



Law Council
OF AUSTRALIA

Legal Practice Section

21 April 2023

Senator Jess Walsh
Chair, Economics Legislation Committee
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Senator Walsh

Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section (the **Committee**) in relation to the Senate Economics Legislation Committee's inquiry into the *Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023* (the **Bill**).
2. This submission is focussed on the reform of the four registers (**DGR Registers**) of deductible gifts recipients (**DGRs**) set out in **Schedule 3** to the Bill.
3. Overall, the Committee supports the policy intention to simplify the administration of the DGR categories currently entered on the DGR Registers by removing the requirements for separate registers, and thanks the Treasury for improvements which have been made to address several of the issues raised in its submission to Treasury on the exposure draft of the Bill. The Committee is however, concerned that the current drafting of Schedule 3 will not fully achieve the desired outcome of a smooth and efficient transition from the DGR Registers.
4. The Committee is particularly concerned that as it stands, Schedule 3 will result in:
 - (a) **Unnecessary confusion**—see comments in paragraphs 6 to 9 below about the practical impact of the 'conduit policy'.
 - (b) **High legal burden**—many organisations will need legal advice in order to comply with the requirements of Schedule 3 and in some respects prior to the transitional date.
 - (c) **Unintended consequences**—see comments in paragraphs 10 and 11 below about organisations that will be excluded from the transitional provisions or required to transfer assets to another organisation, which is an unintended consequences of the drafting. See also comments in paragraphs 12 to 14 about the many questions that those operating overseas aid funds will have to grapple with.

5. The Committee urges the Economics Legislation Committee to support further amendments to Schedule 3 that will achieve the desired outcome and adequately transition, in particular, those organisations that are currently endorsed without imposing additional complexity and burdens on them. While many of the recommendations for improvement are technically complex, they are all proposed with the goal of making it simple and resource-efficient for organisations on the DGR Registers to remain DGRs under the new regime.

Conduit policy for Environmental Organisations (EOs) and Harm Prevention Charities (HPCs)

6. In part 1 and part 2 of Schedule 3, relating to EOs and HPCs respectively, there is an additional special condition to *'have a policy of not acting as a mere conduit for the donation of money or property to other organisations, bodies or persons'*.¹
7. As explained below, this special condition will create significant uncertainty and cause many EOs and HPCs to inadvertently cease to be DGRs—not because they are acting as a conduit, but merely because they do not have a documented conduit policy. The Committee strongly recommends that this condition be removed because it is not required.
8. The Committee acknowledges that this additional special condition is not a new requirement for EOs or HPCs but is a current requirement under the Register requirements.² Currently, this requirement is satisfied if the organisation includes a statement that they will not act as a mere conduit in their constitution. The Guidelines for both EOs and HPCs³ do not require these organisations to have a detailed or separate policy document.
9. There are three serious concerns with continuing this requirement as a special condition attaching to the proposed DGR category for EOs and HPCs:
 - (a) It creates confusion across all categories of DGR. The law already provides that no DGR can act as a mere conduit. DGRs (and other charities) are required to exercise their discretion/powers and apply their resources in pursuit of their charitable purposes. By including this as a special condition for EOs and HPCs only, one may construe a legislative intent that other types of DGRs *may* act as a mere conduit.

The Committee submits that the 'conduit policy requirement' is not necessary, creates confusion and uncertainty, and can be removed without consequence to the way that EOs, HPCs and all DGRs operate.

¹ See section 2 of part 1 of Schedule 3 which will amend section 30-60 of the *Income Tax Assessment Act 1997 (ITAA97)* in relation to REOs and section 8 of part 2 of Schedule 3 which will amend item 4.1.4 of the table to sub-section 30-45(1) of ITAA97.

² See sections 30-270(2) and 30-289A(1) of the ITAA97.

³ In relation to REOs, see Guide published by the Department of Climate Change, Energy, the Environment and Water (available here: <https://www.dcceew.gov.au/about/assistance-grants-tenders/environmental-tax-concessions/register-organisations>), in particular paragraphs 2.6 and 2.7 (page 11) and also the model clauses for constitution of REOs which "must be included in your constitution" (pages 15-16 the Guide). In relation to HPCs, see Guide published by the Department of Social Services (available here: <https://www.dss.gov.au/our-responsibilities/communities-and-vulnerable-people/programmes-services/register-of-harm-prevention-charities#1b>), in particular paragraphs 1.5 and 1.6 (page 5) and the model clause "to be inserted" in constitutions of HPCs (pages 15-16 of the Guide).

- (b) Many EOs and HPCs will wish to amend their constitutions to remove all the additional requirements imposed by the relevant Register, and draft Schedule 3 could be administered to require EOs and HPCs to amend their constitutions to delete the rules currently required for inclusion on the Registers. These rules include the statement that they may not be conduits. Many current EOs and HPCs may inadvertently breach the special condition when they remove the Registers' requirements from their constitutions.
- (c) Where requirements are imposed by legislation, it should be readily apparent how organisations to whom the legislation apply should comply. The draft legislation is not clear about why an EO or HPC should have a policy and how an EO or HPC would meet the conduit policy special condition.

Issues raised by including the conduit policy special condition for just EOs and HPCs include whether a separate document will be required, or whether the condition can be satisfied simply if the organisation has a practice of not acting as a mere conduit (as currently occurs for other categories of DGRs). If documentation is required, it is unclear as to the level of formality that will be necessary (i.e., whether it be sufficient to retain one sentence in the constitution). Where a standalone policy document is required, the Committee queries whether this would need to include any more than a simple statement. On the basis of how unclear and seemingly unnecessary the requirement is, the Committee submits that it should be removed.

