



# **Submission to the Treasury Regarding Definition of Charities Consultation Paper**

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## 2 Findings and Recommendations

1. The Wilderness Society generally welcomes the opportunity to comment on the proposed statutory definition of charities, but is not convinced that the proposed definition provides greater clarity than the existing common law and tax rulings. At crucial points the proposed definition is inconsistent with and inferior to the current common law. The specific findings and recommendations of The Wilderness Society are as follows:
  - a. (definition of charities) so long as activities are legal and are pursuant to a charitable purpose (as opposed to evidencing an alternative purpose), then there should be no issue in relation to charity status. However, the Consultation Paper seeks to set out number of qualifications and disqualifying factors which we believe is wrong in principle and, rather than adding clarity or confirming current understandings of charitable status, the proposed definition will undermine current understandings and cause greater confusion
  - b. (Public Benefit Balance test (Consultation Paper s2.1.3)) The balance of harm and benefit is inherently a very political question, particularly in an environmental context. Either the detriment or harm provision should be removed, or the criteria needs to be spelled out.
  - c. (Consult Question 5: Public Benefit) It would be better to move protection of the natural environment up a level to be part of the core definition and meaning of a charity, rather than as part of a list of charitable purposes. Thus, clause 4(1)(b)(ii) of the 2003 Charities Bill would be “for the public benefit or for the protection of the natural environment”.
  - d. (Consultation Q 12: Advocacy) if the purpose is charitable, then all legal activities should be available in pursuance of that purpose. Accordingly, the disqualifying purposes in the paragraph 8(2) of the 2003 Charities Bill could be retained as disqualifying purposes, with the exception of 8(2)(c) which should be removed as per the AidWatch decision. However, any reference to activities should be deleted as simply not relevant at the level of legislation.
  - e. (Consultation Q13) the issues in the Consultation Paper are complicated, as are the current and previous ATO rulings and various cases. This complexity is itself a barrier to advocacy for a charitable purpose. It would be much easier to allow any legal activity pursuant to a charitable purpose, or failing that, at least the clearer and more flexible and empowering position of TR 2011/4.
  - f. (Paragraph 113 – Electoral Laws) If the intent of the charity test is simply to stop DGR or tax concession charities being used to conduct funds to political parties, this could be done with more direct tax regulation of such transfers. It should not distort the definition of a charity, particularly as advocacy and engagement with political parties is so core to the pursuit of modern charitable purposes
  - g. (Para 116 – Illegal activities) the fear of crossing a very vague line of “support” may shut down or deter some legitimate charitable activities. Much better to

have a clearer line that says simply that charities shall not conduct or engage in conduct constituting a serious offence, as per the 2003 Bill

- h. (Q 16 – list of charitable purposes) The proposed list of charitable purposes includes “the advance of the natural environment” (para 125) We suggest that words like “protect, maintain, restore” would be more appropriate than “advance”
- i. (Q 16 – list of charitable purposes) welcomes the inclusion of an explicit environmental head as a charitable purpose, but this should be extended to the protection or promotion of a sustainable urban environment.

### **3 Background**

- 2. 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, Shelburne Bay, Kakadu, Ningaloo Reef, Victorian and South Australian mallee wilderness and the forests of south eastern and south western Australia.
- 3. TWS is a national organisation with members, staff, fundraising and environmental activities in different locations around the country. TWS Inc works with and alongside independent Wilderness Society entities in the various states within a federated structure. We are one of Australia's largest environment advocacy organisations, and our activities include:
  - a. Informing the public of environmental issues including through a website, emails, magazines and other publications, and face to face communications;
  - b. Scientific research and funding of research on the environment;
  - c. Analysis of environment policy, and advocacy on issues such as climate change, forest management, marine national parks and wilderness protection; and
  - d. Engagement with corporations, governments and Indigenous organisations with an interest in or impact on high conservation value environments.

