



Law Council
OF AUSTRALIA

Legal Practice Section

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Dear Jacky

REQUIRING DEDUCTIBLE GIFT RECIPIENTS (DGRs) TO REGISTER AS CHARITIES

1. The Charities & Not for Profits Committee (**the Committee**)¹ of the Law Council of Australia's Legal Practice Section welcomes the opportunity to make a submission to Treasury in relation to the Exposure Draft Bill, Explanatory Materials and FAQs relating to the *Treasury Laws Amendment (Measures for a later sitting) Bill 2020: Requiring all DGRs to be registered charities*.
2. Overall the Committee supports the accountability which will flow from requiring these DGRs (which are not government entities or operated by government entities) to be reporting to the Australian Charities and Not for Profits Commission (**ACNC**) as, or as part of, registered charities. We are pleased to see this part of the reforms announced in December 2017 seeing real progress and again urge the Government to accelerate the other reforms announced which will result in a significant easing of red tape and unnecessary regulatory requirements, amongst other benefits.
3. We have some substantive comments on the application of the proposed legislation as well as a number of drafting issues.

Substantive comments

4. The Committee suggests that there should be a very limited discretion for the Commissioner of Taxation (**Commissioner**) to exempt an entity from these amendments which could include the following circumstances:
 - Where a declaration of trust or transfer of assets to a charitable trust will result in significant loss of funds due to tax or duty being imposed as a result of the restructure.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

- If charitable status can only be achieved by creation of a new charitable trust in respect of item 1.1.3 in which case it will no longer be eligible (as the special conditions require creation prior to 1963).
 - Where the fund is operated by a government entity (as defined in the *Charities Act 2013* (Cth)) which is not an Australian Government Agency and therefore will be unable to meet the proposed requirements (or consideration is given to replacing the references to Australian Government Agency with government entity (as defined in the *Charities Act 2013* (Cth))).
 - Where a trust or unincorporated association needs to apply to court or requires a legislative change in order to make the required changes to be eligible.
5. While we have very limited information concerning the factors the Commissioner must and can consider in determining an extended application date, the reference in the FAQs to treating “Non-charity DGRs that have had ACNC registration refused or involuntarily revoked by the ACNC” as ineligible for an extension seems unduly harsh and the two issues seem unrelated. There are any number of valid reasons why an entity may have previously been refused ACNC registration. We submit this should be a consideration that is within the Commissioner’s discretion rather than a fixed consequence as we understand is currently proposed.
 6. We submit that it is misleading in the FAQs to simply refer to ‘non-government DGRs’ as a number of DGRs which are government entities or operated by government entities will need to take some sort of action or lose the DGR status, unless the proposed legislation is amended as we suggest.

Drafting issues

Exposure Draft Bill

7. In line with our comment above in para 1, third bullet, we suggest instead of ‘Australian Government Agency’ the legislation uses the term ‘government entity’ (as defined in the *Charities Act 2013* (Cth)).
8. We note that items 10 and 11 of the draft legislation amend the definition of environmental organisations and cultural organisations and suggest the current sections 30-270(1) or 30-300(5) should be deleted as these are covered by the charity requirements and they are differently worded to the application of the not for profit requirement accepted by the ACNC.
9. We consider the reference in item 14(1)(a) to ‘gifts satisfied a requirement’ should instead read ‘fund, authority or institution satisfied’ as the requirement to ‘not be an ACNC type of entity’ is in the column of special conditions applying to the entity rather than the column of special conditions applying to the *gift*.
10. Item 14(2)(b)(i) should refer to ‘the requirement as amended’ as the current reference to the ‘requirement mentioned in sub-item (1)’ is the requirement to ‘not be an ACNC type of entity’.
11. We suggest that the word ‘immediately’ in item 15(a) is unnecessary and should be deleted as time should not be relevant if an application has been made and the Commissioner has not decided before the application date. Further, paragraph 21 of the Explanatory Materials (**EM**) refers to the Commissioner not having made a

decision on the application 'immediately' prior to the application date, which is inconsistent.

