AMPAG Submission

Fairer, simpler and more effective tax concessions for the not-for-profit sector—(the Discussion Paper)

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About the Australian Major Performing Arts Group

The Australia Major Performing Arts Group, (AMPAG), established in 1999, is the peak body for Australia's major performing arts companies and by default for the wider cross section of the subsidised small to medium performing arts industry. Our core membership comprises 28 not-for-profit companies ranging in size from Opera Australia and the Sydney Symphony Orchestra to mid-sized companies like the Australian Chamber Orchestra and the Queensland Theatre Company and smaller ones such as the West Australian Ballet and the State Theatre Company of South Australia. (Companies are listed Appendix 1.)

The 28 member companies have a combined turnover (in 2011) of over $438 million (ranging from $4.7 million to $69 million) with net assets of $140 million. Box office is the key source of income but the companies also depend on donations and sponsorship as well as some commercial activities. Government subsidy (state and federal combined) averages around 38 per cent across the 28 companies. Private support is a growing proportion of these companies' income and critical to their survival.

The process

We welcome the opportunity to provide our comments[1] on the questions contained in the November 2012 discussion paper of the Not-For-Profit Sector Tax Concession Working Group entitled 'Fairer, simpler and more effective tax concessions for the not-for-profit sector'.

As preliminary comment, we note that the guiding principles of the Working Group state:

> By understanding what the existing concessions are and their original intent and current scope of application, the Working Group will be better able to assess the appropriateness of the existing concessions.

The community would have been better able to respond to the focus questions if the discussion paper had explained the original intent of the concessions referred to. In our view, we could only properly assess 'the appropriateness of the existing concessions' by:

- identifying both the mischief at which the legislative regime of tax concessions was directed and the objects of the original provisions—including how the policy, objects and legislation have changed over time
- examining the extent to which the mischief and the approach adopted have currency today
- determining whether today's environment (including the legislative framework) might lead to a different description of the mischief or solution chosen.

The discussion paper does not cover this process with sufficient information and, therefore, our responses in some areas have been limited to our own experiences and perceptions, which are mostly confined to the performing arts sector.

[1] AMPAG has made this submission on behalf of its members.

Summary of AMPAG's recommendations

1. AMPAG supports the status quo of the scope of entities and activities that fall within income tax exemption.

2. item 9.1(b) of section 50-45 of the Income Tax Assessment Act should be amended to refer to '**the arts'**, rather than simply 'art', properly reflect our understanding of allowable activity, as it relates to our performing arts members.

3. AMPAG supports retention of the 'dominant' purpose test for charities to support flexibility in how charities achieve their primary purpose.

4. AMPAG requests that the Working Group consider not merely the tax expenditures of concessions but also the considerable deadweight costs to the sector in complying with the taxation system.

5. 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.

6. 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.

7. AMPAG supports 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.

8. AMPAG supports 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.

9. AMPAG supports retaining the progressive tax system which delivers levers for equity and fairness by design. Donations could be encouraged if the tax rebate for funds donated to charity was over 100 per cent.

10. AMPAG supports developing a matched funding scheme accompanied by streamed systems and information around such a program, targeted at building core endowments and attracting new individual and corporate donors. However, we would not support a cap on government contributions.

11. 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.

12. AMPAG strongly supports removal of the current legislative requirement that GST be charged on charity auction transactions and on fundraising events such as charity dinners where the funds raised are eligible for DGR. We recommend an amendment to the GST laws 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.

13. 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 might be structured in an Australian context for proper consideration.

14. AMPAG supports replacing the minor benefits arrangement based on the lower of 20 per cent of the donation or $150. A more responsive mechanism that still distinguishes benefit and gift would be:

    - removing the monetary capped amount as the ultimate threshold and replacing it with a percentage rate—and lifting the allowable percentage to a sliding scale of 50–100 per cent
    - 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.

15. AMPAG supports the section 65 J rebate approach to overcome the discrimination that would otherwise arise as a result of the higher FBT rate. As a matter of policy, the rebate should be available to all employers that are not eligible for tax deductibility for FBT. The additional FBT 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.

16. AMPAG supports extending the minor benefit exemption to tax exempt bodies on the same basis as it applies to other entities.

17. AMPAG supports both retaining the FBT rebate approach and extending it to all tax exempt NFPs—but we would also support modelling of alternative approach, such as refundable tax offsets to employers, a direct tax offset to the employees or a tax free allowance for employees.

18. AMPAG supports charitable institutions being able to make GST-free supplies where the activity is 'non-commercial'. A measure that would better reflect this policy would be if the total price that is obtained for a class of supplies (see more detailed comments under question 47 below) 'is less than 75 per cent, or is reasonably likely to be less than 75 per cent of the total costs incurred by the supplier' in making those supplies.

