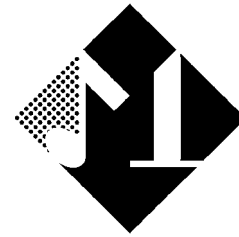


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Music Council of Australia

SUBMISSION to the INQUIRY into the DEFINITION OF CHARITIES AND RELATED ORGANISATIONS

January 18, 2001

EXECUTIVE SUMMARY

The summary extracts from the full submission in such a way as to present the argument coherently. The paragraph numbers in this summary refer to paragraph numbers in the main submission. However, the summary text may compress the extended text in the submission.

DEFINITIONS AND THEIR CONSEQUENCES

- 1.1 For an organisation, the **purpose of classification** as a charity or related organisation is to be eligible for certain privileges under the law which enable it to survive and to pursue its objectives. To vary the present definitions therefore has real world consequences in admitting or excluding organisations from a category.
- 2.2 Under the definitions cited in the Inquiry's *Discussion Paper*, non-profit music organisations would be likely to **qualify for classification as charities**. It is unlikely that any would qualify as public benevolent institutions or religious organisations.
- 2.6 Some music organisations may qualify as **community not-for-profit service organisations**; however, the nature of the exclusions cited in para. 31 may cast doubt. If that is the case, we would argue for a broadening of the definition.
- 3.1 If an organisation qualified for membership under the published definitions as a public benevolent institution, a religious organisation or community not-for-profit service organisation, it also would seem to qualify as a charity. Therefore, *prima facie* those categories for practical purposes would be redundant and **we would recommend the retention of a single category, "charity"**, as presently defined.
- 2.8 It would be a matter of **concern if as a result of the Inquiry, the present definitions and eligibility requirements were narrowed in, for instance, the Register of Cultural Organisations**.
- 4.1 The Issues Paper para. 13 notes that "an organisation may **undertake commercial activities to raise funds to support its core activities**". This is common practice in music, opera and theatre, whether within or without the normal artistic parameters of the company.
- 4.2 **Wholly or partially charitable?** On what basis could a decision be made that an organisation which uses a surplus from one activity to cross-subsidise another is only partially charitable? Is there a real-world consequence of such definitional niceties which would have a public benefit?
- 4.5 The **crucial question is the ultimate purpose to which the profits are applied**. The defining characteristic of a non-profit organisation is not that it does not make a profit, but that

the profit is not distributed. Therefore, such “profits” stay within the organisation to be applied to its charitable purpose.

5.3 **Definition by purpose or by nature?** There may be no clear border beyond which the nature of the activity can be said to be incongruous with the purpose of the organisation. Again, the issue is resolved by addressing the purpose to which the profits are applied. The means by which they are achieved is a matter for judgement by the company, not government.

6.3 **Primary and secondary purposes.** A charitable organisation may have multiple purposes. Provided that each of the purposes is acceptable under a legal definition of “charitable” and is obligated under the Articles of the company, it does not seem a fruitful exercise for a government to require that they should be ranked in importance.

7.1 In summary, multiplication of categories and fine distinctions may increase work and costs without necessarily creating public benefit. **Our strong recommendation to the Committee is to seek to achieve the maximum simplicity in the regime of definitions such as to facilitate the greatest public benefit.**

CHARITABLE ACTIVITY IN MUSIC

8.1 The **purpose of non-profit charitable activity in music** is (a) to provide to the public a cultural benefit which would not be available to it were provision dependent totally upon market forces, or (b) to provide a service or benefit to assist those who are making the provision to the public.

8.2 **Music offers a cultural benefit** to the public when the public, hearing the music, experiences spiritual and/or intellectual and/or emotional *value*. Such value can include the emergence or clarification of personal, community or national *identity*. Musical activity also can create a sense of community and community *belongingness*, whether in the shared activity of creating music, or listening to it.

9.2 Music of any style is capable of delivering cultural benefit to those attuned to its meanings. **Musical style should not be taken into account in assessing eligibility as a charity.**

WHAT IS THE NEED FOR MUSIC TO BE TREATED AS A CHARITY?

