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To whom it may concern

SUBMISSION TO THE TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES DISCUSSION PAPER

The Foundation for Alcohol Research and Education (FARE) welcomes the opportunity to provide comment on the *Tax Deductible Gift Recipient Reform Opportunities Discussion Paper* (Discussion Paper). This process is an opportunity for the Australian Government to strengthen the Deductible Gift Recipient (DGR) framework while continuing to support and value the work of the not-for-profit (NFP) sector.

FARE recognises the need for reform of complex NFP sector governance and administrative arrangements. We therefore support proposals to introduce a new requirement for all DGRs (other than a government entity) to be registered and regulated by the Australian Charities and Not-for-profits Commission (ACNC), and the transferring of administration of the four DGR registers to the Australian Taxation Office (ATO).

However, like many others in the NFP sector, we are very concerned about a number of other proposals outlined in the Discussion Paper that appear to target organisations that undertake advocacy to achieve their purpose, particularly environmental organisations. Our submission argues that: DGR reform should be guided by principles that ensure a sustainable NFP sector; DGR reform should focus on charitable purpose not charitable activity; advocacy in pursuit of a charitable purpose is a legitimate activity; and reviews and audits must be commensurate with nature of risk.

FARE is an independent organisation that has been working for more than a decade with communities, governments, health professionals and police across the country to take action to reduce alcohol harm. In that time, FARE has helped more than 750 communities and organisations, and backed over 1,400 projects around Australia. Alcohol harm is significant, resulting in more than 5,500 lives lost and 157,000 hospitalisations each year in Australia.¹

FARE is a health promotion charity registered with the ACNC and has DGR status. As outlined in FARE's constitution, the objects of the Foundation are to:

- a) Promote health and social wellbeing by stopping harm caused by alcohol in Australia, including alcohol-caused disease and injury, and alcohol's harm to others.
- b) Support evidence-based alcohol-related public health policy, including prevention, treatment and rehabilitation.
- c) Promote the prevention of alcohol harm, particularly among vulnerable population groups such as children, young people, women and Aboriginal and Torres Strait Islander peoples.
- d) Promote community awareness and provide education about the harmful effects of alcohol consumption and its impact on chronic disease.
- e) Identify, commission, conduct and disseminate research that will lead to a better understanding of what works to stop harm caused by alcohol.

As the above highlights, FARE's purpose and associated activities are diverse. FARE's Strategic Plan 2014-17 outlines our five strategic goals. These goals aim to communicate world-leading research, develop and advocate for policies and programs that will reduce alcohol harm, mobilise communities and organisations across the country to work together to stop harm caused by alcohol, and continue to defend the public interest and hold the alcohol industry to account.

To achieve these goals FARE activities range from developing and undertaking targeted health promotion campaigns and commissioning research, to research translation and advocacy directed at all levels of government. Advocacy is a fundamental component of FARE's mission to stop harm from alcohol given such a pursuit is highly dependent on policy change.

Focus of the DGR reform process

The NFP sector has and continues to play an important role in Australian society, contributing to a diverse range of areas such as health, arts and culture, social services and the environment. The sector provides key opportunities for Australians to pursue their interests and contribute to achieving positive social, cultural and environmental change.

Economically, the sector's contribution to Gross Domestic Product (GDP) increased from \$21 billion in 1999-00 to \$43 billion in 2006-07 (average annual growth rate of 6.7 per cent).² In 2006-07, the NFP sector employed 890,000 people of which 41 per cent were employed full-time.³

Like the 2016 *Parliamentary Inquiry into the Register of Environmental Organisations*, we are concerned that the DGR reform process is politically inspired and part of broader efforts aimed at challenging the autonomy and legitimacy of NFP organisations. In particular, we are concerned that the Discussion Paper has singled out NFP organisations engaging in advocacy activities as organisations warranting increased scrutiny, and that Treasury has allowed itself to become engaged in partisan politics.

