

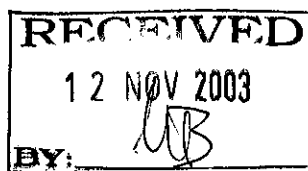
From the office of the  
CHIEF EXECUTIVE OFFICER



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7 November 2003

Ms Jane Schwager  
Member  
Board of Taxation  
C/- The Treasury  
Langton Crescent  
PARKES ACT 2600



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Dear Ms Schwager

**Re: Australia Council submission to consultation on the Charities Bill 2003  
by the Board of Taxation**

The Australia Council welcomes the Australian Government's ongoing commitment to reform in the relationship between the taxation system and charities. Through this reform process, the Government has an opportunity to enhance the clarity and consistency of definitions and, as a result, enhance reporting and governance and the delivery of public benefit by the charitable sector. The Australia Council (the Council) appreciates that the Australian Government (the Government) places a priority on this area of reform and would like to convey support for the inclusion of cultural organisations in the new Bill—it is a landmark reform.

The Australia Council supports the report of the Inquiry into the Definition of Charities and Related Organisations June 2001. We propose that more can be achieved by enacting all the recommendations within that report. As you will be aware, the Australia Council Chairman, David Gonski AO, was a member of the Inquiry Committee. While we had discussions with Mr Gonski over the course of the preparation of this submission, it is important to note that it reflects the organisation's views, rather than Mr Gonski's individual views. . Background information on the Council is included at Attachment A.

The Council was pleased to work together with the Working Group of the Board of Taxation to set up a roundtable meeting with peak arts representatives on Wednesday, 27 August. We have been continually monitoring the views of the arts and cultural sector about the issues involved with this reform, and this meeting reconfirmed the sector's position, which we will represent within this submission. Organisations that participated in the roundtable meeting were:

- Arts Law Centre
- Community Cultural Development New South Wales (CCD NSW)
- Symphony Australia
- National Association for the Visual Arts (NAVA)
- Disability in the Arts, Disadvantage in the Arts Australia (DADAA) National network
- NSW Museums & Galleries Foundation
- Opera Australia

The inclusion of culture in the draft legislation and explanatory material issued on 22 July 2003, is a great advance in 'workability', that is, clarity and transparency to charitable arts and cultural organisations.

The Government's recognition that participation in arts and cultural activities is strongly related to civic engagement and the generation of 'social capital' (benefiting not just the people who participate directly, but also a benefit that accrues to everyone) has been positively received in the arts and cultural sector.

The cultural public benefit cannot be charged to everyone and is therefore supported by the Government in a variety of ways, including the charitable and gift deductibility provisions in the taxation system. While the tax expenditures available to arts and cultural charitable organisations are less than 1/10<sup>th</sup> of 1% of the Government's total tax expenditures, losing this provision would cause a considerable, negative impact on the arts and cultural sector. Therefore, the proposed definition greatly improves the flexibility of public charities policy to be effective in the face of changing social needs.

In this submission, the Council would also like to raise a number of concerns and questions about the draft legislation, particularly relating to the following provisions:

1. disqualifying purpose
2. Government control
3. serious offences
4. missed opportunities for reform.

### **1. Disqualifying purpose**

The Council believes the new definition of ineligibility or "disqualifying purpose" in section 8 would impose additional an administrative burden on many arts and cultural organisations currently registered as charities. Leaders in the arts sector support the Treasurer's statement on this question—that the Bill "does not attempt to restrict criticism of public policy by recognised charities". We also agree with the explanatory notes to the Bill, which 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 detailed implications of legislation are often revealed by subsequent interpretation in the courts, and it is therefore important to avert any possible uncertainty and/or costly legal activity through careful policymaking.

Across the arts sector, leaders in good faith have expressed uncertainty about the intention and potential interpretation of the terms "ancillary" or "incidental". All of the peak bodies brought together on this issue by the Council could identify ancillary and incidental activities, including providing advice to government from time to time. It is not clear for example, whether it would be in breach of the legislation for charities to accept an invitation to provide advice to the Tax Board and the Government on issues such as this reform.