12. The meaning of the reference in item 15(2)(b)(i) to 'other such applications for the fund, authority or institution outstanding' is unclear. What are the other outstanding applications being referred to? Do these outstanding applications need to be made to the Commissioner before the application date. Further, if there are other outstanding applications, as currently drafted there appears to be no end date?
13. Item 16(4) requires the application for an extension to be made in the first 12 months. It is likely that the first time some of these DGRs will become aware of these amendments will be when they lose their DGR status and then it will be too late to apply. We can see that the intention is for these DGRs which are not keeping up to date with requirements to reapply for both charity and DGR status so the Commissioner can be sure of compliance and up to date contact details. However, we are concerned that some will think they are compliant and that this change does not apply to them. We encourage the Commissioner to contact the DGRs directly to inform them of this change prior to the deadline. We also suggest that there is some discretion as the moment DGR is revoked the fund, authority or institution must transfer the funds in the gift fund to another DGR.
14. Item 16(5) is unclear. Is the intention of the sub-item to provide an alternate meaning for 'extended application date'? If so, the alternate meaning appears to be the date an application for an extended application date is determined. Rather than try and use a different meaning for 'extended application date', it would be clearer to state that the amendments to the special conditions will not apply until the Commissioner refuses the application, if this is the intended meaning of the sub-item. Or use a different expression.

Explanatory Materials

15. EM 1.7 appears to have been part of the EM which included reforms on moving the registers to the ACNC. We suggest that this is redrafted to suit this particular reform.
16. We suggest that the first sentence in EM 1.14 is deleted as it is repetitive of the second sentence which is more correctly stated, and that a reference to 'except for those which are government entities or operated by government entities' is added.
17. We consider that EM 1.16 is incomplete. In addition to non-charity DGRs, the paragraph should also refer to non-charity entities operating a DGR. The paragraph should also refer to 'funds, authorities and institutions' instead of funds alone.
18. There are a number of references to 'non-charity DGRs' and 'non-charity DGR funds' throughout the EM and we make the same suggestion to be more accurate as noted above in relation to EM 1.16.
19. In EM 1.19 the word 'becomes' should be amended to 'become'.
20. The phrase in EM 1.20 'the Commissioner determines that date' is confusing as it implies the Commissioner determines the date, when instead the legislation outlines that the Commissioner determines the outcome of the application for an extended application date. Further, EM 1.20 states that the transition rule will apply until the extended application date which does not take account of the fact that the transition

rule will not apply if the entity became entitled to DGR. The word 'fund' after 'institution' also needs to be deleted. We suggest the following amended wording for EM 1.20:

Upon application, the Commissioner can determine that a fund, authority or institution has an extended application date, in which case the transitional rule will apply from the application date to the earliest of the following:

- *when gifts to a fund, authority or institution become deductible under Division 30 as amended by this Schedule; or*
- *the extended application date.*

21. In line with our suggestion above in relation to item 15(a) of the Exposure Draft Bill, we suggest that the word 'immediately' should be removed from EM 1.21. We reiterate our comment above in relation to item 15(2)(b)(i) of the Exposure Draft Bill that the drafting regarding 'other outstanding applications' is unclear.
22. We suggest that EM 1.22 should be amended in accordance with our comments in relation to EM 1.20 and not refer to 'that' extended application date.
23. In EM 1.26, the word 'operate' should be amended to 'operates.' We also suggest replacing the reference 'a day' on line 3 with 'the day' to avoid confusion that there can be differing days for the extended application date and adding the words 'or the fund, authority or institution meets the amended requirements' at the end of the paragraph. We also repeat our comment in relation to EM 1.20 that the phrase 'the Commissioner determines that date' is confusing.
24. We consider that EM 1.28 would be clearer if it started with the words '*The Commissioner may not have made the determination as to whether to allow the extended application date to apply by the transitional application date for a particular fund, authority or institution or operating entity.*' We also refer to our comment above in relation to item 16(5) of the Exposure Draft Bill and reiterate that rather than trying to use a different meaning for extended application date, it would be clearer to state that the amendments to the special conditions will not apply until the Commissioner refuses the application.
25. In relation to EM 1.32, we again repeat that comment that the language of the Commissioner determining an application date is confusing. In this context, it appears to refer to an objection when the Commissioner has not made a decision. We consider that it would be clearer to state 'if an entity is dissatisfied with the Commissioner's decision not to allow an extended application date'.

