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NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

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9<sup>th</sup> December 2011

Dear Sir/Madam

### **Re 'A Definition of a Charity' Consultation**

The National Association for the Visual Arts (NAVA) welcomes the opportunity to make this submission in response to the 'A Definition of a Charity' Consultation Paper released in October 2011.

NAVA is a not for profit peak body representing and advancing the professional interests of the Australian visual arts, craft, media art and design sector. Since its establishment in 1983, NAVA has advocated for policy and legislative change to encourage the growth and development of the visual arts sector and to increase professionalism within the industry. It provides leadership to the sector and sets industry standards. It also provides direct service to constituents through offering expert advice, representation, resources, grants, training and a range of other services.

The recognition of arts and cultural organisations as having charity status is a very significant issue for the sector and for the benefit of the community as a whole. Understanding the range of benefits gained by the community from arts and cultural activities, governments at all levels provide a variety of forms of subsidy for not-for-profit (NFP) arts organisations including some forms of tax exemption (DGR and PBI) for those listed on the Register of Cultural Organisations. The practical implication of the definition of art organisations as charities is to entitle the organisations to special treatment under the tax regime creating clarity between the different terms and the tax relief they are entitled to.

Currently, not for profit visual arts and craft organisations fit within the understanding of charities under common law in that they are not for profit bodies with a sole or dominant purpose that is beneficial to the community. However there are efficiency improvements that could be made to allow arts and cultural NFPs to secure charitable status recognising their contributions as well as their distinctly diverse activities, including advocacy.

While many arts and cultural organisations like NAVA are listed on the [Register of Cultural Organisations](#) which allows us to receive tax deductible donations to assist us with a wide range of activities, we are not recognized as public benevolent institutions (PBIs). Of huge value would be the expansion of the criteria for PBIs to allow us to offer staff salary packages to redress what is widely recognised as the limitations on being able to pay salaries appropriate to the qualifications, ability and level of experience of those working especially in the small to medium sized arts and cultural organisations.

NAVA agrees with the consultation paper that a significant step forward is acknowledgment that “Charities and the wider NFP sector are a key part of the Australian community and economy. Providing them with greater certainty as to what is considered charitable will assist in reducing the compliance burden the sector currently faces”. However, NAVA would also like to highlight the necessity for Government to legislate the definition of a Charity without imposing on or regulating the organisations’ activities.

This is of particular significance for NAVA, which is a company limited by guarantee, that undertakes work for the benefit of the community as a core business supporting artists, undertaking advocacy for the visual arts, craft, media art and design sector as a whole and supporting the industry through diverse activities including sector development. A great deal of NAVA’s work is focused on offering information, referrals and expert advice to the sector, providing professional development and career advancement opportunities for artists and setting best practice standards for our industry. However, in order to achieve a conducive environment which fosters the flourishing of Australia’s cultural life, NAVA also devotes energy to providing policy advice to governments, acting as a conduit between its constituents and key decision making bodies and trying to influence certain areas of legislation so as to foster lively cultural activity and the free flow of ideas. Recent examples of the kind of legislation and regulation on which NAVA had influence are the introduction of the Artists Resale Royalty scheme to deliver artists a new income stream and the changes to Sedition legislation to protect artists’ freedom of expression.

NAVA’s primary concern is that in making any adjustments to the definition of a Charity, the Government should ensure that the consequences do not impact adversely on not-for-profit arts organisations and their often precarious economic circumstances. It is important that this change will still allow organisations the same benefits and serve to strengthen their operations and ability to deliver services and benefits to the community. By affording the cultural sector the same status as other charities including taxation concessions, the government would be assisting the sector in generating stronger support mechanisms, private donations, longer term sustainable incomes, community ties and a recognition of the contributions of those working in these areas.

NAVA’s response to the Consultation Paper will be focused on the questions and issues that directly affect the visual arts, craft, media art and design sector.

## **Section 2. Issues in Defining a Charity**

### Consultation Question 1

In response to the consultation questions in Section 2 NAVA has concerns over areas of confusion as detailed in point 56. By including in a definition of charity not only its purpose but also its activities, the legislation is creating a value judgment about the charitable activities and this has the potential to be confusing and also unnecessarily regulatory. The legislation should seek to focus on the purpose of an organisation without opening up the possibility for regulating charitable activities that bring services and benefits to the community.

