 of subsection 30-55(1) of the *Income Tax Assessment Act 1997***

DGR status allows eligible organisations, such as those on the Register, to receive donations deductible from the donor's taxable income. Consistent with similar schemes overseas (see Part 3), the environmental register was established as an incentive for citizens and corporations to fund organisations that are active in the public sphere, while also feeding into the logic of small government and shifting the burden of catering for social needs back onto the community.

In Australia, to be on the Register the principle purpose of the organisation 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.*[1]

Organisations that seek DGR status as an environmental organisation must apply to the Department of the Environment and seek the approval of the Minister for the Environment as well as the Treasurer. The Department of the Environment publishes guidelines which provide guidance as to the criteria that must be satisfied for an environmental organisation to be registered (Guidelines).[2] The Guidelines provide as follows:

> *"The environmental purpose must be the organisation's principal purpose. The objects of the organisation must be set in the context of the natural environment. This includes all aspects of the natural surroundings of humans, whether affecting them as individuals or in social groupings. The term natural to describe `environment' is used to make a distinction between the natural environment and other types of environments eg*
> *• built;*
> *• cultural; and*
> *• historic environments.*
>
> *The natural environment and concern for it would include, for example: significant natural areas such as rainforests; wildlife and their habitats; issues affecting the environment such as air and water quality, waste minimisation, soil conservation, and biodiversity; and promotion of ecologically sustainable development principles.*
>
> *The natural environment would exclude, for example:*
> *• constructions such as the retaining walls of dams;*
> *• cultivated parks and gardens;*
> *• zoos and wildlife parks (except those parks and zoos principally carried on for the purposes of species preservation); and*
> *• cultural sites and heritage properties."*

3. Consultation Question 4 - The role of charitable advocacy, with a focus on environmental organisations

This legislation and Guidelines are broad enough to capture environmental organisations whose primary activity is advocacy about environmental issues. This is supported by the case law discussed below in relation to the endorsement of charitable institutions under section 50-5, Item 1.1 of the ITAA 1997. An institution is charitable if its 'main or predominant or dominant' purpose is charitable in the technical legal sense.[3]

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1 *Income Tax Assessment Act 1997* (Cth) s 30-265.

2 Commonwealth of Australia, Department of the Environment, *Register of Environmental Organisations, A Commonwealth Tax Deductibility Scheme for Environmental Organisations*, Guidelines, 2003.

3 *Federal Commissioner of Taxation v. Word Investments Limited* (2008) 236 CLR 204; [2008] HCA 55 *(Word Investments)* at paragraph 17 *; Congregational Union of New South Wales v. Thistlethwayte* (1952) 87 CLR 375 at paragraph 19.

In 2010 the High Court ruled in *Aid/Watch Incorporated v Commissioner of Taxation* that 'charities' may engage in public debate.[4] The judgment described the freedom to speak out on political issues as "indispensable" for "representative and responsible government".[5] Moreover, the court pointed out that there is no general rule that excludes "political objects" from charitable purposes.[6] Instead, the key consideration is whether the organisation "contributes to the public welfare".[7]

The High Court failed to provide guidance on whether the decision applies to political activities other than generating public debate. For example, the decision is silent on whether lobbying or campaigning is consistent with an organisations charitable status.

Taxation Ruling 2011/4, rewrites TR 2005/21 to reflect the Commissioner's views following recent significant decisions of the High Court and Federal Court in this area, including *Aid*/*Watch.* The Commissioner has expressed his opinion as to how far the political activities of an organisation can reach as follows:[8]

"Following the High Court's decision in Aid / Watch :

- *an entity can be charitable if it has a purpose (including a sole purpose) of generating public debate with a view to influencing legislation, government activities or government policy in relation to subject matters that come within one or more of the four heads of charity, as long as the means used and the ends to be achieved are not inconsistent with the rule of law and the established system of government;*
- *an entity does not necessarily have to present a balanced position in order to be considered an entity with a purpose of generating public debate: it could express a singular point of view about a subject matter that comes within one of the four heads of charity.*

Political parties are not charitable. A sole purpose of engaging in activities associated with political parties is not charitable.

However, if the purpose of an organisation is otherwise charitable, its status will not be affected by non-charitable political activities that are simply a means of effecting its sole charitable purpose. These activities could include seeking to persuade members of the public to vote for or against particular candidates or parties in an election, or distributing material designed to underpin a party political campaign."