19. 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.

Consultation questions

Q 1 What criteria should be used to determine whether an entity is entitled to an income tax exemption?

Q 2 Are the current categories of income tax exempt entity appropriate? If not, what entities should cease to be exempt or what additional entities should be exempt?

Subject to one or two exceptions of a technical nature, AMPAG members are charitable institutions because they are established for the promotion of the arts. We strongly believe that income tax exemption for charitable institutions should continue.

AMPAG supports the status quo of the scope of entities and activities that fall within income tax exemption.

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.

The tax amendments introduced in 1922 enabling associations for artistic and scientific purposes to be income tax exempt recognised the social value of public support for artistic organisations. This amendment has supported the sustainability of performing arts companies to survive and develop their artistic practice and access as it lowers the overall cost of delivering arts to the community.

ABS research paper 8106.0: *Not-for-profit Organisations, Australia, 2006–07* found that at the end of June 2007, art and culture organisations made up 20 per cent of all NFP organisations in Australia. This was the second highest category recorded by the ABS, just behind religious organisations on 21.3 per cent. Of course the 'art and culture' category is much broader than just performing arts (performing arts organisations accounted for approximately 9 per cent of the category). These organisations should be entitled to income tax exemption.

We also recognise that an NFP organisation established to encourage art, literature or music is exempt from income tax under item 9.1 and 9.2 of section 50-45 of the *Income Tax Assessment Act 1997*. We consider that this is appropriate and necessary because:

- the income tax exemption of NFP bodies which carry on substantially similar activities or have similar purposes ought not be treated differently if, as the structure of the exemption infers, one body might fail to obtain 'charitable institution' status
- the identification of the kind of activities that are income tax exempt ought to be framed broadly to encompass the full range of beneficial activities that is supported by the exemption. Essentially we would be concerned if the scope of NFP bodies that are afforded income tax exemption were narrowly or technically framed and interpreted. Such an approach would create non-neutrality within the purposes pursued by the NFP sector leading to uncertainty, unfairness and higher compliance costs.

We observe that the present legislative approach to exemption—by listing 'charitable institution', 'art', 'literature' and 'music' as separate exempt associations—contains a degree of overlap and that this is not helpful if the legislation is seeking to communicate the government's policy and purposes in granting exemption to organisations that are established for the advancement of culture.[2] In this regard, we note that item 9.1(b) of section 50-45 of the Income Tax Assessment 1997 Act refers to 'art'.

To properly reflect our understanding of allowable activity, as it relates to our performing arts members, the category should be referred to as '**the arts'**, rather than simply 'art'.[3]

We support the pre-condition to income tax exemption that the entities be genuinely not-for-profit and pursue the objects for which they are established and not for the purpose of profit or gain to their membership. As far as our members are concerned, it is highly unlikely that they will develop operational surpluses over (even) the medium term and will continue to depend on volunteers, government support, donations and sponsorships to carry on their activities. Once it is determined that these activities are of benefit to the community, it seems inappropriate, illogical and impractical to bring those NFP activities within the income tax net and to impose income tax on the basis of an artificial construct of 'taxable income' for a financial year. It is clear, in our view, that the measure of assessable income and allowable deductions designed for personal tax and 'for-profit' entities would need substantial revision to address the different circumstances and purposes of a NFP.

Any consideration to bring NFP entities into the income tax regime must recognise the exceptionally limited (and often voluntary) resources of the sector and the deadweight costs of tax compliance that it and the broader community would suffer as a consequence. In this regard we strongly agree with the following comments of the AFTS Architecture paper[4]:

> … every extra hour spent by households and business grappling with the myriad of tax rules and obligations (including the different regimes across the States) is an hour not used to produce goods and services (including utilising leisure time), that are of higher value to Australians. Likewise, every dollar needed to fund the administration of the tax-transfer system is a dollar that needs to be raised through taxation. Given the regressive nature of complexity, a complex and inefficient system is also likely to fall short of expectations for a fair distribution of opportunities and risk throughout the community.

Having made this observation, we note that the amendments proposed to the 'in Australia' rules contained in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 would seem to be unnecessarily restrictive and complex—and could potentially affect the ability of our members to use DGR funds for overseas tours (which are considered essential for their professional development and for Australia's soft diplomacy)—when regard is had to the apparent mischief at which they are directed.

