

6 December 2011

Manager
Philanthropy and Exemption Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir or Madam

RESPONSE TO CONSULTATION PAPER – A DEFINITION OF CHARITY

Artsource welcomes the opportunity to provide feedback and comment in relation to the Consultation Paper “A Definition of Charity”.

About Artsource

Artsource is a not-for-profit company limited by guarantee whose objects are:

- to promote the image and interests of members of the Company in the arts;
- to provide services to arts practitioners particularly to Members of the Company with a view to increasing their income earning capability in the arts.

It was established in 1986 with the support of the State and Commonwealth Governments. The Company receives triennial funding from the State of Western Australia and is also expected under the terms of its funding agreement to increase its income from other sources in order to become less dependent upon State government funding. This type of funding arrangement places great pressure on the organisation, tending to impede its ability to fund core operations and provide the full range of services it currently offers to visual artists in Western Australia. For example in 2010 Artsource reliance on State Government triennial funding represented 26% of overall income.

The nature of Artsource’s work for artists has changed over time. For instance, in 1996 Artsource established its Artists Agency in response to the growing demand for public art and the State Government Percent for Art Scheme. The Agency was established with the objective of increasing the professional opportunities for artists to enable them to become informed about and take advantage of the Scheme. Artsource thereafter became the pre-eminent place for clients to engage artists and for artists to seek employment opportunities in Western Australia. This service to members has given rise to a diversity and range of employment opportunities that may otherwise not have eventuated. Artists are now sought via the Agency for commissions, consultancies, advice, teaching, residencies, leasing as well as for purchases of their work. In 2003, the company developed and began implementation of a program of professional development specifically geared to Indigenous and regionally based artists in WA. This work has become crucial for many such artists and has given them access to employment and other professional development opportunities that were then, and continue to be, sorely needed.

In carrying out its objects, Artsource represents the rights and interests of over 900 members throughout the state of Western Australia. It provides support of various kinds to visual artists to assist them to achieve a successful professional artistic practice, including by offering professional development courses, managing

subsidized studio spaces in various locations throughout the metropolitan area, facilitating residencies for artists interstate and overseas, as well as providing up to date relevant information for artists about opportunities for commissions, employment and grants. Artsource fills this role in Western Australia in an effort to assist visual arts practitioners to achieve “best practice” and to also assist them in obtaining better incomes reflective of their skill and contribution to society and community welfare.

The work of Artsource is necessary to assist in correcting the very low earnings of visual artists in Australia, which has been well documented over many years. For instance, in a survey conducted on behalf of the Australia Council in 2003, the mean annual income of visual artists and other categories of artists for 2000-2001 was \$37,200 (including non-arts related income), compared with other workforce professionals who earned \$54,400. This income was made up by category of artist as follows:

Mean earned income of artists, 2000-01 financial year

Practising professional artists	Creative income (\$)	Other arts-related income (\$)	Total arts income (\$)	Total non-arts income (\$)	Total income (\$)
Writers	20,400	6,100	26,400	19,700	46,100
Visual artists	12,600	7,300	20,000	9,300	29,300
Craft practitioners	19,100	4,000	23,300	7,000	30,300
Actors	22,500	5,000	27,400	14,300	41,700
Dancers	16,700	7,100	23,900	3,000	26,900
Musicians	17,700	9,800	27,600	13,500	41,100
Composers	12,700	14,000	26,700	11,500	38,200
Community cultural development workers	8,400	8,300	16,700	9,400	26,100
Total	17,100	7,400	24,600	12,600	37,200

