

A definition of charity Consultation Paper, October 2011

Submission to the Treasury

On behalf of:

- the Sydney Opera House Trust, and
- the Powerhouse Museum, Sydney

Re Questions 14, 15 and 16

Re the exclusion of "Government bodies" from the contemplated core definition of charity



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1 Executive summary – suggested specific amendments

1.1 Paragraphs 119-122 and question 15 of the Consultation Paper invited comment on the definition of “government body” in the Exposure Draft of the Charities Bill 2003 (ED).

1.2 This submission is focused on:

- (a) public bodies created by statute or any other legislative or government instrument, such as:
- the Sydney Opera House Trust;
 - the Museum of Applied Arts and Sciences, trading as the Powerhouse Museum, in Sydney; and
 - other similar cultural, educational and environmental bodies in NSW and the other States and Territories,
- (b) which have Deductible Gift Recipient (DGR) status, under either item 1, or item 4, of the table in section 30-15 of Division 30 of the *Income Tax Assessment Act 1997*; and
- (c) which would qualify as **charitable institutions** under the common law test, **but for the fact that they are (or may be) regarded as “controlled by government”** under the common law test.

They are sometimes referred to as “government-like charities” (as in the “Treasury’s Not-for-Profit Reform Newsletter” (NFPR Newsletter), Issue 2, 21 November 2011, at page 4) or government-like charitable institutions.

1.3 Their DGR status recognises that they are all of significant public benefit – that is, of significant benefit to the Australian community.

1.4 A consequence of their evident ongoing significant public benefit is that the Government has publicly stated that their DGR status will not be adversely affected by the introduction of a statutory definition of charity: NFPR Newsletter Issue 2, 21 November 2011, at page 4.

1.5 [Primary recommendation]

The primary recommendation in this submission is that:

- (a) there is no valid policy reason for continuing to exclude an **Australian** DGR body from the **legal status** of a charitable institution merely because it is “controlled by government”;
- (b) accordingly, paragraph (b) of the definition of “government body” in clause 3(1) of the ED should be deleted; and
- (c) if any Government wishes that **legal status** not to apply to a particular body, or class of bodies, for any particular purpose (such as a particular **tax** concession, for example relating to FBT), then it can and should expressly exclude that body or class of bodies from entitlement to the relevant concession. (This approach is preferable from the current legislative approach, under which:
 - (i) they are automatically disqualified from being charitable institutions under the general law (with all the significant consequential detriments outlined in part 4 below);
 - (ii) but nonetheless remain eligible for DGR status.)

1.6 [Secondary recommendation]

Alternatively, if the Government is unwilling to go that far, then there are compelling policy and practical reasons to change the common law control test applicable to government-like DGR charities:

- (a) **from** one which involves the mere **power** to control,
- (b) **to** one which requires the **actual exercise** of **effective** control over the management or activities of the relevant body (an **Alternative Control Test**).

1.7 **Attachment 3** contains specific suggested amendments of a kind which would implement an Alternative Control Test.

1.8 Specifically, the objectives of the particular amendments suggested in **Attachment 3** are:

- to be more precise about what might constitute government “control” in the case of government-like DGR charities;

- to set out more appropriate criteria, linked to the extent to which the government **actually exercises** in practice any power to direct or otherwise control the relevant entity's management or activities generally (that is, exerts effective control in practice), and **not** to the mere existence of what might be regarded as a **power** to exercise control (such as because of a power to nominate and remove a majority of the members of the governing body of the body) (that is, the mere **capacity** to control); and
 - to target the application of these criteria solely (or at least principally) at the bodies that, for both policy and practical reasons, need the relaxed criteria, namely DGR bodies that are presently handicapped in their ability to solicit and receive donations from Private Ancillary Funds (**PAFs**) and Public Ancillary Funds (**PuAFs**), solely because they are connected to government in some way.
- 1.9 The reasons for the changes suggested in the Primary Recommendation, and the Secondary Recommendation (as detailed in **Attachment 3**), are explained in parts 2 to 6 below.
- 1.10 Paragraph 5.3 below contains specific comments on the drafting amendments detailed in **Attachment 3**.

2 What is the historical background to the “government body” exclusion from the definition of charity?

- 2.1 It is well settled that a Government **department** cannot be a charity. And this submission does not seek to argue that it may be (contrast the NSW Treasury, Victorian Government and Queensland Department of the Premier and Cabinet submissions referred to in Chapter 28 of the June 2001 Report of the Inquiry into the Definition of Charities and Related Organisations (**CDI Report**)).
- 2.2 But there is an issue regarding **bodies** created by statute, and other bodies said to be connected to government, and, in particular, regarding a body “controlled by” government (as stated in paragraphs (b) and (d) of the definition of “government body” in subsection 3(1) of the ED).
- 2.3 The historical background to this issue is referred to:
- by Kirby J in the *Central Bayside* case [2006] HCA 43, at paragraphs 71 and 121-144;

- at paragraphs [2.20]-[2.22] in GE Dal Pont (with S Petrow) “Law of Charity” 2010 (**Dal Pont and Petrow**); and
- in chapter 28 of the CDI Report.