We note the government is currently considering its options regarding unrelated commercial income generated by charities. AMPAG recommends any income generated by the NFP which is ultimately 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 they subsequently spend on supporting their core not-for -profit objectives. AMPAG supports

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[2] In the Report of the Inquiry into the Definitions of Charity and Related Organisations of June 2001 the Inquiry recommended the term 'the advancement of culture', observing that 'Culture is broader than "the arts"', p. 181.

[3] See footnote 2.

[4] Architecture of Australia's Tax and Transfer System, August 2008, Australian Treasury, p. 5.

the introduction of a tax 'hiatus' period of 3–5 years for earnings achieved through commercial activity to be moved across the organisation for expenditure on the core NFP activities. A hiatus period avoids the cash flow issues, annual compliance and administration costs and delays that would exist in a system where the commercial income was taxed in the year of earning and the charity issued with franking credits that could be redeemed at a later time.

AMPAG supports retention of the 'dominant' purpose test for charities to support flexibility in how charities achieve their primary purpose.

Q 3 Should additional special conditions apply to income tax exemptions? For example, should the public benefit test be extended to entities other than charities, or should exemption for some types of NFP be subject to different conditions than at present?

As a general comment, the question of additional conditions for the exemption from income tax must be considered against the objectives that the government sought to achieve in framing the exemptions. Many have varied over time—for example, the original exemption now contained in item 9.1(c) was restricted to games of sport in which human beings were the sole participant. The expansion to a broader range of sports and animal racing was a clear policy decision of the government and reflected a change in the nature of sporting endeavours and community activities.

The income tax exemption of organisations that are established for the encouragement of the arts (but are not charitable institutions that fall under item 1.1) must satisfy not-for-profit and 'in Australia' tests, both of which are proposed to be amended by the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012. AMPAG has made submissions about this proposal separately.

Our experience with the proposed amendments to these conditions shows how easily the restatement or expansion of conditions to these general categories of exemption can have unintended consequences. Therefore, we believe that any additional conditions should be are phrased as principles—perhaps in the form of code of conduct—and not as legislative rules. Of course, the principles that are additional conditions should be consistent with the government's objectives in introducing the exemption into the income tax law.

AMPAG member organisations are generally endorsed as charitable institutions under the existing taxation law. In this regard, we consider that the advancement of the arts carries with it a presumption of a public benefit as discussed in the October 2011 Consultation paper, 'A definition of charity'.[5]

On the other hand, the exemption contained in section 50-45 of the Income Tax Assessment 1997 Act may apply to other organisations that meet the needs of a narrower segment of the community.[6] We are concerned that introducing a public benefit test may narrow the scope of the existing exemption for 'art' and 'music' in a way that would be inconsistent with their listing as an exempt item, separate from 'charitable institution'. Therefore, we would not support the introduction of a public benefit test as a general proposition, but would propose that existing charities are presumed to meet a public benefit test.

[5] 'A definition of charity', Consultation paper, October 2011, Australian Treasury
[6] As discussed at ATO Draft Taxation Ruling TR 2011/D2 paragraphs 124–130

The public benefit test, as described in the 'A definition of charity' paper, would seem to contradict the policy of including some of the items in the existing exemption—for example, some unions or employer associations may not meet a public benefit test of the type discussed in the Charity paper.

Q 4 Does the tax system create particular impediments for large or complex NFPs?

Despite their general exemption from income tax, AMPAG members dedicate a great deal of unproductive time in compliance with the myriad of requirements that the taxation system places on them. As indicated above, given the limited resources available to NFP organisations, the complexity and coverage of today's taxation obligations create costs and risks similar to large commercial organisations, in an environment where resources are scarce.

AMPAG requests that the Working Group consider not merely the tax expenditures of concessions but also the considerable deadweight costs to the sector in complying with the taxation system.

Q 5 Should other types of NFPs also be able to claim a refund of franking credits?

Yes. See our response to Q 6.

Q 6 Should the ability of tax exempt charities and DGRs to receive refunds for franking credits be limited?

We note that Australia's reform of the company taxation system in 1985 was based on a number of principles that are not included in the Discussion Paper.[7] Both the draft White Paper, 'Reform of the Australian Tax System' (RATS), and the 'Australia's future tax system' (AFTS) report state that, ideally, the taxation of corporate profits should be integrated with the personal taxation system. In general, the principle underlying Australia's imputation system is that the profits of corporations ought to be taxed in the hands of their beneficial owners at those shareholders' marginal tax rate. Both reports describe corporate taxation as a withholding for the tax that will be paid by shareholders when the profits are distributed.

