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**Submission to *House of Representatives Standing Committee on the Environment Inquiry into the Register of Environmental Organisations May 2015***

### **About The Wilderness Society**

The Wilderness Society is an Australian, community-based, not-for-profit, non-governmental environmental advocacy organisation with charitable status.

We were formed in 1976 by a small group of concerned Australians who came together to launch a campaign to protect the wild Franklin River in south west Tasmania.

We have been listed on the Register of Environment Organisations since 11th June 1993.

We have a membership of 34,000 Australians. Our members are actively involved in our organisation and elect our governing board (the Committee of Management) who oversee the operation of the national organisation (TWS Inc).

The Wilderness Society is a federation of eight separately incorporated organisations working together for the protection of nature and wilderness through an umbrella organisation called The Wilderness Society Australia Incorporated (TWSA). These incorporated organisations are also run by volunteer Management Committee's elected by members from that state.

Our shared organisational purpose is to protect, promote and restore wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth.

We operate campaigns to safeguard our sources of clean water and air, to tackle dangerous climate change, to create a safe future for life on Earth, and to give a better world to our children.

Our organisational vision is an Australian society that protects and respects the natural world to create a vibrant, healthy continent with positive connections between land, water, people and wildlife.

TWSA has adopted a series of values that guide our operations which include:

- A passion for our purpose,
- The power of people to make change,
- Organisational independence and integrity,
- Compassion, and;
- A commitment to success in protecting the environment.

## Funding and Charitable Status

TWS Inc. is an Income Tax Exempt Charity and a Deductible Gift Recipient. Donations to its public fund, the Wilderness Fund, are tax deductible.

Ninety six percent of our funding is provided through members who pay annual membership fees and also contribute regular donations to support our work, and supporters who donate to specific appeals. Other funds come from bequests and online and retail sales of merchandise.

The annual breakdown is;

- Deductible gifts - \$10,950,000
- Non Deductible gifts - \$1,200,000

## Comment on Inquiry Terms of Reference

We note the committee's purpose is to *inquire into the administration and transparency of the Register of Environmental Organisations (the Register) and its effectiveness in supporting communities to take practical action to improve the environment.*

The Wilderness Society is pleased to provide information to inform the Committee's Inquiry and in particular is delighted about the opportunity to showcase the important work we undertake to improve the health and protection of the natural environment.

TWS is interested in the Committee's deliberations and examination of the term 'on ground environmental works.' This concept has no legal standing in relevant legislation and seems to involve a vast array of speculation about its meaning and relevance to this Inquiry.

If it was to be argued by a future Government that only environmental groups that engaged in 'on ground environmental works' are considered to be a charity under the *Income Tax Assessment Act 1997 (Cth)*, this proposition could be seen as a direct attempt to damage and silence those groups that fulfil a charitable role through ongoing advocacy directed at influencing those decisions that relate to the protection of the natural world by political and corporate decision makers.

Many fair minded Australians would rightfully see this sort of reform in its political context as being primarily concerned with silencing those voices that do not suit the interests of political and corporate decision makers.

Certainly over the past several years we have seen a succession of governments at the state and National level, acting on the public and private advocacy by myriad corporate interests and tax deductible think tanks, cutting government funding and seeking to restrict advocacy activities for a range of environment groups and public interest groups in pursuit of deeper political and ideological goals.

Consistent threats to environmental organisations funding, status and credibility create the perception in the mind of many in the community that we are entering a new era of intolerance of dissenting voices and Government becoming captured by the interests and needs of large corporate players.

The political context of this inquiry have been highlighted by several commentators such as Joan Staples in the Conversation<sup>1</sup> and Mike Seccombe in the Saturday Paper<sup>2</sup>, including:

- last year's attempt by Liberal MP Richard Colbeck to ban environmental boycotts;
- incidences of gag clauses being written into the contracts of community legal centres;
- the defunding of voluntary environment, sustainability and heritage organisations and national Environmental Defenders' Offices; and
- the drafting of anti-protest laws in states such as Western Australia.