2.4 Broadly, historically, it has been accepted that:

- If the purposes of a body connected to government are no more than to implement governmental (including legislative) objectives, then it is merely an agent of government and does not qualify as a body whose purposes are identifiably charitable.
- But mere establishment by statute does not automatically bring about this result. For example, public universities established by statute are not automatically treated as mere agents of government.
- Under the common law, the test for determining whether a government **body** (otherwise charitable) is disqualified from being a charity depends on whether the body is “controlled” by government. This test is reflected in paragraphs (b) and (d) of the definition of “government body” in subsection 3(1) of the ED. For example, public universities have the status of charitable institutions, unless they can be said to be controlled by government.
- Thus, the common law bright line theoretical test of “control” is whether (in addition to being established and governed by statute) it is subject to Ministerial or other government control. Importantly, the historical test looks to the mere existence of a power to control (that is, a **capacity** to control), and not whether control is ever exercised (that is, whether there is effective control in practice). Further, for example, the mere power to appoint and remove a **majority** of the members of the governing body of a body is regarded as conferring control. So too is a statutory provision saying that the body is ultimately subject to the control or direction of the Minister, even if in practice the body acts autonomously and independently, because the Government never gives any directions or otherwise exercises any effective control. (See generally Chapter 28 of the CDI Report.) It is this control feature which is said to give the body too close an association with government.
- By way of contrast, a body (otherwise charitable) which is substantially independent (say because a Minister can only appoint and remove a **minority** of the members of the governing body of the body and does not have an express statutory power to control or

give directions), even if dependent upon the government for some of its funding, remains charitable.

3 What is the continuing relevance of the “controlled by government” exclusion?

3.1 Case law shows that, in practice, the theoretical bright line test is difficult to apply.

- The Freehills submission to the Board of Taxation December 2003 Report, referred to in paragraph 4.18 of the Report, said:

“[T]he government control issue in practice is the most important and difficult issue we face in relation to the common law concept.”

- This is shown by the High Court overturning the decisions both at first instance and by the Victorian Court of Appeal in the *Central Bayside* case, and by the other Court decisions referred to in paragraphs 124-125, 131-134 and 143 of the judgment of Kirby J in that case. See also paragraphs 138-142 of that judgment.
- See also the “Committee’s Conclusions” section in chapter 28 of the CDI Report and paragraphs 4.18 to 4.32 and 4.34 of the Board of Taxation December 2003 Report. In particular, paragraph 4.29 of the latter Report noted that:

“... the common law is still unclear ...”.

- In short, the application of the government control test is one of degree, and will depend upon the particular circumstances of the case, and is not really a “bright line” test at all.

3.2 But, perhaps more importantly, from a policy point of view the underlying rationale for such a test no longer exists. As Dal Pont and Petrow say, at paragraph [2.21]:

“The goalposts have shifted in modern times. Any clear charity-government divide is no longer. ... there is in modern law far less compulsion to distinguish charitable from government purposes.”

See also Matthew Harding, “Distinguishing Government from Charity in Australian Law”, (2009) 31 Sydney Law Review 559, at 560.

In particular:

- In this day and age, ultimate public accountability may warrant a degree of ultimate Ministerial or other government control over the body (such as over the appointment and removal of a majority of the members of the governing body of a body) but in practice leave the running of the body entirely in the hands of its governing body, so that in practice the body effectively operates quite independently of government.
- But, as stated above, the historical test looks to the **mere existence** of such a power (or capacity) to control, regards it as conferring control by government, and does not consider whether in fact effective control is ever exercised.
- Query whether, for example, the mere power to appoint and remove a majority of the members of its governing body should automatically disqualify the body from being a charity. Query too whether even an express power to give directions or control should be an automatic disqualification when effective control is never exercised by the government.
- And what is the basis for distinguishing a public university of a State or Territory, given that it is theoretically open to the parliament at any time to change the statute governing the university, impose ultimate Ministerial or other government control and (in an extreme case) take control or even ownership of any cash reserves of the university?

