Submission to the Senate Economics Committee Inquiry into Disclosure Regimes for Charities and NFP Organisations

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Summary of Major Recommendations

1. **Overarching Approach:** Any need for reform of the not-for profit 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 not-for-profit sector across the various jurisdications with this being the priority rather than the establishment of a whole new national regulatory body.

2. Any disclosure regime (and discussion of it) should be flexible enough to differentiate the content of activities and whether such activities contribute directly to the purpose of the organisation or are simply a necessary means to an end.

3. Any disclosure or regulatory regime for the not-for-profit sector should have appropriate thresholds and differing requirements to be appropriate for the size and volunteer or professional nature of different organisations.

4. To the extent that national regulation is required, it should be achieved initially by harmonising the state laws rather than through the establishment of a national regulator.

5. With uniform laws there should be 'cross-border" recognition of state based registrations and licences so that not-for-profit organisations are not required to register or be licensed in each state they operate in.

6. 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.

7. 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.

8. If the Senate Committee is to recommend major changes to the regulation of the not-for-profit sector, and particularly if it is to recommend the establishment of a central regulator, it should recommend and set out an appropriate and full participatory public process in the development of any such a scheme.

9. The electoral expenditure disclosure laws need to be amended to more closely define the expenditure which is to be disclosed, or alternatively, exempt not-for-profit organisations which are acting pursuant to a non-electoral purpose. The threshold for reporting annual electoral expenditure should not be lowered until the problems in the definition are fixed.

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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 and indigenous organisations with an interest in or impact on high conservation value environments.

Tax and charity status

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).

Since about 2004 TWS has been 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 have 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.

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, and a range of other environment groups. The ATO found that The Wilderness Society was entitled to Tax Concession Charity Status. To our knowledge, the ATO found only one environment group, AidWatch, not entitled to Tax Concession Charity Status, and the ATO's decision in that matter was recently overturned by the AAT.[1]

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1 *AidWatch Inc v Commissioner of Taxation* [2008] AATA 652.

There is nothing wrong with people voicing different opinions as to an appropriate definition of charitable work or the operation of the tax system, and The Wilderness Society was happy to cooperate with the ATO in its audits. In their letter confirming our Tax Concession Charity status, the ATO thanked us for our "professional and cooperative approach in responding to [their] numerous requests for information".[2] We make no criticism of the ATO or its officers who handled the investigation.

However, what is relevant for this Senate Inquiry is that in this whole episode the ATO was subject to political pressure, was used as a political attack dog by partisan interests, and much government and not-for-profit time was wasted in the process. It is also worth noting that this attack was ideologically driven and derived from opposition to what TWS does and stands for – not from a lack of disclosure or anything which a stronger regulatory regime would fix.

In this sense, we encourage the Committee to look behind calls for greater transparency because our view, based on internal market research we have done, is that the broader community has high level of faith in the not-for-sector. The issue may be less about governance and more about political differences. The Wilderness Society is therefore suspicious of some agendas for regulatory reform and our general approach and first recommendation is as follows.

Recommendation 1:
Any need for reform of the not-for profit 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 not-for-profit sector across the various jurisdications with this being the priority rather than the establishment of a whole new national regulatory body.

More specifically, in the light of our experience of this "tax attack", plus our experience of operating as a major community environmental organisation for 30 years, The Wilderness Society wishes to make submissions to the Senate Inquiry in relation to the terms of reference listed under (a) and (b). We will do this by commenting on the issues raised in the Inquiry's background paper and then raising an issue not contemplated in the background paper but which is an onerous and at times silly mandatory disclosure requirement.

The Wilderness Society does not receive government grant funding and as such does not wish to make specific comment on term of reference (c), although some of the general comments below may also be relevant to your consideration of that reference.

Issues in Background Paper

Notwithstanding our query above re the extent or the reality of any shortcomings in the not-for-profit sector, The Wilderness Society supports a transparent and robust not-for-profit 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

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2 ATO letter to The Wilderness Society Inc, 21 February 2006.

