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TAX DEDUCTIBLE GIFT RECIPIENT REFORM DISCUSSION PAPER

Dear Sir/Madam

We are pleased to provide you with BDO's feedback in response to the Tax Deductible Gift Recipient Reform Opportunities Discussion Paper ("discussion paper") that was issued by the Federal Treasury on 15 June 2017.

The enclosed BDO report gives our comments on the consultation questions in the Discussion Paper.

Should you wish to discuss any of our comments, please feel free to contact me on +61 2 9240 9736, or via email: Lance.Cunningham@bdo.com.au.

Lance Cunningham
BDO National Tax Director

BDO Response to Consultation Questions

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?**

   As identified in the discussion paper there are many organisations that have Deductible Gift Recipient (DGR) status but are not registered as charities and many of these may not be eligible to be registered as charities.

   A charity is defined pursuant to the *Charities Act 2013 ("Charities Act")*. It is not entirely clear in the discussion paper whether it is intended to amend the Charities Act to include these non-charity DGRs as "deemed charities" or it intended that these non-charity DGRs would cease to have DGR status

   If it is intended to extend the definition of charity to include these "deemed charities" this may result in unintended consequences with those organisations being able to present themselves as charities which may confuse the general public as to what constitutes a charity. This has the potential to damage the concept of what is a charity.

   In addition, another unintended consequence that may arise from the re-categorisation of what is a charity may be to provide access to other taxation concessions such as refunds of imputation credits, currently reserved for charities.

   Alternatively, if it is intended that only DGRs that fit under the current definition of charity can registered as a DGR, this would exclude many worthwhile organisations that are contributing greatly to the Australian community and providing services on a volunteer basis that may alternatively have to be provided by the Government at taxpayer's expense.

   If these entities are precluded from being DGR's it may mean these organisations would have to incur additional administration costs of establishing separate entities that may or may not be able to obtain charity status.

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

   See comments under 1 above

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

   As private ancillary funds are not designed to take donations from the public, their financial statements should not be required to be made publicly available.

   However, private ancillary funds should have to complete the Annual Information Statement (AIS) in a similar manner to all other charities and subject to audit requirements in line with their treatment as a charity. That is, private ancillary funds should be subject to the same regulatory requirements as charities.

The financial statements for private ancillary funds should also be required to be lodged with the ACNC in accordance with existing rules for charities but not made available to the public.

4. **Should the ACNC require additional information from all charities about their advocacy activities?**

Many charities and other DGRs need to make representations to government departments, elected representatives and use the media in order to advocate for the cause or the segment of the community which they serve. The requirement to specifically identify these advocacy activities in a report to the ACNC could provide an administrative burden for the DGRs

There is also a difficulty in defining what "advocacy activities" are. For example, charities that have many dealings with government, such as those partly funded by governments, will need to present their information and/or their case to government from time to time. Would this be seen as advocacy?

Perhaps a better approach would be to simply identify the types of advocacy that are not acceptable such as the following:

- Charities / DGR holders should be prevented from providing support for particular political parties or candidates or endorsing a particular political party's agenda
- DGR funds should not be able to be applied to activities that include illegal actions under either Australian or international laws.

Many DGRs rightly involve themselves in actions and advocacy designed to challenge current perceptions that are detrimental to the particular matters for which they have received the DGR status. We do not see a need to restrict these activities apart from those mentioned above.

For many environmental organisations the activities undertaken are focused on changing public attitudes from a position of general apathy to one of passive support in the interest of achieving the objective of environmental protection, which should be seen as an appropriate activity for such an organisation.

5. **Is the Annual Information Statement the appropriate vehicle for collecting this information?**

BDO considers that the AIS is the appropriate mechanism to collect any additional information for the following reasons:

- The AIS data collection form has been subject to a consultation process to allow input from those who are responsible for completing the AIS. Therefore, the current arrangements appropriately allow for a balance between the data required by the ACNC as regulator, the practical ability of the sector to collate the data and the meaningfulness of that data
- The AIS data collection is not released to the public allowing the ACNC to collate information without the risk of releasing commercially sensitive information.

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

The current consultation process between the ACNC and the NFP / charity sector for the design of the AIS forms has provided guidance to the ACNC to manage the data collection process, whilst also allowing the ACNC to articulate the reasoning for particular requests for data.

BDO's participation and observation of this consultation process for the AIS has seen this review process provide a good balance between the data collection and practicality / effort to collect.