Transitional provisions—EOs, HPCs and ROCOs⁴

- 10. On the Registers ceasing, current EOs, HPCs and ROCOs will become endorsed as DGRs for the whole organisation. The draft transitional provisions⁵ require amendments, as otherwise:
 - (a) some existing organisations will lose their DGR status as they do not meet the transitional provision requirements;
 - (b) organisations may be required to transfer the money out of their public fund to another entity; and
 - (c) some organisations would require urgent legal advice to carefully and correctly amend their constitutions for compliance.
- 11. The transitional provisions need amendment as follows:
 - (a) Paragraph (1)(c) in each of the relevant transitional provisions must be deleted. For the transition provisions to operate, all that should be required is that the entity is currently on the respective Register and endorsed as a DGR for the operation of a fund, authority or institution paragraph 30-120(b) of the ITAA97. The current draft would exclude organisations that have been accepted onto the respective registers without having the winding up provision as expressed in the Bill. For example, the relevant Department may have accepted distributions on winding up to a specifically listed entity with consistent purposes.

⁴ Organisations on the Register of Cultural Organisations.

⁵ Parts 1-3 of Schedule 3.

- (b) Clarification is required for EOs endorsed as a whole that they continue to be endorsed as a whole.
- (c) Subsection 2 needs to be divided into two sub-sections:
 - (i) one to cover the continuation of the DGR status but amending this to the whole entity; and
 - (ii) secondly, to cover the necessary deeming requirements for the constitution.
- (d) This second part would:
 - (i) only apply until the organisation amends its constituent documents to remove the Registers' requirements; and
 - (ii) include a form of the current paragraph (2)(b) but delete the words '*unless or until the entity establishes a replacement gift fund*' as the monies in the public fund must continue as the gift fund or it would be considered 'wound up'. The reference to a '*replacement gift fund*' is not a continuance of the fund but a new fund, in which case the monies would need to be distributed to another organisation. This is not intended.
- (e) Paragraph 2(c) must be broadened to include the many different forms of drafting of winding up provisions, including both the public fund winding up provision *and* the broader organisation winding up provision.

Many provisions will follow the wording of the gift fund provisions, which refer to winding up of the public fund *or revocation of DGR status*. The legislation could be amended to state '*treat any requirement in the constituent document to transfer assets or funds (on a winding up or other occurrence) to another entity on [the relevant register] as a reference to another entity, gifts to which can be deducted under Division 30 ITAA*'.

- (f) Some organisations' public fund provisions only apply if the organisation is on the relevant Register. As such, there should be a savings clause for those organisations which have provisions which may cease to be operative when the organisation ceases to be on the respective register—stating: "*Notwithstanding the terms of the governing document, the public fund shall continue as the gift fund in the form required in section 30-130 and be read as meeting the requirements of section 30-125(6)(a).*"

Transitional provisions—overseas aid funds

12. Currently there are many different types of organisations which operate overseas aid funds, including public benevolent institutions (**PBIs**), HPCs, faith-based organisations (registered charities for the advancement of religion), and organisations which also operate other funds. It is the Committee's view that few current organisations which operate overseas aid funds will meet the transitional requirement in paragraph 20(3)(d) of Schedule 3 because they will not have articulated in their current constitutions (or the rules of their overseas aid funds) the principal purpose as described in the substitute item 9.1.1 proposed by Schedule 3—that is, delivering development or humanitarian assistance activities (or both) in a developing country

and in partnerships with entities in the country, based on principles of cooperation, mutual respect and shared accountability.

The ATO may wish to take a broad and generally facilitative and constructive approach about the scope of what will be accepted as covered by paragraph 20(3)(d). However the Committee queries whether the proposed wording allows for this to occur.

13. Questions which arise are:

- (a) Will the ATO be checking each entity's purposes in their constitutions before amending their DGR status? What is to happen to those organisations that are currently endorsed but who do not meet the requirement in paragraph 20(3)(d)?
- (b) Can a PBI which currently operates an overseas aid fund be endorsed as a whole under both items 4.1.1 relating to PBIs and 9.1.1 relating to organisations delivering overseas aid?

How will the fact that the PBI could then be considered to have two principal purposes (that of a PBI and that of being an organisation with the principal purpose as stated in the substitute item 9.1.1) be treated by the Australian Charities and Not-for-profits Commission which is responsible for registering the PBI as a registered charity (and item 4.1.1 relating to PBIs) on the one hand, and the ATO, which will be responsible for item 9.1.1 relating to organisations focused on delivering overseas aid on the other hand?

- (c) Will subsection 30-130(3) of the ITAA97 apply to the two gift funds resulting from paragraph 20(4)(a) of Schedule 3 of say an HPC which operates an overseas aid fund so that they can be merged?
- (d) What if the current overseas aid fund has terms which provide that, on the public fund ceasing or revocation of DGR endorsement, the funds must go to another overseas aid fund? The transitional provisions should make it clear that changing this to a gift fund is not a winding up, cessation or revocation.

14. The Committee also refers to the issues noted above in subparagraph 10(d)(ii) in relation to the use of *'until the entity establishes a replacement gift fund'* in paragraph 20(4)(b).

15. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair of the Committee, Seak-King Huang at shuang@milnerhuang.com.au and Deputy Chair, Alice Macdougall at Alice.Macdougall@hsf.com.

Yours sincerely



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