3.3 In summary:

- From a policy and analytic point of view, the concepts underlying the traditional distinction between charitable and government purposes are full of holes; or, as Dal Pont and Petrow put it (at paragraph [2.22]), the judgments in *Central Bayside* suggest “a porosity in the relevant concepts”; and
- As noted by the Board of Taxation in its December 2003 Report (at paragraph 4.25):

*“The draft definition [in the ED] may not be sufficiently workable and flexible to charitable bodies as they operate today. In some cases this is because the draft Bill seeks to reflect **the common law which remains uncertain or no longer relevant to emerging entities**”. [Emphasis added.]*

4 More importantly, what harm does the retention of the “controlled by government” exclusion cause?

4.1 The harms arise in a number of different ways. We will outline some of them in turn.

4.2 **First**, as noted in the last paragraph in chapter 28 of the CDI Report, arbitrary distinctions arise between different entities in different Australian jurisdictions which perform essentially the same functions:

- The CDI Report instanced public hospitals.
- Other examples might include fire brigades, ambulance services and other emergency and rescue services.
- More relevant to this submission may be iconic cultural, educational or environmental institutions such as concert halls (including the Sydney Opera House) and other performing arts centres, museums (including the Powerhouse Museum), libraries, art galleries and public botanic gardens.
- In every such case, whether or not a body fulfilling the same function, for the public benefit, qualifies as a charitable institution, or is disqualified on the basis that it is controlled by government, will depend on the particular circumstances of the case.
- In practice, as noted in paragraph 3.1 above, the dividing line is often extremely difficult to advise upon or determine.

4.3 A more relevant criterion for distinguishing them from normal government departments, instrumentalities and other public authorities is that all the above bodies depend, to a material extent, on receiving donations, bequests and sponsorship from the public, or other public fund-raising:

- to meet their operating expenses; and
- in many cases to build up capital in order either to meet desired capital expenditure or to invest so as to earn an income to be used to meet future annual operating expenses.

This is recognised by the fact that most, if not all, of such bodies qualify in their own right for DGR status under item 1 or item 4 in the table in section 30-15 of the *Income Tax Assessment Act 1997*.

4.4 By way of contrast, other bodies controlled by government may be 100% funded by government (or by compulsory levies on the people whom they serve – such as some primary produce marketing boards), and typically would not have any need for DGR status. They are outside the scope of this submission.

4.5 **Secondly**, and more pertinently for the purposes of this submission, the “controlled by government” exclusion produces arbitrary, capricious and harmful results for many government-like DGR charitable institutions which are expected by Government to, and in fact do, substantially rely on soliciting and receiving public donations, bequests and sponsorship and on other public fund-raising activities in order to meet both operating expenses and current or anticipated capital expenditure.

Specifically, they are affected by a particular disability - namely their inability to receive donations from both Private and Public Ancillary Funds, because they are not regarded as charitable institutions under the common law. This arises as follows:

- Until at least 2007, all PAFs (then called Prescribed Private Funds) had to be formed as charitable trusts. Even since then, many (if not most) new PAFs are formed as charitable trusts.
- Similarly, most PuAFs have been formed as charitable trusts, in order to have perpetual succession, by reason of not being subject to the rule against perpetuities (also known as the rule against remoteness of vesting).
- Relevantly, under the common law, a charitable trust is not permitted to make a donation or distribution to a **non-charitable** institution or other entity. This means that a charitable trust is unable to make a donation to a government controlled body **even though that body has DGR status**.
- Beginning in 2006, some (Victoria, NSW and Queensland) but not all States passed legislation to enable charitable trusts subject to the proper law of the relevant State to make a donation to a Government controlled body in that State (see paragraph [17.49] of Dal Pont and Petrow). But the legislation is not uniform (contrast the Victorian and the NSW legislation).

More particularly, in order for a charity to avail itself of this power, it must go through an administrative “opt-in” procedure which, among other things, includes executing a declaration in the form of a deed **and** then applying to the ATO to change the basis

upon which it is endorsed as exempt from income tax. (See, for example, the Victorian “Guidelines for trustees of certain charitable trusts (ancillary funds and prescribed private funds) wishing to distribute to government public hospitals in Victoria”, available at <http://foundation.petermac.org/document.doc?id=7>.) In practice:

- Not all charitable funds are entitled to use the “opt-in” procedure in the Victorian, NSW and Queensland Acts. For example, PAFs and PuAFs whose proper law is not that of Victoria, NSW or Queensland cannot take advantage of this procedure.
 - Others are initially ignorant of the availability of the “opt-in” procedure.
 - And, even after the availability of the “opt-in” solution is explained to them, most of the remaining ones regard it as a burdensome nuisance, and consequently are unwilling to incur the expense and inconvenience of getting expert advice on the issue and the procedures and then implementing the procedure.
- The result is that those PAF and PuAF charities will not donate to the relevant government controlled bodies and instead direct their donations to other (and in many cases similar) DGRs which are not regarded as government controlled bodies.
- 4.6 From a policy and an analytic point of view, there is no logical basis for the law distorting donor behaviour in this way, especially when the application of the control test is one of degree, depending upon the particular circumstances of the relevant body, and not the function it performs or the type of public benefit it provides.
- 4.7 Further, the disability described in paragraph 4.5 above can lead to other adverse consequences for the relevant PAF or PuAF, as follows:
- (a) The experience of the relatively few informed professional advisers in Australia is that many PuAFs and PAFs (and their normal advisers) are unaware of the subtleties referred to in paragraph 4.5 above and, in ignorance, may donate or distribute moneys to DGR bodies which, because of a connection to government, are disqualified from being charities under the common law control test. This has potentially dire consequences for the PuAF or PAF in question, namely:
 - it ceases to be exempt from income tax under its existing classification; and