The Council recommends that charities should be permitted to engage in advocacy on behalf of those they benefit. Conduct of this kind should not deny charitable status even if it involves advocating for a change in law or policy. Indeed, it is increasingly the case that governments respect and seek the expert advice of charities, particularly in developing and amending legislation

and policy due to their intimate knowledge of their constituencies and their capacity in the areas of strategic research, analysis and planning, which can benefit not only their individual sectors but often to the community as a whole. The Council also understands that the independence of charities from government and political processes is an important component of their role in serving the public benefit.

The Council believes the greater emphasis on the definition of charities should be their purpose. For this reason, it may be desirable to amend the Bill in such a way to exclude organisations where their formal constitution, articles, etcetera, are for the purposes set out in section 8 and not refer to 'engaging in activities'. If this aspect of the Bill is not amended, we anticipate it would impose an additional administrative burden on charitable organisations—many report they will devote time and energy to more accurately reflect their organisation's purpose by reconsidering their formal statements of purpose. For small not for profit organisations the potential legal advice required and the administrative burden of extraordinary action would have a negative impact.

Not only does the current ineligibility definition limit the capacity of the Government's policy to support cultural organisations today, it also hinders the capacity to adapt to the changing needs of society. The Council believes it is appropriate to rely on the sole or dominant purpose of an organisation as the key criterion in classing it as a charity. The critical factor should be the purpose to which an organisation's resources are applied, rather than the nature of individual activities.

## **2. Government control**

The Council's third major area of concern relates 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.

In our view, the subsections [a], [c] and [d] are not problematic. However, we are concerned about 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" and case law will continue to develop. The definition of government control appears to be widening. This points to potentially adverse interpretations in future, which should be eliminated as far as possible at this drafting stage.

There are many major cultural institutions whose directors on the governing board are appointed by the Government. This may constitute control as described in the notes to the Bill:

- 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.

We expect the categorisation of government bodies in the legislation or its interpretation will be a major issue. It has been suggested that one single government appointee to a Board may constitute 'government control'. Peak bodies have raised concerns that the definition will require several years of administrative decision, and possibly case law before it provides real guidance to arts institutions. This will create additional costs for arts companies seeking endorsement, and uncertainty for donors and arts managers.

The Council would like to raise the following questions about the concept of control:

- the Council provides triennial funding to over 200 nationally significant arts organisations across Australia. Could organisations which sign a performance or service agreement with the 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"?
- many companies are based at, or perform in, state and federal government owned and operated venues, which are 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 created through a new policy initiative of Government, such as the Arts Law Centre, the Noise Festival etcetera, be providing a function "considered to be a government function" and therefore be defined as a government entity?

The current Bill may not only limit the capacity of the Government's policy to support cultural organisations today, it may also hinder the capacity of charities to adapt to the changing needs of society. Increasingly, areas of activity in society—health, business, planning and the justice system—use the unique facilitative effects of the arts to better pursue their objectives. For example, creative artists have worked with the military to develop strategic skills.

Cultural enterprises are being required to become more business-like in order to keep their activities going, and many organisations attract significant income from non-government sectors, which is in part due to their charitable status. Therefore, it is quite reasonable to expect that in future, many cultural organisations will work with other sectors periodically as an incidental way to developing their income streams, if not their art, directly. This will involve government and potentially also organisations that could be considered to be under government control.

If this aspect of the Bill goes ahead without change, we anticipate that it could have devastating impacts on all levels of government funding for cultural activities. Many major cultural institutions and icons could be considered to be subject to government control and the viability of these institutions would be threatened. We predict that the burden to those organisations and the increased demand on the public purse would be unsustainable.

### **3. Serious offences**

The cultural sector has raised a number of questions about the core definition of charities in relation to serious offences. The Bill provides that a charity "(e) does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence. A serious offence means an offence against a law of the Commonwealth, of a State or of a Territory, that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence)."

We note that the Bill refers to conduct and not conviction—this has been interpreted as activity and not a determination by a court of law. Assuming that the government's intent is to refer to convicted offences we propose that the Bill specify this. Otherwise a provision that refers to activity alone appears unnecessarily wide. Conduct, which is subject to an allegation, may not ultimately be an offence.