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.

Accordingly, any disclosure and regulatory regime must be able to support and nurture (rather than overwhelm and bureaucratise) the not-for-profit sector's work, but at the same time ensure that public confidence in the sector is maintained by good governance and transparency.

Lack of Transparency

The background paper discusses concerns over lack of transparency, particularly in reference to costs of fundraising and how much money raised goes to the intended programs/beneficiaries. The paper discusses this largely in terms of accounting exercises (eg. how much goes to particular programs?). However, the issues are not simple accounting transparency and are not clear cut for many organisations.

Over the past 10 years, The Wilderness Society has run one of the most successful "street canvass" membership recruitment programs in the country, and also runs a successful bequest program. These "fundraising programs" have involved speaking directly to up to 1 million people a year about environment issues, providing them with information, leaflets and encouraging them to take various actions to protect the environment (as well as become members of TWS). Given that part of our (charitable) environmental purpose is the promotion of environmental protection, it would be misleading simply to have these programs lumped into a general basket of "fundraising costs" as if they were no different from investment in commercial enterprises. These "fundraising programs", as well as raising funds, represent a major organisational effort in providing public information pursuant to our environmental purpose.

More generally, if no distinction is made between the sorts of fundraising used by not-for-profits, it would be a major disincentive to integrate fundraising into the core programs of an organisation. There are many advantages of integrating fundraising into core programs, including:

- building a sense of ownership of fundraising and capacity building across a whole organisation;
- ensuring fundraising ethics and practices align to the purpose of the organisation, and
- in some cases, an implicit message in the delivery of core programs (funding is not to be taken for granted).

Any disclosure regime should recognise the extra, non-tangible value of activities which are not solely or simply fundraising activities.

Recommendation 2:

Any disclosure regime (and discussion of it) should be flexible enough to differentiate the content of activities and whether such activities contribute directly to the purpose of the organisation or are simply a necessary means to an end.

As noted above, it is important in considering any national disclosure regime to ensure that its requirements do not stifle the passion and creativity which are the

hallmarks of the not-for-profit sector. One key factor in maintaining this is a consideration of the scale of operations of any specific organisation. The governance and disclosure requirements which might appropriately be expected of an organisation the size of TWS, which gets over $10m in money from the public each year and is administered by a professional staff, must be quite different from the requirements on an organisation of 20 volunteers who are caring for their local bit of bush on a budget of $10,000.

In this context we note that various other submissions to the Senate Inquiry also recognise the importance of the issue of size, and those who suggest that there should be one regulatory regime (regulator) for all are clearly not contemplating the sorts of small associations we are referring to. For instance, the submission from Chartered Secretaries Australia, which is a particularly thoughtful and useful submission and which elsewhere recognises the need for thresholds and size differentiation (Recommendation 3), nonetheless advocates for one national regime applying to all – effectively abolishing state incorporated associations (Recommendation 1). But throughout its submission, Chartered Secretaries Australia refers small NFPs which operate at a scale not dreamed of by many of the small groups we work with. In the authors' home state, the Conservation Council of South Australia has over 60 members groups – all incorporated bodies. Only about half a dozen have any paid staff.

The management committees (not boards of directors!) of small local organisations (and even some small national organisations) are run by volunteers who joined because they want to protect a particular area, voice a concern over a particular issue or get their hands dirty in environmental restoration work. They keep minutes of meetings and count and bank the money from the chocolate raffle – they are ordinary community members, not NFP "directors" – and they should be treated as such. If these people are made subject to the same laws and requirements which govern large organisations and even corporations, and are forced to deal with a distant Federal watchdog, they will either be unable to comply (because they won't know how) or more likely, will simply cease to do the vital actions that they were involved in.

