The Tax Institute

22 February 2023

Personal and Indirect Tax, Charities and Housing Division
Treasury
Langton Cres
Parkes ACT 2600

By email: charitiesconsultation@treasury.gov.au

Dear Sir/Madam

Deductible Gift Recipient Registers Reform

The Tax Institute welcomes the opportunity to provide comments to the Treasury in relation to the consultation on the Deductible Gift Recipient (**DGR**) Registers Reform exposure draft legislation and explanatory material.

In the development of this submission, we have closely consulted with our National Not-for-profit Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

Our feedback is set out below.

The requirement to maintain a gift fund

The Tax Institute is of the view that the mechanism for endorsement of the four DGR categories, referred to in the exposure draft legislation, is unduly complex in relation to the requirement to maintain a gift fund. The exposure draft legislation seeks to endorse a whole organisation as a DGR under section 30-120(a) of the *Income Tax Assessment Act 1997* (**ITAA 1997**). Generally, where the whole organisation is endorsed under section 30-120(a) there is no need to comply with the gift fund requirements and section 30-130 does not apply. However, under the special conditions contained in section 30-45, 30-55 and 30-100 of the exposure draft legislation, it then requires compliance with section 30-130 (maintaining a gift fund).

The separate treatment of these four categories of DGR undermines the intention of reducing the red tape and harmonising the administrative requirements of the DGR categories. It also creates confusion as discussed in the next section of this submission. We have provided recommendations to simplify this as outlined below.

Section 30-125(6)(b) of the *Income Tax Assessment Act 1997*

The Tax Institute is of the view that the gift fund rules should be simplified so taxpayers and practitioners can easily and accurately apply them. For example, the words 'by this section' in section 30-125(6)(b) of the ITAA 1997, creates confusion (as outlined below) and the removal of this wording would better clarify its application.

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We understand from our members that most of these funds are setup by establishing an entity with an 'internal' public fund, with the entity being endorsed as a DGR for the operation of that public fund under section 30-120(b). This means that the entity must maintain a complying gift fund under section 30-130, by virtue of section 30-125(2)(e). In effect, the public fund is the gift fund. Under the transitional rules in the exposure draft, entities that already have such an endorsement are instead deemed to have been endorsed under section 30-120(a). This would ordinarily mean that they do not require a gift fund. However, the requirement to have a gift fund is now built into the relevant item numbers in Subdivision 30-B. Our understanding is that this means that both paragraphs (a) and (b) of section 30-125(6) apply as follows:

- paragraph (a) applies because the entity has to comply with section 30-130; and
- paragraph (b) applies because the entity is not required 'by this section' to meet section 30-130, rather, it is required to do so by the relevant item number in Subdivision 30-B.

This results in two different sets of similar, but not identical, rules applying.

We recommend that the exposure draft is updated to delete the words 'by this section' from section 30-125(6)(b), so that the test is no longer required to be met. The application of two different sets of rules is complex for taxpayers and practitioners to understand and is likely to result in inadvertent misapplication of these rules. Alternatively, we consider that it would be preferable to simplify the gift fund rules in their entirety.

Transitional rules for cultural organisations

We consider that the proposed transitional rules should be extended for cultural organisations. The exposure draft legislation section 7(2)(c) for environmental organisations and section 11(2)(c) for harm prevention charities contains rules designed to overcome the legislative requirement that, on winding up of the fund, the surplus assets need to go to another fund on the register. Constitutions will have been drafted to comply with this, so the transitional rules remove the need to amend such constitutional provisions.

There is no such current legislative requirement for cultural organisations, so there is no matching paragraph in transitional section 16(2). However, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts that administers the register of cultural organisations has for many years been insisting (administratively) that the applicant entity have rules in its constitution providing that on winding up of the fund, and indeed, on loss of endorsement, the surplus funds not only have to go to another DGR (as contemplated in 30-125(6)(a), the general rule), but in fact to a DGR with similar objects and that qualifies for deductions under section 30-100 (which is considerably narrower than the general rule). Many entities have rules in their constitution which seek to comply with this requirement. Therefore, we consider that the transitional rules need to overcome this condition, so that entities in this space do not have to amend their constitutions to prevent the future application of the general rule from being hindered.

Organisations endorsed for the operation of an overseas aid fund

The exposure draft legislation will require all entities endorsed for the operation of an overseas aid fund to have a principal purpose of delivering development or humanitarian assistance activities (or both):

- paragraph (a) in a country covered by section 30-85; and
- paragraph (b) in partnership with organisations in the country, based on principles of cooperation, mutual respect and shared accountability.

Paragraph (b) focuses on the activities of the organisation rather than the charitable purposes. This creates practical difficulties for certain organisations, such as, public benevolent institutions that operate an overseas aid fund and religious charities that operate an overseas aid fund. We recommend that paragraph (b) is rewritten so its focus is on the charitable purpose of the organisation rather than its activities.

Confusion with governing documents

The transitional provisions attempt to ensure that entities that currently meet the public fund requirements and the more limited winding up requirements will not be obligated, by the Commissioner, to meet those requirements. However, many of these entities will have these requirements included within their governing documents and therefore will still need to satisfy them unless their governing documents are amended. We consider that it is imperative that the explanatory materials provide clearer guidance on this point to ensure that entities understand that they are still bound by their governing documents.

Harm prevention charities and the 'in Australia' requirement

We recommend that the requirement for harm prevention charities (**HPCs**) to have principal activities 'in Australia' be removed. In our view this has been taken from the harm prevention charities guidelines which reflect an outdated position about the DGR 'in Australia' requirement.

Non-conduit policies

Existing rules for DGR endorsement require that the organisation cannot act as a mere conduit for the donation of money or property. Including the requirement that HPCs and charities on the Register of Environmental Organisations (**REO**) have non-conduit policies is a duplication of the existing requirement for DGR endorsement. Such charities cannot, in the exercise of good governing and receipt of true gifts, act as mere conduits. Furthermore, this requirement is no different for HPCs and charities on the REO as for all other DGRs.

The Tax Institute is of the view that the specific requirement for HPCs and charities on the REO is redundant and should be removed. This amendment will remove unnecessary complexity and enable organisations to better understand the specific requirements to register as a HPC or environmental organisation.

Responsibility of the Australian Charities and Not-for-profits Commission

The exposure draft legislation and explanatory materials do not provide clarity as to whether the process for registration of the four DGR categories will be the same as the other 48 DGR categories administered by the ATO. For the other 48 DGR categories, the application to register as a charity is completed through the Australian Charities and Not-for-profits Commission (**ACNC**), which interacts with the ATO for DGR endorsement. The explanatory materials do not provide guidance as to whether this will be applicable for the four DGR categories.

The Tax Institute is of the view that it is important that the processes for the four DGR categories are aligned with that of the other 48 DGR categories, and that explanatory materials explicitly state whether the process for these four DGR categories is aligned with that of the other DGR categories.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix A** for more about The Tax Institute.

If you would like to discuss any of the above, please contact The Tax Institute's Tax Counsel, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

Scott Treatt

General Manager,
Tax Policy and Advocacy

Marg Marshall

President

APPENDIX A

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government, and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge, and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships, and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic, and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.