While the NFP sector is the recipient of tax concessions, it is important to remember that the sector, unlike businesses, is 'not-for-profit' and includes organisations that assist some of the most vulnerable and disadvantaged people in Australian society, who rarely have a voice. The NFP sector is also just one of many sectors that receives financial concessions from the Australian Government. There are industries with a clear vested interest that are also receiving generous tax concessions, and are permitted to claim advocacy expenses as tax deductions. This includes industry front organisations such as DrinkWise.

Wine producers receive government rebates from the Wine Equalisation Tax (WET) Rebate. This subsidy entitles wine producers to a rebate of 29 per cent of the wholesale value of eligible domestic sales, up to a maximum of \$500,000 each financial year⁴ (changing to a maximum of \$350,000 per annum from 1 July 2018).⁵ This costs taxpayers more than \$300 million each year.^{6,7} The wine industry is also the beneficiary of generous government financial support in the form of export marketing assistance, tourism support, and research and development.

Industries such as the mining industry also benefit from tax concessions. The liquid fuel (for example diesel or petrol) tax credit entitles businesses to a rebate of 40.1 cents per litre on fuel consumed by vehicles that are not used on public roads.⁸

When it comes to the reform of tax concessions and arrangements, it is essential that the NFP sector is not unfairly targeted.

Principles for DGR reform

Any reform of the DGR should be guided by principles that ensure a sustainable NFP sector. FARE has developed six principles to guide the DGR reform. These are:

1. A DGR status must have a clear charitable purpose (or purposes) that is of public benefit.
2. Any changes to DGR arrangements must be justified with robust evidence.
3. DGR governance and administration processes should be clear and efficient.
4. DGR governance and administration must be beyond political interference.
5. There should be equal treatment of DGR organisations irrespective of purpose.
6. The autonomy of DGR organisations must be respected.

FARE's positions and comments on the Discussion Paper are informed by these principles.

Positions on proposals in Discussion Paper

FARE has commented on selected proposals in the Discussion Paper and supports the submissions made by Philanthropy Australia and the Community Council for Australia.

1. FARE supports the introduction of a new requirement for all DGRs (other than a government entity) to be registered and regulated by the ACNC.
2. FARE supports the transfer of administration of the four DGR registers to the ATO.
3. FARE supports the abolition of the requirement to establish a public fund to receive tax deductible donations.
4. FARE opposes the activity-level focus of the review as suggested in consultation questions 4 to 6 and 12 and 13 of the Discussion Paper.
5. FARE opposes the proposal to introduce new reporting obligations for advocacy activities on the basis that they would impose additional, unwarranted and burdensome bureaucracy on charities.
6. FARE opposes the proposal to limit the level of advocacy undertaken by environmental organisations by requiring them to allocate 25 to 50 per cent of their donation revenue to environmental remediation.
7. FARE opposes the proposal to introduce a formal rolling review program as suggested in consultation question 9, as existing arrangements are sufficient to ensure compliance with the law.
8. FARE opposes the need for special or additional powers to sanction environmental DGRs on the basis that all DRGs are required to comply with the terms of their registration with the ACNC.

Specific comments on Discussion Paper

DGR reform should focus on charitable purpose not charitable activity

The common law of charity focuses on organisation 'purposes' for classification as a charity. Purposes, as stated in an organisation's formal documents, such as its constitution, are the starting point for inquiries as to whether it is charitable. Activities deemed a second tier inquiry are used as indicators or signposts of an organisation's purpose. Activities are not the initial starting point of inquiry. This has been accepted by the ACNC legislation where the principal charity registration section⁹ is expressed in terms of purpose with one exception.¹

A purposes approach allows those with oversight of charities to devote charitable resources to the most efficient and effective way of achieving their mission. This allows flexibility that a pure activities approach might not allow. Further, a focus on activities can easily descend into a complex and unsatisfactory rules based exercise rather than a principles based inquiry that is far more suited to the classificatory task.

The Discussion Paper raises both charitable purpose and charitable activities. However, as demonstrated above, charity law focuses on purposes and not activities, and the DGR framework generally has a focus on purpose rather than activity. In the absence of strong and compelling reasons to the contrary, the focus of DGR reform should likewise focus on purposes.

