

# *Tax deductibility of philanthropic donations: reform of the specific listing provisions in Australia*

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## **Abstract**

*There are currently 190 not-for-profits (NFPs) and other entities that are eligible for tax deductible donations through a system that specifically names them in the income tax legislation. These entities are referred to as deductible gift recipients (DGRs). The approach of naming them in legislation, when they don't fit within an existing DGR category, has been criticised as being highly politicised and ad hoc. This article provides an in-depth analysis of the system of specific listing DGRs through the use of four case studies to demonstrate the criticisms that have been raised by scholars and representatives of the NFP sector. It presents arguments that support many of these criticisms, although conceding that the system should not be completely abandoned. It concludes with suggestions as to how this system can be improved.*

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## 1. Introduction

The deductible gift recipient (DGR) framework set out in Div 30 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) underpins philanthropy in Australia. Section 30-15 ITAA97 provides that a donation of \$2 or more to an entity referred to in the income tax legislation as a DGR is deductible from a taxpayer's assessable income, whether the donor is a company or an individual. If, on the other hand, the donation is property rather than cash, the property must be valued at greater than \$5,000.<sup>1</sup> The tax deductible donation can reduce the taxpayer's assessable income to nil but not below nil,<sup>2</sup> however, in most cases, a donor can elect to spread the deduction over a period of up to five years.<sup>3</sup> Deductible gift recipient status is therefore essential to organisations that wish to access a large proportion of Australian private benevolence. Furthermore, philanthropic structures such as private and public ancillary funds can only make distributions to item 1 DGRs.<sup>4</sup> The tax concession of deductibility of donations is also of considerable cost to the revenue. Treasury estimates that the amount of revenue lost every year due to this tax concession is around \$1.2 to 1.3b.<sup>5</sup>

What makes an entity a DGR, is not actually defined in the income tax legislation. The legislation instead states that entities that are DGRs must satisfy specific requirements. The areas targeted for DGR status vary widely and include health, education, welfare and rights and cultural organisations. The specific categories and requirements are set out in Subdivs 30-A, 30-B and 30-BA ITAA97. In summary, the income tax legislation requires that the organisation is one of the entities referred to in ss 30-15 to 15-105. In many, but not all, cases, the entity must also be a registered charity.<sup>6</sup> Furthermore, it must be endorsed by the Commissioner of Taxation under Subdiv 30-BA as a DGR unless it is specifically named in the legislation<sup>7</sup> and it must have an Australian business number (ABN).<sup>8</sup>

The historical development of the concept of DGR has been discussed elsewhere and is not the subject of this article, however it is clear from the research that Div 30

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- 1 S 30-15 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97). Unless it is specific types of shares, see items 7, 8 of the table, s 30-15 ITAA97.
  - 2 S 26-55 ITAA97. Current and previous year losses are also taken into account before the maximum deduction for a donation is calculated. So that if a taxpayer has losses, this may reduce the amount of donation deduction they are entitled to.
  - 3 Subdiv 30-DB ITAA97. These donations include money of \$2 or more and property valued at more than \$5,000.
  - 4 S 31-10 ITAA97. This category does not include specifically listed DGRs.
  - 5 Australian Government, Budget 2014-15, Budget paper no. 1, statement 5, Appendix B: *Tax expenditures*.
  - 6 See, for example, item 1.1.1 of the table in s 30-20(1) ITAA97, which states that for a public hospital to be a DGR as a health recipient, it must be either a registered charity or an Australian government agency.
  - 7 S 30-115 ITAA97.
  - 8 S 30-125 ITAA97.

has evolved in an ad hoc manner, resulting in a DGR framework that is complex, cumbersome and a source of red tape.<sup>9</sup> There are 52 ways that an entity can become a DGR.<sup>10</sup> One of these ways is through the federal government listing an entity by name in the ITAA97<sup>11</sup> and this particular process is an example of the system at its most opaque and political.<sup>12</sup> Although there are approximately 51,000 charities operating in Australia,<sup>13</sup> only 190 not-for-profits (NFPs) (of which some are charities) are specifically listed as DGRs.<sup>14</sup> These specifically listed DGRs are the focus of this article.

The federal government has recently recognised, to a limited extent, that there is need for reform of the DGR process by calling for submissions in response to its 2017 discussion paper, *Tax deductible gift recipient reform opportunities* (Treasury discussion paper).<sup>15</sup>

The discussion paper refers in part to the specific listing of DGRs. Questions 1 and 11 are of particular relevance to this article and ask:<sup>16</sup>

- “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?  
 ...
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?”

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9 F Martin, “The socio-political and legal history of the tax deduction for donations to charities in Australia: 1788–1936” (2017) 38 *Adelaide Law Review* 195; Australian Charities and Not-for-profits Commission (ACNC), Forum Report, *Measuring and reducing red tape in the not-for-profit sector*, February 2014, 14, David Gilchrist suggests that “Red Tape is that administrative practice that delivers greater cost to the organisation, government and/or the community than the benefits that the administrative practice returns in total”.

10 47 categories in Div 30 ITAA97, four registers and by applying to the Minister for Revenue and Financial Services for listing by name, Div 30 ITAA97. See generally, Treasury, *Tax deductible gift recipient reform opportunities* (2017) 3.

11 S 30-17(1)(a) ITAA97.

12 N Silver, M McGregor-Lowndes and J-A Tarr, “Should tax incentives for charitable giving stop at Australia’s borders?” (2016) 38(1) *The Sydney Law Review* 85, 102; for a general discussion, see Australian National Audit Office (ANAO), “Administration of deductible gift recipients (non-profit sector)” (audit report no. 52, Australian Government, 2011).

