



1 August 2017

Senior Adviser
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The Treasury
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By email
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Dear Sir/Madam

**Tax Deductible Gift Recipient Reform Opportunities - Discussion Paper
Submission by Arts Law Centre of Australia**

On 15 June 2017 the Treasury released a consultation paper to consider possible reforms to the Deductible Gift Recipient ('DGR') tax arrangements ('the Proposal'). The Arts Law Centre of Australia ('Arts Law') provides this letter by way of response to the request for submissions and comments on the Proposal ('Submission').

1. The Proposal

1.1 The Proposal seeks to reform DGR tax arrangements in the following ways:

- (a) Introduce a requirement that all DGRs become registered charities;
- (b) Transfer the administration of the current four DGR registers to the Australian Taxation Office ('ATO');
- (c) Remove the public fund requirement for DGRs;
- (d) Implement a regular, rolling review of all DGRs by either the ATO or Australian Charities and Not-for-profits Commission ('ACNC'); and
- (e) Introduce a sunset period for specifically listed DGRs.

1.2 The Proposal also references the advocacy concerns raised by the House of Representatives Standing Committee on the Environment's inquiry on the Register of Environmental Organisations ('REO inquiry') in April 2016. The Proposal suggests that the registration of DGRs as charities will address these concerns, as the ACNC has developed a guideline on advocacy and campaigning ('ACNC Advocacy Guidance') which all DGRs can refer to for assistance.

- 1.3 This Submission will focus on the following issues highlighted by the Proposal:
- (a) The requirement for all DGRs to register as a charity with the ACNC;
 - (b) The removal of the public fund requirement;
 - (c) The streamlining of the administration of the four DGR registers;
 - (d) The possible negative impact of the inclusion of the REO Inquiry may have on arts organisations and community centres that do participate in advocacy; and
 - (e) The rolling review to be conducted every 5 years on charities by the ATO or ACNC.
- 1.4 Arts Law provides legal advice, education and resources to a very broad range of arts organisations which could be affected by these reforms especially small to medium sized organisations. These include the peak arts organisations such as National Association of Visual Arts, peak Indigenous organisations such as ANKA and Desart, small not for profit artist run initiatives which exhibit a wide range of visual arts and experimental work, small Indigenous art centres in regional and remote locations, organisations which support musicians and music projects, writers organisations e.g. Australian Society of Authors, not-for-profit organisations working with artists with disabilities, regional arts organisations, screen organisations, and dance organisations. It is a very long and diverse list of organisations all dedicated to advancing culture in some way.

2. Requirement to register as a charity (consultation questions 1 – 3)

- 2.1 Overall, Arts Law supports all organisations with DGR endorsement being required to report to the ACNC. This will ensure that DGR endorsed organisations are dealt with in a more transparent manner and will strengthen the compliance across the sector. This will, in turn, help to build public confidence and trust in the charitable sector as a whole and will contribute to a more equitable governance environment for DGRs.

Charitable purposes of arts organisations

- 2.2 To register as a charity, an arts organisation must have a purpose that falls within one or more of the twelve charitable purposes set out in the *Charities Act 2013* (Cth), amongst other things. Arts Law considers that most arts organisations will fit within one of more of the charitable purposes (in particular advancing religion, advancing culture or promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia) so theoretically this should not present any difficulties.
- 2.3 Arts organisations that are registered public funds on the Register of Cultural Organisations (**ROCO**) (numbered 12.1.1 pursuant to the *Income Tax Assessment Act 1997* (Cth) section 30-100) do not currently need to register as a charity but need to have a principal purpose of promoting literature, music, a performing art, a visual art, a craft, design, film, video, television, radio, community arts, arts of Indigenous persons or movable cultural heritage. Provided this principal purpose meets the requirements for a charitable purpose of advancing culture, Arts Law considers this principal purpose is akin to the charitable purpose of advancing culture and in those circumstances, these funds should not have any difficulty meeting the requirements for charity endorsement. However, due regard will need to be had to the time and resources that will be expended by these organisations to make an application for charity status. For example, if an organisation's registration is refused because it also has a non – charitable purpose, they are likely to need significant support to review the purposes of the organisation as set out in their constitution and potentially their activities which contribute to their purposes.