### **4 TWS tax and charity status**

- 4. 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 recipient (DGR status).
- 5. In 2004 and 2005, TWS was subject to a concerted campaign by sections of the former government, the timber industry and others who disagree with our environmental advocacy. In the parliament, media commentary, press releases and think-tank reports, our opponents called for the removal of our charity and DGR status based on what they (mis)characterised as political activity. Much of this attack was derived from outdated, irrelevant or simply factually incorrect

material or understandings of tax law, yet it continued after the Australian Tax Office had released its tax ruling (TR 2005/21) and had investigated and confirmed our entitlement to Tax Concession Charity status.

6. As a result of this political attack, in the period 2004-2006, the ATO conducted audits of The Wilderness Society Inc, and of The Wilderness Society Qld and SA. In each case, the ATO found that The Wilderness Society entity concerned was entitled to Tax Concession Charity Status. TWS was happy to cooperate with the ATO in its audits and we make no criticism of the ATO officers who handled the investigation, but the whole exercise was time-consuming and wasteful where it was always clear that our activities were directed to our environmental purpose.
7. Given this background, The Wilderness Society has a particular interest in the interpretation of charitable status. When the ATO's ruling TR 2005/21 was being developed, TWS made a major submission. We made further submissions to the Senate Inquiry into NFP disclosure regimes, and in relation to the ATO TR 2011/D2 which has become TR 2011/4. In making this submission, we draw on these earlier submissions, the case law which evolved during that time, and our experience as a leading environmental non-government organisation.

## **5 The Consultation Paper on the Definition of Charities**

8. The Consultation Paper was difficult to read and at times unclear for two reasons. Firstly, the paper and many proposals were built around proposed changes to the definitions in the (abandoned) 2003 Charities Bill, though not all the 2003 documentation was easy to find. Secondly, given this is a pre-draft consultation, many important questions of detail are not clear and would only be clear when we see the draft legislation. However, TWS has gone back and reviewed that 2003 Bill and the Explanatory Memorandum and considered the issues raised in the Consultation Paper.
9. In our reading, the Consultation Paper sets out a basic framework where a charity must have a charitable purpose, and that is demonstrated by constituting documents as well as the activities of an organisation. The list of charitable purposes is set out in the paper and all activities must be pursuant to that charitable purpose (ie. other purposes are not permitted). Commercial operations can be charitable and receive tax concessions as long as they are pursuant to the charitable purpose, although unrelated commercial activities would (under separate Treasury proposals) be taxed in an ordinary non-concessional manner.
10. At this level, the framework appears broadly consistent with TR 2011/4 and the common law. TWS supports this broad framework, but believes that the proposed statutory definition does not follow that framework to its logical conclusion or reflect the current state of the law. The High Court in Aid Watch states:

*“It is also settled law that whether a particular corporate body is a charitable institution depends on the central or essential object of the institution as determined by reference to its constitution and activities ... If the main purpose of such a body is charitable, it does not lose its charitable character simply because some of its incidental or concomitant and ancillary objects are non-charitable.”*

11. Following this logic, in our submission on TR 2011/D2, we argued that the position should be:

*that charities have all legal activities at their disposal to achieve their charitable purpose just as governments and businesses do. Businesses are not accountable to the ATO for what brand of machinery they invest in to achieve their production and charities should not be challenged by the ATO for what strategies they implement to achieve their recognised charitable purpose.*
12. The TWS position is that, so long as activities are legal and are pursuant to a charitable purpose (as opposed to evidencing an alternative purpose), then there should be no issue in relation to charity status. However, the Consultation Paper seeks to set out number of qualifications and disqualifying factors which we believe is wrong in principle and, rather than adding clarity or confirming current understandings of charitable status, the proposed definition will undermine current understandings and cause greater confusion.
13. TWS believes that, as a result of the series of court cases over the past 6 years and the articulation of the ATO position in TR 2011/4, there is greater clarity and a better definition now than there has previously been. In fact, and particularly in light of the issues raised by the attempt to codify the common law definition (discussed below), we question whether a statutory definition is now needed. This is not to impugn motives or process involved in the current attempt to codify the definition, nor to impugn or oppose other parts of the NFP regulation reform process which clearly have merit. It is simply to say that it is not clear why a statutory definition is needed or how it will add clarity (in fact, the opposite appears to be the case).
14. Further, and alternatively, if after public consultation the determination is still to proceed with a statutory definition, it should be at least as good as the current common law definition. For the reasons put forward in relation to the specific consultation questions, TWS does not believe this is the case.

