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Consultation on the Definition of a Charity  
The Board of Taxation  
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Dear Ms Schwager

### **Board of Taxation Consultation on the Charities Bill 2003**

The Artists Foundation of WA welcomes the Federal Government's commitment to the reform of the taxation system as it relates to charities as an opportunity to enhance the clarity and consistency of the definition of charity and, as a result, streamline reporting, and simplify the governance of the charitable sector. If successful, this can only be of benefit to all Australians, as the charitable sector is a major provider of community and cultural services.

The Artists Foundation of WA [AFWA], is the leading membership body for visual artists in WA. Incorporated in 1986 as a Company Limited by Guarantee, AFWA is recognised as a charitable organization by the Federal Dept of Communication, Information Technology and Arts and the ATO. AFWA delivers core activities to inspire, expand and improve the sustainability and profile of the visual arts sector in WA. The organization is also in day to day contact with Government about public policy as it relates to the interests of the arts and visual artists in Western Australia.

AFWA welcomes public consultations being conducted by the Board of Taxation into the workability of the legislative definition of a charity as proposed in the Charities Bill 2003. AFWA staff attended briefings in Perth conducted by the ATO and as part of that consultative process would wish to make this submission.

#### **1. Generally**

We understand the purpose of the legislation to be the codification of the **existing law defining charitable purposes**, subject only to an extension of the existing law to incorporate certain child care organisations, self help bodies and closed or contemplative religious orders. We also understand that the principal objectives of the legislation are to achieve certainty, consistency and workability.

While AFWA welcomes this approach, and in particular the specific reference to the advancement of Culture as a principal charitable purpose, AFWA has considerable doubts as to whether those objectives will be met.

AFWA questions whether the development of charitable law will be impeded so long as the Board of Taxation remains, in effect, the determining body as to what is a charity in law and what is a permissible ancillary activity for a charity;

AFWA also questions the effect of the draft wording as it relates to political activities and incidental purposes, the definition of Government Bodies, and the omission of PBIs.

## **2. Certainty, Powers of Interpretation**

Although the Bill seeks to codify the existing law, its wording lacks precision in key areas, and calls for subjective determination (for example, what is a universal or common good 7 (1) (a) ? How many people constitute a numerically negligible group 7 (2) ? ). We believe that while the Bill seeks to set out the current position in law of what is a charitable purpose, it has to be recognised that by using 'new language', the legislation will inevitably give rise to new questions of interpretation and determination. What or what is not a charitable purpose is something of an art form not a science!

Since the Board of Taxation will, in effect be the body responsible for interpreting the provisions of the Act in relation to the recognition of organisations as charities and for tax exemption claims, a restrictive interpretation is perhaps inevitable, given the Board's over-riding responsibility as the tax gathering authority.

Accordingly, it could well give rise to a whole new raft of court cases, providing organisations have the resources to challenge decisions in the courts. More probably, given the costs involved, the development of charity law in Australia could well be stultified.

## **3. Inclusion of a specific reference to Culture**

The furtherance of the arts has long been recognized as a charitable purpose. Nevertheless, AFWA welcomes the inclusion of the more wide embracing concept of the advancement of culture as a principal head of charity. Such recognition confirms the importance of culture and the arts to the fabric of Australian society. Culture is not however defined, and again AFWA believes important questions of definition will undoubtedly arise.

## **4. Disqualifying Purpose, Section 8**

As we understand it, Clause 8 (2) (a), (b) and (c) are a correct statement of the law. We recognise that the courts have long held that a political purpose can never be charitable. However, the concluding wording raises considerable concern over the extent to which an organisation whose purposes are charitable, can legitimately undertake **activities** to influence public policy as a means of pursuing those charitable purposes.

Activities which in themselves are not charitable (for example, fund raising, pure research, lobbying for a change in, or having input into, Government policy ), are permissible for charities where they can be demonstrably shown to be in furtherance of the organisation's principal charitable purposes and are NOT of such a scale as to be the main, or one of the main purposes of the organisation.