While DGR status through the Register is separate from an organisation's status as a charity, it is arguable that the 'principle purpose' in section 30-265 of the ITAA 1997 and the 'main or predominant or dominant purpose' in relation to charities have the same meaning and effect in the respective legislative provisions. Both provisions must be construed in light of the constitutional system of representative and responsible government, which recognises the importance of the free exchange of political views. In this system, advocacy is one method through which many environmental organisations fulfil their purpose for the 'protection and enhancement of the natural environment." Accordingly, we contend that an environmental organisation that has a political purpose will not be excluded from being registered as an environmental organisation.

The *Aid/Watch* case has been applied in the New Zealand Supreme Court in *Re Greenpeace*.[9] Speaking with reference to the political campaigns of Greenpeace the majority decision of Elias CJ, McGrath and Glazebrook JJ noted at [69]:

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4 (2010) 241 CLR 539 [48] (French CJ, Gummow, Hayne, Crennan & Bell JJ).
5 Ibid 556 [44].
6 Ibid 557 [48].
7 Ibid 557 [49].
8 Draft Taxation Ruling TR 2011/D2, paragraph 68.
9 [2014] NZSC 105.

> A conclusion that a purpose is "political" or "advocacy" obscures proper focus on whether a purpose is charitable within the sense used by law. It is difficult to construct any adequate or principled theory to support blanket exclusion.

We support the reasoning of these courts and the importance they placed on protecting a robust public sphere that contributes to public debate.

An amendment protecting organisations engaging in political purposes has precedent overseas. In England (and Wales) the issue of whether or not a charity can engage in political purposes has been partially mitigated by the inclusion of inherently 'political' purposes (such as the promotion of human rights) in the statutory list of charitable purposes[10] and by less restrictive guidance by the Charity Commission of England and Wales.[11] Similarly, Ireland's charity legislation includes in its definition of charitable purposes inherently 'political' purposes[12] and Canada has clarified that ancillary and incidental political activity is acceptable.[13]

Outside of the common law world, non-governmental organisations are not generally subject to any sector-specific restrictions. The strongest protections for political advocacy were recommended by the Council for Europe, which recommended that non-governmental organisations should enjoy 'the right to freedom of expression', and in particular:

- the right 'to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law'[14]; and
- the right 'to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation' (subject to legislation on the funding of elections and political parties).[15]

The recommendation of the Council of Europe also includes guidance that:

> NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income for investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax credits.[16]

Parts of this rationale resonate with Chapter 7 of the *Re:think Tax Discussion Paper* which articulates the view that governments provide tax concessions to support the not-for-profit sector with the aim of helping increase their level of activity. Consistent with this view, we need laws that support the position that tax benefits should exist alongside charitable advocacy.[17]

We are concerned that any move to require additional information from all registered charities relating to their advocacy activities would lead to the exclusion of groups engaging in political debate and would reduce public participation in environmental matters. This participation has already been weakened after Federal funding cuts to State and Territory Conservation Councils and Environmental Defenders Offices. The consequences of the current inquiry must be seen in this light. In summary, we believe that requiring all registered charities to report their advocacy activities to the ACNC is inappropriate and would result in the exclusion of groups engaging in political debate.

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10 *Charities Act 2006* (UK) c 50, s 2(2)(h). Equivalent provisions are found in *Charities and Trustee Investment (Scotland) Act 2005* (Scot) asp 10, ss 7(2)(j)–(l); *Charities Act (Northern Ireland) 2008 (NI)* c 12, s 2(2)(h).

11 *Charity Commission, Speaking Out Guidance on Campaigning and Political Activity by Charities* (2008).

12 *Charities Act 2009 (Ireland)* ss 3(11)(e)–(f).

13 *Income Tax Act, RSC 1985 (5th Supp)*, c 1, ss 149(6.1)–(6.2).

14 Committee of Ministers, Council of Europe, *Recommendation on the Legal Status of Non-Governmental Organisations in Europe Recommendation CM/Rec* (2007) 14 (10 October 2007) [12].

15 Ibid [13].

16 Ibid [57].

17 Australian Government, Re: think, Tax Discussion Paper, March 2015

4. Consultation Question 12 - The appropriate proportion of an environmental organisations public fund that should be committed to environmental remediation

This term of reference lacks sufficient clarity for concrete engagement. However, we are concerned that a distinction may be drawn between groups who do 'on ground' conservation and scientific work and those that do advocacy and campaigning. This distinction is problematic for several reasons.

