



James Goodman (Chair), AID/WATCH

4 September 2017

Dear Madam/Sir,

Submission: Joint Standing Committee on Electoral Matters

Aid/Watch is pleased to have the opportunity to make a submission to the Joint Standing Committee on Electoral Matters Inquiry into the Conduct of the 2016 Election.

We wish to focus our comments on the proposed ban on foreign donations for ‘third parties’ as outlined in the ‘Second Interim Report into the conduct of the 2016 Federal Election’. Specifically we wish to address the rationale for a ‘prohibition on donations from foreign citizens and foreign entities to... third parties’ (Rec 3.75), and the committee’s decision to examine further measures to ‘extend a foreign donations ban to all other political actors’ (Rec 3.76).

We also attach our submission to the recent Treasury inquiry into DGR status in order to correct some of the misleading statements that are made in Chapter 2 regarding the misuse of charitable and DGR status.

Background on Aid/Watch

Aid/Watch is a small organisation that monitors the Australian Government policies on aid and trade as they affect people and their environment in developing countries. Our principal purpose, as defined in our constitution, is to ‘to seek to ensure that... aid projects and development programs and projects are designed to protect the environment and associated human rights of local communities in countries that receive Australian aid’. Aid/Watch is a charity and holds DGR status under the Register of Environmental Organisations.

In 2006, the Australian Taxation Office (ATO) stripped Aid/Watch of charitable status citing projects and campaigns by the organisation as inherently political. This began a court process that led to the High Court four years later for a test case watched closely by the Australian charity sector. The outcome in the High Court stated that charities could have a dominant purpose of influencing and engaging in public ‘agitation’ for legislative and policy changes. This landmark decision was a win for freedom of political communication. For the charity sector in Australia, it resolved almost a decade of uncertainty and strengthened the ability of charities to advocate for the public good.

An Evidence-free Proposal

The Committee starts with what it defines as a principle of ‘national sovereignty’, that ‘only those with a direct standing interest [should] participate in Australian democracy’. It translates this principle into a concern ‘that foreign players may influence Australian elections and political decision-making’. The Committee does not attempt to establish whether such influence is being exerted nor whether such influence may be positive or negative. It simply cites public concern about foreign donations to political parties and politicians, and an interested party, namely the Minerals Council of Australia. Oddly, there is no attempt to objectively assess the extent of foreign donations, nor what influence they exert.

Despite minimal evidence, the Committee proposes an outright ban on all foreign donations to political parties, associated entities and third parties that incur political expenditure as defined under the Commonwealth Electoral Act. Importantly, this includes any form of ‘public expression on an issue in an election’. As noted below, the current arrangement is that political expenditure by third parties is declared and published by the AEC on a yearly basis, regardless of whether an election is underway. It is not clear why reporting expenditure to the AEC is not an acceptable alternative solution for foreign donations to third parties. The need for a ban is simply asserted as necessary for ‘consistency’.

‘Consistency’ for whom?

The Committee states it is ‘of the opinion political entities, be they parties, associated entities, third parties or other actors should all be subject to the same rules’. The inclusion of ‘third parties’ reflects current AEC rules. The AEC defines the three sets of entities as potential ‘participants in the electoral process’, and requires them to disclose expenditure on political communication covering any ‘public expression of views on an issue in an election by any means’ (above a threshold of about \$13,000 in any one year).

Fifty-five organisations declared that they incurred third party political expenditure for 2015-16. Organisations are as diverse as Greenpeace (\$55,000), the Minerals Council of Australia (\$.8m), the Business Council of Australia (\$2.6m) and Get up (\$10m).¹ The requirement seems to be unevenly adhered-to: some are notable for their absence, such as the Institute of Public Affairs, which regularly expresses views on electoral issues, and spent \$3.9m in 2015-16.

The Committee claims that excluding ‘third parties’ would offer opportunities to ‘circumvent’ a ban applying to political parties and associated entities. In support of this the Committee repeats highly questionable anecdotal claims that charities are currently avoiding electoral funding rules (in Chapter 1). These claims are incidental to the main focus of the report but are factually incorrect. They seem to be designed to create the impression, at the outset, of a malign charitable sector, and especially in relation to environmental issues (as reflecting the agenda of the MCA).

The statement for instance, that environmental groups ‘were actively participating in political campaigns but were still registered as charitable organisations thus allowing them to avoid declaring the source of their foreign and domestic funding’ (2.27) is especially misleading. As outlined in the addendum to this submission, charities and holders of DGR status are permitted to engage in

¹ AEC (2017) Summary of Political Expenditure returns, 2015-16. Source: <http://periodicdisclosures.aec.gov.au/SummaryPoliticalExpenditure.aspx>

political activity to change Australian law and policy, as their dominant purpose. Relevant expenditure needs to be reported to the AEC; there is no requirement to report on foreign funding for any political organisation.