The aim of the imputation taxation system is thought to address the following biases and inefficiencies that would otherwise arise if the full benefit of tax paid at the corporate level were not available as a refundable credit to shareholders:

- the preference of companies and individuals, to debt over equity as the form of capital investment
- the choice of conduit vehicles (such as trusts and partnerships) to raise capital and carry on businesses
- the preference of companies and shareholders to retain earnings to allow preferentially taxed capital gains as an alternative to taxable dividends.

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[7] 'Reform of the Australian Tax System', Draft White Paper, June 1985, AGPS Canberra 1985, Chapter 17; 'Australia's future tax system', Report to the Treasurer December 2009, Part 2 Detailed Analysis, Volume 1 pp. 185–198.

While refunds of imputation credits are not available to non-residents and some tax exempt bodies, it is clear that this limitation is based on costs to the revenue rather than the efficiency of the broader taxation system.

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, that 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 RATS and AFTS report, 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 1997 Act 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 RATS and AFTS report, 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 1997 Act.

Q 7 Should the ATO endorsement framework be extended to include NFP entities other than charities seeking tax exemption?

AMPAG does not have a comment on this issue at this stage.

Q 8 Should the income tax exemptions for State, Territory and local government bodies be simplified and consolidated into the ITAA 1997? Which entities should be included?

AMPAG has no preference for placing exemption provisions for state and territory bodies in the Income Tax Assessment 1997 Act unless, in doing so, the scope or interpretation of the scope of the exemption is altered.

In this latter respect, 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. The Queensland Theatre Company and the two South Australian companies are state government entities and must be able to continue to benefit from the NFP support mechanisms.

Q 9 Should the threshold for income tax exemptions for taxable NFP clubs, associations and societies be increased? What would a suitable level be for an updated threshold?

Not applicable.

Q 10 Please outline any other suggestions you have to improve the fairness, simplicity and effectiveness of the income tax exemption regime, having regard to the terms of reference.

AMPAG's recommendations for improved fairness and efficiency are noted under DGR and GST headings below.

Q 11 Should all charities be DGRs? Should some entities that are charities (for example, those for the advancement of religion, charitable child care services, and primary and secondary education) be excluded?

AMPAG supports 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 including:

- health promotion charities
- school building funds
- public benevolent institutions
- overseas aid funds
- registered cultural and environmental organisations
- public libraries, museums and art galleries.

AMPAG supports 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. These organisations face unintended administration barriers which prevent DGR recognition of their multiple activities unless costly restructuring into separate entities takes place.

Q 12 Based on your response to Q11, should charities endorsed as DGRs be allowed to use DGRs funds to provide religious services, charitable child care services, and primary and secondary education?

AMPAG does not have a definitive view but makes the observation that charities endorsed as DGRs should be able to further their underlying purpose through whatever means is appropriate including education activities but this is not to say that any act of education should be able to access DGR funds.

AMPAG companies raise DGR funds to support education activities in relation to the performing arts. It is appropriate that such funds retain their DGR status because they fundamentally support the advancement and engagement of the community in the arts and develop arts practitioners, arts audiences and cross community engagement.

Q 13 Would DGR endorsement at the entity level with restrictions based on activity address the behavioural distortions in Australia's DGR framework? Could unintended consequences follow from this approach?

AMPAG has no comments to offer on this question.

Q 14 If DGR status is extended to all endorsed charities, should this reform be implemented in stages (for example, over a period of years) in line with the PC's recommendations, or should it be implemented in some other way?

AMPAG generally supports the PC's recommendations.

Q 15 Would a fixed tax offset deliver fairer outcomes? Would a fixed tax offset be more complex than the current system? Would a fixed tax offset be as effective as the current system in terms of recognising giving?

The progressive tax system delivers levers for equity and fairness by design. If a flat rate were enforced that was less than the top marginal tax rate it would act as a disincentive to high net worth individuals from donating. This would lead to charities increasingly relying on public revenue to fund their services. The one way such a suggestion would stimulate giving is if the deduction was uniformly set at the higher tax level.

Q 16 Would having a two tiered tax offset encourage giving by higher income earners?

Donations could be encouraged if the tax rebate for funds donated to charity was over 100 per cent. For example, further giving could be incentivised by allowing an income tax deduction of 150 per cent of the amount donated.

Q 17 What other strategies would encourage giving to DGRs, especially by high income earners?

As government support plateaus, the potential role of philanthropic support to fund new creative endeavours is of increasing significance to the major performing arts companies. However, Australians' level of giving is proportionately less than in the US, UK and Canada. Government has an important role in developing a culture of giving across the population by introducing proactive incentives as well as providing confidence and leadership in this area. AMPAG has been surveying private sector support for the major performing arts for the past 11 years. If regulation and incentives for private sector support remain the same, it would be safe to assume that corporate sponsorship will continue to plateau and any growth in philanthropy will be at a relatively slow pace. Therefore a new approach is needed.