- in the case of a PAF, it ceases to be entitled to a cash refund on franking credits.
- (b) A PuAF or PAF that exercises the “opt-in” procedure, not only ceases to be a charitable trust for the purposes of Commonwealth law, but, more importantly in practice, it also loses that status:
- for the purpose of the law of any State or Territory **outside** the State in which it opted in: for example, if the “opt-in” was under the Victorian legislation, it would cease to be entitled to any stamp duty, land tax or council rate concessions in NSW in respect of the purchase and ownership of land in NSW. This has potentially dire and disproportionate disadvantageous consequences for the PuAF or PAF concerned; and
 - for the purpose of accessing any commercial concessions, such as those discussed in paragraph 4.9 below. Again, this is a quirky, dire and disproportionate adverse consequence for the PuAF or PAF concerned.

In both cases, the PuAFs and PAFs that “opt-in”, and their advisers, may be ignorant of these adverse consequences when the PuAF or PAF opts in, and may only become aware of the consequential problems when it is too late.

4.8 **Thirdly**, the problems alluded to above are not necessarily solved by the relevant body setting up a separate (public ancillary fund) foundation, governed by a trust deed, even if unquestionably not controlled by government. This is because:

- If the foundation is set up as a **charitable** trust, it too is subject to the same limitation as other PuAFs, and cannot donate or distribute to its associated body.
- Even if the foundation is set up as a non-charitable trust (so as to be able to donate to its associated body), it still cannot itself receive donations from any PuAFs, PAFs or any other charitable entities.

4.9 **Fourthly**, bodies which are characterised as “charities” qualify for relevant concessions which are not available to bodies excluded from that status merely because they are regarded as controlled by government, even if they are DGRs. For example:

- Income tax exempt charities qualify for discounted rates for postage: go to <http://auspost.com.au/business/charity-mail.html>. This is an extremely valuable

concession, especially at a time in the economic cycle when fund-raising is so difficult and when direct mail is an effective and frequently used tool. For example, the Sydney Opera House could reach 378,000 people in a direct mail campaign using its database. The unavailability of this concession to bodies like the Sydney Opera House Trust and the Powerhouse Museum increases the costs substantially to such an extent that it becomes too expensive. Not only does this effectively deny it the use of this fund-raising tool; but it also denies it the opportunity to publicise more widely its need for donations from the public.

- Charities also qualify for various other commercial concessions, such as reduced borrowing costs from banks, other reduced or waived fees, or best terms.

4.10 **Fifthly**, the absence of the charity status (an arbitrary outcome):

- contributes to and reinforces the incorrect public perception that the body is fully funded by government;
- and thereby makes it more and unnecessarily difficult to raise more funds from the public; and
- limits the body's ability to solicit and receive donations from many willing overseas donors, whose rules or applicable local law restrict its overseas donees to bodies regarded as charitable in their local jurisdiction.

4.11 In that regard, **Attachments 1 and 2**, respectively, summarise the relevant experience of:

- the Sydney Opera House Trust; and
- the Powerhouse Museum in Sydney.

4.12 **Sixthly**, and importantly, a close examination of the Australian Business Number register discloses that there are many iconic government established bodies throughout Australia with DGR status which appear to be wrongly classified and, consequently, to have incorrect tax characterisation and endorsement – that is, are **not** classified as Government Controlled Entities, when they should be so classified – with the practical consequence that:

- (a) they presently have an undeserved and unfair advantage over other government-like charitable institutions with DGR status, classified as Government Controlled Entities, such as the Sydney Opera House Trust and the Powerhouse Museum; and

- (b) as a practical matter, if and when the errors are discovered, as part of a classification review following the establishment of the Australian Charities and Not-for-Profits Commission (**ACNC**), it is likely to prove politically impossible (or at least extremely difficult) in practice to prospectively deprive these institutions of their Charitable Institution status (and access to sources of funding from PAFs and PuAFs) and relegate them to the status of Government Controlled Entities with DGR status.

Both our Primary and Secondary Recommendations give the Government an expedient (and we think correct, from both a policy and an analytic point of view) means of avoiding the inevitable political flack involved in enforcing a new definition of charity which merely adopts the common law test, and in having to explain the fundamental and significant classification and tax endorsement errors by the ATO which have existed for at least the last 10 years.