A ‘level playing field’ – but not for some

The Committee states the inclusion of ‘third party’ players will ‘capture all participants and support an equitable and level playing field’, but its model excludes reporting requirements for the activities of key political players – notably by companies, and private lobbyists.

Political donations from a company registered in Australia would not be defined as a ‘foreign donation’ under the proposed scheme. As quoted in the Committee Report, the 1981 NSW legislation on election funding requires donors to have ‘a legitimate link with Australia, either through residence of the donor or its officer or by being registered in Australia’. A Transnational Corporation need only pay \$479 to register an Australian company, and then transfer whatever capital is required to secure its political influence over the political system.

The model as proposed therefore directly disadvantages all non-corporate ‘third party’ entities wishing to influence the political process. As such it enables foreign-controlled corporate entities to gain added political advantage over non-corporate domestic entities, allowing the use of offshore capital to further influence and indeed manipulate the Australian political process. A cynic would suggest this is exactly what the proposed ban is designed to achieve.

Corporate Political Activity

Clearly, to be ‘consistent’, expenditure by corporate entities to influence political outcomes would have to be included in any ban on foreign funding. Across the board, the overseas-owned corporate sector routinely donates to various politically-influential organisations in Australia, to business associations like the MCA and think-tanks such as the IPA. One would assume that banning such expenditure would be necessary to achieve a ‘level playing field’.

Most of the major members of the Minerals Council of Australia, for instance, are foreign-owned Transnational Corporations, including Adani Mining, AngloGold, BHP Billiton, Rio Tinto, Peabody, Newcrest, Idemitsu, and Glencore. The MCA plays a major role in influencing Australian political outcomes, not least with its 2010 campaign to defeat PM Kevin Rudd’s proposed Resource Super Profit Tax.

The MCA’s ‘Keep Mining Strong’ media campaign reportedly cost \$22m (though, oddy, in that year the MCA only reported \$4m in political expenditure to the AEC).² The new resources tax agreed by PM Gillard, saved the largely foreign-owned sector \$35bln over ten years. Corporate players in Australia appeared to learn the lessons, with the ensuing spate of corporate-funded public campaigns targeting legislative proposals, often led by overseas-owned companies.³

² ABC (2010) ABC 4 Corners: ‘Whats Yours is Mine’. Source: <http://www.abc.net.au/4corners/content/2010/s2917620.htm>

³ Cook. A. (2013) ‘The Power Index: Election Deciders and Corporate Lobbyists, Crikey, 30 May. Source: <http://www.crikey.com.au/2013/05/30/the-power-index-election-deciders-corporate-lobbyists-at-5/>

'Private' Political Activity

Likewise any ban on foreign funding would have to also ban foreign funding of private lobbying. The Committee has not been concerned with non-public political activity – yet it is well known that this is a major aspect of political life.

Third-party lobbyists in Canberra are officially constrained by a requirement to register: in 2017 there were 567 registered lobbyists, in 240 firms, with 1749 clients.⁴ In addition, it is estimated there are a further 1000 unregistered lobbyists.⁵ Organisations representing members' interests such as business associations are exempted and there is no regulation of direct lobbying. The cost of lobbying activities is not disclosed.

If the Committee does not intend advantaging private lobbyists and transnational corporations then it will have to extend coverage of the ban on foreign donations to include much of the Australian corporate sector, and much of the 'private' political process. The Committee's silence over corporate influence over the political process only underlines the skewed character of its conclusions.

Strange (authoritarian) bedfellows

The proposal for a ban on foreign political donations to 'third parties' puts Australia in bad company. Proposals in Australia are part of a wave of measures taken by relatively authoritarian states explicitly designed to curtail the domestic influence of internationally-funded non-government organisations.

Russia, China, India, Egypt, Israel, Hungary, Cambodia and Ethiopia have all introduced new obligations for internationally-funded NGOs. In several jurisdictions, for instance, NGOs receiving foreign funding are required to be designated as 'foreign agents' and to undergo tortuous administrative hurdles and surveillance in order to continue operating. Many have given up, at a serious cost to democratic life across the globe.

Concerns about such obligations have been voiced at the United Nations for half a decade: in 2013 the Human Rights Council called on states to ensure 'that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding...'.⁶ Since then, numerous international organisations have raised concerns at the growing impacts on shrinking 'civic space'.

