

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**

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

**About the Chamber of Arts and Culture WA Inc (CACWA)**

The Chamber of Arts and Culture WA is a not-for-profit incorporated organisation whose objects are:

- 1.1 The objects of The Chamber are to promote and sustain interest in and the development of Culture and the Arts in Western Australia by gathering together Arts organisations, associations and individuals in each sector of the Arts to: -
  - 1.1.1 provide advice to the State Government and other stakeholders to facilitate broad long-term planning and resourcing of Culture and the Arts in Western Australia;
  - 1.1.2 develop and coordinate a cohesive voice from the Culture and the Arts sector;
  - 1.1.3 identify direct or indirect funding sources that can be made available for the to development of Culture and the Arts in Western Australia;
  - 1.1.4 provide Members of the Association with a forum to exchange information, advice and assistance where appropriate;
  - 1.1.5 promote the value of Culture and the Arts as an integral part of everyday life in Western Australia; and
  - 1.1.6 undertake any activity that the Board shall from time to time determine to be in furtherance of the objects of The Chamber.

*The Chamber is a united voice to promote, advocate and represent the value of a vibrant and sustainable arts and cultural sector in Western Australia.*

The Chamber of Arts and Culture WA Inc is the state’s representative arts body, providing an independent, cohesive voice for the sector in Western Australia.

The Chamber is a not-for-profit organisation that aims to bring the WA arts sector together to debate, discuss and to take action as a collective on the major issues that impact the sector. The Chamber will promote the value and achievements of arts and culture, people and activities in WA.

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The Chamber will provide advice to Local, State and Federal Governments and other stakeholders to facilitate long term planning and resourcing of culture and the arts in Western Australia. It will promote the value of culture and the arts as an essential and mainstream aspect for Western Australians of all ages.

**About the Chamber**

The Chamber membership comprises influential and passionate leaders of the Western Australian arts and cultural activities and institutions across a range of arts areas - institutions, organisations, artists and individuals.

The governance and leadership of the affairs of the Chamber are vested in the Chamber Board. The Board consists of 12 members, 5 selected and 7 nominated by members annually at the Annual General Meeting.

The Board undertakes a role in identifying key strategic policy issues of the sector and creating a forum for issues relevant to the sector. The Board with input from its' members, will approve policy and long-term strategy for the Chamber and advocate on behalf of the arts and culture sector.

**Membership of the Chamber**

**Membership** of the Chamber is open to Western Australia based not-for-profit societies, associations, boards, service funds and other bodies whether incorporated or unincorporated whose activities promote and sustain interest in and the development of culture and the arts in the State.

It also includes **individual members** involved in activities that promote and sustain interest in and the development of culture and the arts in the State.

**Associate Members** are also encouraged to join - companies, individuals and organisations that support the arts and the aims of the Chamber but not necessarily involved directly in artistic or cultural activities.

**Core Priorities**

The Chamber is committed to:

- Plan and lobby for a co-ordinated approach and commitment to the development of hard and soft infrastructure that addresses the current needs and future growth of the arts and culture sectors in WA.
- Developing and maintaining excellent relationships with our membership in order that broad priorities be understood and met through effective lobbying and advocacy.
- Work with the sector and business to better link, celebrate and articulate the benefit of the arts to the community and value to society.

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The work of the Chamber is necessary to assist in correcting the very low earnings of artists and performers 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**