11.8 Lacking subsidy and/or private charitable support, many music and performing arts companies would be **unable to present their services** and the public would forego the benefit.

11.3 All governments, Federal and State, subsidise artistic activity which cannot support itself from earned income, thereby **confirming their belief in the public benefit afforded by the companies’ cultural activities**. It would be consistent with this policy if through charities and taxation legislation governments were to encourage the private sector to emulate their example.

CHANGING CIRCUMSTANCES IN THE PERFORMING ARTS

12.1 Circumstances in the world of music and the performing arts are changing. The Commonwealth’s Inquiry into Major Performing Arts found that **many of the 29 major companies were heading towards bankruptcy** due mainly to changing external circumstances. These companies depend, *inter alia*, upon individual donations. The donations are encouraged by the tax-deductibility provisions under tax legislation.

12.4 It can be inferred that **smaller companies are in similar or worse jeopardy**. Note that smaller companies tend to be unsuccessful in gaining corporate sponsorships but have some success in eliciting the private donations encouraged by tax legislation.

13.1 For the arts, the **trend for government “outcome-based funding agreements for the provision of defined services” has caused great difficulty in meeting core costs**. Support from private sources is a possible partial remedy. However, often that support is provided on a similar basis.

13.2 These and other pressures have obliged companies to attempt to become less dependent upon government subsidies by increasing earned income and **downgrading the scale or quality (and thus the cost) of the artistic product**, a practice that has destructive outcomes.

14.1 Companies are more than usually vulnerable financially, and **loss of charity status would be disastrous for some**.

SUBMISSION to the INQUIRY into the DEFINITION OF CHARITIES AND RELATED ORGANISATIONS

January 18, 2001

DEFINITIONS AND THEIR CONSEQUENCES

1. A preliminary comment on the task of the Inquiry

1.1 For an organisation, **the purpose of classification as a charity** or other related category is to be eligible for certain privileges under the law which enable it to survive and to pursue its objectives. The purpose for the government presumably is to encourage charitable work and at the same time to limit registration to those organisations providing genuine benefit to the community. To vary the present definitions therefore has real world consequences in admitting or excluding organisations from a category.

1.2 The Inquiry's Terms of Reference do not require it to consider the possible legislative outcomes of its recommendations as to definitions. If this Inquiry were located in the academy, attempts to distinguish the finest gradations of meaning for and between terms might be laudable. However, its conclusions will have consequences in law and regulation, and in some circumstances to multiply categories and establish the finest of distinctions is to increase the costs and complicate the lives and work of all concerned without necessarily creating public benefit. While we do not argue that the Inquiry should "examine or provide options for the appropriate legislative and administrative treatment of charities and related organisations", we do suggest that it should reach its conclusions bearing in mind the potential real-world consequences.

2. The music sector in its relationship to existing definitions of charities and related organisations in Australia

2.1 Within the music sector, there is a for-profit sector and a not-for-profit sector.

2.2 Many music organisations within the not-for-profit sector are registered as charities.

Many music organisations fall under the common law definition of "**charity**" as given in the para. 18 of the Inquiry's *Issues Paper*, viz:

- they are non-profit bodies
- providing a public benefit
- with a sole or dominant purpose that is charitable in a legal sense, that is
 - [the very indefinite] purposes beneficial to the community
 - [some also have a primary or secondary purpose under the para. 18 definition]: the advancement of education.

2.3 Examples are non-profit performing organisations such as orchestras, choirs, bands, ensembles, community music councils; presenting organisations such as e.g. Musica Viva; educational organisations such as community music schools or as they are often known, regional conservatoria.

2.4 Music organisations generally are unlikely to qualify as **public benevolent institutions** under the definition of para 21, although such institutions may use music in realising their purposes.

2.5 It is conceivable that a music organisation might qualify as a **religious organisation** (*Issues Paper* para. 24), but instances must be rare.