13 Australian Charities and Not-for-profits Commission, “Australian charities report 2015”, 10.

14 Treasury, *Tax deductible gift recipient reform opportunities* (2017), 3.

15 Treasury, *Tax deductible gift recipient reform opportunities* (2017).

16 Treasury, *Tax deductible gift recipient reform opportunities* (2017), 15.

This article discusses these specific questions and, more broadly, specific issues of concern to the general public<sup>17</sup> that arise in the current process of specifically listing DGRs in the taxation legislation. These issues are first, the political process that must be undertaken in order to become a specifically listed DGR, and second, that there is no strong regulatory oversight of these DGRs. It also provides possible alternatives for how this system could be improved. Section 1 has introduced the Treasury discussion paper and the questions it asks that relate to specifically listed DGRs. Section 2 establishes the research methodology used in this article. Section 3 provides an overview of the historical and legal background to this group of DGRs. Section 4 discusses the problems of politicising of the specific listing of DGRs and the lack of regulatory oversight of these DGRs that are not also charities. It brings into this discussion the role of the Australian Charities and Not-for-profits Commission (ACNC) in overseeing charities in Australia. This section then analyses four specifically listed DGRs as case studies in order to demonstrate the two issues that are the subject of this article. Section 5 proposes a new process for specific listing of DGRs.

## 2. Research methodology

The article uses two approaches to research. First, in order to understand existing legal rules relating to DGRs, the article employs theoretical and historical research.<sup>18</sup> This is essential to gain an understanding of the conceptual rationale behind the legal rules and principles considered. This is also described as fundamental research, which is research that is aimed at gaining a deeper understanding of law as a social phenomenon, and includes research on the historical, philosophical, linguistic, economic, social or political implications of law.<sup>19</sup> Second, it uses case study

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17 As argued by community interest groups and representatives of the NFP sector such as K Seibert, Pro bono Australia, “DGR reform – a game changer for philanthropy demand”, 17 July 2014, available at <https://probonoaustralia.com.au/news/2014/07/dgr-reform-a-game-changer-for-philanthropy-demand/>; D Fittler, Gilbert and Tobin solicitors, “The lowdown on DGR”, (2013) working paper no. 59; S Rodman and M McGregor-Lowndes (1995) *Charity tax exemptions: a stitch in time saves nine*, Queensland University of Technology, Brisbane (working paper). In 2003, the Treasurer proposed an amendment to the *Income Tax Assessment Act 1997* (Cth) (ITAA97), with effect from 1 July 2003, to allow specifically listed DGRs to be prescribed by regulation (Treasurer’s press release no. 49, 29 August 2002). The measure was part of the government’s response to the *Report of the inquiry into the definition of charities and related organisations*. This proposal is discussed later in the article, but it did not proceed.

18 T Hutchinson and N Duncan, “Defining and describing what we do: doctrinal legal research” (2012) 17 *Deakin Law Review* 83, 101-102; D Pearce, E Campbell and D Harding, “Australian law schools: a discipline assessment for the Commonwealth Tertiary Education Commission” (1987), para 9.14.

19 Information Division of the Social Sciences and Humanities Research Council of Canada, Consultative Group on Research and Education in Law, “Law and learning: report to the social sciences and the Humanities Research Council of Canada”, 1983.

methodology, which is a form of qualitative research.<sup>20</sup> These case studies provide real world examples of the problems articulated by the theoretical and historical research. The advantage of qualitative research is that the nature of a problem can be better understood when looked at through the lens of reality, and this can aid the development of appropriate guides to action.<sup>21</sup> The author has used these case studies as illustrative of the potential problems that the current system of specifically listing DGRs raises. The fact that only four cases studies are discussed is a limitation, however, qualitative research in this article is used as a benchmark to establish how the law is operating. The use of case studies is only one way that the arguments raised are supported.

### 3. Background to the specific listing of DGRs

It is submitted by commentators in the NFP sector that the lack of comprehensive reform of Australia's DGR framework continues to impede the ability of many charities to access philanthropy.<sup>22</sup> Philanthropy Australia and other influential organisations believe that this taxation framework should be based around principles of simplicity, clarity, certainty and ensuring there are appropriate incentives to encourage philanthropy.<sup>23</sup> In respect of the specific listing of DGRs, Silver, McGregor-Lowndes and Tarr argue<sup>24</sup> that it is a political process with a successful application requiring "the support of the Commonwealth Government minister responsible ... for the type of activities and purposes of the organisation seeking listing".<sup>25</sup>

Australia has approximately 51,000 charities.<sup>26</sup> The 2015 report of the ACNC, found that, at the time of the report, there were 38.5% of registered charities with DGR

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20 J Corbin and A Strauss, *Basics of qualitative research* (3rd ed, 2008) 1.

21 Ibid 16.

22 K Seibert, Pro bono Australia, "DGR reform – a game changer for philanthropy demand", 17 July 2014, available at <https://probonoaustralia.com.au/news/2014/07/dgr-reform-a-game-changer-for-philanthropy-demand/>; Philanthropy Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; The Tax Institute, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 18 July 2017; Justice Connect, "DGR reform opportunities discussion paper", 7 August 2017, available at [www.justiceconnect.org.au/our-programs/not-for-profit-law/law-and-policy-reform/dgr-reform-opportunities-discussion-paper](http://www.justiceconnect.org.au/our-programs/not-for-profit-law/law-and-policy-reform/dgr-reform-opportunities-discussion-paper).