The current legal regime is robust in outlining the purposes for which charities can legitimately be established, as well as in ensuring charities demonstrate that they do not have a 'disqualifying purpose.'² Furthermore, the regulatory environment does account for other, relevant laws, which further specify prohibited conditions on DGRs in pursuing their purpose.³

FARE therefore strongly opposes the activity-level focus of the potential reforms (as suggested in consultation questions 4-6 and 12-13 of the Discussion Paper). Such an approach casts doubt and uncertainty over what activities a DGR entity can lawfully undertake, and insufficiently establishes that the current regime of 'charitable purpose' is not robust for regulating the sector.

Advocacy in pursuit of a charitable purpose is a legitimate activity

FARE is very concerned about proposals in the Discussion Paper that relate to advocacy activities by charities. These include proposals for new reporting obligations for advocacy activities (consultation questions 4-6), and a proposal to limit the level of advocacy undertaken by environmental organisations by requiring them to allocate 25 to 50 per cent of their donation revenue to environmental remediation (consultation question 12).

Advocacy by charities has been recognised as a legitimate activity essential to Australia's system of parliamentary democracy. Australian charities can undertake advocacy to further their charitable purposes, through supporting or opposing relevant government policies and decisions. The importance of this was recognised by the High Court in the *Aid/Watch*¹⁰ decision of 2010, where the Court held that charities undertaking advocacy was essential to Australia's constitutional system of parliamentary democracy. This decision was subsequently legislated in the *Charities Act 2013*.

¹ The one exception is Harm Prevention Charities which have a principal purpose test.

² Disqualifying purpose includes: a purpose to promote/oppose political parties/candidates; a purpose to engage in or promote unlawful activity; a purpose to engage in or promote activities contrary to public policy (which does not include opposing specific policies of the Government). See ACNC Fact Sheet http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy.aspx

³ In regards to OAGDS, for example, organisations must demonstrate compliance with the 2006 Anti-Money Laundering/Control of Terrorism Financing Act, and the Criminal Code vis-à-vis extraterritorial powers in relation to child sex tourism.

Advocacy is an important approach that charities can use to address the causes of health, social and environmental problems, rather than just the symptoms. This often requires policy change.

For example, if a community is experiencing high levels of alcohol harm due to poor regulation of licensed premises in that area, providing more police and hospital emergency staff will have little impact if licensed premises can continue operating in the same way. Achieving a reduction in alcohol harm is accomplished when policies are implemented, often resulting from advocacy efforts of organisations. These advocacy activities are aimed to improve the health and safety of communities who are negatively impacted by alcohol.

The Discussion Paper asserts that ‘some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community’ (p4). However, there is no evidence to support this assertion. Unsubstantiated and speculative statements about the expectations of the broader community should not serve as a basis for making public policy.

The Discussion Paper also provides no evidence to support the need for new reporting obligations for advocacy activities. These proposals are strongly opposed on the basis that they would impose new and unjustified bureaucracy on charities. Registered charities with DGR status, such as FARE, already report on their activities through the Annual Information Statement and financial statements.

FARE, like many others in the NFP sector, is concerned about the singling out of environmental organisations in this Discussion Paper. Requiring that a certain proportion of an environmental organisation’s activities be directed towards environmental remediation represents an intrusion on the autonomy of these organisations and amounts to the Australian Government trying to ‘pick winners’ in terms of what approaches charities should use to achieve their charitable purpose.

Charities and their supporters are in the best position to determine what approaches are most appropriate in order to achieve their charitable purpose. The proposed restrictions are strongly opposed on the basis that they would impose new and unjustified red tape on environmental charities that will make it harder for them to achieve their charitable purpose. All DGR recipients should be treated equally, irrespective of their cause.

Well targeted and proportional approaches to maintain transparency and accountability for charities are supported and can be achieved by ensuring all DGRs are registered as charities under the oversight of the ACNC, as the Discussion Paper proposes.