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<sup>1</sup>Joan Staples, 2015, 'Attacks on NGOs are a threat to our democracy'

<http://joanstaples.org/2014/07/25/attacks-on-ngos-are-a-threat-to-our-democracy/>

<sup>2</sup> Mike Seccombe, 26 July 2014, 'Brandis ties NGO funding to non-advocacy' *The Saturday Paper*

<http://www.thesaturdaypaper.com.au/news/politics/2014/07/26/brandis-ties-ngo-funding-non-advocacy/1406296800#reform-through-advocacy>

In June 2014, at the Liberal Party Federal Council, Tasmanian MP Andrew Nikolic (Member for Bass) moved a motion that was unanimously supported, recommending that the federal government remove the charity and tax deductibility status of NGOs who engage in 'illegal activities', specifically citing The Wilderness Society, the Bob Brown Foundation and the Environmental Defenders Offices as engaging in political activism that constitutes 'untruthful, destructive attacks on legitimate business'.<sup>3</sup> Contrary to these claims, the Wilderness Society has a strong record of working constructively and cooperatively with both government and industry to reach mutually satisfactory legislative and policy reform in relation to environmental issues, with the Tasmanian Forests Agreement being one recent example.

By example, the Tasmanian Forest Agreement (TFA) was the result of several years of good faith negotiations between the Tasmanian timber Industry, community groups, unions and environmental groups (including the Wilderness Society).

The final agreement, reached in 2012, including the commitment to protect identified high conservation value forests and to build a new sustainable brand for Tasmanian Forestry built on Forest Stewardship Council accreditation of logging operations in native forests. The Agreement was endorsed by the Tasmanian Parliament in 2013 and was funded by the Australian Government to the tune of \$150 million.

One outcome of the TFA was joint trade and investment missions to Japanese markets by Government, Industry and Environmental Groups (including The Wilderness Society) to encourage investment in the Tasmanian timber Industry.

Unfortunately this new era of cooperation has been stalled by the outright opposition of the Hodgman Government.

We also note that environmental groups are permitted at law to conduct advocacy activities in pursuit of their charitable purpose to protect and enhance the natural environment and that this has been confirmed by the High Court of Australia in the Aidwatch case.

## **The activities and achievements of The Wilderness Society to protect the environment**

The Terms of Reference for this inquiry include consideration of the definition of 'environmental organisation' under the *Income Tax Assessment Act 1997* (Cth), including under Subdivision 30-E (30.265) that requires that an environmental organisation's principal purpose must be (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or the provision of information or education, or

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<sup>3</sup> 'Liberal MP moves to strip charity status from some environmental groups' *ABC Online*, 29 June 2014, [http://www.abc.net.au/news/2014-06-29/andrew-nickolic-moves-to-strip-charity-status-from-some-environs/5557936?WT.ac=statenews\\_tas](http://www.abc.net.au/news/2014-06-29/andrew-nickolic-moves-to-strip-charity-status-from-some-environs/5557936?WT.ac=statenews_tas)

the carrying on of research, about the natural environment or a significant aspect of the natural environment.

The Wilderness Society is pleased to provide information about our organisation's history, purpose and activities that satisfy the requirements for eligibility as a charity with tax deductibility status which highlights our commitment to 'the protection and enhancement of the natural environment'.

Our organisation was formed in 1976 to campaign for the protection of the Franklin River in south west Tasmania. Ten of thousands of Australian's joined our society to ensure that the Franklin was not dammed and was protected for future generations.

This campaign saw thousands of Australians arrested in non-violent actions to stop the construction of the dam; it witnessed hundreds of thousands of Australians attend peaceful rallies and public meeting to demonstrate their support for the 'no dams' campaign and saw innovative paid advertising and political campaigns to encourage decision makers to overturn the deeply unpopular decision by the Tasmanian Government to dam the river.

It is worth reflecting that no amount of tree planting or other 'on ground environmental works' would have protected the Franklin River from millions of cubic metres of reinforced concrete. The loss of the Franklin would have been a national tragedy.

Since then and with the support of millions of concerned citizens across the country, we've worked to protect millions of hectares of our great and irreplaceable wild places by harnessing public opinion; by commissioning and publishing important, often ground-breaking research and analysis and by countering misinformation campaigns by corporate and political interests.