5 Is there a better solution to the serious problems caused by the “controlled by government” exclusion?

- 5.1 We suggest that the remedy for all the above ills should be the implementation of our Primary Recommendation in paragraph 1.5 above.
- 5.2 Alternatively, under our Secondary Recommendation in paragraphs 1.6 and 1.7 above (detailed in **Attachment 3**), the remedy should be to permit a body otherwise regarded as government controlled:
- not to be disqualified from being regarded as a Charitable Institution simply because it is regarded as controlled by government, applying the common law test,
 - so long as:
 - it would otherwise qualify as a not-for-profit charitable body, and
 - it is at least partially and materially dependent on public donations and other fund-raising (which would normally be reflected in its DGR status).
- 5.3 We comment on the suggested drafting amendments in **Attachment 3** as follows:
- First, at present we do not see the need to change the law for bodies controlled by the government of a foreign country. Our concern is solely with bodies regarded as controlled by an Australian government, under the common law test.

- The changes to paragraph (b) of the definition of “government body” in clause 3(1) of the ED are threefold:
 - One to add a reference to a local governing body, as recommended by the December 2003 report by the Board of Taxation (see paragraph 4.3 of its report).
 - Secondly, to add a reference to new subsection (2).
 - Thirdly, to give the Government the power in an exceptional case, by regulation, to specifically name a body as one which is **not** to be regarded as a government body. (Compare paragraph 4.30 of the Board of Taxation December 2003 Report, which contemplated permitting some bodies and trusts to be prescribed as charitable by regulation.)

- The critical provision is suggested new subsection (2). Briefly:
 - Its purpose is to relax the historical common law control test in a **limited category of cases**, where **actual effective control** is not exercised by government over the operations of the body.
 - The cases would be limited to instances where the relevant body is at least partially and materially dependent on public fund-raising (such as would be evident from DGR status). Other cases would remain subject to the strict common law test.
 - It is suggested that the mere existence of a power to appoint and remove a majority of the members of the governing body of a body should not be sufficient to deem a body to be a government controlled body if in fact the governing body, and therefore the body itself, behave independently (as is usually the case) and is not subject to effective Government control or direction. See draft subparagraph (2)(b)(i).
 - A requirement for consent or approval does not amount to a power to direct. Nor does what is in form or substance a power of veto. Therefore, neither of them should be taken to confer control by government. See draft sub-paragraphs (2)(b)(ii) and (iii).

- A mere requirement to report or account to, or be audited by, government is quite appropriate for any entity established and governed by statute, and which receives or may need some government funding, but it does not amount to a power to direct. Nor does any requirement to comply with safety or other prudential standards, requirements or policies which are relevant to or appropriate for either the body itself (such as the requirements of a Public Service Act regarding employees of the body, or to be audited by the Auditor-General) or for a body carrying out the same or a similar function (whether or not controlled by government) (such as might be applicable to an emergency service). See draft subparagraph (2)(b)(iv).
- Any control arising under or by reason of, and solely by virtue of, a funding agreement should be ignored, as similar controls may be imposed on other entities in receipt of similar government funding, merely to ensure accountability and the measurement of performance and outcomes of the funded activities, which is appropriate for any entity in receipt of government funding. See draft subparagraph (2)(b)(v). That reflects the policy stated in paragraph 1.19 of the Explanatory Material to the ED.
- Similarly, the mere existence of a power say to require the body to pay an amount to consolidated revenue should be ignored if, for example, it has never been exercised and it is presently reasonably expected that it would not in fact be exercised in the foreseeable future. Similarly, the power referred to in the “Example” underneath suggested subparagraph (2)(b)(vi), in **Attachment 3**, should be ignored if it has not in fact been exercised in the recent past and it is presently reasonably expected that it would not in fact be exercised in the foreseeable future. There may be other examples of theoretical powers in a statute which have not been exercised in the recent past and may reasonably be expected not to be exercised in practice in the foreseeable future. See draft subparagraph (2)(b)(vi).
- Once those kinds of issues are ignored, then a fairer and more objective basis would exist for determining whether a government exercised **effective** control and whether the body deserved the legal status of a charity (or should be knocked out by the “controlled by government” exclusion).

- 5.4 It is noted that, hopefully, in time the States and Territories and local government would accept for the purposes of State and Territory law any charity status conferred by amendments to the ED along the lines suggested in part 1 above.
- 5.5 But it would always remain open to the Commonwealth, a State or Territory or a local government body to specifically provide that certain charities or types of charities (such as those aided by the suggested amendments) did **not** qualify for particular concessions or for other specific purposes – in other words, to **exclude** them from particular concessions:
- That is a better way to proceed, from a policy and analytic point of view, rather than to knock out all bodies controlled by government under the historical common law test from charitable status, even if they are DGRs, and unnecessarily exclude them from fully availing themselves of the full range of opportunities for fund-raising, both in Australia and overseas.
 - It may also be politically a much more sensible approach, because it would avoid the otherwise inevitable and embarrassing political problems referred to in paragraph 4.12 above (which should not be underestimated, having regard to the stature and influence of many people associated with the relevant iconic institutions).