Given Australia's culture of giving is under-developed, any action to stimulate philanthropy must in the first instance prioritise the rewards to both the donor and contribute to tangible outcomes of the recipient organisation. It is vital that any measure to stimulate increased private support does not in fact or perception appear to be a mechanism to position private giving as a replacement to government support.

Matched funding

AMPAG believes the foremost priority is developing a matched funding scheme accompanied by streamed systems and information around such a program. An initiative such as this will be most effective if targeted at the activities most in need of support and growth. There are two main areas where such a need is clear: building core endowments and attracting new individual and corporate donors.

Already such schemes have increased support for the arts in some states in Australia (WA, SA and Tasmania), in many cases forming new partnerships, and have been highly successful in several countries overseas. For example, the Canada Cultural Investment Fund stimulates donations to arts organisations by providing matching funds of up to one dollar for every dollar raised from private donors, to create endowment funds or to increase existing endowments.

While AMPAG supports a matched funding scheme, we would not support a cap on government contributions. Although some kind of proportional scales or other limiting mechanism may be required because gifts to endowments can be very large, a cap would undermine the success of the scheme and limit donors' enthusiasm for giving at meaningful levels.

Public collections
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.

Donations on fundraising events
AMPAG strongly supports removal of the current legislative requirement that GST be charged on charity auction transactions and on fundraising events such as charity dinners where the funds raised are eligible for DGR. We recommend an amendment to the GST laws 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.

The differing tax treatment of the same contribution as both a gift and a price paid for a good or service is not good policy. It creates a level of disengagement between the giver and the organisation, when on completing the transaction donors realise their generosity is, in effect, taxed. While the full amount is eligible for DGR the organisation must calculate GST on the amount. The charity pays.

Amendments to the income tax law in 2004 made it possible for part of a contribution to a fundraising event or a charity auction to be tax deductible. However, as no similar amendment was made to the GST Act, it means the contribution as a gift for income tax purposes is fully taxable under the GST Act.

The Tasmania Symphony Orchestra runs an annual fundraising dinner and charity auction. It is a pivotal activity that helps attract private support for the orchestra in a state where capacity to develop philanthropy and corporate giving is limited by the size of its economy. To charge GST on the efforts of volunteers and staff to generate financial returns for the NFP activities is inappropriate and sends the wrong government message to donors—that is, that government taxes an act of charity.

We note that AMPAG's proposal for an amendment to the GST law in this and other respects (see focus question 46 below) was agreed to by the previous government on 14 October 2007.

Q 18 Should testamentary giving be encouraged through tax concessions and what mechanisms could be considered to address simplicity, integrity and effectiveness issues?

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.

More broadly, testamentary giving is complicated and the final value and beneficiaries of a deceased estate are not always clear or fixed ahead of time. Research indicates that only 7 per cent of wills in Australia contain a charitable bequest and that the percentage for arts organisations is significantly lower than this.

However, AMPAG is broadly aware of testamentary giving being encouraged through tax concession in Canada, a country that like Australia does not levy death duties on its citizens.

In 2009 the Australian Centre for Philanthropy and Non-profit Studies (CPNS) at the Queensland University of Technology produced a discussion paper that referred to the Canadian situation partial exemption of capital gains tax on property gifted to a recognised charity:

> Canada has no inheritance, gift, estate, or generation skipping taxes, so donations do not require an exemption from such taxes. However, every taxpayer is deemed to have disposed of his/her assets immediately prior to their death, thus capital gains taxes may be triggered. A testamentary gift of property to a qualified donee can reduce that capital gain that would otherwise result, but it cannot create a capital loss. A full or partial exemption from capital gains tax can be realised for gifts of cultural property, publicly traded securities, and ecologically sensitive land with provisions to increase the usual deduction limits. As noted above, a full exemption will shortly be legislated. Section 118.1 of the Income Tax Act 1985 Canada deems a gift to a qualified donee made by an individual's will to have been made by the individual immediately before death. It further provides that a gift made in the year of death is deemed to have been made in the year immediately prior to death. This allows the donation tax credit to be claimed in the individual's terminal tax return or in the year immediately prior to death. In addition, tax liabilities arising from the deemed disposition of capital property of the deceased upon death may be offset by donation tax credits arising from such a gift in the terminal return.
> —2009, p. 18, wiki.qut.edu.au/download/attachments/89014028/MMcGregor-Lowndes+Planned+Giving+Strategies.pdf?version=1&modificationDate=1239676141000

AMPAG recommends further modelling on how testamentary giving might be structured in an Australian context for proper consideration.