In 2013, Human Rights Watch asked 'So why is it wrong for NGOs to solicit financial support from foreign friends? Bolstered by foreign funds, governments routinely advance their political agendas. Militaries and businesses do the same. Why should NGOs be singled out for restriction?'⁷ The Economist reported on the trend in 2014: 'More and more autocrats are stifling criticism by barring non-governmental organisations from taking foreign cash' (12/9/14), citing Hungary, Egypt

⁴ Register of Lobbyists, PMC, Canberra. Source: http://lobbyists.pmc.gov.au/who_register.cfm

⁵ Burdon, D. (2016) 'Canberra's unregistered lobbyists outnumber those on federal lobbying register two-to-one', Canberra Times, 2, September.

⁶ Human Rights Council Resolution 22/6, 'Protecting Human Right Defenders, clause 9(b), at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/22/L.13

⁷ Human Rights Watch, 2013, 'NGOs Have a Right to Receive Foreign Funding', at: <https://www.hrw.org/news/2013/04/26/ngos-have-right-receive-foreign-funding>

Azerbaijan, Mexico, Pakistan, Russia, Sudan and Venezuela.

In 2015 the Carnegie Foundation reported: 'Just in the past two years, China, India, and Russia, along with many smaller countries—such as Cambodia, Hungary, and Uganda—spanning all ideological, economic, and cultural lines, are stepping up efforts to block foreign support for domestic civil society organizations.'⁸

The World Economic Forum 2017 Global Risk Report highlighted the double standards for business and NGOs: 'In some countries, for example, businesses and civil society actors have different reporting requirements – for example, civil society actors may be prohibited from receiving foreign donations, while businesses are encouraged to seek foreign investment.'⁹

In its 2017 report, 'Civic Space: Rights in Retreat' CIVICUS an 'onslaught on foreign funding' and echoed the WEF: 'There is, of course, considerable hypocrisy on display here: governments that decry foreign support for CSOs are more than happy to accept foreign funding themselves, including support from donors for their national budgets, or by courting foreign direct investment in the private sector'.¹⁰

An Australian 'First'

The proposal from this Committee under Recommendation 3.75 is not simply to regulate foreign funding to 'third parties', but to ban it outright. This is draconian in the extreme: there is no ban on foreign funding for third parties in any of the countries that have introduced measures against foreign-funded organisations.

At various points in the report the Committee asserts that Australia is out of step with other OECD countries in not banning foreign political donations. At one stage for instance it asserts that many of the submissions to the inquiry support a ban on foreign donations and believe this is 'consistent with the approach of other countries'. This may be true of a ban on foreign donations to political parties – it is not true for the proposal to extend the ban to third parties.

Elsewhere it claims that Canada, New Zealand and the UK 'limit expenditure or require registration from third parties in election campaigns' (2.20). Generally, these countries only permit donations for election campaigning from domestic residents and companies during elections (see the UK example).¹¹ This is not the same as banning any foreign donation to third parties, , as as proposed by the Committee , regardless of whether the donation is for electoral campaigning, if they at any time in the electoral cycle they are 'actively participating in political campaigns'.

⁸ Carnegie Foundation, 2015, 'The closing space challenge: how are funders responding', at: <http://carnegieendowment.org/2015/11/02/closing-space-challenge-how-are-funders-responding-pub-61808>

⁹ World Economic Forum, 2017, *Global Risk Report*, 2.2 at <http://reports.weforum.org/global-risks-2017/part-2-social-and-political-challenges/2-2-fraying-rule-of-law-and-declining-civic-freedoms-citizens-and-civic-space-at-risk/#view/fn-5>

¹⁰ CIVICUS, 2016, 'The Continuing Onslaught on Foreign Funding', in *The Year in Review: Civic Space, Rights in Retreat*, p. 5-8, at: http://www.civicus.org/documents/reports-and-publications/SOCS/2016/summaries/YIR_Civic-Space.pdf

¹¹ UK Electoral Commission, 'Donations to non-Party Campaigners'. Source: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/169467/to-donations-npc-ukpge.pdf

This repeated blurring of provisions in other countries appears to be deliberate. In fact no country in the OECD has a blanket ban on foreign donations to ‘third parties’. Australia would likely be the first democratic country in the world to implement such a ban.

As such, the Australian proposal sets a new low-water mark, and one that is highly significant for having originated in a high-income democracy. If introduced it will only encourage and enable others to take similar measures in a race to the bottom.

