



AUSTRALIAN MAJOR PERFORMING ARTS GROUP

Consultation Paper: A Definition of charity

Submission to:

Philanthropy and Exemptions Unit

The Treasury

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Introduction

AMPAG, the umbrella association of 28 not-for-profit major performing arts companies from around Australia, welcomes this opportunity to raise its concerns with government about the introduction of a statutory definition of 'charity'. Fundamentally, AMPAG supports the introduction of a statutory definition, as long as arts and culture are identified as a charitable purpose within an expanded list of purposes beyond the four current categories (relief of poverty, advancement of education, advancement of religion, or other purpose beneficial to the community). We would also propose that greater flexibility and clarification is provided concerning the criteria that a charity must meet.

We are confident the government understands the importance of performing arts companies remaining as charitable entities under the *Income Tax Assessment Act 1997* so that they can continue to deliver outstanding performances to audiences nationally and internationally, achieving a vibrant, inclusive and resilient arts sector for all Australians to enjoy.

This submission has been prepared with the assistance of various AMPAG members and while we endeavour to speak with a unified voice it does not override individual policy positions made by our members.

About the Australian Major Performing Arts Group

AMPAG is the umbrella association of 28 not-for-profit major performing arts companies (see Appendix A) from around Australia that receive financial investment from both state and federal governments. The companies present theatre, dance, ballet, circus, opera, orchestral and chamber music performances around Australia as well as educational and access programs.

The 28 member companies in AMPAG perform extensively nationally and internationally. In 2010 there were nearly 2.3 million attendances at mainstage capital city performances by the AMPAG members. In addition the companies presented 340 seasons in 128 regional centres around the country and more than 600,000 young Australians attended 4,600 education performances.

The AMPAG companies provide employment to over 8,000 people annually, representing 71 per cent of total employment in the federally subsidised Australian performing arts industry.¹ Their combined turnover exceeds \$400 million with 37 per cent coming from governments and the remainder from box office (43 per cent), private sector support such as sponsorship and philanthropy (13 per cent), and 'other' (7 per cent) which includes fees and some related commercial activity. Without that private sector support and the related commercial activity, most of these companies would be unable to continue to operate.

Arts and the not-for-profit sector

ABS research paper 8106.0: *Not-for-profit Organisations, Australia, 2006-07* found that at the end of June 2007, art and culture organisations made up 20 per cent of all not-for-profit organisations in Australia. This was the second highest category recorded by the ABS, just behind religious organisations on 21.3 per cent. Of course the 'art and culture' category is much broader than just performing arts (performing arts organisations accounted for approximately 9 per cent of the category) but the figure shows the major impact defining 'charity' will have on the sector.

We would contend that the definition of charities should include specific mention of arts and culture for the reasons outlined in the Charities Bill 2003 explanatory memorandum. Further that

¹ Australia Council Arts Organisations 2010 Annual Report
www.australiacouncil.gov.au/about_us/our_structure/arts_organisations

any definition of 'arts and culture' is sufficiently flexible to encompass evolving new arts forms which result from new technologies and societal changes.

Proposed definition

It is proposed to base an Australian statutory definition on the Charities Bill 2003, which contained the following requirements that an entity must meet to be a charity:

- It must be a not-for-profit entity
- It must have a dominant purpose that is charitable
- It is for the public benefit
- It does not engage in activities that do not further, or are not in aid of, its dominant purpose
- It does not have a disqualifying purpose
- It does not engage in, and has not engaged in, conduct that constitute a serious offence
- It is not an individual, partnership, a political body, a superannuation fund or a government body

Core definitions

It must be a not-for-profit entity

AMPAG agrees with the explanatory material to the Charities Bill 2003 that the not-for-profit requirement does not imply that a charitable entity cannot generate a profit. However, we are concerned that only profit-generating activities can be undertaken if that profit is applied only for charitable purposes.

As we pointed out in our submission to the Treasury Consultation Paper: *Better targeting of not-for-profit tax concessions*, the commercial activities of the MPA companies include the operation of bars and cafes in performance venues, the selling of merchandise (such as CDs, DVDs, t-shirts), lease of premises, performance classes etc. Companies are actively encouraged by their government funders to be entrepreneurial to reduce their reliance on government funding.

The companies are required by their government funders to build financial reserves to ensure the long-term financial viability of their organisation. The maintenance of reserves to at least 20 per cent of annual turnover is a funding requirement under the tripartite agreements with their state arts funding agency and the Australia Council. All reserves that companies amass are done so to fulfil their altruistic purposes.

We discussed this issue at length in our submission to *Better targeting of not-for-profit tax concessions* and would reiterate the need for flexibility to be applied to the definition of charitable purpose so that performing arts companies are able to access new and innovative forms of raising funds. In the long term this will assist in the health and sustainability of the arts sector overall.

We strongly agree with the Community Council of Australia's submission which points out that if entities conduct activities that generate a profit this should not disqualify them from attaining charitable status – given that this is what the current law provides for and is confirmed in the latest ATO Tax Ruling 2011/14. Of particular note is the fact that the ruling indicates that an entity can distribute surpluses to owners or members as long as the distribution of funds is in *furtherance* of its charitable purposes.