## **6 Responses to Specific Consultation Questions**

### **6.1 Consult Question 1: dominant purpose to be replaced by exclusively charitable purpose:**

15. In our submission on TR 2011/D2, TWS criticised the ATO for confusing purpose and activities. Provided that it is clear, as per the framework set out above, that what is at issue is the actual purpose of the organisation (as evidenced by constitutional purposes and activities), we see little difference in the formulations as they relate to organisations like TWS whose purpose (both dominant and exclusive) is the protection of the environment.

### **6.2 Public Benefit Balance test (Consultation Paper s2.1.3)**

16. The Consultation Paper does not ask a direct question about the proposal at paragraph 60 arising out of the 2010 Senate Inquiry that public benefit must be balanced against any detriment or harm, yet it is a complex issue which raises a number of concerns. While balancing benefit against harm is probably intended to be applied to the immediate activities of a charity (eg. the religious cult harming its members as per paragraph 90 of the Consultation Paper), the

framing of the statement is open-ended and could be used to attack genuine charities.

17. The balance of harm and benefit is inherently a very political question, particularly in an environmental context. For example, action to protect a particular species of plant or animal is an obvious charitable activity pursuant to a purpose of protecting the natural environment. However, if protection of that species requires closing, moving or otherwise adversely impacting on an industry or activity which employs people and contributes to economic growth, is this detriment to the economy and community taken into account when considering the public benefit in relation to charitable status? Such balancing is an appropriate thing for government to do in various decisions (eg. land use), but it is not an appropriate consideration in relation to an NGO's charitable purpose.
18. Presumably the Australian Charities and Not-for-Profit Commission (ACNC) will decide such balancing questions, but we are reluctant to support any such proposal without a fuller explanation as to what basis or by what criteria such detriment or harm is to be assessed. Either the detriment or harm provision should be removed (it was not part of the 2003 proposal), or the criteria needs to be spelled out – and hopefully at least rule out grander political arguments.

### **6.3 Consult Question 5: Public Benefit**

19. We note at paragraph 74 that the Consultation Paper outlines that “benefit” could be broader than simple material utility. This is important in relation to environmental protection where there may be no immediate, material benefit for the public, but there is a deeper philosophical issue. The requirement that a charity be “for the public benefit”, when put in relation to protection of the natural environment, is an anthropocentric approach which is undermining of the very purpose (protection of the environment) it sees as a benefit. It suggests that protection of the environment is only charitable when it provides a benefit to the public. This is narrow and out-of-date thinking. The protection of the natural environment is, and should be seen as, important, necessary and beneficial for its own sake – that is, for the sake of the thousands of other species with whom we share the planet.
20. In practice, assuming (as per paragraph 124 of the Consultation Paper) that protection of the natural environment is to be viewed as a charitable purpose, then there will be an in-built assumption that it is of public benefit. Environment groups like TWS would then have no difficulty with showing their purpose to be of benefit to the public – as per current practice. However, while it is true that protection of the natural environment does also benefit the public – ie. the human community, the formulation remains anthropocentric and flawed. It would be better to move protection of the natural environment up a level to be part of the core definition and meaning of a charity, rather than as part of a list of charitable purposes. Thus, clause 4(1)(b)(ii) of the 2003 Charities Bill would be “for the public benefit or for the protection of the natural environment”.

