



AUSTRALIAN MAJOR PERFORMING ARTS GROUP

Submission to Board of Taxation ("Board")
Review of workability of the Charities Bill 2003

1. AMPAG

The Australian Major Performing Arts Group is the umbrella organisation for the 27 companies which receive funding from the Major Performing Arts Board of the Australia Council.

The 27 companies cover all states and produce work in drama, music, dance, opera and circus. They account for more than 70 per cent of paid attendances and provide 86 per cent of the employment in the subsidised arts sector, (Major Performing Arts Inquiry 1999).

Reflecting the diversity of the performing arts the member companies have a wide variety of non-profit structures from that of a company limited by guarantee; under state statutes; as a department of a university; and even several orchestras structured as subsidiaries of the Australian Broadcasting Corporation with governance arrangements to give them autonomy. Some member companies are registered as charities; all receive gift deductibility through the Register of Cultural Organisations. Rates of government subsidy vary from five to 85 per cent.

Recognition as a charity is crucial to many member companies which depend on philanthropic and corporate support to underpin their main stage and educational work. Tax exemption also allows member companies to better balance financial responsibility with the ability to produce vibrant work accessible to large numbers of people. Income tax exemption, and GST exemption are vitally important in budgeting for new Australian works, touring (both interstate and regionally) and in keeping ticket prices as low as possible.

In all cases the dominant purpose of member companies, expressed in their constitutions, vision statements and their work, is to advance culture in Australia.

2. Scope and purpose of submission

This submission raises several practical matters which effect AMPAG members in particular. It is not intended as a legal analysis of the Bill and the policy behind it.

AMPAG has spoken to several groups and law firms that plan more comprehensive submissions in this regard.

AMPAG urges the Board to consider special resourcing for the implementation of the Bill once it is enacted. The establishment of a dedicated administrative body to administer the legislation, with a clear policy brief, was a key recommendation made by the Charities Definition Inquiry. AMPAG believes the regulation of charities should be undertaken by an expert body which recognises the need to maintain a viable and healthy sector rather than being undertaken by the mainstream Australian Taxation Office whose dominant purpose is to raise revenue.

3. Serious offences (Section 4.1(e))

AMPAG believes this section will be unworkable. It does not require a conviction in a court, nor is there any limit to the time in which an entity may have engaged in conduct that constitutes a serious offence.

If the Australian Tax office were given the responsibility of determining whether charitable entities are, or have engaged in conduct that constitutes a serious offense the ATO would have to acquire the legal expertise to do so.. As a matter of public policy this area is surely best left to the courts.

Most theatre, dance and opera companies have at some time in their history had complaints that specific productions were obscene or blasphemous. A number of productions have produced controversy about community standards, and debate about the importance of free expression of ideas. Community standards are continuously evolving and the performing arts not only reflect but have a role in leading this continuous change. Should companies be penalised for complaints about conduct based on community standards of 30 years ago? Should the ATO act as the arbiter of current community standards of taste and decency?

Whether motivated by malice, publicity, or any other factor, if a complaint is brought to the tax authorities against a registered charity to the effect that a stage work is considered offensive, there is an immediate threat to the company's financial position and perhaps to its ability to operate. Under the current legislation there is no mechanism to ensure a quick resolution of the complaint. Further, inadvertent breaches of legislation or breaches of legislation that do not result in a conviction should not preclude endorsement as a charity.

4. Advocacy and peak bodies for charitable entities (Section 8.2(c))

AMPAG also wishes to raise the issue of workability of those sections dealing with disqualifying purposes and in particular the "purpose of attempting to change the law or government policy."

Member companies take seriously their responsibility of ensuring that government subsidies are used as efficiently and effectively as possible. Dialogue with government on arts policy and administration, either self initiated or as a consequence of governmental request, is clearly part of this responsibility. Governments always

take into account the views of the arts sector when considering policy changes. . This aspect of the work undertaken by arts companies is in all cases ancillary to the dominant purpose of advancement of culture.

AMPAG urges the Board to look at the workability of these sections in cases where charitable entities entrust advocacy work to a peak body like AMPAG In this case, the companies have pooled their resources to more effectively promote and develop awareness of the contribution of major performing arts to the Australian community, and to present the views of the major performing arts companies to governments and the broader community.

If the Charities Bill acts to make advocacy through peak organisations less financially viable, companies will be required to use a higher proportion of their government funding to undertake these activities individually..

AMPAG believes that where peak bodies are involved in policy discussions on behalf of charitable entity members that this work is ancillary to the dominant charitable purpose.

AMPAG suggests that advocacy could be included within the definition of advancement at Section 10.2. AMPAG also notes that the Charities Definition Inquiry suggested that activities of a charity must not be contrary to public policy,. It did not suggest that a charity should not advocate for change.

5. Government bodies

Like many charitable entities, AMPAG members have watched the recent uncertainty in respect of the tests to be used to determine whether a non-profit body is a government body with interest.

AMPAG member companies, of whatever structure, receive Federal and State subsidy funds through a Tripartite Agreement negotiated through the Australia Council. This agreement includes as a condition of funding (as contemporary public policy advocates) performance outcomes across financial and artistic goals. The Board of Taxation should take these agreements into account when it is investigating the impact of recent court decisions which suggest performance/output agreements for funding may imply Government control. This Bill provides an opportunity to clarify policy in this area in a manner that the current Explanatory Memorandum does not. Accountability for public funding is one of the cornerstones of confidence in public institutions. .Boards of AMPAG companies certainly do not consider that accountability for use of public funds implies control of their operations by a Government.

AMPAG believes that Parliament must make policy in this area more clear. Are output based funding agreements intended to imply government control of an entity which would otherwise be counted as charitable?

The interpretation of the control concept as set out in the explanatory memorandum would necessitate many AMPAG companies reviewing their constitutions. In some cases state governments have the power to appoint Board members, although accepted

practice is for the Boards to act autonomously. Thus passage of the Bill would mean considerable cost to the companies in seeking legal advice, and subsequently revising constitutions and established practice. State governments may also be required to reconsider their enabling legislation. By way of example: A recent Bill in QLD requires the Queensland Theatre Company to submit a draft strategic plan to the State Treasurer and the Minister for the Arts. The issue of whether this would constitute control is unclear at this stage.

AMPAG suggests that the issue of “control” would in the end need definition through specific cases by either a court or a tribunal. Despite a number of attempts to legislate definitions of control through influence on decision making within broadcasting licence holders (Broadcasting act 1942 and Broadcasting Services Act 1992), in practice making a finding of control has required intensive factual investigation by experts. A real diversion of time and public resources.

6. Altruism

AMPAG makes no comment on the definition adopted in the draft other than to say member companies are altruistic in their pursuit of the advancement of culture.

7. Cultural purpose

AMPAG welcomes the adoption of the Charities Definition Inquiry recommendation of a specific charitable purpose for culture. While the common law has extended to include non-profit cultural entities as charitable, it is important that legislation which will codify common law specifically includes this category in unambiguous terms.

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