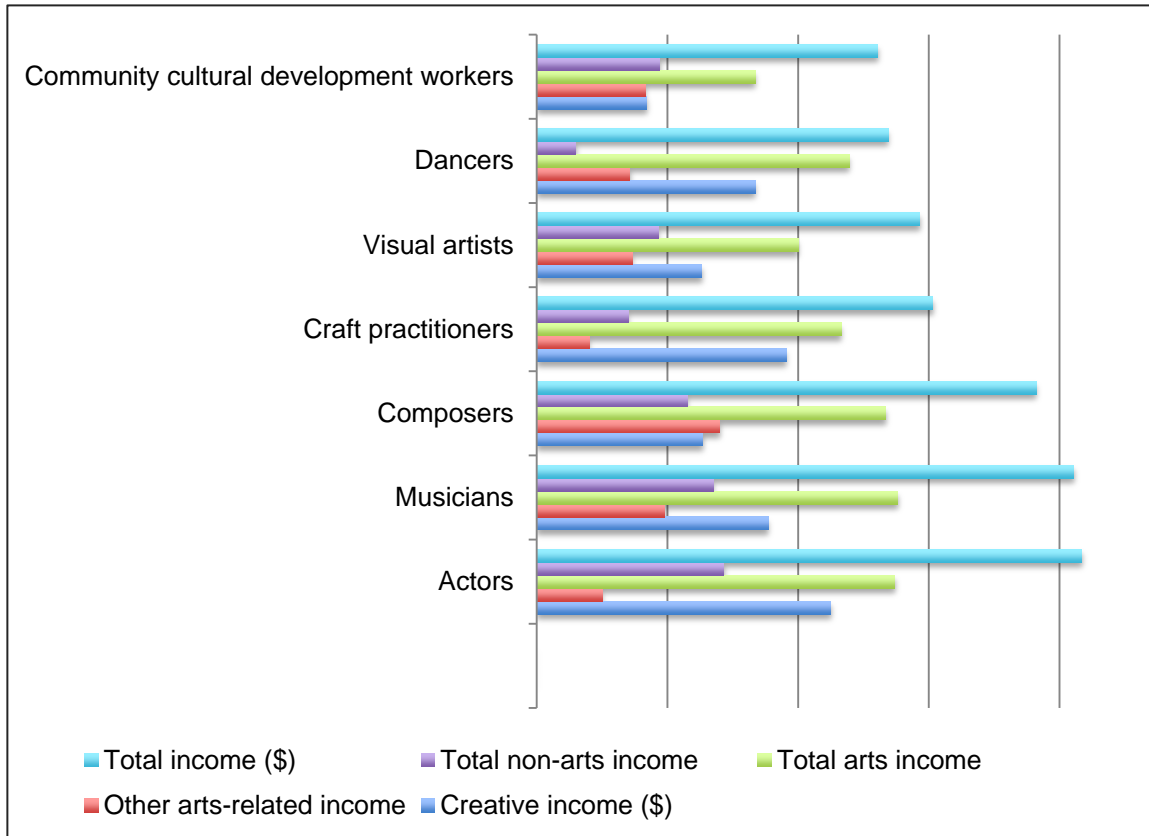
<b>Practising professional artists</b>	<b>Creative income (\$)</b>	<b>Other arts-related income (\$)</b>	<b>Total arts income (\$)</b>	<b>Total non-arts income (\$)</b>	<b>Total income (\$)</b>
Writers	20,400	6,100	26,400	19,700	46,100
<b>Visual artists</b>	<b>12,600</b>	<b>7,300</b>	<b>20,000</b>	<b>9,300</b>	<b>29,300</b>
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
<b>Total</b>	<b>17,100</b>	<b>7,400</b>	<b>24,600</b>	<b>12,600</b>	<b>37,200</b>

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":



A significant number of our member organisations are listed on the Register of Cultural Organisations but do not have the benefit of charity tax concession endorsements from the ATO at this time. 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 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**

- 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. 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 realised 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 The Chamber's submission no further clarification is required.

It is desirable, in the Chamber's submission, for not-for-profit representative organisations in the arts and cultural sector that are also peak industry bodies not 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 the Chamber’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, The Chamber 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 The Chamber exist to promote the viability of the 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, 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 The Chamber are essential to advancing the economic welfare of such 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 The Chamber 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.

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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 demonstrate their continued meeting of the test. The conflict of interest that this would involve appears undesirable. The Chamber 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?**

The Chamber 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, The Chamber 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.

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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, The Chamber 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?**

The Chamber 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?**

The Chamber 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?**

The Chamber 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?**

The Chamber 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.



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

The Chamber 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?**

The Chamber does not wish to respond to this question.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sam Walsh', with a long, sweeping underline that extends to the left and then curves upwards to the right.

Sam Walsh  
Chair  
Chamber of Arts and Culture WA