Timeframe and resources proposed for registration

- 2.4 The proposed 12 months in paragraph 24 of the Proposal is insufficient time for all of these organisations/funds to take steps to register with the ACNC, particularly for those organisations/funds requiring structural changes or for smaller arts organisations with limited resources. Arts Law is aware that approximately one third of arts organisations on ROCO do not have charitable status and at least one organisation which was advised it was likely to be refused registration as a charity because not all of its purposes were considered charitable.
- 2.5 The Government will need to commit additional resources to the ACNC to assist existing DGR organisations to apply for charity registration. Further, despite the tools that have been developed for charities that are mentioned in paragraph 32 of the Proposal, many of these organisations require legal assistance to progress their applications for charitable status or restructure their organisation in order to meet the requirements, and many of these organisations will not be able to afford these legal services. This will add a significant burden to under-resourced organisations such as, Arts Law which provide free or very low cost legal assistance.
- 2.6 An alternative approach would be to require all organisations with DGR status, regardless of whether they are registered charities, to report to the ACNC during a suggested transition period of 24 months. This would allow both the ACNC and the DGR organisations to assess the needs and eligibility of organisations which do not have charitable status.

Increased reporting for incorporated associations

- 2.7 Arts Law is concerned about the additional reporting obligations that will subsequently be imposed on arts organisations established as incorporated associations that are not currently required to be registered as charities with the ACNC. As incorporated associations they will be registered both with the relevant state regulator and with the ACNC, and must therefore meet the reporting obligations under relevant state laws and their obligations as registered charities.
- 2.8 Arts Law is also concerned about the additional reporting obligations that will be imposed on small arts organisations that are not currently registered as charities. Many of these organisations have minimal or no staff, other than volunteers. Whilst reporting to the ACNC may seem minimal, it is an additional task amongst unfunded and unpaid activities, such as reporting on fundraising compliance amongst different states and territories, that small arts organisations already undertake.
- 2.9 Arts Law understands that the ACNC is continuing to work with state and territory regulators to streamline the reporting arrangements for charities. Arts Law submits that there must be a particular focus on expediting this process if the proposed DGR reforms are to go ahead as the requirement to lodge financial reports to two bodies is unnecessary red tape for many organisations in the arts community.

3. Public fund (consultation question 8)

- 3.1 Arts Law supports the removal of the public fund requirement in the Proposal. Under the current system, cultural organisations registered with ROCO must maintain a public fund that meets the criteria in sections 30.300(3) of the *Income Tax Assessment Act 1997* (Cth). One of the requirements for a public fund is that it is administered or controlled by a majority of people who, because of their tenure of some public office or their position in the community, have a degree of responsibility to the community as a whole. For example church authorities and clergy, school principals, judges, solicitors, doctors or other professional people etc. This

requirement is problematic for small arts organisations, particularly those based in rural and regional areas, which we note is highlighted in the Proposal at paragraph 49.

- 3.2 A responsible person under the ACNC is generally the board, committee members or trustees of a charity. Responsible persons have legal responsibilities under the ACNC legislation to appropriately manage their charity in accordance with the Governance Standards. This is a much simpler process, particularly for rural and regional arts organisations, and provides sufficient safeguards for the proper management of public funds. Arts Law also supports the Proposal's proposition that it is confusing to have two different tests for 'responsible persons' under the ACNC and for public funds.
- 3.3 Non-government institutions that are public libraries, public museums, public art galleries and institutions consisting of a public library, public museum and public art gallery or of any two of them (which are numbered 12.1.2, 12.1.3, 12.1.4 and 12.1.5 respectively in section 30.100 of the *Income Tax Assessment Act 1997* (Cth)) do not need to maintain a public fund although we note there is a similar 'responsible person' requirement for these types of organisations too that are imposed on public funds, in particular that they be owned or controlled by people or institutions who, because of their tenure of some public office or their position in the community, have a degree of responsibility to the community as a whole. We recommend this requirement be similarly removed if these types of organisations are required to register as charities.