### Consultation Question 2

NAVA is the peak industry body for the visual arts, craft and design sector and agrees with the 2003, New South Wales Administrative Decisions Tribunal which held that “a body which enhanced the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution”. This decision indicates that while it is not necessary that a peak body deal directly with members of the public, it is the degree of integration and commonality of purpose with its members that determines its charitable status.”

### Consultation Question 3

In point 2.1.3 (59.) of the Consultation Paper NAVA suggests it may be useful to include cultural and arts activities definitions of benefit for the community as it is important to recognize these activities as having varied and often intangible community benefits, ie it is hard to quantify the value of cultural enrichment. If a definition of arts and cultural activities were to be included, then NAVA strongly recommends sector consultation be undertaken to develop these terms.

In response to point 65, NAVA recommends clarification on the distinction between public benefit and member benefits as many arts organisations, including NAVA, work towards both goals. In building the strength of its artist and other arts professional members, organisations like NAVA are ensuring the flow-on benefit to the community resulting from what these people (both members and non-member beneficiaries of its services) will then bring to the public in enriching their cultural experience.

It is also the case that many cultural organisations are encouraged by governments to become more self-reliant and pursue independent income sources, including from membership fees. It is essential that these organisations are not discriminated against because they also include a membership. Most NFP visual arts, craft, design and media infrastructure bodies undertake a great variety of activities to ensure their own survival and the wellbeing of the sector for which they provide resources and facilities. In building the strength of the sector, these organisations are ensuring that the public will gain the benefit of cultural experience resulting from the achievements of artists (who often also provide other related services).

### Consultation Question 4.

NAVA supports changes to the Charities Bill 2003 to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities. In Indigenous communities, family ties can extend very broadly. If for example, a remote Indigenous community set up a NFP art centre to promote and market the art and craft work being generated by community members who happened to all be related, this should still be recognized as a charity.

### Consultation Question 5.

NAVA recommends as an addition to the current ‘Deemed Public Benefit’ as set out in ruling TR 2011/D2 that it include art and culture. Currently Commonwealth legislation identifies closed or contemplative religious orders and open and non discriminatory self help groups but does not specifically stipulate cultural or artistic organisations which assumes they will fall into the ‘purposes beneficial to the community’ in Deemed Charitable Purposes and subject to the public benefit test. NAVA supports the idea of maintaining flexibility in the legislation without attempting to specifically stipulate the concept of altruism which is often subjective. In relation to cultural value, including ‘practical utility’ in the meaning of benefit would cause problems.

Arts organisations may be focusing their direct services on their arts constituents, with the intention and expectation that community benefit will be derived from the activities of these constituents (artists and other arts professionals).

It needs to be understood that to achieve a community benefit purpose from providing access to cultural experiences, arts organisations often have to:

- build the capacity of arts professional providers
- help facilitate community interest and engagement eg through interpretation and educational activities
- provide the appropriate environment and facilities.

NAVA recommends that if the types of services are to be used as assessment criteria for whether or not NFP arts organisations are to be classified as charities, this should be predicated on an understanding of the complex long term direct and indirect strategies used by organisations to achieve their purpose.

#### Consultation Question 7.

Consideration will need to be given to the requirement for demonstrating 'public benefit' and how this is imposed. NFPs and Charities frequently run on very small operating budgets and low staff numbers and are extremely time limited. Currently NFPs and small organisations are being particularly hard hit by compliance requirements such as government funding requirements, by economic instability and charity fatigue amongst donors which results in a loss of income and more pressure to diversify income streams. New forms of accountability and potential 'public benefit tests' and compliance would need to be implemented without excess costs or time requirements on these organisations.

For arts and cultural institutions, public benefit can be determined through a variety of measures including their:

- developing Australia's sense of identity and community,
- enhancing people's life experiences through arts education,
- increased visual literacy, enjoyment and engagement with the experience of visual excellence,
- participation in the pleasure of creative activity,
- cross-industry exchange including arts and cultural flow-on affects in education, community development, IT, advertising, the urban environment, media, science, technology etc.,
- increased economic contribution to Australia's GDP,
- participation by highly educated professionals in relatively low paid or unpaid positions to develop cultural capital and/or
- high levels of volunteer commitment
- through cultural achievement, developing and fostering a strong international profile for Australia in a globalised world.