The issue is one of degree, and, in the case of political purposes, of substance. (For example, while it has always been perfectly legitimate for charities operating in areas of social health, the arts, or the environment, to advise Government on better ways to assist the beneficiaries of those organisations, it was not permissible for them to support a political party to secure changes.)

Although the Bill seeks to embody in legislation the current definition of charitable purposes as determined by the courts over the centuries, considerable concern arises from the wording adopted in clause 8. A restrictive interpretation of this clause would have a detrimental effect on the (hitherto legitimate) activities of charities, limit their capacity to inform Government and be consulted by Government; and give rise to expensive challenges in the courts.

We note that the Treasurer on this question states<sup>1</sup> that the Bill “does not attempt to restrict criticism of public policy by recognised charities”(30 July). The explanatory notes to the Bill state that it “sets no barriers on criticism of public policy by recognised charities. There is no change from existing practice... engaging in advocacy or lobbying would only disqualify an entity from being treated as a charity if the advocacy or lobbying activities were more than ancillary or incidental to its other purposes”.

Nonetheless, the current wording is read as limiting charities (and would-be charitable organisations) in the extent to which they can properly undertake a activities to influence public policy. Moreover, since the interpretation of legislation can only be fully revealed by subsequent decisions of the courts, AFWA would argue that these draft provisions be re-examined and recast to ensure greater clarity and certainty and the avoidance of costly legal action.

In this respect, AFWA is aware of, and shares the concern of other arts organizations over the meaning of “ancillary” or “incidental ” purposes.

The Bill uses the term ‘ancillary or incidental **purposes**’: It does not refer to ancillary or incidental **activities or powers**, which can be legitimately undertaken in furtherance of a charitable purposes. AFWA would argue that such a distinction be incorporated into the Bill. The critical issue is the purpose to which an organisation’s resources are applied rather than the nature of individual activities, provided that the constitution of the organization empowers such activities.

## 5. Definition of Government Bodies

A further area of concern is in relation to the exclusion of government bodies from charitable status. In the current Bill government body means:

- (a) the Commonwealth, a State or a Territory; or
- (b) a body controlled by the Commonwealth, a State or a Territory; or
- (c) the government of a foreign country; or
- (d) a body controlled by the government of a foreign country.

Subsections © and (d) are not problematic, however we are uncertain of the implications of sub section (b) [bodies controlled by the Commonwealth, a State or a Territory]. The explanatory notes recognise that “the issue of what establishes government control has been the subject of much case law”.

There are many major cultural institutions supported by the Commonwealth which have government appointments to their board. On the face of it this may constitute control as described in the notes:

- “powers invested in a Minister to approve appointments to a management board;
- powers invested in a Minister to remove appointments from the management board (or to dissolve the board);
- powers invested in a Minister to overturn decisions of the management board, or to instruct the management board;
- powers invested in a Minister to approve the work program of the entity; and
- the ability of a management board to exercise the powers of government, such as the power to make by-laws and to impose penalties for breaches of those by-laws.

Again many companies are based at or perform in state and federal government owned and operated venues subject to Ministerial control. Is this open to interpretation as control (as referred to in the notes as “the ability of the government (often a Minister) to exercise control over the operations and activities of the entity”)?

Could organisations which sign a performance or service agreement with government be seen as in government control (as described by the notes as “carrying on its activities at the government’s instruction or on the government’s behalf it may be considered to be a government body”)? Would these agreements be seen as “regulated to the extent that it is merely carrying on its activities at the government’s instruction or on the government’s behalf it may be considered to be a government body”?

If this aspect of the Bill goes ahead without clarification it would impose additional administrative burden on charitable organisations as they review their activities to try to determine if their activity in the past or in the future may be affected by this provision.

## **6. Omission of PBIs**

The Artists Foundation of WA notes the omission of Public Benevolent Institutions in this Bill as a missed opportunity to bring clarity and certainty to a complex area of law and administration. We hope that Government can be persuaded to turn attention to this area.

Yours Sincerely

Jenny Wright  
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The Artists Foundation of WA