



AMPAG's response to the Australian Government discussion paper, *Re:think—Better tax system, better Australia*

WHO WE ARE

The Australian Major Performing Arts Group, or AMPAG, is the umbrella group for Australia's major performing arts companies who develop and deliver cultural content at the elite level and support cultural capacity and performing arts access across the country. They reach diverse audiences in city and regional areas as well as overseas, through their performances and through vibrant community and educational engagement.

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AUSTRALIA'S MAJOR PERFORMING ARTS COMPANIES

Adelaide Symphony Orchestra



Orchestra Victoria



Australian Brandenburg Orchestra



Queensland Ballet

Queensland Ballet

Australian Chamber Orchestra



Queensland Symphony Orchestra



Bangarra Dance Theatre



Queensland Theatre Company



Bell Shakespeare



State Opera South Australia



Belvoir



State Theatre Company of South Australia



Black Swan State Theatre Company



Sydney Dance Company



Circus Oz



Sydney Symphony Orchestra



Malthouse Theatre



Sydney Theatre Company



Melbourne Symphony Orchestra



The Australian Ballet



Melbourne Theatre Company



Tasmanian Symphony Orchestra



Musica Viva Australia



Western Australian Ballet



Opera Australia



West Australian Opera



Opera Queensland



West Australian Symphony Orchestra



THE MAJOR PERFORMING ARTS COMPANIES: KEY FACTS

MPA activity levels and audience

- The MPAs create over 4100 ticketed performances per annum
- 4.035 million Australians attended a performance, school activity or workshop by an MPA company in 2013—an increase of 58,000 on 2012.¹
- Of these, 3.145 million people attended a performance.

MPAs' organisational structure and revenue

- The major performing arts companies are designated 'major' by government.
- The companies are mostly not-for-profit companies with charitable status, with a few being statutory bodies.
- The MPAs received almost \$165 million in government funding (federal and state) in 2013, under individual tripartite or quadripartite agreements.
- In 2013 MPA companies earned \$203 million from ticket sales.
- Private sector support (philanthropy, fundraising and sponsorship) now comprises 15 per cent of total income for the companies, with 43 per cent from box office, 30 per cent government grants for core funding, 4 per cent grants for specific initiatives and 8 per cent other income.
- The MPAs employed nearly 9000 people in 2013, including 4900 artists and a further 2500 creatives and technical staff.

THE ISSUE

The government is undertaking a review of the tax system, to have 'an open and constructive conversation with the community on how we can create a better tax system that delivers taxes that are lower, simpler, fairer'.

The 28 MPA companies are all not-for-profit (NFP) bodies, mostly charities with a few statutory bodies.

The tax system has the power to influence behaviour and can leverage greater taxpayers' support for NFP activities and therefore further benefit to society if it encourages increased giving.

Government subsidy (state and federal combined) averages around 34 per cent across the country's 28 major performing arts companies with individual subsidies ranging from around 9% to over 50%. In 2013 private sector giving across the group averaged 15% of total company income. It is a growing proportion of these companies' income and is critical to their survival. Because they increasingly rely on donations, they value the encouraging influence that income tax exemption on charitable gifts has on individuals' propensity to donate to charitable causes. Of the

¹ Data supplied by The Australia Council

total \$71.3 million reported private support in 2013, \$39.0 million (55 per cent) was received as private giving, \$29.7 million (42 per cent) was from corporate sponsorship and a net amount of \$2.6 million (3 per cent) came from fundraising events. But rates of donor support, which are often project-based, are unpredictable—and some believe they may have plateaued. Therefore, the concessional support given to donors is critical, as is the base funding provided by government.

The performing arts sector faces high risks. It is innovative and constantly invests in new work—the equivalent of R&D. It also seeks to provide broad community access regardless of socioeconomic position.

NFP entities are a vital part of the community's experience, growth and inclusiveness. While the focus of many NFPs is to protect and support the vulnerable, others exist to nourish the community in other ways—through sport and recreation, through conservation of the local environment and heritage, through religion, through multicultural activities, and, importantly, through arts and culture.