6 Would there be any unintended adverse (from the government’s point of view) consequences of making appropriate legislative changes?

- 6.1 At present, we cannot see any disadvantages from the Government’s point of view of making the changes requested above in either our Primary or our Secondary Recommendation. In particular, because all the contemplated affected bodies should already have or be eligible for DGR status, it is questionable whether the suggested changes would involve any material additional tax expenditure for the government, as arguably the legislative changes would just contribute to a more level playing field and enable the presently adversely affected DGR bodies to better compete for scarce public fund-raising from PAFs and PuAFs.
- 6.2 On the contrary, we can see only positives, such as:
- levelling the playing field between bodies performing the same function, for the public benefit; and

- increasing their ability to raise more funds from PAFs, PuAFs and the public generally, and to minimise their costs (by taking advantage of available commercial concessions, such as discounted postage), thereby lessening their dependence on Government financial support - which in any event is under continued downward pressure, as a result of the ongoing global financial crisis or exigent circumstances more locally.

6.3 For all the above reasons, we commend this submission to you.

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for and on behalf of:

the Sydney Opera House Trust, and

the Museum of Applied Arts and Sciences, trading as the Powerhouse Museum, in Sydney



Attachment 1

Re the Sydney Opera House Trust

(See paragraph 4.11 of the Submission)

Attachment 1 – Fundraising at Sydney Opera House Trust

About Sydney Opera House

The Sydney Opera House Trust (SOHT) is responsible for the operation and management of the Sydney Opera House.

The Sydney Opera House is perhaps the most internationally recognised symbol of Australia and undoubtedly one of the great buildings of the world. It is also one of the world's busiest performing arts centres, with seven primary performance venues in use nearly every day of the year. In 2010/11, 1,795 live performances were enjoyed by over 1.3 million people who bought tickets to an event here and we welcomed over 8.2 million people to the site from Australia and overseas. Our programming mix has undergone extensive changes to broaden the appeal of Sydney Opera House to make it accessible to as many people as possible, from traditional forms such as ballet, opera and symphony to hosting popular musical acts, cabaret, theatre, comedy and arts festivals and even talks festivals on controversial issues of the day.

In addition to this, we have already embarked on several community engagement and access programs which will see us extend the opportunity for people to have a 'Sydney Opera House' experience beyond our Bennelong Point site, whether it be by live streaming of performances on the internet, bringing school groups from western Sydney and regional NSW to the Sydney Opera House to attend performances, or collaboratively presenting performances from Sydney Opera House to audiences in the Port Macquarie region of the NSW central coast.

Fundraising at Sydney Opera House

What is not commonly known is that Sydney Opera House is a not-for-profit performing arts centre. We are responsible for generating over 84% of our operational funding. The 16% balance of funding comes from the NSW State Government who also funds building maintenance. There is continual downward pressure on government funding and accordingly, we are increasingly reliant on public donations and corporate sponsorships to achieve our goals. We set up our Annual Giving Program in 2007 to raise funds for the following activities:

- to create, present and produce world-class work across all art forms;
- to develop our education and community programs; and
- to offer free public programs.

Impact of not having charity status

Despite SOH's clear objective in supporting and promoting the arts, because we are regarded as being 'too close to government' to be considered a charity under the existing laws, SOH has been at a distinct disadvantage when it comes to fundraising from Private Ancillary Funds (PAFs) and Public Ancillary Funds (PuAFs). Unless a PAF or PuAF's trust deed allows it to make grants to non-charities, organisations like SOH are effectively locked out from fundraising from this increasingly affluent and generous sector of the Australian fundraising landscape.

While a 'workaround' does exist, it is a complicated process to explain to any potential donor and fraught with legal and tax implications which, more often than not, results in a failure to

complete a gift to us. It has been our experience that the time invested in trying to cultivate PAF and PuAF grants is generally not time well spent and given our stretched internal resources, we have had to concentrate on other fundraising initiatives.

In the current economic climate, all organisations who seek public donations find they are doing so in an increasingly competitive and limited market. Philanthropy Australia reports that PAFs control over \$2 billion in corpus funds and made grants of \$153m in year ending June 2009.¹ When PAFs and PuAFs have been specifically set up with the intention of facilitating giving, it is a cruel outcome that effectively prevents a legitimate arts organisation like SOH from pursuing support from this sector.

Given the worldwide profile of the building, we have received a number of enquiries from potential overseas donors keen to support our work. However, in our experience, many of these trusts and foundations can and will only support registered charities. Again, our lack of charity status under Australian law has meant that we are unable to receive these gifts.

By not being recognised as a charity under Australian law SOH is unable to negotiate best terms, reduced fees or waived fees and expenses which effectively raises our costs of fundraising unnecessarily. A recent example was our inability to host a fundraising event to cultivate donors because, as a non-charity, we were going to be charged \$20,000 appearance fees for our guest of honour – which we cannot afford to pay. If we were a charity, the costs would have potentially been waived.

