



**Submission from The Wilderness Society Inc
Regarding the Productivity Commission's
Draft Research Report on the Contribution
of the Not for Profit Sector**

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Introduction

The Wilderness Society Inc (TWS) is an independent, self-funded non-profit organisation that seeks to protect, promote and restore wilderness and natural processes for the ongoing evolution of life on earth. Established in 1976 to protect the Franklin River in Tasmania, TWS has since played an important role in many of Australia's most important and effective environment campaigns, including the protection of the Daintree, Shelbourne Bay, Kakadu, Ningaloo Reef, Victorian and South Australian mallee wilderness and the forests of south eastern Australia.

TWS is a national organisation with members spread across the country and with staff, fundraising and environmental activities in all capital cities. We are one of Australia's largest environment advocacy organisations, and our activities include:

- Informing the public of environmental issues including through a website and emails, magazines and other publications, and face to face communications;
- Scientific research and funding of research on the environment, most recently by being an industry partner to a major Australian Research Council grant obtained by the Australian National University and assisting in the publishing of the ANU's "Green Carbon" report;
- Analysis of environment policy, and advocacy on issues of climate change, forest management, marine national parks and wilderness protection; and
- Engagement with corporations, governments, indigenous and other environmental non-government organisations with an interest in or impact on high conservation value environments.

As an environment organisation, The Wilderness Society Inc is a Tax Concession Charity. We are also listed on the Register of Environment Organisations and are therefore a tax deductible gift (DGR) recipient. The Wilderness Society does not receive government grant funding.

TWS Inc has approximately 110 permanent staff, probably another 30-40 casual fundraising staff and a significant number of volunteers. Staff are based in a number of states and the ACT.

In addition, The Wilderness Society "family" also consists of another eight separately incorporated, mostly state- and regionally-based organisations across the country. These much smaller TWS organisations would each have around 4-6 permanent staff and many volunteers.

Response to Issues raised in the Draft Report

TWS has read with interest the Productivity Commission's draft report. We offer the following opinions and seek clarification on issues pertaining to our particular (but probably not unique) organisational situation. Due to resource constraints we will only address those issues in which we have either significant opinions or questions.

TWS supports a transparent and robust not-for-profit (NFP) sector as a vital part of civil society and a modern democracy. The environment which we are passionate about protecting can not speak for itself, but across the country volunteers organised through not-for-profit groups are responsible for caring for, restoring and protecting important natural environments. This work is only possible if people feel inspired to act and supported in their actions, and if there is public confidence in the not-for-profit sector.

We recognise that there is impetus for improved governance and greater accountability by NFPs from governments and the community. However, any disclosure and regulatory regime must be able to support and nurture (rather than overwhelm and bureaucratise) the NFP sector's work, but at

the same time ensure that the high level of public confidence in the sector is maintained by good governance and transparency.

1. The nature of NFPs

TWS agrees with many of the points raised in chapter 2 regarding the nature of NFPs, particularly the complexity, ambiguity and differences of NFPs; the organic establishment of many NFPs by small groups of passionate concerned people; the synergies between NFPs and social capital; and the role and importance of participatory decision-making and process, the value of relationships for effectiveness, volunteer engagement and the ability to manage innovation and risk taking.

The report also highlighted areas that TWS is currently struggling with, *vis* significant recent growth and the subsequent drive to professionalise management and internal policies, procedures and practices, drive an efficient learning and change embracing culture, and the tensions this has caused for some existing staff and volunteers, particularly but not exclusively in our smaller organisations, and in our internal decision-making processes.

2. Regulation of the NFP Sector

i) National regulatory reform and centralised regulation

The Wilderness Society is not opposed to national regulatory reform, but the objectives need to be clear.

We are aware that some calls for greater transparency and regulation for the NFPs that use public policy advocacy activities to assist in achieving their purpose may be subject to political or industry scrutiny based on ideological differences.

We believe that many of the areas of concern which may come under a “regulatory reform” category could be well addressed by support rather than regulation. A key issue in our experience is finding the volunteers with the requisite management, personnel, financial, governance and organisational skills to be on Management Committees. This is partly a product of the increasing size and professionalization of organisations like TWS. Management Committees are now far less “hands-on” and require a greater skill levels than is the case for smaller, less professional organisations. The skills issue in relation to disclosure is magnified for those organisations without professional staff. As has been identified by the draft report, what is needed is support for those responsible for financial management and organisational governance, not simply regulation prescribing what is required.

TWS also believes that in any discussion of national regulatory reform it is necessary to distinguish between the problems associated with different jurisdictions and the need for a national regulatory body. The latter does not necessarily follow from the former.

As the not-for-profit sector is diverse, flexible and often springs semi-spontaneously from immediate community needs or interests - a multiplicity of ways to incorporate may better reflect the nature of the sector than a centralised national regime.

There are certainly a range of problems with the lack of a *nationally consistent* regulatory regime. TWS encounters many instances where its work is made less efficient because of different local regulations and the need for multiple registrations and licences across states, principally in relation to fundraising. We therefore agree with the recommendation of the report to seek harmonisation of fundraising regulation and mutual recognition across Australia.