23 Philanthropy Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; The Tax Institute, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 18 July 2017.

24 N Silver, M McGregor-Lowndes and J-A Tarr, "Should tax incentives for charitable giving stop at Australia's borders?" (2016) 38(1) *Sydney Law Review* 85, 102.

25 Thomson Reuters, *Not-for-profit best practice manual*, vol 1 (at service 2) [5.1.607].

26 Australian Charities and Not-for-profits Commission, "Australian charities report 2015" 10.

status.<sup>27</sup> Therefore, not all charities are DGRS and not all charities are eligible for DGR status. The largest groups of charities that are eligible for DGR status are public benevolent institutions (PBIs).<sup>28</sup>

As discussed by Chia and O'Connell, income tax was originally levied by the various Australian states.<sup>29</sup> The Australian Constitution<sup>30</sup> which came into effect 1 January 1901 allocated most of the expenditure responsibilities to the states and the expectation was that the federal government would carry out functions that the states were not able to conduct efficiently themselves, such as defence and foreign affairs.<sup>31</sup> The Constitution provided that the federal government was solely responsible for customs and excise.<sup>32</sup>

Until 1915, the revenues derived from customs and excise duties had been enough to meet the Australian federal government's revenue needs. But, in 1915, the Commonwealth enacted the *Income Tax Assessment Act 1915* (Cth) to raise funds for the war effort, and to deal with the economic issues arising from Australia's part in WWI.<sup>33</sup>

This Act exempted from income tax the income of religious, scientific, charitable or public educational institutions.<sup>34</sup> It also granted a deduction for gifts, each exceeding £20, to "public charitable institutions".<sup>35</sup> Harris, in his comprehensive analysis of the historical development of Australian taxes, states that "[s]ection 18(h) allowed a deduction for gifts to certain institutions or public war fund and had no obvious counterpart in the prior Acts considered by this study".<sup>36</sup>

27 Australian Charities and Not-for-profits Commission, "Australian charities report 2015" 50; see also N Cortis et al, "Australian charities report 2015" (Centre for Social Impact and Social Policy Research Centre, University of New South Wales, Australia) 49–50.

28 N Cortis et al, "Australian charities report 2015" (Centre for Social Impact and Social Policy Research Centre, University of New South Wales, Australia) 49–50.

29 J Chia and A O'Connell, "Charitable treatment? – A Short history of the taxation of charities in Australia" in J Tiley (ed), *Studies in the history of tax law vol 5* (Hart Publishing, 2011) 91.

30 *The Commonwealth of Australia Constitution Act 1900* (Imp).

31 S Reinhardt and L Steel, "A brief history of Australia's tax system" (paper presented at the 22nd APEC Finance Ministers' Technical Working Group Meeting, Khanh Hoa, Vietnam, 15 June 2006) 6.

32 S 90 of *The Commonwealth of Australia Constitution Act 1900* (Imp).

33 S Reinhardt and L Steel, "A brief history of Australia's tax system" (paper presented at the 22nd APEC Finance Ministers' Technical Working Group Meeting, Khanh Hoa, Vietnam, 15 June 2006) 7; PA Harris, "Metamorphosis of the Australasian income tax, 1866 to 1922" (Australian Tax Research Foundation, research study no. 37, 2002) 175–176.

34 S 11(d) of the *Income Tax Assessment Act 1915* (Cth).

35 S 18(h) of the *Income Tax Assessment Act 1915*.

36 PA Harris, "Metamorphosis of the Australasian income tax, 1866 to 1922" (Australian Tax Research Foundation, research study no. 37, 2002) 187.

The income tax legislation was amended in 1927 to alter the range of eligible donees to “public charitable institutions”, public universities in Australia or to affiliated colleges, and public funds to establish and maintain funds for WWI memorials.<sup>37</sup> But the definition of public charitable institutions was not the broad group that is recognised today. Public charitable institution was defined to mean a public hospital, a PBI and a public fund established and maintained for providing money for such institutions or for the relief of persons in necessitous circumstances.<sup>38</sup> This amendment introduced the concept of PBI, a more limited category of exempt entity that is unique to Australia and which is more akin to the ordinary meaning of charitable, being relief of poverty, rather than its broader legal meaning.<sup>39</sup> As noted above, PBIs make up the largest group of DGRs.

The process of amending the income tax legislation in order to add organisations to the list of eligible gift recipients continued, although a consideration of parliamentary debates shows that there was no well thought out government policy behind these changes except that the relief of poverty has always been at the core of benefitting charitable giving.<sup>40</sup> In 1940, at the height of WWII, the taxation legislation was amended to add public institutions or funds established and maintained for the comfort, recreation or welfare of members of the naval, military or air forces and the Commonwealth, when made for purposes of defence, as DGRs.<sup>41</sup> In 1966, the Australian Conservation Foundation Incorporated and various state bodies of the National Trust of Australia were specifically listed.<sup>42</sup> This appears to be the earliest example of the specific naming of an organisation in the tax legislation as eligible for deductible donations.<sup>43</sup>

To overcome the cumbersome process of requiring an act of parliament every time a specific environmental organisation was added to the list of eligible entities, the Register of Environmental Organisations was proposed as part of the 1992–93 Budget. It is also likely that the mechanism was introduced to limit tax expenditures.<sup>44</sup> The register was legislated through the *Taxation Laws Amendment Act (No. 5) 1992* (Cth)

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37 S 14(c) of the *Income Tax Assessment Act 1927* (Cth).