FAQs

(a) What if a DGR is already an ACNC registered charity?

26. The Committee submits that this section should contain additional information that a fund or institution operated by a registered charity does not need to separately register as a charity with the ACNC. Charities do not always appreciate that it is the main entity that is the DGR, but tend to think of the fund as the DGR and so may assume that the fund or institutions is required to separately register.

(b) What if a DGR is not an ACNC registered charity?

27. The Committee submits that the last paragraph should be amended to make it clear that since those entities are operated by government, they will not lose their DGR status. As currently drafted the section could be read as implying that since they are government entities they are not charities and consequently are not eligible for DGR endorsement.

(c) What will a DGR need to do to maintain both ACNC charity registration and DGR endorsement?

28. The sentence 'an endorsed DGR also needs to review its entity's affairs' is unclear. Is it intended to refer to an entity endorsed for the operation of a fund or institution? If so, the fund or institution is not an entity. The Committee suggests amending this sentence to: 'an endorsed DGR also needs to regularly review whether it is still eligible to be endorsed as a DGR'.
29. The Committee also notes that the drafting regarding factors affecting DGR endorsement could be improved to provide greater clarity as follows:

Entitlement to DGR endorsement is contingent upon complying with the relevant eligibility requirements relating to:

- *purpose and operations;*
- *maintenance of a gift fund;*
- *the 'in Australia' requirement that requires DGRs to be established and operated in Australia;*
- *requirements for receipts issue to donors.*

(d) What are the transition arrangements?

30. The fourth paragraph of this FAQ states: '*Non-charity DGRs must apply to the ACNC to seek charity registration before the end of this period if they wish to maintain their DGR status beyond that time.*' This implies that an application must be made to the ACNC for charity registration in order to qualify for the time extension. We are unsure the source of this requirement in the Exposure Draft Bill. Was this intended to state that an application for a time extension must be made to the Commissioner during the transitional period in order to qualify for the extension?
31. The second last paragraph on transitional arrangements states:

'If a DGR has not achieved ACNC charity registration within the 12-month transition period, it must apply for an ATO Commissioner's time-limited exemption to maintain their DGR endorsement.'

32. This wording makes it sound as though an entity that has not achieved ACNC charity registration within the 12-month transition period it can apply for an extended application date after the 12-month transition period has expired. This is inconsistent with the drafting in the Exposure Draft Bill.

(e) What are the exemption provisions?

33. We consider that the references to 'exemption provisions' may be misleading or confusing and suggest the language 'extended time for application' be used instead.
34. The second paragraph in the section on 'exemption provisions' refers to entities being able to indicate in their charity registration application that they wish to apply to the ATO for 'the exemption'. Will this process be streamlined in practice, i.e. will this relieve entities from applying directly to the ATO? We suggest this is clarified.

(f) Can all DGRs apply?

35. The Committee strongly disagrees with the response to the question 'Can all DGRs apply'. We submit it should not be as definitive as expressed in the FAQs as there can be a number of reasons for the ACNC to refuse charity registration which may have been rectified – sometimes it can just be in the manner in which the information has been provided to the ACNC. Further, a circumstance may arise where an entity seeks an extension because it needs a law change, and the ACNC rejects the application because without the law change, the entity is not eligible for charity registration. It should be a factor considered by the ATO but not a definitive factor - there seems no justification for this proposal.

Requests for further guidance

36. The Committee requests further guidance on the following:
- What is to happen with government entities with DGR status which cannot meet these requirements?
 - Factors the Commissioner will and must consider in granting an extended application date to an applicant.
 - Where an entity has DGR status revoked, will the ATO be following up with these entities and checking the funds in the gift fund are transferred to another DGR?
 - The approach of the ATO to those entities which have been incorrectly assuming they were charitable for income tax exempt purposes or wrongly self-assessing. This needs to be covered in the FAQs suggesting self-disclosure may be required.

37. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Charities & Not for Profits Committee Chair, Jennifer Batrouney AM QC on [REDACTED].

Yours sincerely



Michael Tidball
Chief Executive Officer