Income tax exempt status allows eligible NFP entities to use more of their income for carrying out their purposes. This exemption should reflect the value the community places on these purposes. It should support NFPs that contribute to making a better society. As the Australia Council found recently in its *Arts Nation* report, '85% of Australians think the arts make for a richer and more meaningful life'.²

As Minister for the Arts, Senator George Brandis, has said: 'We need to ensure that ... the arts are accessible to the Australian arts public, not just to the elite, critical public, but to the broad middle class of the Australian community who have a genuine and deep, if not necessarily specialist, devotion to the arts, whether it be concerts, opera, ballet, contemporary dance, visual arts, whatever the artform may be.'

The benefits of engagement with the arts to society are well documented. They include substantial economic, tourism and employment benefits, social inclusion and wellbeing, and significant improvements in educational achievement.

AMPAG believes the principle of public benefit should be the most useful general guide for determining eligibility for tax exempt status. Given the benefit NFP arts companies provide to our communities, tax reform should not negatively affect NFP arts companies or their employees.

DEDUCTIBLE GIFT RECIPIENTS (DGR) STATUS

Are the current tax arrangements for the NFP sector appropriate? Why or why not?

AMPAG believes the current tax arrangements for the NFP sector are largely appropriate. These arrangements include income tax exemption, DGR status, GST and FBT concessions. As explained above, NFP entities are a vital part of the community's experience, growth and inclusiveness.

² <http://www.australiacouncil.gov.au/research/arts-nation-an-overview-of-australian-arts/> released

We believe the concessions should be used in a way that provides the maximum social benefit by enabling the NFP sector to achieve its community and altruistic purposes.

We also agree with the rationale behind providing tax concessions to the NFP sector:

- without incentives such as tax concessions, the overall level of activity in the NFP sector may be below what is optimal for society,
- tax concessions to the NFP sector are a form of payment or government support for the delivery of goods or services that are of public benefit,
- activities undertaken by the NFP sector save governments from making outlays for similar activities,
- income tax is only borne by individuals and is imposed on corporate entities as proxies for individuals. As charities and other NFPs are formed for the purposes of public benefit, not the private benefit of individuals, they should not be within the income tax regime.

By encouraging private giving in the NFP sector, the tax system has the power to influence the behaviour of others and can therefore leverage greater support for NFP activities.

AMPAG supports:

- retention of the 'dominant' purpose test for charities to support flexibility in how charities achieve their primary purpose
- associations established for the advancement of the arts or culture, which are also statutory bodies supported by state or federal funding, should be able to access and leverage income tax exemptions, DGR status and FBT and GST concessions to the same extent as other incorporated NFP performing arts companies
- retaining the current registration process for cultural organisations and for the broader types of activities to be eligible for DGR status to remain within the target areas as outlined by the ATO
- rationalising the DGR legislation to address the issue of single NFP organisations involved in multiple activities, all of which would individually qualify for DGR status
- retaining the progressive tax system which delivers levers for equity and fairness by design.

Gifts & Minor benefits arrangement

Philanthropic support is sought because of its generous capacity to sustain the needs of the charity and not those of the benefactor. AMPAG recognises the importance of ensuring the notion of a 'gift' is retained.

AMPAG believes the discussion and development of donor relations would be strengthened if this principle of a 'gift' continued to exist even in a situation where a minor benefit is bundled with a considerable gift—as might occur in a charity event—while still limiting DGR to the amount that is above and beyond the value received. This would stimulate philanthropy across the sector, and would introduce flexibility in the way in which the charities begin to engage with the new generation of benefactors.

Currently DGR compliance must be considered by charities in relation to Taxation Ruling TR2005/13 which explains the purpose of the gift deduction provisions under Division 30 of the *Income Tax Assessment Act 1997* (ITAA 1997) and the operation of section 78A of the *Income Tax Assessment Act 1936* (ITAA 1936) in relation to gifts.