38 Ibid.

39 GE Dal Pont, *Law of charity* (LexisNexis, Butterworths, 2010) [2.28]; see also M Chesterman, “Foundations of charity law in the new welfare state” (1999) 62 *Modern Law Review* 333, 340–341.

40 F Martin, “The socio-political and legal history of the tax deduction for donations to charities in Australia: 1788–1936” (2017) 38 *Adelaide Law Review* 195.

41 S 6(b) of the *Income Tax Assessment Act 1940* (Cth)

42 S 8 of the *Income Tax Assessment Act 1966 No. 50* (Cth).

43 House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations* April 2016, 6 [2.8]. The Australian Conservation Foundation Limited became the first environmental organisation to be named in the taxation legislation.

44 See ss 30-280(4), 30-289B(4), 30-305(4) and 30-280(4) ITAA97 which all state that the relevant minister must have regard to the policies and budgetary priorities of the federal government when deciding whether or not to add an organisation to the register.

and came into effect on 24 December 1992.<sup>45</sup> Three other registers were subsequently added: the Overseas Aid Gift Deduction Scheme and Register, the Register of Harm Prevention Charities and the Register of Cultural Organisations.<sup>46</sup>

In 2003, the Treasurer proposed an amendment to the ITAA97 to allow specifically listed DGRs to be prescribed by regulation.<sup>47</sup> This proposal was intended to allow continued scrutiny by the parliament but make legislative amendments concerning specifically listed DGRs less administratively costly and timelier.<sup>48</sup> However, this proposal was not enacted.

The current situation is that if an organisation does not fall within one of the 47 categories of DGR in the ITAA97 or the four registers of DGRs, they can attempt to be specifically listed. In order to do this, they must approach the Minister for Revenue and Financial Services.<sup>49</sup> There are currently around 190 such entities.<sup>50</sup> Not all these entities are charities.

Deductible gift recipients that are not charities are not subject to the registration and auditing requirements of the ACNC, which regulates the charities sector.<sup>51</sup> Furthermore, it can be argued that DGRs that qualify due to specific listing have only obtained this status due to their strong political connections. For example, in 2017, the Minister for Revenue and Financial Services proposed adding the Bourke Street Fund to the list of DGRs that are specifically named in the ITAA97. This was because of the decision by the Prime Minister to work with the Victorian Government to support victims of the violence that occurred in Bourke Street, Melbourne on 21 January 2017.<sup>52</sup> Clearly a very worthwhile cause, but not all organisations have such strong lobbying power or political connections. An earlier example of an organisation with strong lobbying powers is Nursing Mothers, now known as the Australian Breastfeeding Association. This organisation was established in 1964<sup>53</sup>

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45 House of Representatives Standing Committee on the Environment, *Inquiry into the Register of Environmental Organisations* April 2016, 7 [2.10].

46 Treasury, *Tax deductible gift recipient reform opportunities* (2017) 2-1; see also NS Silver, (2016) "Beyond the water's edge: re-thinking the tax treatment of Australian cross-border donations", PhD thesis, Queensland University of Technology [3.3.1].

47 The Hon. Peter Costello, Treasurer's press release no. 49, 29 August 2002.

48 Para 2.5 of the explanatory memorandum to the Taxation Laws Amendment Bill (No. 7) 2003.

49 Treasury, *Tax deductible gift recipient reform opportunities* (2017) 3.

50 Treasury, *Tax deductible gift recipient reform opportunities* (2017) 3.

51 *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

52 Page 5 of the explanatory memorandum to the Treasury Laws Amendment (Bourke Street Fund) Bill 2017.

53 Australian Breastfeeding Association, "About the Australian Breastfeeding Association", available at [www.breastfeeding.asn.au/aboutaba](http://www.breastfeeding.asn.au/aboutaba).



and specifically listed in the income tax legislation as a DGR in 1984<sup>54</sup> after a strong political campaign.<sup>55</sup>

#### 4. Lack of regulatory oversight of specific listing DGRs

The requirements to be a DGR are set out in Div 30 ITAA97. This division is complex and lengthy and not only establishes certain purposes as those considered worthwhile and therefore to be subsidised by the revenue, but also specific criteria for each type of entity to be eligible. For example, education is a general category for DGRs. But, in order to qualify as a DGR in this category, many organisations must also be registered charities.<sup>56</sup> This means that they are subject to the registration processes of the ACNC and the continual educative and monitoring regime that the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) establishes. They must also then be endorsed by the ATO.<sup>57</sup>

The ACNC was set up to achieve the following objects:

- maintain, protect and enhance public trust and confidence in the NFP sector through increased accountability and transparency;
- support and sustain a robust, vibrant, independent and innovative NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the sector.<sup>58</sup>

For a charity to obtain important federal tax concessions, such as the exemption from income tax, it must be registered with the ACNC.<sup>59</sup> To gain registration, an NFP must have an Australian business number and lodge specific documents with the ACNC, such as a copy of its constitution, details of its address for service and contact person.<sup>60</sup>

The ACNC has a range of compliance powers available. It can revoke registration of a charity if the charity does not comply with certain legal requirements, such as

54 Australian Breastfeeding Association, submission to the Board of Taxation on the Draft Charities Definition Bill, 30 September 2003.

55 Prof. M McGregor-Lowndes, “Notes to participants”, *Tax deductible gift recipient reform opportunities, discussion paper*, Missions Interlink, 15 June 2017, July 2017.