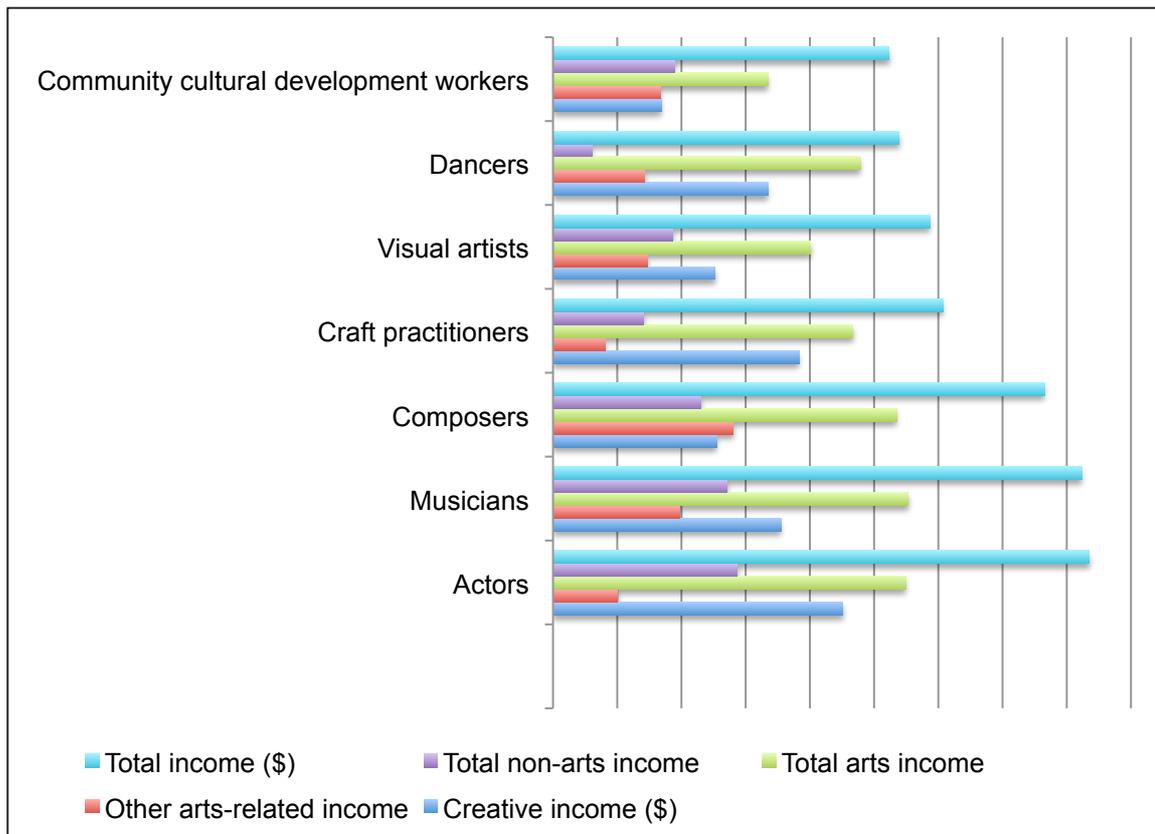
Notes:

1. Mean average incomes may be strongly affected by outliers, that is, extreme values within a particular sample. Although the incomes of the majority of artists are relatively low, a few enjoy very high earnings. This sample contains several artists who earned incomes above \$200,000 in 2000-01.
2. All income is gross (pre-tax) income.

Source: Australia Council, *Don't give up your day job: An Economic Study of Professional Artists in Australia* (Throsby and Hollister 2003).

This data has been used to create the graph below, from which it will be seen that in

the sample survey visual artists earned the second least amount for “total arts income”:



Artsource is listed on the Register of Cultural Organisations but does not have the benefit of charity tax concession endorsements from the ATO at this time. It may well be desirable for it to seek to obtain such endorsements if it is to be able to continue to fund its core operations and provide the range of services that are necessary to advance the earning capacity and skills of visual artists throughout Western Australia, including those from remote indigenous communities. This is particularly desirable in circumstances in which its funding agreements continue to be outcomes based and dependent upon increasing its sources of funding by other means than grants and subsidies from government.

In our submission, organisations such as Artsource should be capable of being endorsed as organisations having a charitable purpose in view of the public benefit that its activities produce in improving the economic viability of artistic practice and hence the cultural richness of the society in which artists engage.