We would like to query kinds of offences are relevant and the date of the commission or omission of the relevant conduct? Will the Bill relate only to conduct past a certain date? Some charities - many decades old - may have caused offences to law and regulation in the past but are scrupulous corporate and civic bodies today.

Further, if a serious offence includes failure to comply with some legislation such as the corporations law, many officers of charities have inadvertently conducted offences relevant to the Act. We would appreciate greater clarity to the scope of offences with which the Bill intends to deal, and encourage the Government to consider focusing the Bill to convictions only.

If this aspect of the Bill goes ahead without change we anticipate that it would impose an additional administrative burden on charitable organisations as they review their activities to attempt to determine whether their activity in the past or future may be affected by this provision.

#### **4. Missed opportunities for reform**

The public policy treatment of charitable status, benevolent enterprise and gifts in Australia is addressed using separate policy mechanisms. There is considerable interest in the not for profit sector in a more streamlined and unified approach to very similar areas of policy more in line with other developed countries such as the USA, UK and Canada. While not explicitly cited in the terms of reference this issue is particularly relevant to the matters of workability and administrative burden for cultural organisations.

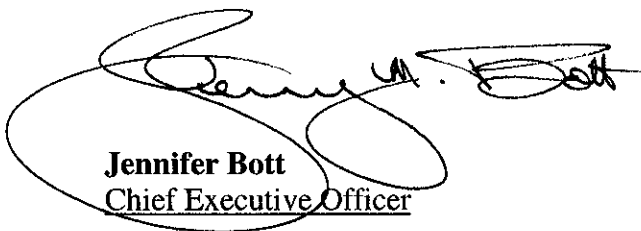
Again, the Australia Council supports the recommendations of the Inquiry into the Definition of Charities and Related Organisations June 2001.

#### **Conclusion**

The Council once again acknowledges that the inclusion of cultural organisations in the new Bill is a very welcome reform. There are several areas which require further attention and development in relation to disqualifying purpose, Government control, serious offences and some unexplored opportunities for reform.

Thank you for this further opportunity to work with the Board of Taxation. I hope the matters set out in this submission will assist in developing the draft legislation.

Yours sincerely



**Jennifer Bott**  
Chief Executive Officer

## **Background to the Australia Council**

The Australia Council (the Council) is the Australian Government's arts funding and advisory body. Its vision is to enrich the life of the nation by supporting and promoting the arts.

The Council is a Commonwealth statutory authority created under the *Australia Council Act 1975*. Section 5 of the Act defines the functions of the Council as:

- (a) to formulate and carry out policies designed:
  - (i) to promote excellence in the arts;
  - (ii) to provide, and encourage provision of, opportunities for persons to practise the arts;
  - (iii) to promote the appreciation, understanding and enjoyment of the arts;
  - (iv) to promote the general application of the arts in the community;
  - (v) to foster the expression of a national identity by means of the arts;
  - (vi) to uphold and promote the rights of persons to freedom in the practice of the arts;
  - (vii) to promote the knowledge and appreciation of Australian arts by persons in other countries;
  - (viii) to promote incentives for, and recognition of, achievement in the practice of the arts;
  - (ix) to encourage the support of the arts by the States, local governing bodies and other persons and organisations;
- (b) to furnish advice to the Government of the Commonwealth either of its own motion or upon request made to it by the Minister, on matters connected with the promotion of the arts or otherwise related to the performance of its functions; and
- (c) to do anything incidental or conducive to the performance of any of the foregoing functions.

Australia is a culturally rich nation and the work of our artists and cultural identity is central to contributing to our sense of national identity and the way we are perceived by the world. The Council fulfils a crucial role in supporting Australian artists and arts organisations to pursue artistic excellence, to create and present their work, to take advantage of opportunities to improve and develop their skills, and to tour and promote their work to wider audiences. It directly supports young, emerging, developing and established artists through a range of grant programs offered across all artforms, and it encourages arts and non-arts organisations to support and present artists' work, thereby expanding employment opportunities for all artists.

The Council also plays a vital role in developing new audiences for the arts both here and overseas and promotes the greater appreciation of the value and role of the arts in the community.