56 For example, item 2.1.1, s 30-25(1) (public universities) and item 2.1.2, s 30-25(1) (a public fund for the establishment of a public university) ITAA97.

57 S 30-120 ITAA97.

58 S 15-5(1) ACNC Act; ACNC, “ACNC’s role”, available at [www.acnc.gov.au/ACNC/About\\_ACNC/ACNC\\_role/ACNC/Edu/ACNC\\_role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe](http://www.acnc.gov.au/ACNC/About_ACNC/ACNC_role/ACNC/Edu/ACNC_role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe).

59 Item 1.1, s 50-5 and s 50-110 ITAA97.

60 Div 30, s 25-5 ACNC Act; ACNC, “Information checklist – what you need to apply”, available at [www.acnc.gov.au/ACNC/Register\\_my\\_charity/Start\\_Reg/Registration\\_checklist/ACNC/Reg/RegChecklist\\_new.aspx?hkey=c605613f-0b89-4ab5-9a33-88b2ec0e2e42](http://www.acnc.gov.au/ACNC/Register_my_charity/Start_Reg/Registration_checklist/ACNC/Reg/RegChecklist_new.aspx?hkey=c605613f-0b89-4ab5-9a33-88b2ec0e2e42).

lodging its annual information statement.<sup>61</sup> The ACNC also has the power to issue warnings,<sup>62</sup> directions,<sup>63</sup> enforceable undertakings,<sup>64</sup> injunctions,<sup>65</sup> suspension and removal of responsible persons,<sup>66</sup> and disqualification of responsible persons from being eligible to be on the governing body of any registered charity.<sup>67</sup> It can also impose administrative penalties for false or misleading statements<sup>68</sup> or failure to lodge documents on time.<sup>69</sup> Revocation and administrative penalties are able to be applied to any registered charity.<sup>70</sup>

Furthermore, charities are subject to duties and responsibilities as set out in the ACNC Act and regulations. These include ensuring that the annual information statement is lodged,<sup>71</sup> that financial reports are lodged with the ACNC if the charity is medium or large<sup>72</sup> and that the organisation provides any further information required by the ACNC.<sup>73</sup> Charities must also meet a set of governance standards to be registered and remain registered with the ACNC. These include that they must be NFP and work towards their charitable purpose. Charities must be able to demonstrate this and provide information about their purposes to the public. Charities that have members must take reasonable steps to be accountable to their members. This means that they should provide members with adequate opportunity to raise concerns about how the charity is governed. The members of a charity's governing body should also ensure that it is well governed, responsibly managed and meeting its obligations under the law.<sup>74</sup>

Listed organisations, on the other hand, are not required to register with the ACNC unless they are also a charity. The specifically listed entities that are not charities are effectively granted DGR status in perpetuity, without being subject to any governance standards or any requirements of the ACNC Act, even though these requirements apply to all registered charities.

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61 Ss 35-5 to 35-15 ACNC Act.

62 S 80-5 ACNC Act.

63 Ss 85-5 to 85-20 ACNC Act.

64 Ss 90-5 to 90-15 ACNC Act.

65 Ss 95-5 to 95-35 ACNC Act.

66 Ss 100-5 to 100-25 ACNC Act.

67 ACNC, "Disqualified persons register", available at [www.acnc.gov.au/ACNC/FindCharity/About\\_Register/Disqual\\_reg/ACNC/Reg/Disqual\\_personReg.aspx](http://www.acnc.gov.au/ACNC/FindCharity/About_Register/Disqual_reg/ACNC/Reg/Disqual_personReg.aspx). Governance standard 4 – Suitability of responsible persons, enacted by regulation under s 45-10 ACNC Act.

68 S 175-10 ACNC Act.

69 S 174-35 ACNC Act.

70 ACNC, "How we ensure charities meet their obligations", available at [www.acnc.gov.au/ACNC/About\\_ACNC/Regulatory\\_app/Regulatory\\_powers/ACNC/Regulatory/Reg\\_powers.aspx?hkey=dbb9ff1c-6f50-43d8-8946-444de35c66e7](http://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/Regulatory_powers/ACNC/Regulatory/Reg_powers.aspx?hkey=dbb9ff1c-6f50-43d8-8946-444de35c66e7).

71 S 60-5 ACNC Act.

72 S 60-10 ACNC Act.

73 Subdiv 60-E ACNC Act.

74 Subdiv 45-B of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth); ACNC, "Meet Governance Standards", available at [www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds\\_overview.aspx](http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx).

## Specific listing DGRs: case studies

The author has used case studies at this stage of the article, in order to demonstrate the criticisms that have been raised about specific listing of DGRs, but in a real world setting.

This is a form of qualitative research.<sup>75</sup> The advantage of qualitative research is that it allows the nature of a problem to be better understood and thereby facilitates the development of appropriate guides to action.<sup>76</sup>

The following case studies highlight the two concerns raised in this article that specifically listed DGRs (of which there are 190) gain this status through a highly politicised process and that they are not always subject to the oversight and regulation of the ACNC.

By choosing these entities as the subject of case studies, it is not suggested that their objectives are in any way unworthy of DGR status. The four case studies have been chosen because each illustrates a very different type of entity with respect to objectives and structure. But each also illustrates the role that politics plays in obtaining specific listing and, in the case of three of the case studies, that there is no regulatory oversight. The subject of case study I is a proprietary company limited by shares. This structure means that, unlike a charity which must be registered with the ACNC, no information about this organisation is available free to the public. Case study II is a trust and illustrates how a specifically listed DGR that is also a charity is subject to the oversight of the ACNC. Case study II is an example of a charitable trust for educational objectives and case study III, although also having educational objectives, is not a charity. Case study IV is not a charity and is an example of how the political process is utilised at times of societal stress to establish a DGR. Case studies III and IV demonstrate the operation of political influence, although in different ways, that operates when a specifically listed DGR is established.