### **6.4 Consult Question 7: Removal of presumption of public benefit**

21. If the recommendation above to extend the core definition and test of a charity was accepted, any issues around the removal of the presumption of public benefit would be different or potentially irrelevant. However, if the framework of the Consultation Paper is maintained there should be no problems for environment groups like TWS with the proposal to reverse the onus of proof of public benefit

under the first three existing/old Elizabethan heads. Given that protection of the environment sat under the generic fourth Elizabethan head of “other benefit to the public”, the proposed change does not change the position for environment groups. Further, as long as the process of proof is not bureaucratically onerous, it should not be difficult for any genuine charities to prove public benefit and we welcome this consistency of treatment across all charities.

### **6.5 Consultation Question 10: Activities in furtherance of a charitable purpose**

22. As per our overall framework outlined above, we support the formulation in the Consultation Paper. As a matter of good practice, as well as tax law, charities should not engage in activities which are not pursuant to their purpose. However, if this is accepted, then it ought to be the case that the reverse is also the case and that any legal activity done in furtherance of the charitable purpose should be allowed and not endanger an organisation’s charitable status. Unfortunately, as we will outline below in relation to advocacy, we believe that this is not what is proposed.

### **6.6 Consultation Q 12: Advocacy**

23. As per our general statements above, the notion of a “disqualifying purpose” contained in the 2003 Charities Bill and the Consultation Paper is deeply problematic. If it is the case that all activity is done pursuant to a charitable purpose, why then single out particular activities as disqualifying. This is simply the government telling a charity how to pursue their purpose – or stopping them from pursuing their charitable purpose in the way they judge best. As such, it is an unwelcome regulatory intervention and imposition on the prerogatives of a non-government organisation. It is also contrary to the High Court’s finding in the AidWatch case that there is no general doctrine which excludes from charitable purposes “political objects”.

24. It is a different matter if such ‘disqualifying’ activities are such that they evidence a non-charitable purpose such as getting elected to office, but that is a matter of factual inquiry – not of the framework of the Act. However, the whole discussion in the Consultation Paper is flawed in its attempt to avoid the confusion of the 2003 Charities Bill by replacing purposes with activities. Although we have argued elsewhere that political purposes may be charitable (because a plurality of competing organisations engaging in the governmental process is itself of public benefit as a fundamental democratic practice and democracy itself is an undoubted public benefit).<sup>1</sup> We stand by that contention, but at minimum, if we are going to talk about disqualifications, then the framework should be about purposes not activities and recognise (as per Aidwatch) that attempting to change the law or government policy may be a charitable purpose itself.

25. Again, if the purpose is charitable, then all legal activities should be available in pursuance of that purpose. Accordingly, the disqualifying purposes in the paragraph 8(2) of the 2003 Charities Bill could be retained as disqualifying purposes, with the exception of 8(2)(c) which should be removed as per the AidWatch decision. However, any reference to activities should be deleted as simply not relevant at the level of legislation.

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<sup>1</sup> TWS Submission to the Senate Economics Committee Inquiry on NFP Disclosure, August 2008, Page 11.



26. We also suggest that, particularly in light of the High Court decision in the AidWatch case, the use of the term “cause” in paragraph 8(2)(a) of the 2003 Charities Bill is inappropriate and unnecessary. The reference to a “cause” should be deleted. It will not harm the intent or application of the rest of the clause.

### **6.7 Consultation Question 13**

27. The treatment of advocacy relating to political parties in the Consultation Paper is particularly flawed. Advocacy is an important tool for many environment groups in pursuing their environmental (ie. charitable) purpose. It is clearly appropriate and necessary where the protection of the environment requires governmental regulation and on-ground activities to protect the environment. Environmental protection can be quickly undermined or overwhelmed by inadequate regulation of other activities (e.g. planting trees to revegetate a habitat corridor is pointless if an industrial operation or development destroys the core habitat areas). In a modern society, such advocacy inevitably entails contact and relationships with political parties and candidates.