Existing safeguards for ‘third party’ players are adequate

Rather than ban foreign donations to third parties, we recommend the Committee use the existing frameworks provided by the AEC and the ACNC, which adequately balance the right to ‘freedom of political communication’ in Australia with the need to ensure the electoral process is not corrupted by political donations, whether from Australia or elsewhere.

The AEC provisions have been discussed, and could provide a simple means for third party in players in the political process to report on the extent to which their expenditure on political activities draws from overseas donations.

The ACNC is responsible for administering the 2013 Charities Act, which recognises that any charity with aims ‘beneficial to the general public’ can have a sole purpose of: ‘promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country’ (12.1.1).

Charities may not engage in illegal political activity, nor can they directly support/oppose political parties or candidates for office. These requirements are spelt-out by the ACNC and there are clear guidelines in place for organisations. By definition, an organisation cannot gain charitable status if it has a ‘disqualifying purpose’ and there are sanctions in place for violation of these requirements by existing charities

Finally, in Chapter 2 a number of misleading statements are made about the misuse of charitable and DGR status. We attach the submission we made to the recent Treasury inquiry into DGR status to help clarify some of these issues.

Yours sincerely.

James Goodman (Chair)

ADDENDUM

James Goodman (Chair), AID/WATCH

4 August 2017

Dear Madam/Sir,

Submission: ‘Deductible Gift Recipient Reform Opportunities’

About AID/WATCH

Aid/Watch is pleased to have the opportunity to make a submission to the Treasury consultation on reform opportunities for Deductible Gift Recipient (DGR) status.

Aid/Watch is a small organisation that monitors the Australian Government policies on aid and trade as they affect people and their environment in developing countries. Our principal purpose, as defined in our constitution, is to ‘to seek to ensure that... aid projects and development programs and projects are designed to protect the environment and associated human rights of local communities in countries that receive Australian aid’. Aid/Watch is a charity and holds DGR status under the Register of Environmental Organisations.

In 2006, the Australian Taxation Office (ATO) stripped Aid/Watch of charitable status citing projects and campaigns by the organisation as inherently political. This began a court process that led to the High Court four years later for a test case watched closely by the Australian charity sector. The outcome in the High Court stated that charities could have a dominant purpose of influencing and engaging in public ‘agitation’ for legislative and policy changes. This landmark decision was a win for freedom of political communication. For the charity sector in Australia, it resolved almost a decade of uncertainty and strengthened the ability of charities to advocate for the public good. We believe the judgement as it relates to charitable status also applies to DGR status. This position is reflected in our response to this discussion paper.

Summary

The submission addresses consultation question 12 first (Section A); this is discussed at some length given its relevance to our history and circumstances. We make several strong and positive proposals on this issue and more generally, to move the debate forward. We then respond to the remaining consultation questions.

There are three sets of recommendations:

A. Recognise and Promote Policy Advocacy The public benefit of ‘agitation for legislative and political changes’, as recognised by the High Court, should be reflected in DGR regulations. DGR registers should explicitly recognise policy advocacy organisations as acting in the public benefit, and thus deserving of DGR status. This should include an updated definition of ‘Environmental Organisation’ under the REO to make it consistent with the 2010 High Court decision and with

Charity law.

B. Strengthen the Role of the ACNC in DGR Charitable status should be a condition of DGR status; exceptions to this rule should be subject to separate reporting requirements. Given the powers of the ACNC, no further reporting on advocacy or other matters is required for DGR charities beyond what currently exists. If DGR administrative responsibility is to move from Departments it should go to the ACNC, not the ATO.

C. Extend Access to DGR status to all Charities As all charities by definition meet the ACNC's public benefit test we suggest there is no reason, in principle, why DGR status should not be granted to all charities that seek it. We suggest the possible costs and benefits of such a proposal merit investigation.

SECTION A. Response to Consultation Question 12: Proposal to delimit the scope for advocacy allowable for Environmental Organisations in receipt of DGR status

The 2010 High Court judgement in the *Aid/Watch* case established that the constitutional right to freedom of political communication applies to the availability of tax concessions for non-government organisations. The judgement as it relates to charitable status should also apply to DGR status. Any disqualification of DGR status on the basis of an organization having engaged in advocacy as a predominant or sole purpose would fall foul of the High Court judgement. There would, we believe, be substantial grounds for overturning any such measure through the courts.

In 2010 the *Aid/Watch* case established that, under Australian constitutional law, charities could have a dominant purpose of influencing and engaging in public "agitation" for legislative and political changes' (para 45). The decision applied the right to freedom of political communication in Australia, which the High Court had previously defined as a constitutional precondition for representative democracy. In the *Aid/Watch* case the Court found that 'the generation by lawful means of public debate... itself is a purpose beneficial to the community' (para 47), adding that 'in Australia there is no general doctrine which excludes from charitable purposes "political objects"' (para 48).