AMPAG supports amendment of Division 30 of the *ITAA 1997* (DGR legislation) to remove specific dollar limits in relation to the maximum value of minor benefits. It is then suggested rather than retain the reference to specific limitations on what constitutes a minor benefit in the legislation, that it be removed and listed in a regulation. This regulation would outline the percentage cap and determine the maximum value allowed for any minor benefit received by an individual donor. We suggest:

- removing the \$150 cap for donor benefits from DGR legislation and the allowable percentage of linked benefits to an accompanying regulation and increase the threshold from 20 per cent to 55 per cent noting the principle remains that any added benefits received by the donor are not eligible for DGR. When people donate money to a theatre company it's because they value the arts. The MPA companies can't survive on ticket sales and government grants alone. Donors want to be more connected to the company or the gallery beyond just buying a ticket or visiting. They want the relationship to be close.

The tax system in the United States of America enables that closeness to take place through a donation. The anti-avoidance provisions ruling specifically disallow the bundling of benefit and gifts in a way that is not prohibited in the US system (see appendix 1). Yet with pressure for performing arts charities to raise greater levels of philanthropic support to ensure their ongoing sustainability, it is the US system that Australia's performing arts charities are being asked to look and learn from.

We suggest:

- The rules around gifts allows for the bundling of benefits on the condition that the value of the benefits shall be excluded from the value of the gift for DGR purposes.
- Expanding the scope of a 'fundraising event' to encompass activities undertaken for the purpose of soliciting contributions of amounts significantly greater than the value of the goods and services acquired.

The anti-avoidance rules for donations where the donor receives material private benefits should be rewritten in a simplified form and included in ITAA 1997

In Australia draft legislation

AMPAG has commented on proposed **In Australia** draft legislation in 2012 and 2014. Its purpose is to determine if DGR status is retained on charitable funds that are applied to international expenditure and activities. We hold deep concerns that each of the previous drafts of the legislation has created the potential for uncertainty and additional red tape or compliance issues. It is highly doubtful that the proposed new reporting and assessment requirements set out in even the most recent draft (2014) will reduce the actual mischief that the legislation is attempting to target.

Companies need clarity and certainty in relation to DGR status when trying to raise philanthropic funds for overseas activities and collaborations. The most recent proposed draft law would compel our members to seek a determination on charitable support for each activity involving international elements. This would require charitable companies to navigate a series of hurdles and reporting, creating new red tape with no benefit to the sector.

The legislation also relied on qualitative assessment of the activity and its outcomes that would be difficult to pre-empt. While we recognise philanthropists want certainty in relation to DGR status of funds donated, it is the company that carries the responsibility for proving both the purpose for which the funds are to be directed and the quality of execution of such purpose. If this legislation were to inadvertently trigger non-compliance, it would be extremely damaging to the companies' relationship with its donors and its brand reputation. AMPAG has argued that for these reasons should new *In Australia* tax legislation be introduced there is public benefit in exempting major performing arts companies.

There are additional concerns that AMPAG raised in relation to the exposure draft which can be found; <http://www.ampag.com.au/article/when-is-in-australia-not-in-australia>

To what extent do the tax arrangements for the NFP sector raise particular concerns about competitive advantage compared to the tax arrangements for for-profit organisations?

Commercial activities

AMPAG believes any income generated by the NFP which is required to be used to further the NFP's aims should not attract income tax liability—that is, AMPAG members should not be taxed on income generated by '*commercial activity*' that, under the constituent documents, must be applied or retained for the pursuit of their charitable purposes.

Given the principle that public benefit should be the determining criterion for tax exempt status for the NFP sector, it is inappropriate to prioritise issues of competitive advantage ahead of considering if the NFP activities are efficiently maximising the social benefit.

AMPAG agrees with the observations advanced in the Community Council of Australia (CCA) submission on the Competition Policy Review's recommendations for Australia's Competition and Consumer Policy 2010 competition policy;

'The fundamental difference between a commercial and a not-for-profit organisation is purpose. All charities and not-for-profits are driven by a purpose that has to be about providing a real public benefit. Most commercial entities are primarily about making money.'