Existing charity law sets appropriate boundaries for what advocacy activities by charities are acceptable, and the ACNC guidance for charities is helpful and reflective of the law.

Reviews and audits must be commensurate with nature of risk

FARE believes that transparency and accountability of DGRs is important and that DGRs are endorsed in accordance with their entitlements under the law. However, we do not believe the introduction of a formal rolling review program (consultation question 9) is necessary to achieve this, as existing arrangements are sufficient to ensure compliance with the law.

At present 92 per cent of DGRs are registered with the ACNC. This means that 25,760 of 28,000 DGR entities are already governed by the ACNC regulatory framework which requires annual reporting. The proposal to require all DGRs (except government entities) to be registered as charities will bring more DGRs under the ACNC regulatory framework.

A rolling review and audit process is costly and the case has not been made that such a cost is justified given the current nature of the risk. The ACNC and the ATO already have the power to undertake reviews

and audits where they believe these are warranted, and it is not apparent that introducing new and costly formal review processes is necessary.

FARE recommends a proportionate and risk-based response to this issue. Such a response would include requiring DGRs to be registered with the ACNC (as the Discussion Paper proposes), with the ACNC and the ATO using their existing compliance approach to ensure compliance with the law. This could involve undertaking reviews and audits using their existing powers where systemic issues have been identified and/or certain risk thresholds amongst categories of charities and DGRs have been surpassed.

The expertise of the ACNC and ATO should be respected, and they should be allowed to independently determine what types of reviews and audits are necessary, and under what circumstances. The Commonwealth Government should not interfere with their independence and second-guess their expertise in this regard.

Conclusion

FARE and others in the NFP sector undertake activities with a clear mission. Any reform to the DGR tax arrangements must be done in a way that will result in the growth and sustainability of the NFP sector. Political interference and increased bureaucracy will not contribute to supporting a sector that has for decades worked to achieve positive social, cultural and environmental change.

Please do not hesitate to contact me on 02 6122 8600 or michael.thorn@fare.org.au if you would like further information about this submission.

Yours sincerely



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¹ Gao, C., Ogeil, R.P., & Lloyd, B. (2014). *Alcohol's burden of disease in Australia*. Canberra: FARE and VicHealth in collaboration with Turning Point.

² The Productivity Commission. (2010). *Contribution of the Not-for Profit Sector*, Research Report, Canberra. Retrieved from: <http://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf>

³ The Productivity Commission. (2010). *Contribution of the Not-for Profit Sector*, Research Report, Canberra. Retrieved from: <http://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf>

⁴ Australian Taxation Office. (n.d.). *Wine equalisation tax, producer rebate*. Retrieved on July 11, 2017, from <https://www.ato.gov.au/Business/Wine-equalisation-tax/Producer-rebate/>

⁵ O'Dwyer, K. (2016). *Fact Sheet – Wine Equalisation Tax Rebate Changes*. Retrieved on July 11, 2017, from <http://kellyodwyer.com.au/assets/20161202-Fact-Sheet-WET-Rebate.pdf>

⁶ Senate Economics Legislation Committee. (2014). *Answers to questions on notice Treasury portfolio budget estimates 2014 3 June to 5 June 2014*. Retrieved from:

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⁷ Ferguson, A. (2015). Wine war afoot as tax reform looms. *The Australian Financial Review*. Monday 18 May 2015.

⁸ Australian Taxation Office. (n.d.). *Fuel tax credits – business, Rates – business, from 1 July 2017*. Retrieved on July 11, 2017, from <https://www.ato.gov.au/Business/Fuel-schemes/Fuel-tax-credits---business/Rates---business/From-1-July-2017/>

⁹ S 25-5 *Australian Charities and Not-for-profits Commission Act 2012*. Retrieved from http://www.austlii.edu.au/au/legis/cth/num_act/acanca2012523/

¹⁰ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42. Retrieved from <http://www.austlii.edu.au/au/cases/cth/HCA/2010/42.html>