Reflecting this, the judgement was later expressed in the 2013 Charities Act, which recognises that any charity with aims 'beneficial to the general public' can have a sole purpose of: 'promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country' (12.1.1).

DGR rules should reflect the public benefit of 'promoting or opposing a change to any matter established by law, policy or practice'.

DGR provisions need to be reformed to make them consistent with current Charity Law on advocacy, which itself reflects the High Court interpretation of Constitutional Law as it relates to freedom of political communication for charities. Any restriction on the ability of charities to exercise this public benefit – including as vested in DGR regulations – is potentially unconstitutional.

The 2010 judgement concerned the political purposes of organisations seeking a tax exemption under charitable status. But the judgement is also directly relevant to the administration of 'Deductable Gift Recipient' status. Here, again, the law and associated regulations cannot discriminate against organisations simply because their principal or sole purpose is to agitate for policy change.

Legislation and regulations governing DGR status must not disqualify organisations that focus on

policy advocacy as to do so would curtail freedom of political communication. To date the implications of the High Court's Aid/Watch decision for the government's several DGR registers have not been tested – but they could (and should) be if organisations are struck-off or denied access to DGR due to a dominant or sole focus on advocacy and policy change.

Current DGR rules potentially violate freedom of political communication

Currently advocacy groups are excluded when DGR status is only available to organisations that have 'direct' provision as their predominant purpose. This is the case for the register of 'Public Benevolent Institutions', held at the ATO and the ACNC, which requires PBI's to have a predominant purpose of providing 'direct' relief of poverty. This means that welfare advocacy organisations for instance cannot claim DGR status under the PBI.

Here, DGR status assists in addressing the symptoms of poverty, not its causes: the organisation running the soup kitchen is eligible, not the organization campaigning for welfare rights. If we follow the reasoning adopted by the High Court in the Aid/Watch case, this requirement under the PBI register undermines debate for 'legislative and political changes', chills democracy, and is potentially unconstitutional.

The PBI appears to be the only register that imposes this strict requirement. The Overseas Aid Gift Deduction Scheme', which falls under DFAT, requires that organisations be engaged in providing overseas aid for 'development and/or relief activities'. Under this scheme aid can be used to address the causes of poverty, through development assistance, as well as its symptoms, through direct relief. Further, such development aid may flow to advocacy organisations, provided they are not agents of political parties.

The Register of Environment Organisations states that the principal purpose for an organization to be on the REO must be 'the protection of the environment', which may include 'the provision of information or education, or the carrying on of research.' Advocacy for policy change, as it relates to the environment, is not explicitly defined as a purpose.

Clearly DGR status be made consistent with Charity Law in relation to advocacy, and thereby with freedom of political communication. Below we propose simply carrying across the Charity Law provision that purposes may include 'promoting or opposing a change to any matter as it relates to the protection of the environment that is established by law, policy or practice in the Commonwealth, a State, a Territory or another country' (12.1.1).

The public benefit of political 'advocacy' should be reflected in the Register of Environment Organisations

The Treasury paper raises the question of whether environmental organisations should be required to engage in 'environmental works' in order to be eligible for DGR status. This proposal would disqualify organisations that have a predominant or sole purpose of engaging in political advocacy. As such it contradicts Charity Law, which, as noted, clearly defines advocacy for policy change as of public benefit.

We believe that Treasury should be seeking to widen the scope for environmental organisations to engage in public advocacy, not to restrict it. If such advocacy is indeed for the public benefit – as is recognized under Charity Law and by the High Court – then this should be reflected in DGR regulations. Specifically we recommend that the public benefit of advocacy should be recognized in REO by adding a third clause as follows:

'(1) Its principal purpose must be:

- (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or
- (b) the provision of information or education, or the carrying on of research, about the natural

environment or a significant aspect of the natural environment; or
(c) *promoting or opposing a change to any matter as it relates to the protection of the environment that is established by law, policy or practice in the Commonwealth, a State, a Territory or another country*

SECTION B: Responses to remaining consultation questions

1. ACNC and DGR, Consultation Questions 1, 2, 9, 3, 10, 11, 13

We are generally in favour of requiring charitable status as a precondition for access to DGR status, mainly as this ensures a clear ‘public benefit’ test is applied, via the ACNC. We believe the ACNC process for registering and then annually affirming charitable status offers more-than-sufficient assurance that charities are operating in the public interest. If all DGR recipients are required to hold charitable status then there is no need for additional compliance and reporting requirements for DGR recipients. Exceptions could be made where necessary (eg for organisations specifically listed under the Tax Act, which may have their own reporting requirements). As now, officers of DGR charities would be responsible for maintaining compliance with DGR rules. Given ACNC powers and responsibilities there is no need for a ‘sunset’ clauses or other review provisions for DGR charities.