28. Unfortunately the Consultation Paper suggests a constraint on NGO advocacy around political parties and candidates that would unnecessarily limit environmental advocacy. It also goes against the general principle of the latest Tax Ruling and the idea that advocacy is acceptable if it is pursuant to the charitable purpose.

29. TR 2011/4 says, at paragraph 73, that  
*if the purpose of an organisation is otherwise charitable, its status will not be affected by non-charitable political activities that are simply a means of effecting its sole charitable purpose. These activities could include seeking to persuade members of the public to vote for or against particular candidates or parties in an election, or distributing material designed to underpin a party political campaign*

30. This is directly contradicted by the proposal at para 112 – 114 of the Consultation Paper which says charities may not support political parties or candidates. The contradiction could cause confusion, and the approach in TR 2011/4 is preferred – again because otherwise it is the government telling environment groups how to best pursue their environment purpose.

31. TWS’ experience is that previous (mis)understandings of a prohibition against supporting political parties or candidates severely constrained advocacy. Under TR 2005/21, an environmental organisation could assess the environmental policies of political parties, publicly state that one party was really good or bad for the environment, and implore people to vote for the environment but could not state the obvious conclusion. This created paranoia around how environmental groups could talk to or about political parties, time-wasting semantic tap-dancing which excluded from public debate many less experienced groups, and a general constraint on environmental debate at crucial times in the cycle of government. The message it sent was that when advocacy starts getting traction and politicians start paying attention, it becomes a tax problem!

32. At a day to day level, the lines around what “supporting” or “not-supporting” a candidate might mean are neither clear nor sensible. Is it that you can’t invite one

of the highest profile advocates of your cause to speak at meetings etc – because you know they will tell others that they are working with you on an issue? And where one party or candidate was clearly opposed to environmental protection, and another was advocating what was required to advance the protection of the environment, is silence really the option for environmental protection? In these circumstances the prohibition on supporting candidates is a limitation on the achievement of a charitable purpose as well as a source of much stress, confusion and much time-wasting trying to navigate “non-partisan” positions. The formulation in the Consultation Paper not only unnecessarily limits advocacy, it does nothing to alleviate the confusion in day to day advocacy situations.

33. In putting our position, we recognise that this is not an opening for political groups to claim charitable status and that any advocacy on voting behaviour needs to be incidental to a sole charitable purpose. The Wilderness Society understands this to require that the goal and basis of any statement be environmental protection, and that any assessment of policy or performance of any political party be based on transparent, non-partisan environmental criteria. These are standards we hold ourselves to, and believe that in this framework, the ability of credible environment organisations to advocate a vote for a political party or candidate based on their environmental policies and performance is a legitimate and important part of charitable activity for the protection of the environment.
34. Finally, we point out that the issues in the Consultation Paper are complicated, as are the current and previous ATO rulings and various cases. This complexity is itself a barrier to advocacy for a charitable purpose. Unless the framework is simple, it is unlikely that legislation and tax rulings and advice will ever be specific enough to alleviate the fear and uncertainty around advocacy (and do we want NGOs to have to get advice from a tax lawyer every time they want to engage in the public debate where there is a party political dimension?). Overall, it would be much easier to allow any legal activity pursuant to a charitable purpose, or failing that, at least the clearer and more flexible and empowering position of TR 2011/4.

### **6.8 Paragraph 113 – Electoral Laws**

35. Paragraph 113 of the Consultation Paper is problematic at a different level. It asserts a conflict between charity and electoral laws, but gives no example of where there would be a breach of the Commonwealth Electoral Act or, if an organisation did breach the Act, what difference it would make if it were a charity or not. It is not at all clear how the fact of being a charity would make for a breach of the Act.
36. TWS has often made funding disclosures under the CEA, not least because of the all-encompassing definition of electoral activity in the CEA which means that much non-partisan charitable work would technically fit under the definition. Similarly, TWS has often authorised environmental publicity materials as required by the CEA because the issue in question (eg. climate change, protection of forests) was an issue in an election. We are not aware of any problem with our operations in this regard, or of any other clash between the CEA and charity laws.
37. If the intent of the charity test is simply to stop DGR or tax concession charities being used to conduct funds to political parties, this could be done with more

direct tax regulation of such transfers. It should not distort the definition of a charity, particularly as advocacy and engagement with political parties is so core to the pursuit of modern charitable purposes.