Over the past 40 years we have convinced Governments across Australia to permanently protect some of Australia's most important wilderness areas and natural heritage and we have worked with communities to stop or mitigate the destruction of many special places from ill-considered development.

We have also encouraged governments to pass new laws to protect the environment and to build and support institutions to improve environmental management and monitor the ongoing health of the environment in support of the universally agreed principles of ecologically sustainable development.

We have commissioned important, often ground-breaking scientific, economic and public policy research, undertaken extensive education programs and participated in public debate about the need to protect the environment.

We have lobbied governments and businesses to adopt best practice policies and hundreds of thousands of Australians have participated in public campaigns to demonstrate their support for the Wilderness Society and our organisational purpose.

Through the effectiveness of our advocacy, large areas of the natural world are now permanently protected through secure National Parks, conservation reserves and World Heritage areas including some of the jewels of the natural world such as:

- *Kakadu National Park,*
- *KULLA National Park (Cape York Peninsula),*
- *The Daintree and the Wet Tropics World Heritage Area,*
- *South West Tasmanian Wilderness World Heritage Area,*
- *Fraser Island World Heritage Area,*
- *The Gondwanic rainforests of southern Queensland and Northern New South Wales,*
- *The Commonwealth waters Marine Protected Areas,*
- *Numerous new National Parks throughout the Kimberley, Cape York Peninsula and in the wet, tall Eucalypt forests of eastern Australia,*
- *Important wilderness declared under the South Australia, NSW and Victorian Wilderness Acts and the Queensland Wild Rivers Act.*

It is worth noting that the establishment of these nationally and globally significant natural protected areas has resulted in the birth and growth of long-term, sustainable industries. Tourism, ranger programs, on-ground environmental management and restoration works have helped provide the economic base for many of Australia's regional and remote communities for decades now.

We have worked with local communities to oppose inappropriate, destructive and unpopular development proposals including the Wesley Vale and Tamar Valley Pulp mills and large mining and industrial projects in areas of outstanding conservation value.

We have successfully advocated for strong policies to control broad scale land clearing and to protect high conservation value and wild rivers across a number of state jurisdictions.

We have commissioned research, public outreach and advocacy campaigns to increase on ground funding for the management of National Parks and Parks Areas and for funding and support for the employment of Aboriginal rangers across remote Australia.

We have worked collaboratively with Industry and Government to promote real solutions to long standing and controversial issues such as the Cape York Land Use Agreement, the South East Queensland Forest Agreement and the Tasmanian Forest Agreement. This has involved deep collaboration and cooperation with traditional foes including the native forest logging Industry and farming and grazing lobby organisations.

We have advocated for and supported ground breaking national policy initiatives such as the National Heritage Trust and the Indigenous Protected Areas program.

All of these initiatives have led to a massive increase in funding and scope for what many would describe as 'on ground environmental works' such as the National Landcare program, improved management of Protected Areas and the employment of thousands of Australian to actively manage and protect the natural world.

All of the above outcomes have been achieved with funds donated by individuals who were able to gain a tax deduction for that donation. Our ability to continue to pursue our charitable purpose is intrinsically linked to our ability to receive these tax deductible donations.

## **Key role of advocacy in achieving our charitable purpose**

The majority of the High Court of Australia in the *Aid/Watch*<sup>4</sup> decision has been clear that advocacy activities aimed at policy or legislative change will not exclude an organisation from being classified as a charity. It was held that the generation by lawful means of public debate concerning the efficiency of foreign aid directed to the relief of poverty was a purpose beneficial to the community and apt to contribute to the public welfare. The fact that Aid/Watch's purposes and activities involved agitation for legislative and political change did not disqualify it from being found to be a charitable institution.

Accordingly, the objects and activities of Aid/Watch qualified as charitable under the fourth head of charitable purposes recognised in *Commissioners for Special Purposes of Income Tax v Pemsel*.<sup>5</sup> In light of this, as long as an institution's purpose falls within one of the four heads of charity, the fact that it carries out public advocacy activities should not affect in any way whatsoever its entitlement to be endorsed as a charitable institution.