However, the solution to these wider problems does not necessarily mean that a whole new centralised regulator needs to be established. We would see it as a cheaper, more locally accessible and better option to have uniform legislation but still run by state governments. This would better reflect the local presence of most not-for-profit organisations as well as providing smoother operation for those organisations that operate on a national basis.

There are a number of disadvantages with a centralised regulator, including:

- Many not-for-profit groups are small and local, and a commonwealth regulatory body would seem to be distant, inflexible and regulatory overkill;
- Just by nature of its size and national reach, a national regulator is likely to be more bureaucratic and less responsive than more localised bodies;
- Given the way the ATO was recently used as a political instrument in an attack on The Wilderness Society and other not-for-profit groups¹, we fear that any national regulator could, in the future, be used to stifle the sector. In guarding the all-important independence of the sector, there is strength in diversity of regulators.

Recommendation 1:

That the need for reform of the NFP sector should be more about providing support and encouragement for a vital sector than about its regulation. In this frame, the confusion over different governance regimes may be best met by harmonising laws governing the NFP sector across the various jurisdictions and mutual recognition, with these being the priority rather than the establishment of a whole new national regulatory body.

ii) Legal forms for NFPs

Some legal forms are unsuited to purpose. Eg, State based ‘Associated Incorporations Acts’ are not designed for large organisations with the result that reporting and accountability requirements are inadequate and governance arrangements often weak or inappropriate.

A critical question asked by the Commission is whether state/territory based incorporations of associations should be restricted to NFPs with income less than \$150,000 pa?

If this were to be implemented it is likely that all nine TWS entities would need to be incorporated under new federal legislation. We question whether it would be possible to register nine bodies? Would it be possible for all nine to be eligible for tax concessions and DGR status?

TWS Inc, with an annual turnover in excess of \$10M, would be caught up in the quandary of whether to become a company limited by guarantee. The logistics and financial consequences of this move are unclear to us.

As the Commission has recommended the establishment of a national regulator, there is the question of who such a national regulator would be. Again, given the way the ATO was used as a political football in recent tax debates, and the administrative principle that the tax collector should not be burdened with non-tax regulation (including deciding such esoteric issues like what is a charitable activity), we believe that the ATO would not be the appropriate body. Similarly, we would have little confidence in ASIC as a not-for-profit sector regulator simply because it was set

¹ In the ideologically motivated “tax attack” directed against The Wilderness Society, other environment groups and not-for-profits, we have seen a number of baseless and outdated criticisms made against the sector, based on calls to constrain ‘political’ activity. Such ideologically loaded criteria should not be a basis or objective of reform.

up and would always be primarily directed towards another purpose. The not-for-profit sector is different to the commercial sector.

If there is to be a national regulator established, our preference would be that it be a purpose built, stand alone body with some level of independence from government. However, we would also want it to be publicly accountable, and it would be important that its decisions could be reviewed in a timely and cost-efficient manner. Many in the not-for-profit sector simply would not have the money to challenge decisions which may fundamentally effect their operation, and even those organisations who do have the resources should not be forced at first instance into expensive legal processes.

Given what we have said above about the different scale of operations of groups within the not-for-profit sector, and the problems associated with a big, distant regulator, then if a national regulator is being considered, there should be a threshold as to who it applies to. The current state Association Incorporation Acts generally have minimum requirements for groups which allows for ease of incorporation and running by volunteers. We agree that it is hard to see why national regulation is necessary in the case of a group of 20 people dedicated to protecting their local piece of bush.

Recommendation 2:

A single national regulator is not appropriate for dealing with all not-for-profit groups and that, should a national regulator be set up, it should have a threshold of jurisdiction based on size of the not-for-profits to be regulated and it should have minimal requirements for small to medium not-for-profits.

Given the number of people involved in the not-for-profit sector and the vital need to ensure that people continue to give their time and money to support the work of the sector, any major change in the governance arrangements needs to be fully understood and supported throughout the sector. Without this, there is a danger that people will feel disempowered, or that the changes will be seen as political regulation of the sector – both of which would lead to a decline in support for the sector and in its ability to deliver the vital services it does to the community. A full public process of public participation in the development of any new regulatory regime will be necessary, particularly if there is to be a national regulator established.

Recommendation 3:

Major changes to the regulation of the not-for-profit sector, and particularly the establishment of a central regulator, should trigger appropriate and full participatory public process for the development of any such a scheme.

Recommendation 4:

If a national regulator is to be set up, it should be a stand alone regulatory body, and given the nature of the sector it administers, its decisions should be open to merits review in a low or no cost jurisdiction.

iii) Financial reporting

The draft report proposes that the ‘Standard Business Reporting’ initiative be expanded to include reporting requirements for NPFs. ‘There is a growing push for greater accountability from governments particularly where public funds or subsidies (such as tax benefits) apply’. New accounting, governance and incorporation rules which would bring large NFPs more into line with corporate standards are proposed.