While we see every reason to distinguish disclosure requirements for different size organisations, we see no reason to distinguish between charities and other parts of the not-for-profit sector. The notion of a charity is antiquated and unclear, as evidenced from the debate around the 'political' nature of some environmental activities. The ATO's ruling TR 2005/21 still does not provide clear boundaries around what is charitable and what is political, and since it published that ruling, the ATO decisions on charity status have been successfully challenged twice and it was forced to withdraw another decision.[3]

Beyond legalism, at the philosophical level all not-for-profits represent the coalescing of people around particular interests, and this articulation of interest (even if simply by forming an organisation) is itself fundamentally political. In this sense, the notion of non-political charities is a nonsense. The key issue determining necessary

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[3] The ATO decisions were overturned in the AidWatch case listed above, and in *Victorian Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983 [27 June 2008]. The ATO initially removed the PBI tax status of the Public Interest Advocacy Centre in Sydney, but reversed its decision when it was challenged in the AAT.

disclosure should be size and professionalism, not some particular (changeable) view of the purpose of an organisation.

Recommendation 3:

Any disclosure or regulatory regime for the not-for-profit sector should have appropriate thresholds and differing requirements to be appropriate for the size and volunteer or professional nature of different organisations.

Regulatory Reform

The Wilderness Society is not opposed to national regulatory reform, but the objectives need to be clear. In the 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. Calls to constrain 'political' activity should not be a basis or objective of reform.

Further, 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. **What is needed is support for those responsible for financial management and organisational governance, not simply regulation prescribing what is required.**

The Wilderness Society 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.

There are certainly a range of problems with the lack of a *nationally consistent* regulatory regime. The Wilderness Society 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 note many other submissions to the Senate Inquiry make the same point.

However, the solution to these 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 used a political instrument in the attack on The Wilderness Society and other not-for-profit groups, 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.

The background paper also raises the issue of the number of different ways to incorporate a not-for-profit organisation as if this is a problem. But 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.

Recommendation 4:

To the extent that national regulation is required, it should be achieved initially by harmonising the state laws rather than through the establishment of a national regulator.

It would also be desirable from the point of view of national not-for-profits that particular licences, for example to raise funds, granted in one state be recognised in all states and not require separate application and compliance. This should be possible with uniform laws and would avoid the need for multiple registrations and for a centralised regulator. At a mundane level, governments do this with Driver's Licences. People are not required to apply for a new licence or sit a new test when they drive across a state border (yet arguably driving a car is more dangerous than operating a not-for-profit organisation!), so such cross-border recognition can easily be done.

Recommendation 5:

With uniform laws there should be 'cross-border" recognition of state based registrations and licences so that not-for-profit organisations are not required to register or be licensed in each state they operate in.

However, if the Senate Committee was to recommend it or if there is to be 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 highlighted in the background paper 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 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.

Recommendation 6:

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.

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. 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.

We note the submission from Chartered Secretaries Australia as to audit requirements and the thresholds they set (Recommendation 3). In light of that, if a national regulator were to be set up, it may be appropriate that it only have jurisdiction over not-for-profit organisations whose revenue reached more than $1m per year.

Recommendation 7:

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 pubic participation in the development of any new regulatory regime will be necessary, particularly if there is to be a national regulator established.

Recommendation 8:

If the Senate Committee is to recommend major changes to the regulation of the not-for-profit sector, and particularly if it is to recommend the establishment of a central regulator, it should recommend and set out an appropriate and full participatory public process for the development of any such a scheme.

June 2001 Inquiry

The background paper lists the Summary of Recommendations of the 2001 Inquiry into the Definition of Charities and Related Organisations. Many of these deal with the issue of defining a charity, something which was crucial to the attack on The Wilderness Society and other environment groups. As the ATO Ruling TR2005/21 suggests, and the AAT decision in the Aidwatch case confirm, 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) seem to be regarded as being, by definition, outside of the definition of charity.

Given what we will say below about the electoral disclosure laws, there must be 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) we fit the definition of having a charitable (environmental) purpose. However, we think that any review of the regulation of the not-for-profit 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 many of the 2001 recommendations are redundant.