'Perhaps even more importantly from a purely commercial perspective, the Inquiry into the Definition of Charity (2000) found that the advantages enjoyed by the charity in terms of tax and other concessions are more than offset by the difficulty most charities experience in attracting capital and investment. The Henry Tax Review in 2008 made the same findings – the commercial benefits of tax and other concessions are negated by public benefit and uneven access to capital.'

Unlike a commercial entity surplus income from one year's activities in an NFP will be reinvested in its charitable aims and not distributed to investors or workers in the form of dividends, bonus or wage increases.

Any suggestion that such activities should be taxed in the same way as commercial activities, ignoring their purpose, would create major problems for charities and not-for-profits, and more importantly, for the communities they serve.

Where inequity does need to be addressed is the different application of FBT exemptions across the NFP sector (see relevant section below).

What, if any, administrative arrangements could be simplified that would result in similar outcomes, but with reduced compliance costs?

AMPAG requests that not merely the tax expenditures or concessions but also the considerable red tape costs to the sector in complying with the taxation system should be considered.

We encourage the continuation of ACNC reduction in both red tape and duplication of reporting across jurisdictions and government departments.

All our companies raise philanthropic funds which must be reported in the states where they are raised. Some of our 'national' companies raise funds in several states to support their national touring and educational activities. These companies include Bangarra, Bell Shakespeare, Circus Oz, Musica Viva, The Australian Ballet, the Australian Chamber Orchestra, Australian Brandenburg Orchestra, Sydney Dance Company and Opera Australia. Our members have reported that there is a significant reporting burden across state and federal laws in relation to fundraising activities.

To reduce compliance costs AMPAG supports referral of all powers to regulate charities from the states to the Commonwealth.

What, if any, changes could be made to the current tax arrangements for the NFP sector that would enable the sector to deliver benefits to the Australian community more efficiently or effectively?

Franking credits

If a charity is endorsed as income tax exempt, it will be entitled to a refund of franking credits on dividends it receives.

The entitlement of charitable institutions to a refund of franking credits should not be regarded as a tax concession. In our view, the entitlement to a refund arises under the fundamental policy contained in the imputation system—and that is, tax paid by companies is intended to be a withholding tax for the tax liability of resident shareholders. The proper tax rate payable by resident shareholders of resident companies is the margin rate of the shareholder. Charitable institutions are exempt from income tax. Unless the entitlement to exemption is challenged, the entitlement to a refund of corporate tax paid on dividends is a natural and proper feature of the imputation system. Without this refund entitlement, on the basis of the discussion in the *Rethink* document, and the RATS and AFTS reports, the system would contain damaging biases in the way that charitable institutions structure their activities and their investment strategy.

The inability of other NFP entities that are exempt from income tax under section 50-45 of the *Income Tax Assessment Act 1997* to obtain a refund of corporate tax paid is, in AMPAG's view, a non-neutrality in the taxation system. On the basis of the *Rethink* document and RATS and AFTS reports, it will result in damaging biases in the way that these NFPs entities structure their activities and their investment strategy.

AMPAG supports:

- the entitlement of tax exempt charities and DGRs to receive refunds for franking credits
- extending the entitlement to receive refunds for franking credits to other NFP entities that are exempt from income tax under section 50-45 of the *Income Tax Assessment Act 1997*.

Associations established for the advancement of the arts or culture, which are also statutory bodies supported by state or federal funding, should be able to access and leverage income tax exemptions, DGR status and FBT and GST concessions to the same extent as other incorporated NFP performing arts companies.

Cultural Gifts Program

AMPAG recommends that the Cultural Gifts Program be amended to include performing arts organisations as 'public collections' for them to be able to receive donations of culturally significant gifts, for example, musical instruments.

While the Australian Chamber Orchestra is able to receive musical instruments and art works as deductible gifts of property the process is complicated and quite fraught for the donors. The donor must apply to the ATO for a valuation and pay the cost of the valuer before the donation is allowed; there's a lot of paperwork and delay. This may well still be the case if the Cultural Gifts Program were extended to

the organisation. A further improvement might be to allow the deductions to be self-assessed, as is the case for other tax deduction items.