Q 19 Would a clearing house linked to the ACN Register be beneficial for the sector and public?

AMPAG members doubt such a service would be of benefit to their organisations if it guides potential donors to a generic portal listing all charities together. Our companies greatly rely on the strong relationships they develop with private sector donors. A clearing house has a high risk of weakening the direct relationship between the specific charity and the donor.

Q 20 Are there any barriers which could prohibit the wider adoption of workplace giving programs in Australia? Is there anything the Working Group could recommend to help increase workplace giving in Australia?

AMPAG has no comments to offer on this question.

Q 21 Do valuation requirements and costs restrict the donation of property? What could be done to improve the requirements?

Valuations of gifts

While AMPAG supports the removal of red tape, it would not support moving the valuation process for gift to the ATO. There is a high risk that the process would become opaque and overly complicated by bureaucracy. While the ATO could decide to only seek a valuation from the Australian Valuation Office (within the ATO) appointed as the primary valuer, streamlining the approach to such an extent raises conflict of interest issues. AMPAG is concerned that any such simplification could remove the ability of a charity to challenge contentious valuations or resolve such issues equitably.

Q 22 Is there a need to review and simplify the integrity rules?

Minor benefits

A relatively simple intervention, requiring relatively modest amendments to the DGR legislation, would potentially stimulate a new type of donor.

The ability to engage and involve donors is a key aspect of relationship building between performing arts companies and donors in the USA and is a major restriction on what we can do here in Australia.

AMPAG recognises the prudent need to quantify the value of any direct benefit a donor may receive to ensure that value is not included in any DGR claims. However, Australia's current tax arrangements as they relate to minor benefits within the DGR legislation are unnecessarily and increasingly restrictive. There are two aspects to this particular issue:

- At present it is a requirement that the value of
    - the goods and services acquired as a result of a successful bid at an auction that is held as part of a fundraising event, or
    - the right to attend or participate in a fundraising event

  obtained for a contribution to the DGR, must not exceed the lower of 20 per cent of the donation or $150.

  Clearly CPI and other factors erode the value year on year of the $150 limit and restrict the sort of activities the companies can employ to encourage greater levels of giving or to acknowledge the generosity of giving in a suitable way.

  Further, items 7 and 8 of subsection 30-15(1) are intended to overcome the perception that an above market value contribution to a DGR as part of a fundraising program is not a deductible gift. If it is acknowledged that above market value payments made as part of charity fundraising events are properly regarded as gifts, adopting the restrictive definition of 'fundraising event' in section 40-165 of the GST Act[8] would seem to place such a limitation on the item so as to negate its purpose.

- In instances where items 7 and 8 do not apply, for a contribution to a DGR to be deductible as a gift, 'the giver must not receive a benefit or an advantage of a material nature by way of return. It does not matter whether the material benefit or advantage comes from the DGR or another party. … [C]circumstances which may

[8] http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s40.165.html

lead to a conclusion that a benefit or advantage is material [include] … the benefit is offered by the DGR as an inducement to potential givers'.[9]

Items 7 and 8 reflect a useful policy that the whole amount of a contribution will not suffer non-deductibility merely because benefits arise of values that are significantly less than the amount of the contribution. The example of offering benefits to secure funding is a good example of this principle at work and the rules in items 7 and 8 should be expanded to recognise the true value of gifts. For example, if a philanthropist has donated many thousands of dollars to support an international study bursary for an upcoming performer, inviting the philanthropist to the opening night of a performance that showcases the artist is necessary. Similarly extending that invitation to an exclusive after-show event that includes speeches and presentations that build further understanding of the company, its plans and needs into the future, is also not simply appropriate and good etiquette, it is essential in developing the longer term relationship with supportive philanthropists. Yet items 7 and 8 will not apply to this case and the 'no material benefit' requirement, in putting the deductibility of the contribution at risk, limits a company's ability to nurture the relationship between the company and the philanthropists. It is very difficult to arrange a philanthropic relationship under the current minor benefit thresholds.

AMPAG questions the effectiveness of a dollar value or percentage value whichever is the **lower** as it falsely assumes this mechanism provides a level of safeguard and benefit to the community. In fact, this mechanism actually limits opportunities for developing relationships and nurturing insight and involvement that could lead to greater giving and greater public good. A more responsive mechanism that still distinguishes benefit and gift would be:

- removing the monetary capped amount as the ultimate threshold and replacing it with a percentage rate
- 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.

In this recommendation the value of the benefit still remains quarantined from any DGR treatment.