2.6 Some music organisations may qualify as **community not-for-profit service organisations**, where they have the characteristics as defined in para. 30:

- non-profit, and
- established for community service purposes where the purpose is altruistic.

However, the nature of the exclusions cited in para. 31 perhaps cast doubt. If that is the case, we would argue for a broadening of the definition to include, for instance, an organisation like the Dandenong Ranges Music Council, which has caused the establishment of several dozen non-

profit community music organisations or entities in the Dandenong Ranges in Victoria, to the great enrichment of community life.

2.7 However, if such an organisation could in any case be registered as a charity, with equivalent benefits to its definition as a community not-for-profit service organisation, then the argument is redundant.

2.8 The Inquiry notes (para. 32) that the Commonwealth maintains lists of organisations which, under income tax legislation, can receive tax deductible gifts, but notes that “this is not an attempt to define a charitable organisation”. In the case of the arts sector, there is a Register of Cultural Organisations. Organisations must establish their eligibility for inclusion in this register according to certain criteria. These are not cited in the Issues Paper. Registration confers a most important benefit on an organisation, of the type that registration as a charity might also confer. It is not apparent from the *Issues Paper* whether the work of the Inquiry potentially encompasses the regime under the income tax legislation. This would be **a matter of concern if the result was to narrow the present eligibility requirements.**

3. Several principal categories may be redundant

3.1 If an organisation qualified for classification under any of the other three related categories, it also would qualify as a charity and therefore those related categories are for practical purposes redundant. Unless there is to be differing treatment of the four categories cited, it would be preferable to **collapse all four into one: “charities”**, as presently defined.

4. Wholly or partially charitable?

4.1 The Issues Paper para. 13 notes that “an organisation may undertake commercial activities to raise funds to support its core activities”. This is common practice in music, opera and theatre. For instance, the Victorian State Opera used to produce popular musical theatre works in order to make a profit which could be used to subsidise its operatic seasons. (Unfortunately, these activities also produced a loss, which sent it into bankruptcy; there is no absolutely assured success in the arts.) But even within its normal artistic parameters, a company may include works that are expected to make a profit which is then available to cross-subsidise others: for instance, Sydney Theatre Company’s David Williamson plays, or Opera Australia’s *La Bohème* seasons.

4.2 The Inquiry raises the question of whether a non-profit organisation involved in some “commercial” or profitable activities should be regarded as wholly or partially charitable. In the context of the above observations, is Opera Australia to be regarded as only partially a charitable organisation when it turns a profit on *La Bohème*? Or on Gilbert and Sullivan? Or *Guys and Dolls*?

4.3 What if the turnover of the profit-making activity exceeds the budget of the non-profit activity? Is the tail wagging the dog? Say that because of governmental invocations to financial self-sufficiency, a charitable organisation must find a way to cover 30% of its costs through mounting activities other than those in direct pursuit of its charitable purpose. An organisation with a \$1 million budget for its charitable activities would require a \$6 million “commercial” operation producing a surplus of 5% to cover its deficit. But the entire surplus is applied to the charitable purpose. Is the organisation less a charity because these funds come from its commercial activity rather than from a government which has decided not to provide?

4.4 On what basis is a decision made that the organisation is only partially charitable? Is there a real-world consequence of such definitional niceties which would have a public benefit?

4.5 We suggest that the **crucial question is the ultimate purpose to which the profits are applied.** The defining characteristic of a non-profit organisation is not that it does not make a profit, but that the profit is not distributed. Therefore, such “profits” stay within the organisation to be applied to its primary purpose.

5. Definition by purpose or by nature?

5.1 The Inquiry asks whether the definition of “charitable” should depend upon the purpose of the activity, or its nature. In a definitional exercise such as this, it would be possible to require that any profit-making division or activity should be the same in nature as the primary (or at least secondary, or at least tertiary...!) activity of the organisation. It would be possible to make a judgement that operation of a fish-canning plant is not in its nature an expression of the purpose of Opera Australia. But if Opera Australia were to present a production of say, *Guys and Dolls*, would that represent a change in the nature of its work? Many in the arts community would assert that by producing a popular musical, it had stepped well outside its brief, even though to the general community the differences might seem inconsequential. What if, as a means of cross-subsidising its operatic productions, it were to present an arena concert of a famous rock band? That’s not opera, but it calls upon the company’s skills in theatrical production, marketing, ticket sales etc. What if it used those same attributes to manage other major public events?