2. CNC and Advocacy, Consultation Questions 4, 5, 6, 13

It is not clear why the DGR charities should be required to report to the ACNC on their advocacy activities. As noted, such activity is specifically defined in the Charity Act as having public benefit. Clearly charities may not engage in illegal political activity, nor can they directly support/oppose political parties or candidates for office. These requirements are spelt-out by the ACNC and there are clear guidelines in place for organisations. By definition, an organisation cannot gain charitable status if it has a ‘disqualifying purpose’ and there are sanctions in place for violation of these requirements by existing charities.

Para 29 states that ‘there are concerns that charities and DGRs are unsure of the extent of advocacy they can undertake without risking their DGR status’. This statement is not substantiated but insofar as it holds, suggests a need to more explicitly vest political advocacy into DGR rules: as discussed above, this would correct an inconsistency between the Charities Act that recognizes that political advocacy is ‘beneficial to the general public’, and DGR rules that may have the effect of de-limiting advocacy (for instance in the PBI).

3. ATO, ACNC and DGR, Consultation Question 7

It is not clear that moving the administration of DGR funds from Departments to the ATO would necessarily make the process of applying DGR status any more efficient. To the contrary, the ATO has a direct role in maximizing tax revenue, as against supporting the charitable and DGR sector. The ATO, as outlined in its ‘Statement of Expectations’, is ‘the Australian Government’s principal revenue collection agency’. This may make it more, not less, difficult for otherwise eligible organisations to gain or retain DGR status. A better option, if the administration of DGR is to move from Departments, is to move it to the ACNC. This would make more sense insofar as the ACNC has a specific mandate to ‘support and sustain a robust, vibrant, independent and innovative not-for-profit sector’.

More generally, the Treasury should consider the possibility that, given the strong oversight role of the ACNC and the clear definition of the public benefit purposes of charities as defined in legislation, whether DGR status should become an automatic entitlement for all charities. Given the public benefit of all charities, extending access to DGR status to the whole sector would by

definition be in the public interest. The impacts in terms of lost revenue would likely be more-than compensated-for through a resultant expansion in economic activity associated with the charitable sector. The impacts in terms of enhanced community well-being would clearly be extensive. We believe the ACNC would be the appropriate authority to investigate the potential costs and benefits of such a proposal.

4. Public Fund and Multiple Endorsement, Consultation Question 8

We would support the removal of the public fund requirements for charities that hold DGR status, and permitting charities to be endorsed in multiple DGR categories.



James Goodman (Chair), AID/WATCH

4 August 2017

Dear Madam/Sir,

Submission: 'Deductible Gift Recipient Reform Opportunities'

About AID/WATCH

Aid/Watch is pleased to have the opportunity to make a submission to the Treasury consultation on reform opportunities for Deductible Gift Recipient (DGR) status.

Aid/Watch is a small organisation that monitors the Australian Government policies on aid and trade as they affect people and their environment in developing countries. Our principal purpose, as defined in our constitution, is to 'to seek to ensure that... aid projects and development programs and projects are designed to protect the environment and associated human rights of local communities in countries that receive Australian aid'. Aid/Watch is a charity and holds DGR status under the Register of Environmental Organisations.

In 2006, the Australian Taxation Office (ATO) stripped Aid/Watch of charitable status citing projects and campaigns by the organisation as inherently political. This began a court process that led to the High Court four years later for a test case watched closely by the Australian charity sector. The outcome in the High Court stated that charities could have a dominant purpose of influencing and engaging in public 'agitation' for legislative and policy changes. This landmark decision was a win for freedom of political communication. For the charity sector in Australia, it resolved almost a decade of uncertainty and strengthened the ability of charities to advocate for the public good. We believe the judgement as it relates to charitable status also applies to DGR status. This position is reflected in our response to this discussion paper.

Summary

The submission addresses consultation question 12 first (Section A); this is discussed at some length given its relevance to our history and circumstances. We make several strong and positive proposals on this issue and more generally, to move the debate forward. We then respond to the remaining consultation questions.