Electoral Disclosure

One part of the disclosure requirements on The Wilderness Society and many other not-for-profit organisations which is not considered in the background paper is the requirement to disclose electoral expenditure and the source of money for such expenditure. The Wilderness Society fully supports transparency in electoral funding and advertising but because of the way the laws are written the disclosure requirement goes way beyond what might normally be considered electoral expenditure. Any reference to a member of parliament (state or federal, past or present) is captured as an electoral matter, as is any expenditure on an issue in an election (presumably such as climate change?). The vagueness of these definitions, and the reporting requirements which come from them are onerous and silly, and the system does not achieve the purposes for which the laws were made.

The previous government's amendment to the *Commonwealth Electoral Act* requiring annual disclosure of gifts and expenditures on electoral matters heightened existing interpretation problems and makes the provisions even more confusing and unusable. The problems arise because of the complex interaction of s314AEB (disclosure of expenditure), s328 (authorisation of electoral material) and the definition of political and electoral matters in s4 of the Act and elsewhere. Apart from the simple definition problems of what constitutes electoral matters (which among other things would require advertising of the musical *Keating* to be disclosed!), with the move to annual reporting we must now crystal ball gaze as to what might be an election issue in any one of the 150 electorates or among the multitude of Senate candidates *in the 2010 Federal Election*.

A fuller explanation of the problems for not-for-profit organisations with the electoral expenditure disclosure laws is provided in the appendix to this submission, but we note that The Australian Electoral Commission has published guidelines which purport to exempt from disclosure expenditure where the *primary or dominant*

purpose was not to fund an expression of views on an election issue. While, as is explained in the Appendix here, we doubt the legal basis of this guideline, if the law was to be changed the AEC guideline could be a starting point – in effect exempting most not-for-profits from election disclosure. However, we are aware that this may significantly undermine the necessary transparency in election disclosure. Short of such a blanket exemption, the laws will need amendment to focus on electoral behaviour and give greater clarity as to what is to be declared.

The Wilderness Society is also aware that the government is currently looking at reducing the $10,000 threshold for disclosure to a flat rate of $1,000. While we have no objection to a smaller threshold in a sensible system, unless the current system is fixed this proposal will simply magnify the onerous reporting and either discourage compliance with the disclosure requirements or discourage not-for-profits from pursuing their full range of activities.

Recommendation 9:

The electoral expenditure disclosure laws need to be amended to more closely define the expenditure which is to be disclosed, or alternatively, exempt not-for-profit organisations which are acting pursuant to a non-electoral purpose.

The threshold for reporting annual electoral expenditure should not be lowered until the problems in the definition are fixed.

Appendix: Problems with Federal electoral expenditure disclosure laws for community organisations

This paper discusses problems with the Commonwealth electoral laws in relation to the authorization of electoral material and the disclosure of political expenditure by non-candidates and non-political parties – that is, by individuals, community organisations and businesses. It does not seek to address issues of the monetary limits of disclosure or broader issues about reform of the electoral funding and disclosure regime, but could hopefully form part of this wider discussion.

The *Commonwealth Electoral Act* 1918 sets out provisions which attempt to make the electoral process more democratic by requiring a level of transparency in electoral advertising and expenditure. The Wilderness Society supports this goal. Unfortunately, if taken on its face, the wording of the Act makes the provisions simply unworkable – and onerous on an organisation attempting to comply with those laws. If the provisions are not taken on their face, then the system is open to different interpretations and inconsistent reporting. It is also open to people to hide behind the vagaries, thus defeating the goal of transparency.

The Legislative Framework

Section 314AEB(1) of the Act requires annual disclosure of expenditure greater than $10,000 incurred on a range of things including:

> (ii) the public expression of views on an issue in an election by any means;
>
> (iii) the printing, production, publication or distribution of any material … that is required under section328 or 328A to include a name, address or place of business;
>
> (iv) the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;

Subparagraph (iii) here refers to s328 which requires the authorization of "an electoral advertisement, handbill, pamphlet, poster" with this phrase referring to "an advertisement, handbill, pamphlet, poster or notice that contains *electoral matter*". "Electoral matter" is then defined by section 4 of the Act as "matter which is intended or likely to affect voting in an election", with this intent or affect refined by s4(9) as something containing an express or implicit comment on or reference to:

> (a) the election;
>
> (b) the Government, the Opposition, a previous Government or a previous Opposition;
>
> (c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory;
>
> (d) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory;
>
> (e) a political party, a branch or division of a political party or a candidate or group of candidates in the election; or
>
> (f) an issue submitted to, or otherwise before, the electors in connection with the election.