Consultation Questions

1. **Are there any issues with amending the 2003 definition to replace the ‘dominant purpose’ requirement with the requirement that a charity have an exclusively charitable purpose?**

The Courts have construed “the dominant purpose” provision of the *Income Tax Assessment Act 1997 (Cth)* in several cases, including *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55; *Commissioner of Taxation v Wentworth*

District Capital Ltd [2011] FCAFC 42 and *Commissioner of Taxation v Co-Operative Bulk Handling Ltd* [2010] FCAFC 155. In Artsource’s submission, the dominant purpose requirement as construed in these cases should continue to apply as a key criterion as to whether an organisation is charitable. The critical issue is not the nature of each activity undertaken by a not-for-profit organisation within the scope of its objects, but rather that:

- any profits realized from its activities are not distributed to members; and
- that upon a winding-up, any surplus assets are to be transferred to another organisation having similar objects.

2. **Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?**

The decision provides guidance and is consistent with the ultimate resolution of *Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55 in the High Court of Australia. If no change of the law is to be made by the Government, then in Artsource’s submission no further clarification is required.

It is desirable, in Artsource’s submission, for not-for-profit representative organisations in the arts and cultural sector that are also peak industry bodies not to be precluded from being endorsed as “charitable” by reason of their participation in activities which involve advocating and lobbying for the sector in which they are engaged. For instance, we consider it entirely appropriate and consistent with the charitable status of a peak industry body to respond to this Consultation Paper. As in the Aid/Watch decision, it should be accepted that such activities have a purpose beneficial to public welfare.

3. **Are any changes required to the Charities Bill 2003 to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?**

The definition of “the public” has often proven to be problematic in legislation. In the legislative approach to the issue of “the public” for the purposes of copyright law, it has long been accepted that it is undesirable to define the expression “the public”. Rather a significant body of common law has built up and continues to be relied upon. Consequently, the courts in Australia and elsewhere have long accepted that small numbers of people listening to music may nevertheless constitute “the public” for the purposes of public performances of music.

In circumstances in which charities seek to advance the interests of groups or persons who have suffered poverty, discrimination or inadequate access to opportunities – including indigenous people from groups who are not numerically large – it is desirable to ensure that any approach to clarifying the meaning of “public” is not unduly restrictive.

4. **Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?**

Organisations providing assistance and benefits to beneficiaries with family ties, such as native title holders, should not be precluded from being treated as charitable organisations if their purposes otherwise meet the standard tests of the legislation for endorsement as a charitable organisation, as clarified in the case law referred to above in the answer to question 1.

5. **Could the term ‘for the public benefit’ be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?**

In Artsource’s submission it is highly desirable that legislation retain the flexibility necessary to cope with changing circumstances. A restrictive meaning to the expression “for the public benefit” is inappropriate in light of changing circumstances and the fact that the case law has been adaptive in the past to change in accordance with changing circumstances (often notwithstanding contrary views of the Commissioner of Taxation advocated in the course of litigation). Nevertheless, Artsource would not oppose an approach similar to that adopted by the Charity Commission of England and Wales under which “guidance” is issued and published only after undertaking a process of public or other consultation, as required.

6. **Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?**

So long as it is made clear to the Commissioner of Taxation that the adoption of a process similar to that taken by England and Wales is **not** to be used to wind back categories of charitable purposes that have already been accepted under the case law, then it may be helpful to adopt a similar approach to that taken by England and Wales ie. the common law categories of should explicitly survive and be capable of being augmented by new categories as they emerge in the future.

7. **What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?**

Not-for-profit entities such as Artsource exist to promote the viability of the visual arts and craft sector in Western Australia. As demonstrated by studies and surveys conducted by the Australia Council and statistics compiled by the Census at various times, visual arts practitioners generally earn far less by comparison to the general community or persons engaged in other occupations requiring similar levels of training. Entities such as Artsource are essential to advancing the economic welfare of such visual arts practitioners and hence to public interest in having access to the works of local artists, including those from indigenous and remote communities. However, organisations such as Artsource are presented with many challenges to their

viability and survival although their activities undoubtedly advance the arts and culture in Western Australia.