There are three sets of recommendations:

A. Recognise and Promote Policy Advocacy The public benefit of ‘agitation for legislative and political changes’, as recognised by the High Court, should be reflected in DGR regulations. DGR registers should explicitly recognise policy advocacy organisations as acting in the public benefit, and thus deserving of DGR status. This should include an updated definition of ‘Environmental Organisation’ under the REO to make it consistent with the 2010 High Court decision and with Charity law.

B. Strengthen the Role of the ACNC in DGR Charitable status should be a condition of DGR status; exceptions to this rule should be subject to separate reporting requirements. Given the powers of the ACNC, no further reporting on advocacy or other matters is required for DGR charities beyond what currently exists. If DGR administrative responsibility is to move from Departments it should go to the ACNC, not the ATO.

C. Extend Access to DGR status to all Charities As all charities by definition meet the ACNC’s public benefit test we suggest there is no reason, in principle, why DGR status should not be granted to all charities that seek it. We suggest the possible costs and benefits of such a proposal merit investigation.

SECTION A. Response to Consultation Question 12: Proposal to delimit the scope for advocacy allowable for Environmental Organisations in receipt of DGR status

The 2010 High Court judgement in the Aid/Watch case established that the constitutional right to freedom of political communication applies to the availability of tax concessions for non-government organisations. The judgement as it relates to charitable status should also apply to DGR status. Any disqualification of DGR status on the basis of an organization having engaged in advocacy as a predominant or sole purpose would fall foul of the High Court judgement. There would, we believe, be substantial grounds for overturning any such measure through the courts.

In 2010 the Aid/Watch case established that, under Australian constitutional law, charities could have a dominant purpose of influencing and engaging in public “agitation” for legislative and political changes’ (para 45). The decision applied the right to freedom of political communication in Australia, which the High Court had previously defined as a constitutional precondition for representative democracy. In the Aid/Watch case the Court found that ‘the generation by lawful means of public debate... itself is a purpose beneficial to the community’ (para 47), adding that ‘in Australia there is no general doctrine which excludes from charitable purposes “political objects”’ (para 48).

Reflecting this, the judgement was later expressed in the 2013 Charities Act, which recognises that any charity with aims ‘beneficial to the general public’ can have a sole purpose of: ‘promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country’ (12.1.1).

DGR rules should reflect the public benefit of ‘promoting or opposing a change to any matter established by law, policy or practice’.

DGR provisions need to be reformed to make them consistent with current Charity Law on advocacy, which itself reflects the High Court interpretation of Constitutional Law as it relates to freedom of political communication for charities. Any restriction on the ability of charities to exercise this public benefit – including as vested in DGR regulations – is potentially unconstitutional.

The 2010 judgement concerned the political purposes of organisations seeking a tax exemption under charitable status. But the judgement is also directly relevant to the administration of ‘Deductible Gift Recipient’ status. Here, again, the law and associated regulations cannot discriminate against organisations simply because their principal or sole purpose is to agitate for policy change.

Legislation and regulations governing DGR status must not disqualify organisations that focus on policy advocacy as to do so would curtail freedom of political communication. To date the implications of the High Court’s Aid/Watch decision for the government’s several DGR registers have not been tested – but they could (and should) be if organisations are struck-off or denied access to DGR due to a dominant or sole focus on advocacy and policy change.

Current DGR rules potentially violate freedom of political communication

Currently advocacy groups are excluded when DGR status is only available to organisations that have ‘direct’ provision as their predominant purpose. This is the case for the register of ‘Public Benevolent Institutions’, held at the ATO and the ACNC, which requires PBI’s to have a predominant purpose of providing ‘direct’ relief of poverty. This means that welfare advocacy organisations for instance cannot claim DGR status under the PBI.

Here, DGR status assists in addressing the symptoms of poverty, not its causes: the organisation running the soup kitchen is eligible, not the organization campaigning for welfare rights. If we follow the reasoning adopted by the High Court in the Aid/Watch case, this requirement under the PBI register undermines debate for ‘legislative and political changes’, chills democracy, and is potentially unconstitutional.

The PBI appears to be the only register that imposes this strict requirement. The Overseas Aid Gift Deduction Scheme’, which falls under DFAT, requires that organisations be engaged in providing overseas aid for ‘development and/or relief activities’. Under this scheme aid can be used to address the causes of poverty, through development assistance, as well as its symptoms, through direct relief. Further, such development aid may flow to advocacy organisations, provided they are not agents of political parties.

The Register of Environment Organisations states that the principal purpose for an organization to be on the REO must be ‘the protection of the environment’, which may include ‘the provision of information or education, or the carrying on of research.’ Advocacy for policy change, as it relates to the environment, is not explicitly defined as a purpose.