4. Streamlining the administration to the ATO (consultation question 7)

Application process

- 4.1 Arts Law supports the proposed transfer of the administration of the four DGR Registers, including ROCO, to one body. The current application process for registration on the ROCO is burdensome and lengthy. An application must first be made to the Department of Communications and the Arts who assess the application. It is then forwarded to the Minister for the Arts and the Treasurer for a second assessment. This two-fold Ministerial engagement needlessly extends the process of registration. The application process can take approximately 12 to 18 months to be considered by the Minister for Arts and Treasurer alone, following which it still needs to be sent to the ATO for consideration for DGR endorsement.
- 4.2 We note however that the suggestion in paragraph 42 that the ACNC is likely to take one month to consider applications for charity status under one of the four DGR Registers is unrealistic. Moving the DGR Registers to the ATO in and of itself does not guarantee a better and faster process. The ACNC can take between 3 to 6 months to progress applications for registration of charities which are then passed on the ATO for DGR endorsement, for example public benevolent institutions, that are already required to register as charities. The ACNC and the ATO will need additional resources in order to meet the proposed timeframes for registration.
- 4.3 Despite Arts Law's support for the proposed transfer, it is concerned that the ATO does not have the same expertise as the Department of Communications and the Arts which currently assesses ROCO applications. By moving the process away from the specified portfolios' Ministers and their departments, there is the possibility that specialised knowledge and insight is removed from this process and could lead to decisions that are not in the best interests of the public good that the applying organisation is seeking to support. Paragraph 43 of the Proposal proposes that the ATO or other relevant administrative body could call on the expertise of the relevant government agency for each of the four DGR Registers as required, but does not grant government agencies with specialised knowledge special access or status

in the application process. Arts Law queries whether this will be sufficient and whether the ATO will necessarily be able to identify when it needs expert advice. Practically, it is also likely to result in delays.

- 4.4 In the case of the Arts, the Minister for the Arts and the relevant agency have a specific role in supporting the public good that the arts create, and are the most suitable authority for input should speciality knowledge be helpful for the applicant or for the ATO.
- 4.5 In light of this, Arts Law submits that it would be preferable and more logical for the registers to be transferred to the ACNC instead of the ATO. This will enable ACNC to administer and monitor the register for the charities, as the Proposal seeks registration of all DGRs as charities. The ATO's role should be limited to reviewing the tax concessions attributed to the organisation once it is registered as a charity.

Potential for increased reporting

- 4.6 The Proposal is unclear as to whether organisations previously registered on the four DGR Registers that are transferred to the ATO will need to report to the ATO in respect to any matters specifically covered under those registers or for financial purposes. Arts Law recommends that this opportunity to reform the DGR process be used to streamline all reporting to the ACNC. Any additional information that is required by the ACNC as a result of this change can be incorporated into the Annual Information Statement, however, Arts Law submits that there is no need for the government to receive the level of detailed information about donations that is currently reported under ROCO and this requirement should be removed. .

5. Advocacy (consultation questions 4 – 6)

- 5.1 The Proposal presents the requirement for all DGRs to be registered as a charity as a means of addressing advocacy concerns risen by the REO Inquiry. By becoming a charity, the organisation must not have a disqualifying purpose, such as a purpose of engaging in or promoting activities that are unlawful or contrary to public policy, or a purpose of promoting or opposing a political party or a candidate for political office. This suggested reform was made as a direct response to the REO Inquiry, to 'provide greater assurance to members of the public that environmental DGRs are operating lawfully and in the public interest' (refer to the Proposal at paragraph 77).
- 5.2 The advocacy that many arts organisations undertake is lawful and provided for in the ACNC's Advocacy Guidance. Pursuant to section 12(1)(l) of the *Charities Act 2013* (Cth), a charitable purpose is defined to include a purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, territory or another country if:
 - (a) in the case of promoting change that change is in furtherance or in aid of a purpose including relevantly:
 - (i) advancing culture;
 - (ii) promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia; or
 - (iii) any other charitable purpose.

- 5.3 We note the following forms of advocacy are permitted and acceptable according to the ACNC Advocacy Guidance:
- (a) advancing public debate, including the promotion or opposition of a change in the law; or
 - (b) to promote or oppose a change to a law, policy or practice in the Commonwealth, state or territory or another country
- where this furthers or aids another charitable purpose and;
- (c) advocating or campaigning an issue that is contrary to government policy, but which may not necessarily be contrary to public policy.

5.4 Currently there are a range of arts advocacy initiatives that are introduced with the aim to assist, challenge and invoke thought regarding government policies. For example, advocacy about government cuts to arts funding, arts organisations which host exhibitions that criticise or critique government policies on refugees, and rating/ranking political candidates based on the strength or weaknesses of their arts policies. These types of art advocacy are currently permitted under both section 12(1)(l) of the *Charities Act 2013* (Cth), and the ACNC Advocacy Guidance as they:

- (a) promote a change to a matter established by law in Australia that uses the charitable purpose of advancing culture and promoting human rights in delivering this message; or
- (b) compare or rank political parties or candidates as part of carrying out a charitable purpose, where the material is related to the charity's purpose.