5.2 What if, by means perhaps initially closely related to its main purpose, the company becomes a landlord for premises used for activities quite unlike its own? At what point could it be said, finally, that the nature of the activity is definitively different from the purpose of the company? Obviously, there is the potential for endless argument.

5.3 The point is that we are dealing with shades of grey. Often there may be no clear border beyond which the nature of the activity can be said to be incongruous with the purpose, and to enter into this realm is to invite endless expensive bureaucratic hair-splitting and wrangling.

5.4 **Ultimately, again, the issue is the purpose to which the profits are applied.** The means by which they are achieved is a matter for judgement by the company. It departs too far from its expertise at its own peril, but that is not a judgement to be made by law or regulation.

6. Primary and secondary purposes

6.1 It should be noted that in the arts, there has been a strong expectation by the government funding bodies that arts companies should maximise their earned income and so become less dependent upon government subsidy. For instance, in 1987 the Australian Music Centre earned less than 10% of its income; now it earns of the order of 50%. It is an information and promotional resource and traditionally its main activity was to manage and develop a library of Australian music. It is very difficult to build earnings from a library and if the organisation were to become more self-reliant, it had to broaden its activities: which is to say, based on a strict definition, change its nature.

6.2 Were the new activities: e.g. publication of scores and recordings, management of projects, retailing of Australian music, then secondary to the original purpose? Perhaps that judgement might have been made initially. Later, as they became more firmly established, they might have been regarded as of equal or greater importance in achieving a broader purpose, the promotion of Australian music, as the original activity of developing a library. Once again, it is possible to set up these definitions, attach these labels, but in the real world, is there any point? An organisation may itself see advantage in clarifying such matters from time to time, but is this something with which government should be concerned?

6.3 Admittedly, a charitable organisation may have multiple purposes, more disparate than in the case of the Australian Music Centre. **Provided that each of the purposes is acceptable under a legal definition of "charitable" and is obligated under the Articles of the company, it does not seem a fruitful exercise for a government to require that they should be ranked in importance.** In the course of its operations, a charitable organisation may place more emphasis over time on one, and then another. It is important to the management of the organisation, but need it be a concern to government, or a reporting requirement?

6.4 As with many other matters raised in the Issues Paper, the Inquiry may choose to make such a definitional distinction, or not. If it does not do so, the government will be less likely to create laws and bureaucratic regulations and procedures around a distinction that otherwise has little public consequence.

7. Summary

7.1 In summary, our strong recommendation to the Committee is to seek to achieve the **maximum simplicity in the regime of definitions such as to facilitate the greatest public benefit.**

CHARITABLE ACTIVITY IN MUSIC

8. Music and the nature of its benefit to the community

8.1 The **purpose of non-profit charitable activity in music** is (1) to provide to the public a cultural benefit which would not be available to it were provision dependent totally upon market forces, or (2) to provide a service or benefit to assist those who are making such provision to the public.

8.2 Music offers a **cultural benefit to the public** when the public, hearing the music, experiences spiritual and/or intellectual and/or emotional *value*. Such value can include the emergence or clarification of personal, community or national *identity*. Musical activity also can create a sense of community and community *belongingness*, whether in the shared activity of creating music, or listening to it.

8.3 It might be noted that Commonwealth governments of both sides have charged their cultural arms (e.g. the Australia Council, the ABC, the broadcasting regulatory authority) with, inter alia, the strengthening of **national identity**.

8.4 As to the **evidence** that the community experiences such benefits, we need only cite two items: the raw evidence of public demand for music is the size of the Australian music industry, and for evidence of the nature of the musical experience and the value placed upon it, millennia of written descriptions going back to ancient Greece.