The same definitions and requirements apply to "electoral videos" under s328(1A).

Subparagraph (iv) of s314AEB(1) refers to the *Broadcasting Services Act* which requires authorisation of "political material". This "political material" is defined as "any political material" and is separate from an "election matter".

The authorizations required under both s328 of the CEA and the relevant part of the *Broadcasting Services* Act are not limited to an election period but are permanently in operation.

The Problem

These provisions and the regulatory regime they establish have a number of problems. The boundaries of subparagraph s314AEB(1)(iv) are completely unclear. The definition of "political material" which requires authorisation as meaning "any political material" is no help when the definition of "political" is hotly contested in political philosophy. What is "political" can legitimately mean very different things to different people. Thus there is no clarity as to what broadcasts require the relevant particulars and therefore disclosure of expenditure.

For instance, is an advertisement advocating solar power "political"? Does it become "political" if it says nuclear power is bad and solar power is good? Does it become "political" if it refers to government policies on electricity generation? What about if it refers to government rebates for solar power? Is the "political" issue here climate change, greenhouse gases, electricity generation or government in/action on supporting solar industries? The requirement for authorisation changes depending on how generally the matter is defined. It is not clear who makes these judgments or on what basis.

Subparagraph (iii) of s314AEB(1) is more narrowly focused on elections ("electoral matter" rather than the broader "political material") but similar problems emerge as it picks up the definition of "electoral matter" in s4(9) of the Act. Subsection (d) of s4(9) captures any reference to a former Australian MP. This is so wide that the following would be considered as containing "electoral matters":

- a museum pamphlet on Edmund Barton,
- the guide to the 2008 Adelaide Festival of the Arts (because it contains an advertisement for "Lovers and Haters" - a play about Don Dunstan),
- a poster for the musical Keating.

Those publications would in theory therefore require authorization, and if the expenditure on those publications was over $10,000, the museum, the Adelaide Arts Festival or the music company would be required to declare them as electoral expenditure.

Subsection (f) of the s4(9) definition of an "electoral matter" is also problematically wide, vague and unusable - as is s314AEB(1)(ii) which simply refers to "an issue in an election". When the relevant period for electoral disclosure was at the time of the election, it was at least a little easier to determine what issues were before the electorate – although even here it is impossible to know what issues were "before" or

"in" the electorate in every seat in the House of Representatives, or issues which every senate candidate may submit to the public.

The lack of clarity of these sections is made much worse by the requirement for annual reporting of election expenditures. It would appear that a community group publishing a leaflet raising an environmental or social issue in July 2008 is required to guess (under s328) whether that issue will be an issue in the Federal Election in 2010 in order to decide whether the leaflet requires authorization. In order to know whether to declare the expenditure on the leaflet under s314AEB(1), they must (in August 2009) reassess the decision they made the previous year about what the election issues might be in the 2010 election to decide whether they should disclose the expenditure.

It may be possible to read the Act so as to require only disclosure on electoral matters pertaining to an election in that year, although this is not stated in the Act and is probably not a good reading of the Act. However, in the example above, a community organisation would still be in the position of not really knowing at the time of the expenditure whether the money for the leaflet (and under s314AEC any donation enabling the publication of the leaflet) should be disclosed as electoral expenditure because there may be a by-election somewhere later in the year where the issue is raised.

The crystal-ball gazing required in the above, plus the apparent requirement for the Adelaide Arts Festival and other non-political organisations to disclose electoral expenditure, are so wide and self-evidently silly that they render the disclosure regime unusable.