The Aid/Watch case arose from previous attempts by some members of the Howard Government and key groups such as Industry Associations and think tanks to constrain the scope of activities that could be undertaken by organisations with a charitable purpose. That period involved consistent harassment of both the Aid/Watch organisation and the Wilderness Society.

The practice of environmental advocacy is also supported by other case law. For example, Santow J in the case of *Public Trustee v Attorney-General (NSW)*<sup>6</sup> said the following in support of allowing charities to advocate for legislative action:

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<sup>4</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

<sup>5</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

<sup>6</sup> *Public Trustee v Attorney-General (NSW)* (1997) 42 NSWLR 600 at 621.

*"Persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance. Much will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end. It is also possible that activities directed at political change may demonstrate an effective abandonment of indubitably charitable objects. But if persuasion towards legislative change were never permissible, this would severely undermine the efforts of those trusts devoted to charitable ends that ultimately depend on legislative change for their effective achievement."*

If advocacy or persuasion towards legislative change were found to be inconsistent with an environmental organisation's charitable purpose, this would severely undermine the environmental organisation's ability to achieve environmental conservation outcomes. Many of the activities that the Wilderness Society engages its members in involve advocating for outcomes through generating public awareness and debate over an issue and through that, agitating for legislative and/or policy change to *protect the environment*.

Indeed, while on ground activities such as tree planting are of great value to environment, large scale systematic changes to protect the environment are impossible to achieve without these advocacy activities. The Wilderness Society conducts these activities in pursuit of their charitable purpose to protect and enhance the natural environment.

It is clear from the Aid/Watch case that as long as the Wilderness Society and other groups have a purpose to achieve enhancement and protection of the natural environment, then the fact that we carry out activities which promote change at a political level should not affect in any way whatsoever its entitlement to be endorsed as a charitable institution. Indeed, an increasing number of Australians recognise that we need environmental groups who do more than plant trees and other 'on ground environmental works'.<sup>7</sup>

The ruling in Aid/Watch removed the problem posed by the old case law whereby a Court could not determine whether a particular act of legislative reform would benefit the community. Activities that agitate for legislative and political change contribute to public welfare because they support our constitutionally mandated system of representative and responsible government by encouraging communication and debate between electors and legislators.

Any recommendations of the Committee having the effect of curtailing the lawful activities of environmental groups on the Register (by, for example, imposing conditions on DGR status that limits advocacy) moves away from the law as it is currently understood and enshrined by the *Charities Act 2013 (Cth)*.

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<sup>7</sup> Helen Davidson, 4 June 2014, 'Lowy Poll: More Australians Seriously Concerned about Climate' *The Guardian*  
<http://www.theguardian.com/environment/2014/jun/03/lowy-poll-more-australians-seriously-concerned-about-climate>

## Comment on Governance Arrangements in International Jurisdictions

The Wilderness Society is concerned that the TOR include a requirement to have particular regard to – ‘relevant governance arrangements in international jurisdictions, and exploring methods to adopt best practice in Australia’. We note that both Canada have recently restricted the activities of environmental organisations which has resulted in decreased funding for the environment.

Canadian legislation allows no more than 10% of organisational resources to be spent on advocacy, which is defined as:

*‘explicitly communicates a call to political action (that is, encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country); explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.’*

If this definition or similar were to be adopted in Australia, it would have a significant negative impact on the ability of the Wilderness Society and other environmental organisations to achieve practical outcomes for the environment. It would also create unnecessary regulatory burden for the administration of the register as environmental organisations would need to demonstrate the percentage of organisational resources dedicated to advocacy activities, which, if defined as in Canada, is an incredibly complex and subjective task and inconsistent with the Australian Government’s stated policy objectives of reducing red tape and regulatory burden.

## NGOs, democracy and freedom of political communication

Environmental organisations in Australia have enormous community support with hundreds of thousands of Australian citizens making donations. Our work relies heavily on these donations and in particular on the income of funds that are independent, untied and free from conditions of government grant contracts. If this Committee is to recommend a restriction on or limit the advocacy activities that environmental organisations listed on the Register are able to conduct, this will result in organisations shrinking or folding, or having to rely on government funding for projects which will threaten our independence.