8.5 Apropos of the first, the Australian recording and publishing industry in 1996 was worth over \$1 billion; the total value of the sector may be twice that. 3,791,000 people attended a popular music concert in 1995. 1,081,000 attended a classical music concert. Our common experience tells us that almost everyone listens to some sort of music by one means or another.

8.6 While it certainly would be possible to present music from which the community perceives no benefit (e.g. through total subsidy or sponsorship), this would be an anomaly. There is a natural control: does a sufficient (in a particular context) number of people want to experience a performance of the music? A failure to pass this test is a severe discouragement to any repeated attempt. Except by error or anomaly, it is **unlikely that charitable funds will be used to support musical presentations of no public benefit.**

8.7 Concerning the reference in 8.1 to market forces: a distinction might be made between musical activity which, if it were of sufficient quality and produced under effective management, would be sustained by the market but is not because it lacks those qualities; and activity which, because of cost structures and what seem to be natural limitations on earning capacity, is unlikely to break even if all reasonable criteria for artistic quality and effective management are met. Here, we speak of **market failure**.

8.8 In the area of musical *performance*, an obvious example is the operation of a symphony orchestra. In normal circumstances, to be heard appropriately an orchestra should perform in a venue seating an audience in the order of 1,000-2,000. The income from an audience of this size is insufficient to cover the costs of such a large number of musicians (a full-size orchestra is upwards of 90 players), conductor and guest artists, venue, management and marketing, no matter the quality of the performance and efficiency of the management.

8.9 So why not present a string quartet instead? To begin, most members of an orchestral audience would not regard a string quartet as offering equivalent value or interest; it's a totally different experience. Also, a string quartet should not be presented in a 2,000 seat auditorium -- but in any case, no Australian string quartet could attract such a large audience. Generally, audiences are small and costs still may not be covered (for instance, because venue and marketing costs are so high). In that case, should they be subsidised? That is a matter of judgement. The argument might be made, for instance, that the string quartet represents one of the major achievements in the Western musical tradition and it should be available to Australian

audiences. Well then, is this particular string ensemble of adequate quality, or is its financial need a result of its poor performances? Another judgement to be made.

8.10 Similar judgements would be required in any other musical form or style. Government funding bodies routinely make them through formal procedures. Private donors in their individual ways also assess whether support is justified.

9. Musical style as a criterion of eligibility for charity status

9.1 *Recent changes in notions of musical value.* In decades past, there would have been some agreement in Western countries that spiritual/intellectual/emotional values inhered only, or mainly, in Western classical music. This has changed, and now it is generally believed that the values lie in both the music and the listener and that the listener's response is conditioned by his or her own cultural affinities. Therefore, music of any style is capable of delivering cultural benefit to those attuned to its meanings. The scale or quality of the benefit can vary from one musical work to another, but this is too detailed an issue to be of concern to the Inquiry.

9.2 As a consequence, any inclination of past times to restrict the eligibility to be defined as charities to music organisations that deliver classical music to the public is now inappropriate.

Musical style should not be taken into account. A democracy protects its minorities and should not disenfranchise any particular audience.

10. Services or benefits to those who provide the cultural benefit to the public

10.1 There is a **complex world behind the presentation of music for the public benefit.**

Aspects of this world depend upon the activity of non-profit charitable organisations. Examples of their functions: provision of funds or opportunities to assist skills or career development, including those that increase equitable distribution of opportunity; provision of information about the art form, its practitioners, or its situation in society; provision of information that directly assists the artistic production and the delivery of cultural benefit.

WHAT IS THE NEED FOR MUSIC TO BE TREATED AS A CHARITY?

11. Without subsidies or donations, some cultural services could not be provided

11.1 Governments have decided that certain music and arts organisations provide a value to the community such that public funds should be invested to ensure that the service is able to continue.

11.2 If there were no subsidy, the benefit would not be available.

11.3 **Since governments have this belief in the public benefit of cultural services and support them through subsidy, it would be consistent to encourage emulation by the private sector through legislation and taxation incentives – and they do so.**

11.4 Many music and performing arts organisations depend upon funds contributed from the private sector through corporate sponsorships and corporate and individual donations. Earned income and/or government subsidies are not sufficient to cover their costs.