5.5 Despite the lawful art advocacy that many arts organisations are involved in, Arts Law is concerned there may be a negative connotation and implication in the Proposal regarding advocacy due to the heavy focus on the REO Inquiry. It is submitted that the negative stigma associated with the REO Inquiry, which was targeting environmental DGRs advocacy, may be unfairly applied to all DGRs. It is submitted that further sanctions are not required, as the current legislation and ACNC Advocacy Guidance is a sufficient method of ensuring advocacy remains lawful. Any further sanctions may hinder and inhibit art organisations from conducting and promoting their principal charitable purpose. Advocacy by charitable organisations should not be discouraged, nor should an environment be allowed to grow that might intimidate charities from engaging in the issues that affect their charitable purpose.

Charitable purpose not charitable activities

5.6 The ACNC Advocacy Guidance distinguishes between a charitable purpose and a charity's activities. An activity is undertaken in furtherance of a charity's purpose but they are not one in the same. It appears the Proposal has confused 'charitable purpose' and 'charity's activities', which is inconsistent with the ACNC Advocacy Guidance and the law, and leaves open the possibility of reforms that can impose significantly higher levels of scrutiny to lawful activities.

Increased reporting

5.7 The Proposal also suggests that additional information about advocacy activities should be provided by charities in the Annual Information Statement. Arts Law is opposed to this change because this additional reporting burden will be problematic for many arts organisations. To impose additional reporting will result in ongoing internal reporting and monitoring to meet annual formal reporting requirements. This will increase red tape to

already under-resourced charitable organisations. There is no similar requirement to report on other specific activities in the Annual Information Statement. There is currently only a question regarding how the activities contributed to the organisation's charitable purpose, which is appropriate.

6. Regular reviews of DGRs (consultation questions 9-10)

- 6.1 The Proposal proposes regular reviews by the ACNC and/or ATO to ensure an organisation's DGR status is up to date and to provide confidence to donors wishing to claim tax deductions for donations. In addition, DGRs could be required to certify annually that they meet the DGR eligibility requirements, with penalties for false statements.
- 6.2 Arts Law does not support additional red tape for medium to large charities that are already reviewed to supply reviewed or audited annual returns to the ACNC. The smaller charities are also unlikely to have the resources necessary to supply this additional data and it will create an unnecessary burden on them.
- 6.3 Bringing all organisations with DGR status under the ACNC will provide opportunities for broader analysis of sector data. The ACNC can regularly review the data supplied—this is appropriate and does not introduce additional red tape.
- 6.4 In the first instance, the ACNC and not the ATO is the appropriate body to undertake individual or sub-sector reviews or seek further information where a series of 'red flags' are raised suggesting noncompliance.

7. Conclusion

- 7.1 Arts Law submit that the Proposal presents many relevant and useful reforms, particularly regarding the changes to the administrative processes involved with becoming a DGR. The simplification of the DGR process, the requirement to become a charity and the removal of the public fund are supported by Arts Law. However there are some concerns with the Proposal including:
 - (a) The additional reporting requirements that may be an imposition and burden on smaller non-profit arts organisations, especially those that are incorporated associations;
 - (b) The additional resources required to assist in the transition for many arts organisations to a charity, in terms of reviewing and updating their structure and purposes to align with the legislation;
 - (c) The administration of the 4 DGR Registers by the ATO. In response, Arts Law suggests the administration should be conducted by the ACNC, not the ATO, and the ACNC should be able to seek expert advice when needed - for arts organisations that is the Minister for the Arts and the relevant agency;
 - (d) The potential requirement that organisations have to provide information about their advocacy activities in the Annual Information Statement to the ACNC. Despite the Advocacy ACNC Guidance there are serious concerns that additional reporting, and presumably monitoring of advocacy activities, may lead to future changes to restrict and inhibit advocacy and campaigning; and
 - (e) The imposition of conducting a rolling review of the DGR every 5 years is unnecessary as information is already supplied in annual information through the Annual Information Statement.

Accordingly, Arts Law supports the Proposal, provided significant consideration is given to the issues noted above at paragraph 7.1. It is submitted the Treasurer consider the establishment of one nationally-consistent reporting regime for all DGRs under the proposed new regime. Additionally it is submitted that advocacy standards do not become stringent following the introduction of any reforms, to ensure that advocacy that is legal and abides the ACNC Advocacy Guidance can continue.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Robyn Ayres', written in a cursive style.

Robyn Ayres
Chief Executive Officer