Matched funding scheme

AMPAG supports developing a matched funding scheme accompanied by streamlined systems and information around such a program, targeted at building core endowments and attracting new individual and corporate donors. The Australian Government committed to funding such a scheme in 2010, as recommended by Harold Mitchell in his 2011 *Building Support: Report of the Review of Private Sector Support for the Arts in Australia*. It also committed to cultivating donors through an awareness-raising program. We are encouraged by the Government's recent budget decision to continue to support a matched funding program through Creative Partnerships Australia for a further two years.

Capital Gains Tax

AMPAG considers that the exemption from Capital Gains Tax (CGT) for testamentary gifts should extend to all gifts of property to DGRs and non-DGR tax exempt bodies to avoid the detrimental effect of the estate incurring CGT on the gift. We recommend further modelling on how testamentary giving, as recommended by Harold Mitchell, might be structured in an Australian context for proper consideration.

Tax avoidance

AMPAG supports the existing position that mutual income is not assessable income. If any particular activities of an NFP failed to meet the requirements of exemption under the current statutory rules, the organisation should be able to rely on the mutuality principles for its member income.

AMPAG does not consider that the principle of mutuality is a tax concession. It is a principle of law that a group of people pursuing a common purpose and activity cannot profit from themselves. To disturb this principle would have many adverse effects for small groups undertaking joint activities with pooled funds.

This is not to say that the expenditure of members of a mutual association escapes tax. The GST system will collect revenue on either the contribution of members or the funds expended by the club.

GOODS AND SERVICES TAX

To what extent are the tax settings (that is, the rate, base and administration) for the GST appropriate? What changes, if any, could be made to these settings to make a better tax system to deliver taxes that are lower, simpler, fairer?

MPA companies rely increasingly on philanthropy to meet their growing costs and enable them to realise their ambitions for wider reach, greater access, audience development, artistic excellence and art form development. The government has a role in making it both simpler and more attractive for donors to give philanthropically to the arts.

Under the GST rules, the full price paid for attendance at a fundraising event (unless it is one to which input taxation might be available or a GST-free raffle) is subject to full GST. But for income tax purposes, in general terms, the amount paid that exceeds the market value is treated as a donation.

AMPAG supports removing the current legislative requirement that GST be charged on charity auction transactions and on fundraising events such as charity dinners when the funds raised are eligible for DGR. We recommend the GST laws be amended to ensure that amounts eligible for income tax deductions as gifts will also be treated as gifts under GST law and not subject to GST.

GST-free supplies

AMPAG supports charitable institutions being able to make GST-free supplies where the activity is 'non-commercial'. This setting supports the capacity of performing arts organisations' works to be affordable and accessible regardless of their social economic circumstances.

In relation to GST on tickets AMPAG members would welcome a more flexible approach that allows the calculation to be based on projections for a performance or a series of performances or on a 'supply-by-supply' basis—or any reasonable methodology that reflects the proportion of the total projected costs relating to the total projected sales and allows companies to reduce the time and cost of compliance.

FRINGE BENEFITS TAX

What should our fringe benefits tax system look like and why?

AMPAG supports both retaining the FBT rebate approach and extending it to all tax exempt NFPs. However, disparity in FBT exemptions in the charitable sector advantages some charities and their capacity to attract employees over others.

That one type of charity and its associated public good should have a hierarchical advantage over another is difficult to support. We support equal FBT exemptions entitlements for all NFPs Charities.

However, AMPAG understands FBT exemptions are under active consideration for reform. Options such as income tax rebates and payments to employers to replace FBT exemptions need to be carefully worked through with the sector.

To what extent are the concessions and exemptions in the fringe benefits tax system appropriate?

AMPAG supports the section 65J rebate approach to overcome the discrimination that would otherwise arise if the higher FBT rate were to apply. Employers that pay income tax obtain tax relief for the fringe benefit and the fringe benefit tax. The FBT rate was increased in 1992 when relief was given for FBT. Of course, tax exempt bodies do not obtain tax relief for the cost of the fringe benefit or the FBT itself. As a matter of policy, the rebate—and effectively the 'old FBT rate'—should be available to all employers that are not eligible for tax deductibility for FBT.