### **6.9 Para 116 – Illegal activities**

38. The other activity considered in the Consultation Paper which would disqualify an NGO from being a charity is illegal activity. Clearly a charity can not have an illegal purpose, and tax benefits should not be extended to organisations engaging in serious illegal activities. However, there is a problem with some of the wording in the Consultation Paper. The 2003 Charity Bill definition (paragraph 4[e]) was about not engaging in a serious offence. The Consultation Paper picks up the Charities Bill wording at paragraph 115, but then at paragraph 116 refers to “supporting illegal activities” as a disqualifying activity. The two formulations are very different and would have consequences for advocacy. While a regulatory regime to penalise rather than deregister is probably welcome, there are still problems. It is not clear what “supporting illegal activities” might be – particularly given that the law of protest in Australia is completely unclear and there are few or no clear civil rights. If a group organised a protest involving some minor illegality (eg. banner drop, blocking footpath/traffic) and a charitable organisation made a statement in support of the protester’s cause – would this be “supporting” that activity? (This was argued in the major civil case where TWS was sued by a logging company {*Gunns v Marr & Ors*}, but the case did not get to trial).
39. Again, the fear of crossing a very vague line of “support” may shut down or deter some legitimate charitable activities. Much better to have a clearer line that says simply that charities shall not conduct or engage in conduct constituting a serious offence, as per the 2003 Bill.

### **6.10 Consult Q 16 – list of charitable purposes**

40. As noted above, TWS believes that protection of the natural environment should be elevated to a part of the core definition of charity, rather than being one of a list of charitable purposes. However, we make the following comments “in the alternative” in case this recommendation is not taken up and the framework of the Consultation Paper is maintained.
41. The Consultation Paper suggests adopting the list of charitable purposes from the 2003 Charities Bill and the Extension of Charitable Purposes Act 2004. The proposed list of charitable purposes includes “the advance of the natural environment” (para 125). This wording is an odd formulation. The 2003 Charities Bill carried a definition of “advancement” to include “protection, maintenance, support, research and improvement”. It is not clear why the more ordinary usage could not be used in a statutory definition. We suggest that words like “protect, maintain, restore” would be more appropriate than “advance”.
42. However, there is a more important issue around the scope of environmental purpose. As stated, the charitable purpose is limited to the natural environment. By referring specifically to natural environments, it excludes urban environments and urban environmental issues. There is another head charitable purpose as “the advancement of culture”, which the Explanatory Memorandum to the 2003 Charities Bill notes this includes “the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings”.

This helps, but still does not cover all urban environmental issues – pollution and climate change being obvious big omissions. In 2011, it simply can not be argued that abatement of climate change and pollution are not in the public benefit and charitable purposes.

43. TWS welcomes the inclusion of an explicit environmental head as a charitable purpose, but this should be extended to the protection or promotion of a sustainable urban environment.

#### **6.11 Consultation Question 20: Transitional issues**

44. The transitional arrangements propose that existing charities will not need to re-apply to ACNC when it is set up. This is welcome (noting the need for continuing self-assessment that the activities of organisations are pursuant to its charitable purposes). TWS further welcomes the assurance (at paragraph 153) that the transitional issues will be minimal. However, we point out (as above) that the proposed statutory definition contradicts the common law (and TR 2011/4) in relation to political advocacy and therefore there may be greater impacts than currently envisaged. It is hoped that this problem is overcome by removing the contradiction and bringing the Act more into line with the common law.