The AEC Guidelines

The Australian Electoral Commission has published guidelines on the disclosure requirements which appear to narrow the scope of the Act (see http://www.aec.gov.au/pdf/political_disclosures/forms/ppar_expend/info_sheet.pdf). Those guidelines narrow the interpretation of the Act in two ways:

- By interpreting expenditure under s314AEB(1)(i) and (ii) as requiring declaration only where the *primary or dominant purpose* was to fund an expression of views referred to in (i) and (ii); and
- By interpreting "an issue in an election" in s314AEB(1)(ii) as being an issue that is "likely to affect the outcome of an election".

I could not find any case law to support an interpretation based around primary or dominant purpose. Section 314AEB(1) simply requires disclosure of expenditure incurred for the relevant purposes – with one of the purposes having a definition (via s328 and s4(9)) which explicitly does not require any subjective "primary or dominant" purpose. It simply requires particular acts (eg. reference to MPs, parties etc).

The difference for community organisations is crucial. For instance, for The Wilderness Society, *all* its expenditure is directed towards protecting the environment (as is required by its constitution and the Tax Act), and therefore the primary or dominant purpose is to protect the environment - not to express views on an issue in an election. However, where The Wilderness Society, in pursuit of environmental

protection, makes comment on particular policies, any expenditure on this may still require authorization under s314AEB(1)(iii) and probably should be disclosed.

Similarly, I can see no statutory justification for interpreting "an issue in an election" as "likely to affect" an election. The "likely to affect" interpretation appears to pick up the definition of an "electoral matter" from s4(1), but there is no statutory relationship of this clause to s314AEB(1)(ii). Subsection 314AEB(1)(ii) is in fact much wider than s4(9) in its application as the former could include expenditure on rallies and public meetings, whereas s4(9) only relates to actual publications (as it is only operational through s328 which deals with publications). In any case, the definition of "electoral matter" in s4(9) appears to trump the "likely to affect" notion by actually defining things which that expression means. This clause also relates to an *intention* to affect the outcome regardless of the whether or not it actually could/does affect the outcome - yet an intention without affect appears to be discounted in the AEC guidelines (bottom of page 3).

In both these cases, the AEC guidelines do not seem to have any support in the Act, and may be contradicted by the Act.

Conclusion

While much of the above appears to be legal semantics, it is important because if the Act is interpreted in the way I suggest is its plain meaning, then it is unusable and people will simply not comply. Alternatively, if it is interpreted as per the AEC guidelines, then any organisation will be free not to make any disclosure on the basis that the primary purpose was some broader goal. In either case, the problem is that interpretation is arbitrary and left to individuals and organisations who may interpret it quite differently and therefore make very different disclosures. This inconsistency and potential lack of compliance then defeats the worthy purpose of making electoral funding transparent.

On top of this, from the point of view of a community organisation seeking to comply with what it sees as important laws, the authorisation and disclosure requirement are onerous because they are so unclear and require guesswork and uncertainty stretching over years.

The laws should be amended.

Relevant Provisions of the Commonwealth Electoral Act 1918

4 Interpretation

(1) …

electoral matter means matter which is intended or likely to affect voting in an election.

...

(9) Without limiting the generality of the definition of ***electoral matter*** in subsection (1), matter shall be taken to be intended or likely to affect voting in an election if it contains an express or implicit reference to, or comment on:

(a) the election;

(b) the Government, the Opposition, a previous Government or a previous Opposition;

(c) the Government or Opposition, or a previous Government or Opposition, of a State or Territory;

(d) a member or former member of the Parliament of the Commonwealth or a State or of the legislature of a Territory;

(e) a political party, a branch or division of a political party or a candidate or group of candidates in the election; or

(f) an issue submitted to, or otherwise before, the electors in connection with the election.