## Case study I

### *Southcare Helicopter Fund Pty Ltd*

This organisation is listed in the ITAA97 as a DGR by name. It commenced operations as a DGR on 12 September 2000 and is a private company limited by shares.<sup>77</sup> It has a gift fund to which donations may be made, but is not registered with the ACNC as it is not a charity. Nor is there any free, publicly available access to information about the operations and financing of this organisation as it is a company limited

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<sup>75</sup> J Corbin and A Strauss, *Basics of qualitative research* (3rd ed, 2008) 1.

<sup>76</sup> *Ibid* 16.

<sup>77</sup> Australian Government, "ABN lookup", available at [www.abr.business.gov.au/SearchByAbn.aspx?abn=68084155895](http://www.abr.business.gov.au/SearchByAbn.aspx?abn=68084155895).

by shares and registered with the Australian Securities and Investment Commission (ASIC). Several searches of the corporate records for this entity with ASIC did not reveal anything about its finances, but did disclose that it has been deregistered and that it no longer has any directors or a registered office.<sup>78</sup> It is therefore not known what the objectives of this fund were, whether this fund is continuing in operation as a DGR, whether it is still receiving tax deductible donations from the public and to what use it is making of any donations that it has received. The major concern here, now that the company is deregistered, is what it will do with any funds that are still available in its gift fund. With no scrutiny by the ACNC, it is possible that these funds are dissipated to organisations that are not charities or DGRs. The only recourse is to the state Attorney-General to take legal action to protect charitable assets.<sup>79</sup>

## Case study II

### *Australian Ireland Fund*

The Australian Ireland Fund is a charitable trust and was established in 1987. It is listed by name in the ITAA97 under item 2.2.7 of s 30-25(2), which is the section dealing with DGRs for educational purposes. There are no special conditions listed in the ITAA97 for this organisation, however it is registered as a charity with the ACNC. As a result, it must comply with the ACNC Act and lodge an annual information statement, annual accounts and lodge a copy of its constitution. The Australian Ireland Fund has complied with all these requirements.<sup>80</sup>

Furthermore, its constitution and other documents lodged with the ACNC are freely available to the public. Donors can therefore make an informed decision as to whether they wish to donate to the Australian Ireland Fund first by examining its constitution (in this case, a trust deed), analysing its accounts over a period of years and looking at who its board members are and all other information available on its annual information statement.

This case study demonstrates that the oversight of the ACNC and the publicly available information on the ACNC website allows donors to feel more confident than

78 An application for Voluntary deregistration of a company (6010) was lodged with ASIC on 17 October 2017. See ASIC, [https://connectonline.asic.gov.au/RegistrySearch/faces/landing/panelSearch.jspx?searchText=084155895&searchType=OrgAndBusNm&\\_adf.ctrl-state=eno6x1t39\\_15](https://connectonline.asic.gov.au/RegistrySearch/faces/landing/panelSearch.jspx?searchText=084155895&searchType=OrgAndBusNm&_adf.ctrl-state=eno6x1t39_15). A search of the ASIC registry on 3 April 2018 revealed that it had been deregistered on 17 December 2017 and that there were no current directors or registered office for this company. See ASIC, Current and historical company extract, Southcare Helicopter Fund Pty Ltd 3 April 2018.

79 S 6 of the *Charitable Trusts Act 1993* (NSW).

80 ACNC, Find a charity, "Australian Ireland Fund", available at [www.acnc.gov.au/RN52B75Q?ID=6D23EFB9-1DA4-4AB7-9485-ACD1B8B8249E&noleft=1](http://www.acnc.gov.au/RN52B75Q?ID=6D23EFB9-1DA4-4AB7-9485-ACD1B8B8249E&noleft=1).

they would otherwise, that this entity is fulfilling its objectives and not misusing any of its donated funds. If it was not a charity, but still specifically listed as a DGR, this oversight would not exist.

## Case study III

### *Lionel Murphy Foundation*

The Lionel Murphy Foundation was established after the death of Justice Lionel Murphy QC, BSc, LLB to provide a permanent institution to honour his unique contribution to public life in Australia.<sup>81</sup> Like the Australian Ireland Fund, it is listed by name in the ITAA97 under the education category, s 30-25(2), but it is item 2.2.13. It is not a charity and therefore not registered with the ACNC.