When people donate money to a theatre company or an art gallery it's because they value the arts. They know that arts organisations can't survive on ticket sales and government grants alone and they want to be more connected to the company or the gallery than just through buying a ticket or visiting. They want the relationship to be close.

The tax system in the US enables greater closeness to take place by linking a broader range and scale of benefits while still ensuring only the donation attracts deductible status (see US patrons program example Appendix 2. Note Pacemaker Patrons value of goods and services received makes up 55 per cent of the value of the package). There will always be altruistic arts donors but most people want a relationship in exchange for their donation. If we are to develop the next tier of philanthropists and provide pathways for young adults to develop philanthropic habits, greater flexibility about how we can engage and motivate giving is needed.

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[9] Paragraphs 37 and 44 of TR 2005/13.

AMPAG recommends replacing the dollar maximum cap in donor benefits to a percentage value as well as lifting the allowable percentage to say a sliding scale 50–100 per cent. This way a company that is able to sell a premium double ticket to opening night valued at $250 for $500 is effectively asking the private citizen to match each dollar spent with a $1 donation. If we are to encourage a broader giving culture it would seem counter-intuitive to prevent the associated $250 donation from being tax deductible (and GST-free).

Note: The $150 capped amount has not been updated since 2007. If a dollar amount is to be referenced in the legislation it should be increased for each year since 2007 in line with the labour index amount.

Q 23 Are there additional barriers relevant to increasing charitable giving by corporations and corporate foundations? Is there anything the Working Group could recommend to help increase charitable giving by corporations and corporate foundations?

AMPAG has no comments to offer on this question.

Q 24 Are the public fund requirements, currently administered by the ATO, either inadequate or unnecessarily onerous?

The current arrangements are adequate.

Q 25 Are there any possible unintended consequences from eliminating the public fund requirements for entities that have been registered by the ACNC?

AMPAG is unable to comment as the governance standards to be adopted by the ACNC are yet to be issued. However, if the standards proposed are in line with the ATO's current requirements AMPAG sees no issue with eliminating the public fund requirements for entities that have been registered by the ACNC.

Q 26 Should the threshold for deductible gifts be increased from $2 to $25 (or to some other amount)?

Rarely, if ever, do AMPAG companies issue DGR receipts for $2 gifts. However, AMPAG firmly believes that a change to the threshold would be damaging to the overall giving environment in Australia. The $2 threshold is well understood by the Australian public and continues to be a quoted threshold for smaller fundraising appeals. The cost of communicating and rebuilding public buy-in to a new significantly higher threshold is unlikely to deliver real benefits for charities. Increasing the value of individuals' gifts is better achieved by the charities themselves building understanding and expectations of what they need.

AMPAG has stated above that to increase private giving it is important that the government does not send a signal to the community that it is retreating from support in this space. Increasing the threshold from $2 to $25 could easily be interpreted by the community as government not valuing donations of lesser amounts and/or as a cost-saving exercise for government at the expense of charities.

In general we note that donations of small amounts per week may operate through a workplace direction to pay arrangement that would fail deductibility in the event that the threshold was raised.

Q 28 Assuming that the current two tiered concessions structure remains (see Part B), what criteria should determine an entity's eligibility to provide exempt benefits to its employees?

AMPAG has no comments to offer on this question.

Q 29 Also assuming that the current two tiered concession structure remains (see Part B), what criteria should determine an entity's eligibility to provide rebateable benefits to its employees? Should this be restricted to charities? Should it be extended to all NFP entities? Are there any entities currently entitled to the concessions that should not be eligible?

Q 30 Should there be a two tiered approach in relation to eligibility? For example, should all tax exempt entities be eligible for the rebate, but a more limited group be eligible for the exemption?

The section 65J rebate contained in the *Fringe Benefits Tax Assessment Act 1986* was introduced from 1 April 1994 because, at that time, the effective rate of FBT was almost doubled and FBT was made tax deductible. The rebate under section 65J was made to maintain the costs of FBT for organisations that were not entitled to income tax deductions.

AMPAG believes the policy underlying this approach is still valid today. Despite the change in the income tax law, FBT is a real cost to income tax exempt bodies. It would be unreasonable for a higher incidence of FBT to fall on the tax exempt sector when compared to the taxable sector.

Accordingly, AMPAG supports the section 65 J rebate approach to overcome the discrimination that would otherwise arise as a result of the higher FBT rate. As a matter of policy, the rebate should be available to all employers that are not eligible for tax deductibility for FBT.

As a general issue, the additional FBT that is imposed as a proxy for GST[10] should be abolished and GST paid on the taxable value of fringe benefits that are taxable supplies under the GST law.

Q 31 Should salary sacrificed meal entertainment and entertainment facility leasing benefits be brought within the existing caps on FBT concessions?