7. **What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?**

BDO considers that it is appropriate that the ATO resumes responsibility for the supervision of the DGR registration process, provided it does not result in a duplicated reporting regime.

8. **What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?**

Public funds provide an efficient and effective mechanism for an organisation to be able to receive donations for a particular activity that can qualify for DGR status, even though the primary activity of the entity will not qualify for DGR endorsement.

One example is schools where a building fund is operated as a separate fund even though the controlling entity, the school is a registered charity.

The operation of a separate fund also assists in the administration and any potential review of the DGR endorsed fund, as only DGR related income and applicable expenditure should pass through that fund.

However, we do not consider that it should be a requirement for all DGR's to have a public fund in order to have DGR status.

9. **What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?**

An annual sign off on compliance with the specific DGR requirements could be incorporated into the AIS.

Boards (or their equivalent) are already responsible for the DGR's compliance obligations including:

- All ACNC requirements to be met
- Conditions for income tax exemption contained in Division 50 of the Income Tax Assessment Act 1997 are met
- Conditions for retention of DGR are met

- Other income tax responsibilities such as PAYG withholding, superannuation contributions are met.

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

No BDO Comment

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?**

BDO is of the view that where an entity is specifically listed as a DGR, the decision on whether there the sunset date, if any, for that specific listing may be appropriate in some instances but there should not be general requirement for All DGRs to have a sunset date.

To set five years as an arbitrary sunset date may result in DGRs being listed for an inappropriate period or having to reapply for DGR status with associated administrative costs for the DGR.

A mandatory five-year sunset would also create uncertainty for employment of staff in entities that rely on the DGR endorsed donations for their economic survival. Staff and organisations need certainty to manage their affairs in the most economic manner. In addition, the re application process would distract and require resources to be devoted to that process.

If the DGR listing is linked with the reporting through the AIS or similar, there is less need for an arbitrary sunset date as the AIS reporting allows the collation of data that the ACNC can pass on to the ATO as appropriate.

12. **Stakeholders' views are sought on requiring environmental organisations to commit no less than 25 per cent of their annual expenditure from their public fund to environmental remediation, and whether a higher limit, such as 50 per cent, should be considered? In particular, what are the potential benefits and the potential regulatory burden? How could the proposal be implemented to minimise the regulatory burden?**

BDO consider that introducing a mandated percentage of funds to be applied to environmental work is fraught with risks. If a mandated percentage applies, there are new risks introduced such as whether the application of the funds to meet the mandated requirement is "value for money" or will be effective in the long term.

As an alternative to a mandated percentage of annual expenditure being applied in a particular manner, environmental organisations could be required to make it clear whether their primary purpose is supporting environmental projects such as environmental remediation or whether it is supporting changing attitudes to assist in attaining the relevant environmental goals.

Environmental organisations could operate an advocacy fund and an environmental works fund so that when a donation is made to the entity / fund, a choice can be made by the donor as to what category of expenditure the donor supports.

The environmental organisation is then bound to apply the amounts in each fund in accordance with the rules of that fund. If such a measure is applied consistently across environmental organisations it would empower donors to direct the manner in which their donations are applied and this may have a stronger effect than mandating a percentage to be spent in a particular manner.

13. **Stakeholders' views are sought on the need for sanctions. Would the proposal to require DGRs to be ACNC registered charities and therefore subject to ACNC's governance standards and supervision ensure that environmental DGRs are operating lawfully?**

Standard administrative penalties should be available to the ATO for DGR matters. For general matters the ACNC should be the regulator and manage any sanctions / penalties.

At present the primary major "sanction" available to the ATO is the threat of withdrawal of the DGR registration.

This should only be applied in extreme cases as the removal of a DGR endorsement will require the entity to immediately transfer any remaining DGR sourced funds to another like DGR registered entity and cut off the source of tax deductible donations as a funding source. For many organisations this combination will result in the financial failure and closure of the organisation.

The ATO should be required to apply sanctions that ensure the "punishment fits the crime". Sanctions may include situations where the entity is able to continue to receive deductible donations but with restrictions on the disbursement of funds until the factors that triggered the breach are rectified.

Again this power to apply sanctions will need to be applied in a careful manner as restrictions of access to funds could trigger an insolvency event.

If a requirement to act lawfully is introduced it should be applied to all DGRs not just environmental DGRs, otherwise it may be seen as discriminatory.