TWS recognises the utility of standardization of financial reporting requirements for NFPs, and is open to examining the ‘Standard Business Reporting’ and ‘Standard Chart of Accounts’ but again raises issues relating to horses for courses.

Bearing in mind the dual size of entities in the TWS family, we would like further clarification of what ‘Standard Business Reporting’ would actually mean for both the large TWS Inc entity and our smaller entities.

iii) Charitable definition

Currently, the ATO Ruling TR2005/21, which currently informs the determination by the ATO of whether an organisation qualifies as a charity, is flawed in respect of its consideration of advocacy and lobbying activities. The Commission recognises that this ruling is ‘quite involved’ and difficult to implement by the ATO staff. TWS agrees.

In particular, TWS is concerned that the considerable lack of clarity, and capacity for interpretation coloured by ideological view, may undermine the robustness of a determination of whether political or lobbying purposes are or are not merely ancillary to an organisation’s charitable purpose.

This issue was crucial to the attack on The Wilderness Society and other environment groups. As the ATO Ruling TR2005/21 suggests, and various decisions in the Aidwatch case confirm², advocacy of changes to government policy are consistent with having a charitable purpose. However, the ghost of the 400 year old Elizabethan statue still hangs over the debate. ‘Politics’ or ‘political activity’ (however defined) seems to be regarded as being, by definition, outside of the definition of charity.

There is considerable apprehension about what ‘political’ actually means in law, but in any case, at a philosophical level surely the contest of different political groups (both in the parliamentary sphere and beyond) is itself a public benefit. This is not to judge the content of what a group may propose, but it is to say that the ability of different groups to put forward policies, ideas and critiques is a fundamental part of a robust pluralist democracy – and that democracy is a public benefit. At this point, the distinction between charities, charities taking an advocacy role and political groups blurs completely.

The Wilderness Society is not affiliated to and does not support any political party and our advocacy is always pursuant to our overarching environmental purpose. As such (and as confirmed by the ATO through its audits of three of our TWS entities) we fit the definition of having a charitable (environmental) purpose. However, we think that any review of the regulation of the NFP sector should be less concerned with old fashioned definitions of what a charity is, and more concerned to support a robust sector with all its politics! In this sense, we believe that some of the 2001 recommendations are redundant.

The Commission proposes that the definition of a charity recommended in the 2001 *Inquiry into the Definition of Charities and Related Organisations* be adopted. Whilst this is, in some respects, an improvement on the ATO Ruling, TWS remains concerned that there is the capacity for political manipulation of the some of the issues recommended as charity status determinants by the 2001 Inquiry, particularly a purpose denied charitable status if is determined to be ‘contrary to public

² Aid/Watch Incorporated and Commissioner of Taxation [2008] AATA 652 (28 July 2008)

<http://www.austlii.edu.au/au/cases/cth/AATA/2008/652.html>

Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128 (23 September 2009)

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2009/128.html>

policy'. As has been recently seen in the appeal to the Supreme Court in the AidWatch Case, the implementation of the 'public benefit test' is also very problematic³.

iv) NFP funding

TWS agrees with the Industry Commission's submission that NFPs should be *supported in their endeavours because they serve the community and their activities provide positive public benefits. Public benefits include engagement through volunteering, greater community self-reliance and hence resilience, and community endowments. In addition, society benefits from a multitude of visions and goals which individuals pursue through NFPs, rather than a single vision set by government.* And, R Krever who contents that,

*"First, individuals may be better able to identify the most appropriate causes in their local area than bureaucrats in a central location. Second, individuals may be better able to identify those organisations which are most capable of addressing the needs of the local community. Third, this form of assistance relies on the initiative of individuals and may reinforce socially desirable conduct associated with supporting the community. Finally, pluralism (individual choice) allows individuals to support cause that may be socially beneficial but **may be politically unattractive.**"*

TWS agrees that there is complexity and inconsistency in the current tax eligibility requirements and endorsement processes. Eg various environmental NFPs are treated differently in respect of DGR status, whether endorsed on the DGR Register or specifically listed by name in the Act. The status of those in the latter category is much more secure from political interference.

TWS is not opposed to widening DGR eligibility to all organisations with a charitable purpose and charitable funds. As noted above, TWS would like to see a low cost, independent appeal process for NFPs denied DGR status, or whose status is challenged, with reciprocal rights to the administering body where it believes that the organisation should not have been granted DGR status.

In respect of the future treatment of tax incentives for philanthropy, TWS will be seeking advice from the ATO regarding the ramifications of the Henry Review on Australia's Future Tax System on NFPs.

The Commission has recommended that the Commonwealth Government explore options to promote and support planned giving, especially payroll giving and bequests. TWS would be supportive of this investigation if it is conducted with a view to expanding rather than regulating or constraining these fundraising avenues.

³ Commissioner of Taxation v Aid/Watch Incorporated [2009] FCAFC 128 (23 September 2009)
<http://www.austlii.edu.au/au/cases/cth/FCAFC/2009/128.html>