A contemporary definition of charity must reflect the modern-day nature of NFP activities which includes a 'social economy' whereby market mechanisms are used to achieve social outcomes. In this regard we note that the key recommendation from the recent Senate Economics Committee report: *Investing in good: the development of a capital market for the*

not-for-profit sector in Australia' (November 2011) is to establish a Social Finance Taskforce to act as a catalyst in developing a capital market for not-for-profit organisations and to establish new policies that support increased investment in the sector. The report calls for a strengthening of relationships between the not-for-profit and investment sectors, the promotion of social investment products through intermediaries, and education campaigns to raise awareness of the opportunities and benefits of new social investment for all sectors.

In light of the above we would contend that any changes to Charitable Status that penalise charities for embarking on commercial activities to support their business would work against other government initiatives.

It must have a dominant purpose that is charitable

The consultation paper proposes adopting the common law position that the purpose of a charity must be exclusively charitable, as opposed to the current 'dominant' position. We support the 'dominant' purpose test being retained, to give greater flexibility to charities in how they achieve their primary purpose. As mentioned above, performing arts organisations depend on the income they raise through private sector support—and they do so in varying and innovative ways.

AMPAG, as a peak body and charitable entity itself, supports the consultation paper's position that a peak body providing support services is itself a charitable institution. Advocacy by NFP organisations is an indication of a healthy democracy. AMPAG's own work in this regard has been to advocate for improved national touring networks especially to regional and remote areas, better conditions for workers, improved arts education programs in the national curriculum, a better tax framework to support the arts, a more environmentally sustainable arts sector and the creation of vibrant towns and cities through performing arts activity. We have also carried out extensive research and advocated widely on the impact of digital technology on the performing arts and how it can be better utilised, especially in relation to the NBN.

It is for the public benefit

The Charities Bill 2003 stated that an entity has a purpose which is for the public benefit, only if it is directed to the benefit of the general community or to a sufficient section of the general community. The major performing arts companies are set up for the benefit of all Australians, as reflected in their mission statements:

To present opera that excites audiences and sustains and develops the art form—Opera Australia

To make Shakespeare meaningful and accessible to all Australians—Bell Shakespeare

-To produce classic and contemporary Australian and international theatre with style, passion and world class artistic excellence in order to entertain, challenge and enrich audiences in Melbourne, Victoria and Australia—Melbourne Theatre Company

AMPAG recommends against the adoption of the Charities Bill 2003 definition of public benefit as we believe this is unnecessarily complicated and restrictive and its interpretation may have unintended consequences for the performing arts sector. We believe that it is important to recognise that a public benefit can be intangible. We are particularly concerned about the 2003 definition of public benefit as having "practical utility". Although the explanatory memorandum notes that "practical utility" may include social, mental and spiritual benefits there is a risk that performing arts activities may be disadvantaged because they are intangible and ephemeral.

We would propose that existing performing arts organisations that are charitable entities should be presumed to meet a public benefit test. However, if the presumption of public benefit is removed in favour of all charities being required to demonstrate they are providing a public benefit, we urge that minimal compliance requirements and costs be put in place and

that the definition allows for intangible benefits. Already NFP arts companies are required to undertake numerous compliance tasks in order to operate and we outlined this in our original submission to the *Consultation Paper: Scoping study for a national not-for-profit regulator* (February 2011)

AMPAG would be greatly concerned if a public benefit test were to be applied that would result in burdensome compliance. AMPAG itself, as the peak organisation, should also be considered as operating for the public benefit, given the degree of integration and commonality of purpose it has with its members.

In instances where an arts organisation is newly applying for charitable status AMPAG agrees that the Australian Charities and Not-for-Profit Commission (ACNC) should be empowered to investigate and determine if the organisation is working for the public benefit.

It does not engage in activities that do not further, or are not in aid of, its dominant purpose

The consultation paper points out that an important consideration in determining whether an institution is a charity is not only whether it has a charitable purpose but also whether its activities are 'in furtherance of' its charitable purpose. We would request clarification of what this exactly means, in practice. As stated above, performing arts companies often carry out profit-generating activities in order to raise capital—capital maintained in reserves as part of their funding requirements. AMPAG believes this situation requires a flexible definition of 'in furtherance of' so that this kind of fundraising and maintenance can continue.

We would also support the government's position, stated in the consultation paper, that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as they further its charitable purpose.

It does not have a disqualifying purpose

The consultation paper notes that disqualifying activities include political activities that are more than 'ancillary or incidental'. In the Charities Bill 2003, political activities are listed as:

- advocating a political party or cause
- supporting a candidate for political office
- attempting to change the law or government policy.

We support the consultation paper's proposal that the third point, 'attempting to change the law or government policy', be removed from disqualifying activities.

As the umbrella organisation representing the major performing arts organisations, AMPAG frequently lobbies and advocates on behalf of its members for support or a change in government policy. We are also frequently called upon by government to consult on proposed policies and changes to legislation. Further, the companies themselves often advocate separately and independently to further their own 'charitable purpose'.

