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Jane Schwager
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 Association of Western Australian Art Galleries represents the leading publicly funded and commercial art galleries operating in and around Perth. Incorporated as a company limited by guarantee on 13 February 1990, the Association is established to promote fine art and assist the public in their pursuit of knowledge about the visual arts. In furtherance of those purposes, the Association has from time to time joined with other arts organizations in lobbying Parliament on matters of Government policy regarding the visual arts. The Association was granted charitable status in May 1990.

The Association 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. The Secretary of the Association attended the briefing in Perth conducted by the ATO and would wish to make the following submission.

Before taking up residency in Australia the Secretary of the Association was the Executive Director of the Charity Commission for England and Wales from 1983 – 1991. As the body responsible for registering and supervising charities, the Commission's decisions on charitable status were appealable only to the courts. Accordingly, the Commissioners' decisions had the effect of developing the law in a way which, prior to 1960, had been a matter for the Inland Revenue and the courts. This undoubtedly had a major beneficial impact on the widening of charity to meet evolving social conditions. It has to be noted, however, that questions of

charitable status, the extent to which powers could be construed as the purposes of an organisation, and political activities, accounted for considerable resources and legal expertise at the highest level of the Commission.

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 close or contemplative religious orders. We also understand that the principal objective of the legislation is to provide a clear framework within which eligibility for tax concessions can be assessed. In the consultative meeting opinion was sought as to whether this framework would achieve certainty, consistency and workability.

While the Association welcomes this approach, and in particular the specific reference to the advancement of Culture as a principal charitable purpose, the Association:

has considerable doubts as to whether those objectives will be readily met;

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;

questions the effect of the draft wording as it relates to political activities and incidental purposes;

and argues that a test of altruism should not be introduced into the definition.

1. Certainty.

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 The introduction of the concept of altruism' would only compound the problem.

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.

2. Inclusion of a specific reference to Culture

The furtherance of the arts has long been recognized as a charitable purpose. Nevertheless, the Association 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 the Association believes important questions of definition will undoubtedly arise.

3. 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 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, the Association 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, the Association 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. The Association 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.

Yours sincerely,

David Forrest
Secretary, Association of Western Australian Art Galleries