SOH is also denied access to benefits and other discounts available to registered charities such as inclusion in Australia Post's Charity Mail program. While Australia Post expressed agreement that SOH was effectively charitable in nature, they were unwilling to grant SOH an exemption from their requirement for TCC status (now ITEC status is required). As we now enter the next phase of our fundraising which could include direct mail (proven to be an effective mode of fundraising), we have the opportunity to reach 378,000 people from our database except currently it is cost prohibitive. This is denying us the ability to maximise our fundraising efforts as well as raising awareness of our fundraising need.

It is increasingly hard for SOH to position itself and our fundraising need in terms that the general public readily understand – the ongoing perception is that we are funded entirely by government. The ability to be recognised under a change in the definition of charity would remedy this perception and exponentially increase our chances of receiving more donations and much needed public support.



Samantha Bagchi
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¹ <http://www.philanthropy.org.au/ancillaryfunds/pafs/index.html> (accessed 5 December 2011)

Attachment 2

Re the Powerhouse Museum

(See paragraph 4.11 of the Submission)

Attachment 2 – re Fundraising at Powerhouse Museum

The Museum of Applied Arts and Sciences (MAAS) incorporates the Powerhouse Museum, Powerhouse Discovery Centre: Collection Stores at Castle Hill, Sydney Observatory, operating steam locomotives at Thirlmere and the Migration Heritage Centre. The Powerhouse Museum was originally founded in 1879 and established on its current site in Ultimo, Sydney, in 1988. It conceives exhibitions and programs around the theme of human ingenuity; the ideas and technologies that have changed our world and the stories of the people who created and inspired them. It holds a collection of over 500,000 objects spanning history, science, technology, design, industry, decorative arts, music, transport and space exploration. 650,000 people annually visit the Museum's three sites, including 72,000 student visitors. A program of regional activities and touring exhibitions extends the reach of the Museum throughout New South Wales and Australia, and a comprehensive electronic collection database and suite of online resources take the Powerhouse Museum to audiences internationally.

The MAAS is an Item 1 Deductible Gift Recipient, but is unable to register for Tax Concession Charity status due to its connection to government (the MAAS was established by the Museum of Applied Arts and Sciences Act 1945 No 31). The Museum supplements its annual NSW State Government funding with self generated revenue, and income from sponsorships, grants and donations. In 2010/11 these income streams constituted 19.1% of the MAAS total operating budget. In addition, in 2010/11 the MAAS accepted object donations to the value of \$468,000 for the collection of the Museum.

In recent years, in response to reductions in the funding allocation from NSW Government, there has been an enhanced focus on securing sponsorship and philanthropic support. The Museum's dedicated philanthropic fundraising program, the Powerhouse Foundation, was established in September 2004 as a registered trading name of the MAAS.

The Powerhouse Foundation was established with a charter to build an endowment fund for collection acquisitions and conservation projects. Since 2004 this has been built to \$900,000. Following a review of Foundation activities in 2008, the charter was extended to allow fundraising for any purposes related to the advancement, development, promotion and management of the MAAS and its related sites and activities, in line with the terms of the Museum's Deductible Gift Recipient (DGR) status.

This broader fundraising ambit has allowed the Foundation to conduct fundraising campaigns aligned with the current priorities of the Museum, including a capital works program to redevelop the forecourt and main entrance and establish a new temporary exhibition gallery, youth and education programs and a project to digitise the Museum's

collection. Giving to these programs is promoted via an Annual Giving campaign and targeted approaches to identified potential funding organisations and individuals.

Although the AbaF Survey of Private Sector Support 2009-10 notes that overall philanthropic support for the Arts has dramatically increased since 2001-02 (+161%), over this time the MAAS has not been as successful as many other cultural institutions in attracting philanthropic support, particularly in the category of major gifts and grant contributions. The experience of the MAAS in conducting philanthropic fundraising initiatives over this time indicates that the following factors have contributed to a difficulty in increasing philanthropic income, against the general trend of the sector:

1. The growth of Private Ancillary Funds (PAFs) as a vehicle for structured philanthropic giving

The use of PAFs as a vehicle for philanthropic giving continues to increase, with the number of approved PAFs increasing 10.6% to 858 entities in 2008-09, distributing \$19million in funds to the cultural sector (an increase of 94.5% on distributions made to the sector in the previous financial year).¹

The MAAS has found that it is effectively precluded from this increasingly important source of cultural sector funding by its inability to register as a charity. With all PAFs (or Prescribed Private Funds as they were then known) formed prior to 2007 established as charitable trusts, and the charitable trust format retained by many formed since then, these entities are not permitted to make distributions to organisations without Tax Concession Charity (TCC) registration. While this barrier to fundraising was formally removed in NSW by legislative changes allowing charitable trusts to make a declaration opting into the force of section 22C of the Charitable Trusts Act 1993 (NSW); and applying for status as an income tax exempt fund, at the same time as repealing status as a charitable fund, the experience of the MAAS has been that placing the onus on the charitable trust to put itself in a position to be able to donate to the Museum still constitutes a major barrier to fundraising from this group. As the PAF format is increasingly used by individuals who have significant funds to dedicate to philanthropic giving and who wish to take a planned and long term approach to providing philanthropic support to the not for profit sector, this has the effect of decreasing the Museum's access to potential major gift contributors.