The foundation was established by Gough Whitlam, Neville Wran and Ray Gietzelt, all Labor Party leaders and/or unionists, in 1986.<sup>82</sup>

The foundation's website states that the principal object of the Lionel Murphy Foundation is to provide postgraduate scholarship opportunities for the study of law and/or science, or other disciplines. It has provided 75 scholarships since its inception.<sup>83</sup> In addition, the foundation annually conducts the Lionel Murphy Memorial Lectures, which provide a forum for stimulating public consideration of some contemporary, and often controversial, subject.<sup>84</sup>

In 2018, the lecture was given by Professor Jenny Hocking. The title of her talk was, "The secret history of the dismissal of the Whitlam Government: the palace connection".<sup>85</sup>

Even though this foundation is operational, undertaking its objectives and some information is provided about its activities through its website, it is not subject to independent oversight and regulation by the ACNC as it is not a charity. There is therefore no way of easily establishing the amount of donations that have been

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- 81 The Lionel Murphy Foundation, available at <http://lionelmurphy.anu.edu.au/>, September 2017.
- 82 Senator John Faulkner, "Adjournment – Mr Ray Gietzelt", Senate, 28 November 2012, available at <https://web.archive.org/web/20130503230625/http://www.senatorjohnfaulkner.com.au/file.php?file=%2Fnews%2FKDRNLEZMSD%2Findex.html>.
- 83 The Lionel Murphy Foundation, "Lionel Murphy Postgraduate Scholars 1988 – 2016", available at [http://lionelmurphy.anu.edu.au/lionel\\_murphy\\_postgraduate\\_scholars.htm](http://lionelmurphy.anu.edu.au/lionel_murphy_postgraduate_scholars.htm).
- 84 The Lionel Murphy Foundation, annual lecture, available at <http://lionelmurphy.anu.edu.au/>.
- 85 Australian National University, 30th Annual Lionel Murphy memorial lecture, "The secret history of the dismissal of the Whitlam Government: the palace connection", available at <https://law.anu.edu.au/event/lecture/30th-annual-lionel-murphy-memorial-lecture-secret-history-dismissal-whitlam-government>.

received by this entity since its inception and what it has achieved with this money. Furthermore, the gaining of DGR status for the foundation in order to honour the memory of a Labor Party politician by Labor Party leaders is clearly a highly politicised action.

## Case study IV

### *Bourke Street Fund*

This fund was established by the Victorian Government to provide financial support to victims and their immediate families in respect of certain acts of violence that occurred in and around Bourke Street, Melbourne on 21 January 2017. On 22 January 2017, the Prime Minister announced that the Australian Government would work with the Victorian Government to ensure that the fund received DGR status.<sup>86</sup>

Legislation was then introduced into federal parliament to grant this fund DGR status as a specifically listed organisation.<sup>87</sup> The explanatory memorandum to the Bill provides an explanation of the law as follows:<sup>88</sup>

“1.7 Taxpayers may claim a tax deduction for gifts made to the Bourke Street Fund that was established by the Victorian Government under section 19 of the Financial Management Act 1994 (Victoria), provided the gift complies with the existing requirements of the income tax law. [Schedule 1, item 1, item 4.2.43 of the table in subsection 30-45(2) of the ITAA 1997]

1.8 This amendment ensures that the Bourke Street Fund receives appropriate support through the Commonwealth tax system for its goal of assisting the immediate families of those who lost their lives in the incident, as well as those who were injured and their immediate families.”

Its inception because of negotiations between the Prime Minister and representatives of the Victorian Government demonstrate that it has gained its DGR status through political dialogue and not necessarily because it is any more worthwhile than other NFP organisations that assist people in crisis. Nor is there anything in the statements in the explanatory memorandum that indicate why this catastrophe is more deserving of DGR status than other tragic incidents.

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86 Explanatory memorandum to the Treasury Laws Amendment (Bourke Street Fund) Bill 2017.

87 Explanatory memorandum to the Treasury Laws Amendment (Bourke Street Fund) Bill 2017. The Bill is now law and the legislation is titled, *Treasury Laws Amendment (Bourke Street Fund) Act 2017* (Cth).

88 Explanatory memorandum to the Treasury Laws Amendment (Bourke Street Fund) Bill 2017.

The Bourke Street Fund is not registered as a charity with the ACNC. As it is not a registered charity it is not subject to the scrutiny and regulation of the ACNC as discussed earlier in this section. It therefore has the same limitations as the Southcare Helicopter Fund and the Lionel Murphy Foundation, discussed above.

These case studies illustrate the two points raised in the introduction to this article: first, that if a DGR is not a charity, it is not subject to independent oversight and regulation; and second, that political influence can be a determining factor in gaining specific listing. Case study I demonstrates that this lack of scrutiny and regulation means that a DGR can be deregistered without any government or public knowledge as to where its donated funds are distributed. It may be that they are distributed to another entity with similar objectives, however it is impossible to easily find this out.

Case studies III and IV demonstrate that significant political influence and connections are often part of the process of being specifically listed. Without the political connections and influence that each entity had, it is unlikely that they would have become specifically listed DGRs.

## 5. Government discussion paper and proposals for reform

As mentioned earlier in this article, the federal government has issued a discussion paper relating to certain aspects of granting DGR status.<sup>89</sup> Submissions closed on 4 August 2017 and around 2,500 submissions were made.<sup>90</sup> The federal government has also recently announced that from 1 July 2019, DGRs that are not government entities will be automatically registered with the ACNC.<sup>91</sup> There is no detail in the media announcement about how this process will occur.<sup>92</sup> Furthermore, it is possible, in view of the current political situation, that this proposal will not be passed by the Senate.

The author has examined six submissions to the Treasury discussion paper. These submissions were chosen as they are by peak bodies representing views of significant stakeholders in the NFP sector. It was not possible for the author to review all 2,500 submissions. The overwhelming view of these organisations is that the process for

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89 Treasury, *Tax deductible gift recipient reform opportunities* (2017).

90 Treasury, *Tax deductible gift recipient reform opportunities*, available at <https://treasury.gov.au/consultation/tax-deductible-gift-recipient-reform-opportunities/>.