11.5 Corporate sponsorships are now generally thought of as business expenses, booked to the marketing budget. They do not depend upon charitable tax deductibility classifications.

11.6 Donations, on the other hand, whether from businesses or individuals, are encouraged by the tax deductibility regime.

11.7 On the evidence, corporations are primarily interested in entering sponsorship arrangements with the largest of the performing arts companies, through which they can gain the greatest marketing advantage. The smaller arts companies find it very difficult to secure corporate sponsorships and proportionately benefit much more from the donations encouraged under the tax-deductibility regime. For instance, the superb vocal sextet, The Song Company, received over \$30,000 in individual donations in the year 2000, and about \$6,000 in business donations, but despite continuing attempts over years, received almost nothing in sponsorship. This outcome is a result of its quality on the one hand and size on the other. Without the private donations, there was a question as to whether it could meet its debts as they fell due.

11.8 **For some music organisations, if there were no income from sponsorships or donations, they could not operate and the public would forego the benefit.**

CHANGING CIRCUMSTANCES IN MUSIC AND THE PERFORMING ARTS

12. External changes threaten the financial viability of performing arts companies

12.1 *Securing the Future*, the Final Report of the Major Performing Arts Inquiry (Department of Communications, Information Technology and the Arts), conducted under Commonwealth auspices and reporting in December 2000, showed that **many of the 29 major performing arts companies investigated were heading towards bankruptcy**. The Inquiry cited a number of reasons. It is not necessary here to go into detail; suffice to say that the Inquiry found the companies to be well managed, given the resources available to them, and that generally speaking the problems arose from changing external circumstances such as globalisation.

12.2 All the companies depend to a greater or lesser degree on government subsidies; one important cause of their difficulties was a reduction in core subsidies over recent years. Almost all also receive private subsidies through corporate sponsorships and individual donations.

12.3 As a consequence of the Inquiry, all Australian governments entered into an agreement to increase the core public subsidies to the companies in order that they could continue to operate. The governments thereby reconfirmed their belief that the companies offer a public benefit.

12.4 The Inquiry found that management was at fault only insofar as the companies in the smaller cities could not afford to pay for skills – e.g. marketing skills – at the level of competence that would achieve a more adequate earned income through box office or sponsorship. These nevertheless are the largest companies in those cities. By inference, the performing arts organisations which were not large enough to be classified as “major” and therefore were not investigated by the Inquiry also cannot afford those skills. There has been no Inquiry into the circumstances of the smaller organisations, but the government has ordered one. Until it reports, **it is reasonable to suppose that the smaller organisations also are in difficulty**. We are told, for instance, that two of the regional conservatoria face possible closure.

13. Outcome-based funding displaces core funding

13.1 The *Issues Paper* notes (para. 11) that government funding support is increasingly provided to the sector “through outcome-based funding agreements for the provision of defined services, as opposed to broader grants-in-aid funding”. In the arts this is evidenced as an increase in funding for projects generally coupled with a decline in core funding. The decline in core funding eats into the basic managerial capacities of companies and their ability to continue to provide core programs of high quality and customary scale, while the availability of project funding entices them into additional activity for which the funding does not adequately provide. In particular, it frequently does not fully cover the additional administrative costs of an already over-extended management. This was **one of the causes of financial difficulties for the major performing arts organisations cited by the *Securing the Future* report**. Support from private sources is a possible partial remedy. However, often that support also is tied to particular projects.

13.2 These and other pressures have obliged companies to attempt to become less dependent upon government subsidies by the mutually opposing measures of increasing earned income and downgrading the scale or quality (and thus the cost) of the artistic product. The product then offers less appeal to audiences and less public benefit. The conditions are right for a downward spiral.

14. Summary

14.1 *Through this combination of circumstances, companies are more than usually vulnerable financially, and loss of charity status would be disastrous for some.*