Since the legislative 'workaround' for charitable trusts was implemented, the MAAS has only been able to secure funding from one body who has undergone the change from a charitable fund to an income tax exempt fund in order to be able to donate to the Museum (The Greatorex Foundation).

¹ Taxation Statistics 2008-09, ATO

2. Lack of access to Public Ancillary Funds (PuAFs) with charitable purposes

The MAAS has similarly found itself at a disadvantage in seeking funding from PuAFs providing funding support for the cultural sector, as the majority of PuAFs are also established as charitable trusts. In what is already an incredibly competitive environment for PuAF funding, this issue has the effect of entirely removing charitable PuAFs as a potential source of funding for MAAS programs and activities.

The Museum has found itself unable to influence these well established and professional bodies to alter their trust deed to place themselves in a position where they may legitimately extend funding to the MAAS. The fact that the MAAS, but for its establishment as a statutory body, in all other aspects reflects the operations, objectives and programs of similar not for profit organisations operating in the cultural sector, yet is unable to register as a charity, is a source of confusion for charitable PuAFs. The logic of the 'connection to government' exclusion does not seem to fully justify why the MAAS should be unable to seek funding for activities that otherwise are clearly entirely for the public benefit and are conducted by a registered DGR.

The fact that we are one of a few isolated instances of this 'connection to government' exclusion in the cultural sector also means that it is difficult to convince PuAFs supporting the sector of the significance of the problem and justify the necessary change, and potential risk, involved in altering their trust deeds.

The MAAS has found that even where an established relationship exists with a PuAF, and where there is a managing body that has special expertise in the legal framework around charitable giving, it has not been possible to successfully make an argument to convince the PuAF to alter trust deeds to remove the charitable purposes requirement (as evidenced by our experience with The Trust Company).

In terms of its objectives, programs and day to day operations the MAAS is indistinguishable from other 'charitable' organisations operating in the sector and it may legitimately claim philanthropic support under its DGR status. As our Government funding base continues to contract there is increasing pressure on the Museum to develop alternative revenue streams and our inability to register for TCC status constitutes an unfair and unfounded barrier to accessing the potential benefits of philanthropic funding for Museum programs and activities.

Attachment 3

Suggested drafting amendments to implement an Alternative Control Test for Australian government-like DGR charitable institutions

(See especially paragraphs 1.7 and 5.3 of the Submission)

1 Paragraph (b) of the definition of “government body” in clause 3(1) of the ED, namely:

“(b) a body controlled by the Commonwealth, a State or a Territory”,

should be amended so as to read along the following lines:

“(b) **subject to subsection (2), a body effectively controlled by the Commonwealth, a State, a Territory or a local governing body, other than a body that is prescribed by the regulations not to be a government body for the purposes of this definition;**”
[Emphasis added].

2 In addition, renumber existing subsection (2) as subsection (3), and **insert a new subsection (2)** as follows:

“(2) In determining whether a body is effectively controlled by the Commonwealth, a State, a Territory or a local governing body:

(a) if the body can reasonably be regarded as at least partially and materially dependent on public donations, bequests, sponsorships or other public fund-raising, then

(b) ignore:

(i) the existence of any power to appoint and/or remove members of the governing body of the body, or to dissolve the governing body,

(ii) any requirement for approval or consent;

(iii) the existence of what is in form or substance a power of veto;

- (iv) any requirement to report to, or be audited by, government, or to comply with relevant safety or other prudential standards, requirements or policies;
- (v) any control arising under or by reason of any funding agreement; and
- (vi) the existence of any other power where, having regard to past practice, any pattern of behaviour and any other relevant matters, it might reasonably be expected that the power will not in fact be exercised in the foreseeable future.

Example: An example of a power which may be affected by subparagraph (vi) is a statutory provision which says that, notwithstanding anything contained in the Act establishing and governing the relevant body, in the exercise and discharge of its powers, authorities, duties and functions, the body is subject to the control and direction of the [responsible] Minister.

If the body is one to which deductible gifts can be made under Division 30, the body is to be taken to be at least partially and materially dependent on public donations, bequests, sponsorships or other public fund-raising for the purposes of this subsection.”

- 3 The need for such a body to meet the other requirements in the core definition in subsection 4(1) of the ED, including that it be a not-for-profit entity, would remain.
- 4 No change is requested to paragraph (d) of the definition, relating to a body controlled by the government of a foreign country.