As noted above, there is no general rule in Australian law that excludes "political objects" from charitable purposes. Further, many environmental organisations do both 'on ground' conservation and political advocacy. For example, the Conservation Council SA employs scientists who work on their Fleurieu Peninsula Swamps Recovery Program and also make representations to government on behalf of their member organisations. The dual function served by these employees demonstrates that no meaningful separation can be drawn between conservation and advocacy. Ideally, advocacy work, including political lobbying and campaigning, makes the task of those involved in 'on ground' conservation easier because the environment has been protected.

This simple idea is well articulated in the parable of the River:

> *Once upon a time there was a small village on the edge of a river. The people there were good and life in the village was good. One day a villager noticed a baby floating down the river. The villager quickly swam out to save the baby from drowning. The next day this same villager noticed two babies in the river. He called for help, and both babies were rescued from the swift waters. And the following day four babies were seen caught in the turbulent current. And then eight, then more, and still more!*
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> *The villagers organized themselves quickly, setting up watchtowers and training teams of swimmers who could resist the swift waters and rescue babies. Rescue squads were soon working 24 hours a day. And each day the number of helpless babies floating down the river increased. The villagers organized themselves efficiently. The rescue squads were now snatching many children each day. While not all the babies, now very numerous, could be saved, the villagers felt they were doing well to save as many as they could each day. Indeed, the village priest blessed them in their good work. And life in the village continued on that basis.*
>
> *One day, however, someone raised the question, "But where are all these babies coming from? Let's organize a team to head upstream to find out who's throwing all of these babies into the river in the first place!"*

Finally, a distinction between 'on ground' and 'political' work is inconsistent with the standards to which other DGRs are held. For example, organisations like the Institute of Public Affairs, the Chifley Research Centre or Menzies House engage not only in public debate but lobbying and campaigning. Limiting environmental organisations to 'on ground' work would place an undue burden on their activities and limit their role in the not-for-profit space.

Accordingly, we contend that there should be **no** fixed percentage of an environmental organisation's public fund annual expenditure that must be put toward environmental remediation. The notion that organisations commit 25% of their expenditure on environmental remediation is arbitrary and does not align with the necessary relationship between protection and advocacy.

5. Consultation Question 13 - The appropriateness of the imposition of sanctions for environmental DGRs that encourage, support, promote or endorse illegal or unlawful activities

The discussion paper is silent on what sanctions might involve. However, it is necessary to state from the outset that environmental organisations are already subject to state criminal laws which punish certain kinds of behaviour. Moreover, never in Australia's history of environmental organisations been more professionally organised nor more willing to use legal avenues for redress. Federal Labor MP Tony Burke made this point in response to suggestions that environmental organisations were using the courts to delay coal projects: 'I find it odd that we've gone from complaining that environmentalists are blockading and protesting to complaining that they're turning up to a courtroom.'[18]

In our opinion, any discussion about introducing sanctions ought not be framed in terms of 'illegal activity'. Rather, it is vital to ask – what kind of illegal activity? It is undeniable that our society has improved because of non-violent peaceful protests. The relationship between public advocacy and law reform is most visible with issues such as discrimination against women, the LGBTIQ community, indigenous peoples and the protection of environmental landmarks such as the Franklin River. Had advocacy in these areas become violent or promoted violence, they would have lost public support. Where the lines of desirable disobedience lie in a democracy will always be a matter of debate and we will push up against those lines so long as we are committed to social progress, equality and environmental sustainability. In our view, the existing criminal law and the intelligence of the Australian public are the most appropriate deterrent against undesirable activity. Sanctions would further silence environmental organisations at a time when we need full participation from civil society.

6. Conclusion

In summary, we believe that there should not be any additional reporting obligations imposed on DGRs that engage in advocacy. We also contend that activities for environmental organisations should not be limited to 'on ground' work and that there should not be a fixed percentage of an environmental organisation's public fund that must be put toward this type of work. We believe that the existing criminal law sufficiently deals with organisations that encourage, support, promote or endorse illegal and unlawful activities and that the imposition of additional sanctions is unnecessary. As a society we ought to strive for the broadest possible political debate, rather than attempting to narrow it. If that means that taxpayers subsidise perspectives with which they don't necessarily agree, it is a small price to pay for a robust public sphere.

[18] Jared Owens, 'Tony Burke Rejects Coalition Move to Block Green Group Legal Activism', *The Australian* October 26 2016, http://www.theaustralian.com.au/business/mining-energy/tony-burke-rejects-coalition-move-to-block-green-group-legal-activism/news-story/7cbc67e6558c57a3123865202bef5602.