Clearly DGR status be made consistent with Charity Law in relation to advocacy, and thereby with freedom of political communication. Below we propose simply carrying across the Charity Law provision that purposes may include ‘promoting or opposing a change to any matter as it relates to the protection of the environment that is established by law, policy or practice in the Commonwealth, a State, a Territory or another country’ (12.1.1).

The public benefit of political ‘advocacy’ should be reflected in the Register of Environment Organisations

The Treasury paper raises the question of whether environmental organisations should be required to engage in ‘environmental works’ in order to be eligible for DGR status. This proposal would disqualify organisations that have a predominant or sole purpose of engaging in political advocacy. As such it contradicts Charity Law, which, as noted, clearly defines advocacy for policy change as of public benefit.

We believe that Treasury should be seeking to widen the scope for environmental organisations to engage in public advocacy, not to restrict it. If such advocacy is indeed for the public benefit –

as is recognized under Charity Law and by the High Court – then this should be reflected in DGR regulations. Specifically we recommend that the public benefit of advocacy should be recognized in REO by adding a third clause as follows:

‘(1) Its principal purpose must be:

- (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or
- (b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment; or
- (c) *promoting or opposing a change to any matter as it relates to the protection of the environment that is established by law, policy or practice in the Commonwealth, a State, a Territory or another country*’

SECTION B: Responses to remaining consultation questions

1. ACNC and DGR, Consultation Questions 1, 2, 9, 3, 10, 11, 13

We are generally in favour of requiring charitable status as a precondition for access to DGR status, mainly as this ensures a clear ‘public benefit’ test is applied, via the ACNC. We believe the ACNC process for registering and then annually affirming charitable status offers more-than sufficient assurance that charities are operating in the public interest. If all DGR recipients are required to hold charitable status then there is no need for additional compliance and reporting requirements for DGR recipients. Exceptions could be made where necessary (eg for organisations specifically listed under the Tax Act, which may have their own reporting requirements). As now, officers of DGR charities would be responsible for maintaining compliance with DGR rules. Given ACNC powers and responsibilities there is no need for a ‘sunset’ clauses or other review provisions for DGR charities.

2. CNC and Advocacy, Consultation Questions 4, 5, 6, 13

It is not clear why the DGR charities should be required to report to the ACNC on their advocacy activities. As noted, such activity is specifically defined in the Charity Act as having public benefit. Clearly charities may not engage in illegal political activity, nor can they directly support/oppose political parties or candidates for office. These requirements are spelt-out by the ACNC and there are clear guidelines in place for organisations. By definition, an organisation cannot gain charitable status if it has a ‘disqualifying purpose’ and there are sanctions in place for violation of these requirements by existing charities.

Para 29 states that ‘there are concerns that charities and DGRs are unsure of the extent of advocacy they can undertake without risking their DGR status’. This statement is not substantiated but insofar as it holds, suggests a need to more explicitly vest political advocacy into DGR rules: as discussed above, this would correct an inconsistency between the Charities Act that recognizes that political advocacy is ‘beneficial to the general public’, and DGR rules that may have the effect of de-limiting advocacy (for instance in the PBI).

3. ATO, ACNC and DGR, Consultation Question 7

It is not clear that moving the administration of DGR funds from Departments to the ATO would necessarily make the process of applying DGR status any more efficient. To the contrary, the ATO has a direct role in maximizing tax revenue, as against supporting the charitable and DGR sector. The ATO, as outlined in its ‘Statement of Expectations’, is ‘the Australian Government’s principal revenue collection agency’. This may make it more, not less, difficult for otherwise

eligible organisations to gain or retain DGR status. A better option, if the administration of DGR is to move from Departments, is to move it to the ACNC. This would make more sense insofar as the ACNC has a specific mandate to ‘support and sustain a robust, vibrant, independent and innovative not-for-profit sector’.

More generally, the Treasury should consider the possibility that, given the strong oversight role of the ACNC and the clear definition of the public benefit purposes of charities as defined in legislation, whether DGR status should become an automatic entitlement for all charities. Given the public benefit of all charities, extending access to DGR status to the whole sector would by definition be in the public interest. The impacts in terms of lost revenue would likely be more-than compensated-for through a resultant expansion in economic activity associated with the charitable sector. The impacts in terms of enhanced community well-being would clearly be extensive. We believe the ACNC would be the appropriate authority to investigate the potential costs and benefits of such a proposal.

4. Public Fund and Multiple Endorsement, Consultation Question 8

We would support the removal of the public fund requirements for charities that hold DGR status, and permitting charities to be endorsed in multiple DGR categories.

==