There are sound reasons to accommodate these types of activities within the definition of public benefit but it is important to ensure these are areas that can be used as a framework. However, the focus should continue to be on the overall common purpose and the long term benefit for the public in gaining access to and/or participating in the visual arts, craft, media art and design and other cultural experiences and forms of personal expression.

#### Consultation Question 8.

If a public benefit test is to be applied, then the Government should be providing the ACNC with the funds and capacity to support charities to complete this 'test' through time, advice, assistance and financial means so no unnecessary burdens are placed on often fragile organisations.

#### Consultation Question 10 and 11

NAVA supports the international model of not including activity conditions in the statutory definition of a Charity but focusing on the purpose of the organisation.

The High Court's *Word Investment* decision that "the activities undertaken by the entity need not be intrinsically charitable for the institution to be charitable" is a good guiding principle.

Whilst NFP or charitable organisations can be recognized by the type of activity that they undertake, this should not be subject to legislative conditions. This is particularly important for the cultural and arts sectors which rely on their charity status for financial health and stability and also employ a range of strategies to leverage further philanthropic and private support. By specifying activities, the legislation has the potential to fail to recognize the diversity of practices arts and cultural institutions undertake to ensure they not only bring community and public benefit but also are financially sustainable.

#### Consultation Question 12.

NAVA supports the changes to the 2003 Charities Bill that "charities would be able to engage in political activities, so long as those activities are in furtherance and in aid of its charitable purpose. It may not be necessary for charities to amend their objects to enable them to carry out political activities, as for most charities the change will only affect the type of political activities the charity can engage in." Advocacy is an important and significant element in ensuring arts and cultural sector stability and advancement. Laws need to change as a reflection of societal change and the arts is an integral element in societal evolution. Arts peak bodies play an important role in being able to represent the sector to all levels of government. It should also be noted that a number of charities and NFPs in the cultural sector are expected by their government funders to undertake advocacy as part of their work in strengthening and supporting the sector.

#### Consultation Question 13.

In relation to prohibiting charities from advocating for a political party, or supporting or opposing a candidate for political office, this should be accepted as long as this can be demonstrated to be aligned to their charitable purpose. Because the policies of political parties and individual politicians can have a critically important impact on the NFP sector, it is important that organisations be able to support policies which foster their public benefit purpose and criticize those which act against their purpose. This should be possible without jeopardizing the charity status of the organisation.

#### Consultation Question 14 & 15.

NAVA reaffirms the importance of the High Court Bayside Decision that "although Bayside, like many charities, had a purpose shared by the Commonwealth, this did not alter its essential character as a charity, even though the government was the source of its funds and even though Central Bayside consented to conditions being attached to those funds"<sup>1</sup> This is of particular consequence to arts and cultural organisations as many of the major and significant institution that are supported by the Commonwealth have government representatives on their boards. The legislation should make it clear that the fact that an entity receives government funding, whether it is federal, state or local or established under a government funding program, or has a member of government on its board does not imply that it is a government body.

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<sup>1</sup> <http://www.ato.gov.au/nonprofit/content.aspx?doc=/content/77820.htm>

Consultation Question 16 and 17.

It should be noted that in the initial Charities Bill 2003, seven areas were acknowledged for charitable purposes including 'the advancement of culture'. This inclusion recognises not-for-profit cultural activity as part of the charitable sector and goes some way to supporting and strengthening recognition of the NFP cultural sector and its large and diverse contribution to the Australian community.

It may be beneficial to include a definition of culture and the arts as a Charitable Purpose to ensure the diversity of the sector and its activities is covered and there be appropriate recognition of the application of the term 'advancement.' If a definition of arts and cultural activities were to be included, then NAVA strongly recommends consultation with the sector be undertaken to develop these terms. This could be included in the explanatory material in the Bill.

NAVA would be happy to provide further elaboration of this submission should that be required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tamara Winikoff', written in a cursive style.

Tamara Winikoff  
Executive Director