91 Kelly O'Dwyer, "Reforming administration of tax deductible gift recipients", media release, 5 December 2017.

92 This announcement was made after this article was submitted.

obtaining DGR specific listings needs reform.<sup>93</sup> They generally express concern that the current process is opaque and that there is a need for transparency, clarity, formality and consistency.<sup>94</sup>

There are two items in the discussion paper that relate to the specific listing of DGRs. These are questions 1 and 11, which were repeated in section 1 of this article.

Turning to question 1, the author argues that all entities that wish DGR status (other than government entity DGRs) should be registered with the ACNC as a charity. The approach of the legislation at present is that whether a DGR is a fund or operating as a service provider, they are generally required to be registered charities. As discussed in this article, this means that they are subject to the regulation and monitoring of the ACNC. This oversight body was introduced in 2013 and all objective indicators suggest that it is operating effectively both from a government perspective and from a stakeholder perspective.<sup>95</sup> It is therefore appropriate that it also oversee specific listing DGRs.<sup>96</sup>

Eight submissions reviewed by the author to the Treasury discussion paper argue that the proposal of a general sunset rule in question 11 would increase the red tape burden on organisations with a DGR specific listing and therefore do not support it.<sup>97</sup> This is because, if the DGR is still in existence and is still meeting all the legal

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93 The author has reviewed the following submissions which do not support the sunset clause: Philanthropy Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; The Tax Institute, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 18 July 2017; Australian Christian Lobby, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; Community Council for Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, July 2017; Justice Connect, Not-for-profit Law, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; ACOSS, *Tax deductible gift recipient reform opportunities*, submission to Treasury, undated.

94 See the submissions of Philanthropy Australia, Justice Connect, Not-for-profit Law, The Tax Institute and Community Council for Australia.

95 See F Martin et al, "The rise and fall (?) of two charities commissions: how common law countries can learn from the experiences in New Zealand and Australia" (2017) 27 *New Zealand University Law Review* 1185, 1204-1206.

96 The federal government has announced that from 1 July 2019, DGRs that are not government entities will be automatically registered with the ACNC: Kelly O'Dwyer, "Reforming administration of tax deductible gift recipients," media release, 5 December 2017.

97 Philanthropy Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; The Tax Institute, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 18 July 2017; The Minerals Council of Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, August 2017; Community Council for Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, July 2017; Justice Connect, Not-for-profit Law, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017; ACOSS, *Tax deductible gift recipient reform opportunities*, submission to Treasury, undated; Minderoo, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 14



requirements to be a DGR, then there is no reason to put it through the unnecessary burden of reapplying for this status. Such a reapplication, it is argued, would be a waste of resources of both the DGR and the ATO as the agency that it would need to reapply to. Furthermore, it is already open to the federal government to provide a specific listing for a limited time period, and this already occurs in certain instances where it was believed that a permanent listing was not necessary, for example, the Bourke Street Fund discussed earlier in this article.<sup>98</sup>

Registration with the ACNC will mean that the monitoring function of this Commission should ensure that it is complying with its DGR requirements. A five-year review would also mean that specifically listed DGRs were put in a more onerous reporting situation than other DGRs, which seems an unreasonable burden to place on them.

However, it is not argued that specific listings of DGRs should be abolished altogether. The current DGR framework does not fit every charity and the need for revenue at the federal level means that it is unlikely that it will be expanded to include all charities. The author therefore proposes several steps in the review and reform process for specifically listing DGRs. The author's analysis of the current specific DGRs, for example, Southcare Helicopter Fund, indicates that one specifically listed DGR, and perhaps more, are no longer in operation and should be removed. Step one is therefore that the Australian Government should direct Treasury to review the specific listings and remove any that are no longer operating, this will at least ensure that those DGRs that remain on the list are prima facie eligible to be there. Step two will then be that the updated list is reviewed by Treasury from a legal and operating perspective. The governance standards required for registration of charities with the ACNC provide an excellent framework to benchmark an organisation against. There are five governance standards. These are: purposes and NFP nature of the registered entity; accountability to members; compliance with Australian laws; suitability of responsible entities; and duties of responsible entities.<sup>99</sup> Furthermore, NFPs operating overseas should be required to comply with governance standards that are specifically relevant to international organisations.<sup>100</sup>

Step three, as proposed by Philanthropy Australia, is that the government should establish an independent panel with the task of making recommendations to the federal government regarding whether an organisation should be granted a specific

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July 2017; Greenpeace, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 4 August 2017. Please note that these submissions are from both sides of the political spectrum, eg the Minerals Council of Australia and Minderoo, as opposed to Greenpeace.

98 The special conditions relating to any gift to this fund are that the gift must be made: (a) after 20 January 2017; and (b) before 21 January 2022: see item 4.2.43, s 30-45(2) ITAA97.

99 Subdiv 45-B of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth).

100 ACNC, "Charities operating overseas", March 2018. Available at [www.acnc.gov.au/ACNC/FTS/Charities\\_operating\\_overseas.aspx](http://www.acnc.gov.au/ACNC/FTS/Charities_operating_overseas.aspx).

listing.<sup>101</sup> This panel would be informed by advice from Treasury, but also consider broader factors which Treasury does not necessarily consider, such as the requirement of specific community groups to have a voice in general community discussions, the needs of emerging groups within Australian society and evolving community welfare issues.

These recommendations would be made public, as would the decision of the relevant minister regarding the application which is the subject of the recommendation. Such a process would lead to increased trust and confidence in DGR specific listing.

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101 Philanthropy Australia, *Tax deductible gift recipient reform opportunities*, submission to Treasury, 3 August 2017, 12-13.