Australian citizens understand the importance of representative organisations expressing their collective views and rejoice in the extraordinary positive benefits our nation has achieved through environmental advocacy. The Australian Constitution does not explicitly protect freedom of speech or expression, but the High Court has held that an implied freedom of political communication which operates as a freedom from government restraint, exists as an indispensable part of the system of our representative and responsible government.

In *Nationwide News Pty Ltd v Wills*<sup>8</sup> it was held that once it is recognised that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains. No law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose.<sup>9</sup> This principle is further supported by other case law.<sup>10</sup>

To limit DGR status for environmental organisations engaging in advocacy can be seen as limiting freedom of political communication and impinges on the ability of nature-loving Australians to stand up for the animals, the plants, the landscapes and seascapes which make this country great.

The role played by environment groups and other NGOs is crucial in maintaining the health of democracy in Australia. This principle was central to the Aid/Watch ruling whereby the High Court found that the generation by lawful means of public debate is *in itself* a purpose beneficial to the community so as to be supported by the fourth head of charitable purposes as established in *Pemsel*:<sup>11</sup>

“The provisions of the *Constitution* mandate a system of representative and responsible government with a universal adult franchise... Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is “an indispensable incident” of that constitution system.”<sup>12</sup>

The advocacy work of environmental organisations enriches public debate in Australia and contributes to good policy-making by both government and business. Environmental organisations are uniquely placed to take a considered long-term approach in formulating

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<sup>8</sup> (1992) 177 CLR 1, as per Justice Brennan at 48-9.

<sup>9</sup> *Ibid* as per Justice Brennan at 50.

<sup>10</sup> *Australian Capital Television Pty Ltd and New South Wales v the Commonwealth* [1992] HCA 45; *Unions NSW v New South Wales* [2013] HCA 58.

<sup>11</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

<sup>12</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at 44 citing *Royal North Shore Hospital v Attorney General (NSW)* (1938) 60 CLR 396; [1938] HCA 39. *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 557-559; [1997] HCA 25.

policy asks and goals. Since enriching public debate is broadly within the public good the government should not seek to limit the ability of environmental organisations to engage in advocacy regardless of whether the arguments being put forward align with the government's own ideological beliefs of what is in the public good.

We believe that any reform limiting the ability of environmental organisations to engage in political debate would weaken Australia's long-held model of democracy in which many voices contribute to public policy and would also risk constitutional invalidity by threatening the implied freedom of political communication within the Australian constitution. We urge the Committee to give careful consideration before taking any such action.

## **Transparency and Reporting**

The Terms of Reference for this inquiry provide scope for the Committee to consider the requirements to be met by an organisation to be listed on the Register and maintain its listing; and reporting requirements for organisations to disclose donations and activities funded by donations.

The Wilderness Society reports our activities, funding and spending to our members, donors and supporters in a variety of different ways and places a high importance on transparency and accountability.

Our Annual Reviews provide an overview of the past year's achievements, and supply information about how we've spent our money and prioritised our work. This includes providing access to our financial statements which provides transparency around our income, expenditure, fundraising, bequest fund, and changes in equity.

The Wilderness Society also provides important information about the organisation's activities, funding and expenditure at our Annual General Meeting which gives members an opportunity to ask questions and provide feedback.

## **The operation of the Register**

The current regulatory regime for DGR status, including the DGR registers, is administratively inefficient and enables politicisation of the registers (as we observe to be the case with the Register of Environmental Organisations being overseen by the Minister for Environment). The tests in the *Charities Act* for determining charitable purpose is effectively the same as that applied by the Australian Tax Office for DGR status.

We submit that the existence of the four DGR registers should be reviewed with a view to streamlining to ease the administration and compliance burden for the organisations. There should be no creation of an additional compliance framework for DGR endorsement. The most appropriate entity to make charitable and DGR endorsements is the ACNC which is an independent entity that can play this role without any conflicting objectives that the tax office may have.

## **Request to appear before the Inquiry**

The Wilderness Society would welcome the opportunity to appear before the inquiry.

Yours sincerely,

Lyndon Schneiders

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