It does not engage in, and has not engaged in, conduct that constitute a serious offence

We would support including this requirement as a disqualifying activity. However, we agree with the Community Council of Australia's submission that the ACNC should be empowered to protect charitable assets and the status of organisations when illegal activity has been carried out by individuals within the charity for their own gain, without the knowledge of the organisation as a whole or its directors or trustees.

It is not an individual, partnership, a political body, a superannuation fund or a government body

We would support the consultation paper's position that joint ventures not be excluded from being a charity, which are not considered to be a partnership for tax purposes.

We would also recommend that there needs to be flexibility in the definition so that government owned entities can be registered as charities in special circumstances and which would not be possible under the Charities Bill 2003. In this regard we support amending the requirements in light of the 2003 Central Bayside decision.

Three members of AMPAG are designated statutory authorities by their respective state governments, yet similar companies in other states are designated as charities. Although the state governments may appoint the directors of these three companies their governance structures operate at arm's length from government. These companies operate in the same economic environment and have the same challenges as the other AMPAG members in that they have:

- funding agreements with both the state arts department and the Australia Council and within the agreements are required to meet key performance indicators in order to continue to receive funding;
- they must raise a significant proportion of their revenue from box office, private sector support (donations, corporate sponsorship, fundraising events) and fees;
- their employees are on contracts and do not have the same benefits as public servants (in most cases salaries are considerably below that of public servants);
- they run education and access programs;
- they tour regionally and offer artist development programs.

In effect these companies independently carry out their purpose and thus according to the Central Bayside decision should be considered charitable.

The current exclusion causes confusion in the community and frustration that despite being seen as charitable they are not, because of their connection to government. This then affects the companies' ability to receive funding from charitable foundations and thus works against their business models and the funding bodies' expectations.

Other Issues

AMPAG supports harmonisation of legislation and definitions as a means to reduce complexity and compliance burden of our members. Many AMPAG companies operate nationally and are required to register with each state for charitable status. There are also issues which arise with payroll tax exemption because the definition of charity is different under its state jurisdiction to the definition in other jurisdictions.

We further support harmonising charitable fundraising legislation to enable charitable trusts in all jurisdictions to be recognised as charitable (as set out in paragraph 144 of the consultation paper).

Recommendations

1. That arts and culture be defined as a charitable purpose, as part of an expanded definition of charitable purposes beyond the four categories that currently exist.
2. That flexibility to be applied to the definition of charitable purpose so that performing arts companies are able to access new and innovative forms of raising funds. This might entail their undertaking profit-generating activities.
3. That the dominant purpose test be retained, to give greater flexibility to charities in how they achieve their primary purpose.

4. That AMPAG, as a peak body providing support services to its charitable members, remains a charitable institution itself and that advocacy is seen as a legitimate activity of a charity.
5. That existing performing arts organisations that are charitable entities should be presumed to meet a public benefit test. If a public benefit test is applied across the board, we recommend that this involves minimal compliance requirements and costs for companies.
6. That the Australian Charities and Not-for-Profit Commission (ACNC) be empowered to seek information from organisations to determine their capability and intention to work for the benefit of the public.
7. That activities in furtherance of a charitable entity's purpose be clarified and defined flexibly so that companies can continue to raise private sector funds essential for their survival.
8. That the disqualifying purpose attached to political activities of 'attempting to change the law or government policy' be removed.
9. That engaging in a serious offence is a disqualifying activity.
10. That joint ventures which are not a partnership for tax purposes not be excluded from being a charity.
11. That a flexible definition for "government control" be adopted which allows government-owned entities eg statutory authorities, which independently carry out their purposes, to be registered as a charity.
12. That legislation is harmonised to reduce complexity and compliance burden of performing arts companies operating across multiple jurisdictions.

Appendix A: List of AMPAG Member Companies & their location

Adelaide Symphony Orchestra	South Australia
Australian Brandenburg Orchestra	New South Wales
Australian Chamber Orchestra	New South Wales
Bangarra Dance Theatre	New South Wales
Bell Shakespeare	New South Wales
Belvoir	New South Wales
Black Swan State Theatre Company	Western Australia
Circus Oz	Victoria
Malthouse Theatre	Victoria
Melbourne Symphony Orchestra	Victoria
Melbourne Theatre Company	Victoria
Musica Viva Australia	New South Wales
Opera Australia	New South Wales
Opera Queensland	Queensland
Orchestra Victoria	Victoria
Queensland Ballet	Queensland
Queensland Symphony Orchestra	Queensland
Queensland Theatre Company	Queensland
State Opera South Australia	South Australia
State Theatre Company of South Australia	South Australia
Sydney Dance Company	New South Wales
Sydney Symphony	New South Wales
Sydney Theatre Company	New South Wales
The Australian Ballet	Victoria
Tasmanian Symphony Orchestra	Tasmania
Western Australian Ballet	Western Australia
West Australian Opera	Western Australia
West Australian Symphony Orchestra	Western Australia