***

314AEB Annual returns relating to political expenditure

(1) A person must provide a return for a financial year in accordance with this section if:

(a) the person incurred expenditure for any of the following purposes during the year, by or with his or her own authority:

(i) the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;

(ii) the public expression of views on an issue in an election by any means;

(iii) the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328 or 328A to include a name, address or place of business;

(iv) the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;

(v) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors; and

(b) the amount of the expenditure incurred was more than $10,000; and

(c) at the time the person gave the authority the person was not:

(i) a registered political party; or

(ii) a State branch of a registered political party; or

(iii) the Commonwealth (including a Department of the Commonwealth, an Executive Agency or a Statutory Agency (within the meaning of the *Public Service Act 1999*)); or

(iiia) a member of the House of Representatives or the Senate; or

(iv) a candidate in an election; or

(v) a member of a group.

Note: The dollar amount mentioned in this subsection is indexed under section 321A.

(2) The person must provide to the Electoral Commission a return for the financial year setting out details of the expenditure incurred.

(3) The return must:

(a) be provided before the end of 20 weeks after the end of the financial year; and

(b) be in the approved form.

***

328 Printing and publication of electoral advertisements, notices etc.

(1) A person shall not print, publish or distribute or cause, permit or authorize to be printed, published or distributed, an electoral advertisement, handbill, pamphlet, poster or notice unless:

(a) the name and address of the person who authorized the advertisement, handbill, pamphlet, poster or notice appears at the end thereof; and

(b) in the case of an electoral advertisement, handbill, pamphlet, poster or notice that is printed otherwise than in a newspaper—the name and place of business of the printer appears at the end thereof.

(1A) A person must not produce, publish or distribute or cause, permit or authorise to be produced, published or distributed an electoral video recording unless the name and address of the person who authorised the video recording appears at the end of it.

(1AB) Subject to subsection (1AC), a person must not print, publish or distribute or cause, permit or authorise to be printed, published or distributed an electoral advertisement that takes up the whole or part of each of 2 opposing pages of a newspaper unless, in addition to fulfilling the requirement under paragraph (1)(a) that the name and address of the person who authorised the electoral advertisement appear at the end of it, such name and address also appears on the other page, or the part of the other page, taken up by the electoral advertisement.

(1AC) Subsection (1AB) does not apply to an advertisement of the kind referred to in that subsection:

(a) that is contained within:

(i) a broken or unbroken border; or

(ii) broken or unbroken lines extending across, or partly across, the top and bottom of the advertisement; or

(iii) a broken or unbroken line extending along, or partly along, each side of the advertisement; or

(b) that is printed so that to read one or more lines of the text of the advertisement it is necessary to read across both pages.

(2) A person who contravenes subsection (1), (1A) or (1AB) is guilty of an offence punishable on conviction:
  (a) if the offender is a natural person—by a fine not exceeding $1,000; or
  (b) if the offender is a body corporate—by a fine not exceeding $5,000.

(3) Subsection (1) does not apply in relation to:
  (a) T-shirt, lapel button, lapel badge, pen, pencil or balloon; or
  (b) business or visiting cards that promote the candidacy of any person in an election for the Parliament; or
  (c) letters and cards:
    (i) that bear the name and address of the sender; and
    (ii) that do not contain a representation or purported representation of a ballot-paper for use in an election for the Parliament; or
  (d) an article included in a prescribed class of articles.

(4) Nothing in paragraph (3)(a), (b) or (c) is taken, by implication, to limit the generality of regulations that may be made by virtue of paragraph (3)(d).

(5) In this section:

address of a person means an address, including a full street address and suburb or locality, at which the person can usually be contacted during the day. It does not include a post office box.

electoral advertisement, handbill, pamphlet, poster or notice means an advertisement, handbill, pamphlet, poster or notice that contains electoral matter, but does not include an advertisement in a newspaper announcing the holding of a meeting.

electoral video recording means a video recording that contains electoral matter.

Relevant Provisions of the Broadcasting Services Act 1992

Schedule 2

1. Definitions

"political matter" means any political matter, including the policy launch of a political party.

4. Identification of certain political matter

(2) If a broadcaster broadcasts political matter at the request of another person, the broadcaster must, immediately afterwards, cause the required particulars in relation to the matter to be announced in a form approved in writing by the ACMA.