The activities of such organisations are provided in an environment of decreasing government funding and subsidies, as governments insist on “outcomes” and greater financial independence. The administrative and cost burdens involved in satisfying the Commissioner of the public benefits of their activities in the carrying out of their objects are substantial and may deter such organisations from applying for endorsement as charitable organisation.

It may assist such organisations if a non-exhaustive definition of “charitable purposes” is adopted and that purposes serving “the advancement of the arts, heritage, culture or science” are explicitly included as “charitable purposes”.

8. What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?

It is difficult to envisage how the ACNC could remain “independent” if it is also to provide assistance to charitable organisations to ensure that they may demonstrate their continued meeting of the test. The conflict of interest that this would involve appears undesirable. Artsource suggests that it would be preferable for a truly independent body to be charged with the task of providing advice and assistance of this kind not only to existing charities but also to organisations proposing to apply for endorsement.

It would not be inconsistent if the ACNC provided information and educational materials to the public on its website about its activities, the process of applying for endorsement as a charity, a “mistakes and misconceptions” and “frequently asked questions” section and so on, in a similar way to the information supplied by IP Australia with respect to the processes of applying for trade marks and patents. Indeed, the “TM Headstart” process described on IP Australia’s website may provide a suitable model for the ACNC. The IP Australia model assists proposed applicants in determining for themselves the suitability of proposed trade marks for registration and also to quickly identify any barriers that may prevent registration of a proposed trade mark. This system does not compromise IP Australia’s independence but nevertheless provides enormous assistance and guidance to proposed applicants without the need for them to incur substantial costs, professional advice or commitment of time and resources.

9. What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

Artsource does not wish to respond to this question.

10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

See answer to Questions 1 and 2 above in relation to “dominant purpose”.

11. Should the role of activities in determining an entity’s status as a charity be further clarified in the definition?

As noted in the response to Question 2 above, Artsource submits that, the critical issue is not the nature of each activity undertaken by a not-for-profit organisation within the scope of its objects, but rather that:

- any profits realized from its activities are not distributed to members; and
- that upon a winding-up, any surplus assets are to be transferred to another organisation having similar objects.

It should be possible for a charity to engage in activities that are not per se charitable so long as those activities are nevertheless conducted within the scope of its objects or to advance the purposes of the organisation.

12. **Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?**

As noted above in the response to Question 2, Artsource considers that in contemporary Australia it ought not to be regarded as inconsistent with an organisation's charitable status that it engages in advocacy and lobbying relevant to its purposes. Such organisations are likely to be in a position to advocate for the interests of those who are otherwise not able to advocate or lobby for themselves (the poor, disadvantaged etc) and can arguably advance public welfare by doing so by reason of their special knowledge of the field in which they carry out their objects and activities.

13. **Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?**

Artsource considers that the primary issue is whether a charity is acting within the scope of its objects and purposes when acting so directly in a political manner. Engagement with the political process by charities ought not, however, be prohibited where that action is legitimately to be regarded as being within its objects and purposes.

14. **Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?**

Artsource does not wish to respond to this question.

15. **In the light of the *Central Bayside* decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?**

Artsource does not wish to respond to this question.

16. **Is the list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* an appropriate list of charitable purposes?**

Artsource submits that:

- the categories of "charitable purposes" should be open-ended, not closed

and restrictive, to permit adaptation to changing circumstances and needs;

- as in England and Wales, Scotland and Ireland, purposes serving “the advancement of the arts, heritage, culture or science” should be explicitly included as “charitable purposes”, consistent with the common law.

17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

See answer to Question 16 above.

18. What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

Artsource supports greater harmonization of Commonwealth, State and Territory laws with respect to the definition of “charity” to promote greater uniformity and fairness throughout the country. It is undesirable that different tests with respect to the nature of a charity apply.

19. What are the current problems and limitations with ADRFs?

Artsource does not wish to respond to this question.

Yours sincerely



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