Further, the additional FBT for Type 1 benefits that is imposed as a proxy for GST should be abolished and GST paid on the taxable value of fringe benefits that are

taxable supplies under the GST law. The present system is arbitrary and converts state and territory GST revenue to Federal revenue. Its mechanism is an inaccurate proxy for the proper tax base, it is inefficient and complex.

Arts companies employees do not enjoy the FBT exemption extended to other NFP entities including medical services—and this can limit our ability to compete as employers for the kind of skilled labour that is applicable to both. *Re:think* raises the issue of commercial vs non-commercial competition for labour.

FBT concessions are also used to compensate for funding shortfalls in the NFP sector. The rebate has been very substantially eroded over recent years due to the impacts of bracket creep and adjustments to the marginal tax scales such that there is very little benefit remaining for all but the most highly paid employees. For the FBT rebate to be effective, it should be tied to the employees' actual marginal tax rates. The changes in the May budget further erode any benefit.

In addition, the benefit of FBT concessions is not evenly spread among NFP sector employees: only some entities are eligible for the capped FBT exemption while other entities (but not all income tax exempt entities) are eligible for the rebate. Even among eligible entities, salary packaging take-up rates vary.

Rather than abolishing this concessional treatment, AMPAG believes useful competition in the labour market for NFPs would be introduced by extending a consistent FBT exemption to those NFPs currently ineligible.

Appendix 1

Example of US Patron's packages: **Manhattan Theatre Club**



Be a part of Manhattan Theatre Club

As a **not-for-profit** organization, MTC relies on the generosity of donors to cover **over 40 percent of the costs** of producing our season, developing new plays, supporting playwrights and educating thousands of individuals through our extensive Education Program.

In recognition of their vital support, MTC's Patrons enjoy:

The best seats in the house

MTC reserves the best seats in our theatres for our Patrons, who also enjoy complete scheduling flexibility through a dedicated Patron Hotline.

Intimate access to leading theatre artists

MTC Patrons are afforded the opportunity to interact with playwrights, actors and directors at pre-show dinners, cocktail parties and special events. Imagine talking with Matthew Lopez about what inspired him to write *The Whipping Man*, or asking Estelle Parsons what it was like working on *Good People* – our Patrons have done just that and much more.

A welcoming community

Many Patrons regard MTC as the best place to see their friends and meet new people. They gather before shows in our exclusive Patron Lounges and at our special Patron dinners and receptions.

The amount of goods and services is based on the full usage of the benefits offered. Using fewer benefits increases the amount of the tax deductible portion of the gift.

<http://www.manhattantheatreclub.com/mtc-vip/patron>

BENEFITS GRID

BENEFITS	SUPPORTING (\$2,000)	ANGEL (\$4,000)	PACESETTER (\$6,000)	LEADER (\$10,000)
House Seats for all MTC productions	up to 2	up to 2	up to 4	up to 4
Patron Lounges	✓	✓	✓	✓
Patron Hotline	✓	✓	✓	✓
Unlimited ticket exchanges	✓	✓	✓	✓
Sneak Peek event	✓	✓	✓	✓
Discounts on additional tickets	✓	✓	✓	✓
Patron Seminars	✓	✓	✓	✓
Playbill listing	✓	✓	✓	✓
4 Patron Night pre-show dinner and receptions		✓	✓	✓
Opening Night performances and cast parties			1 Broadway	all 8
7@7 Rehearsed Reading Series reserved seating			✓	✓
Access to purchase House Seats to ENCORES!			✓	✓
Artistic Director's Circle cocktail reception in private home				✓
Informal lunch in conjunction with rehearsal				✓
Access to purchase House Seats to commercial productions				✓
Access to purchase tickets to the Tony Awards®				✓
Goods and services	\$840	\$1,560	\$3,340	\$3,440