

EXPLANATORY STATEMENT

Treasury Laws Amendment (2021 Measures No. 2) Act 2021

Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021

Subitem 16(7) of Schedule 1 to the *Treasury Laws Amendment (2021 Measures No. 2) Act 2021* (the Act) provides that the Minister may, by legislative instrument, prescribe criteria that an application for an extended application date must satisfy, and matters the Commissioner of Taxation must have regard to before granting an extended application date.

The purpose of the *Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021* (the Instrument) is to support the core transitional rules in Schedule 1 to the Act.

Schedule 1 to the Act amended the *Income Tax Assessment Act 1997* to require a fund, authority or institution (with the exception of ancillary funds and specifically listed entities) to, as a precondition for endorsement as a deductible gift recipient (DGR), be:

- a registered charity; or
- an Australian government agency; or
- operated by a registered charity or an Australian government agency.

These amendments generally apply on or after the application date (13 December 2021). However, entities that are DGRs or have applied to the Commissioner of Taxation to be a DGR have an additional 12 months after the application date (referred to as the transitional application date) before the amendments in Schedule 1 to the Act begin to apply. If an entity requires a longer transitional period, it can apply to the Commissioner of Taxation for an extended application date, which is four years after the application date.

Before the Commissioner of Taxation can grant an extended application date to an entity, the Commissioner of Taxation must be satisfied that the prescribed criteria are met and must have regard to the prescribed matters relating to the application. The Instrument prescribes the criteria and matters for this purpose.

The requirements in the Instrument apply in addition to those in Schedule 1 to the Act, including the requirement that the fund, authority or institution (or the operating entity) has applied for an extended application date in the approved form before the transitional application date.

Public consultation was undertaken on the transitional arrangements, including the proposed criteria and matters, between 12 October 2020 and 4 December 2020. This followed a public consultation on a discussion paper released in August 2017. There remains broad support for the reforms as proposed. Further consultation has been undertaken with the Australian Taxation Office and the Australian Charities and Not for-profits Commission in settling the text of the instrument.

Details of the Instrument are set out in the Attachment A.

The Instrument commences on the day after it is registered.

A statement of Compatibility with Human Rights is at Attachment B.

Details of the *Treasury Laws Amendment (2021 Measures No.2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021*

Section 1 – Name

The name of the instrument is the *Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021* (the Instrument).

Section 2 – Commencement

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

The Instrument is made under the *Treasury Laws Amendment (2021 Measures No. 2) Act 2021* (the Act).

Section 4 – Definitions

This section provides for definitions used in the Instrument.

Section 5 – Criteria the Tax Commissioner must be satisfied of in determining an extended application date

Before the Commissioner of Taxation (Tax Commissioner) can grant an extended application date to an applicant, the Tax Commissioner must be satisfied that the prescribed criteria in relation to the application are met.

The prescribed criteria are that, at the time the application for an extended application date is made to the Tax Commissioner:

- there has been no change in the applicant’s circumstances that would affect its entitlement to deductible gift recipient (DGR) endorsement, but for the amendments made by Schedule 1 to the Act;
- the applicant has never had an application for registration under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) refused; and
- the applicant has never had its registration under the ACNC Act involuntarily revoked.

If an applicant does not satisfy all of the above criteria, the Tax Commissioner must refuse its application for an extended application date.

Applicants that do not satisfy all of the above criteria, are less likely to be entitled to DGR endorsement once the amendments in Schedule 1 to the Act apply and pose a higher compliance risk. As the amendments in Schedule 1 to the Act will improve the consistency of regulation, governance and oversight of DGRs, it is therefore not

appropriate to give such an applicant four years after the application date before the amendments apply.

This reflects that the purpose of the extended application date is to ensure applicants that are likely to become entitled to DGR endorsement once the amendments in Schedule 1 to the Act apply, have additional time to do so if that additional time is reasonably needed. This might occur for example, if the applicant needs to go through a court process to change its trust deed to meet the new requirements.

Applicants that do not satisfy these criteria will still have the benefit of the 12-month transitional period that commences after the application date, provided they are either a DGR or have applied to the Tax Commissioner to become a DGR to immediately before the application date. These transitional provisions are set out in Schedule 1 to the Act.

For the majority of affected entities, the 12-month transitional period will be sufficient for these entities to take the necessary steps to become a registered charity or operated by a registered charity, especially given that the reforms were first announced in 2017.

Section 6 – Matters to which the Tax Commissioner must have regard in determining an extended application date

Additionally, the Tax Commissioner must have regard to the prescribed matters before making a determination on an application for an extended application date.

The prescribed matters are:

- during the period between the application date and the transitional application date, whether the applicant took reasonable steps to:
 - satisfy the requirements for entitlement for registration under the ACNC Act;
 - apply for registration under the ACNC Act; and
 - give information or documents to the ACNC Commissioner if required to do so;
- whether it is reasonably possible that the applicant will be able to satisfy the requirements for entitlement for registration under the ACNC Act by the extended application date;
- if the applicant believes it is unlikely to be able to satisfy the requirements for entitlement for registration under the ACNC Act by the extended application date—whether it is reasonable in the circumstances that the applicant be given additional time to wind-up and distribute surplus assets upon winding-up to another DGR with the same or similar purposes; and
- any views expressed by the ACNC Commissioner about the above matters.

The prescribed matter about whether it is reasonable to give an applicant additional time to wind-up and distribute its surplus assets upon winding-up to another DGR reflects that some existing DGRs either cannot be registered under the ACNC Act or may choose to establish a new entity that would instead apply for registration under the ACNC Act and endorsement as a DGR. This prescribed matter therefore ensures there is sufficient flexibility to give these existing DGRs additional time to set up the new entity, where it is reasonable to do so. A relevant factor as to whether it is reasonable to do so is whether the existing DGR's governing document has clauses preventing reforms to enable registration but have clauses enabling it to nonetheless distribute its surplus assets upon winding up to the new entity (once the new entity is registered and endorsed as a DGR).

It is not expected that the ACNC Commissioner will provide views about these matters to the Tax Commissioner for every application for an extended application date. Rather, the ACNC Commissioner will provide views about these matters as needed. For example, this might include a situation where the facts used to inform the Tax Commissioner's assessment of these matters maybe otherwise insufficient.

As with the rationale for the prescribed criteria, these prescribed matters ensure that only applicants that reasonably require more time than the transitional application date to comply with the amendments in Schedule 1 to the Act (or to arrange another entity to be set up to comply with those amendments) can access the extended application date.

If an applicant is dissatisfied with the Tax Commissioner's decision regarding its application for an extended application date, Schedule 1 to the Act allows the applicant to object to that decision in the manner set out in Part IVC of the *Taxation Administration Act 1953*. Part IVC provides a mechanism for internal review, merits review and judicial review of decisions of the Commissioner of Taxation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients—Extended Application Date) Instrument 2021* (the Instrument) is to support the core transitional rules in Schedule 1 to the Act, by prescribing the criteria the Commissioner of Taxation must be satisfied of, and the matters that must be taken into account by the Commissioner, in the Commissioner’s assessment of applications by charities for an extended transitional period.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.