Q 32 Should the caps for FBT concessions be increased if meal entertainment and entertainment facility leasing benefits are brought within the caps? Should there be a separate cap for meal entertainment and entertainment facility leasing benefits? If so, what would be an appropriate amount for such a cap?

Q 33 Are there any types of meal entertainment or entertainment facility leasing benefits that should remain exempt/rebateable if these items are otherwise subject to the relevant caps?

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[10] On Type 1 benefits.

AMPAG understands that excluding these items from the relevant cap recognises the arbitrary nature of the imposition of FBT on entertainment and the ability to choose a formula basis of calculating the value of the benefit to the employee. The RATS White Paper observed that

> it is extremely difficult to determine the extent to which expenditure was incurred for the purpose of earning income as distinct from private purposes. … The only really effective way of countering deductions for private entertainment is to ban deductions for expenditure on entertainment altogether.

As a result of the non-deductibility approach being adopted, the FBTAA, when enacted, included tax exempt body entertainment benefits[11] as taxable fringe benefits—to equate the cost of entertainment between taxable employers and tax exempt employers.

When the FBT rate was doubled and made deductible, employee entertainment became subject to the higher FBT rate and was not non-deductible. In the absence of the section 65J rebate, tax exempt bodies would have been subject to the higher FBT costs (as a result of the grossed-up methodology to calculate the value of fringe benefits) for meal entertainment without any change to their tax circumstances from the beginning of the 1985 reforms.

The section 65J rebate ameliorates the adverse effect of the doubling of the FBT rate (which is only directed at FBT deductibility). It maintains the position that existed before meal entertainment was brought within the FBT system for employers that are subject to income tax.

Accordingly, when the arbitrary basis of assessment of 'abusive' and 'non-abusive' entertainment is considered and the fact that the position pre-1995 was that tax exempt bodies paid FBT at the FBT rate based on the expenditure incurred, it seems unreasonable to deny access to the rebate of FBT—particularly given that few employees would bear tax at the top marginal rate to which the FBT rate is fixed.

Q 34 Should there be a requirement on eligible employers to deny FBT concessions to employees that have claimed a concession from another employer? Would this impose an unacceptable compliance burden on those employers? Are there other ways of restricting access to multiple caps?

The employer is not in a position to know with absolute certainty an employee's activities and financial arrangements outside the organisation's employment agreement with the employee. Therefore, it would be an unfair burden to require the employer to determine an employee's eligibility for FBT concessions.

Q 35 Should the rate for FBT rebates be re-aligned with the FBT tax rate? Is there any reason for not aligning the rates?

FBT rebates should be aligned to individuals' marginal rates.

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[11] Section 39 of the FBTAA.

Q 36 Should the limitation on tax exempt bodies in the minor benefits exemption be removed? Is there any reason why the limitation should not be removed?

AMPAG supports extending the minor benefit exemption to tax exempt bodies on the same basis as it applies to other entities.

Q 37 Is the provision of FBT concessions to current eligible entities appropriate? Should the concessions be available to more NFP entities?

Q 38 Should FBT concessions (that is, the exemption and rebate) be phased out?

Q 39 Should FBT concessions be replaced with direct support for entities that benefit from the application of these concessions?

It would be neither fair nor equitable to phase out the concession or rebates available to NFP entities as such a decision disadvantages NFP employee conditions compared to those available in the for-profit corporate sector.

Compensation mechanisms to replace taxation concessions rarely maintain their value over time. Despite the compliance costs, AMPAG would not support removing the FBT arrangements from which its members benefit.

AMPAG supports both retaining the rebate approach and extending it to all tax exempt NFPs .

Q 40 Should FBT concessions be replaced with tax based support for entities that are eligible for example, by refundable tax offsets to employers, a direct tax offset to the employees or a tax free allowance for employees?

AMPAG is interested in this suggestion and encourages modelling on this proposal to enable better interrogation of the idea.

Q 41 Should FBT concessions be limited to non-remuneration benefits?

Q 42 If FBT concessions are to be phased out or if concessions were to be limited to non-remuneration benefits, which entity types should be eligible to receive support to replace these concessions?

The RATS White Paper explained (at chapter 8) that the FBT approach was adopted as a mechanism to overcome limitations in the taxation of employers for non-cash benefits. In this regard RATS stated the essential feature of FBT as:

> The establishment of legislative rules defining the taxable value of a range of fringe benefits. … taxing non-cash fringe benefits in the hands at the employer level is a better way of proceeding. Apart from the administrative advantages of this option, it is likely to prove less disruptive and, over time, would go a long way towards creating more equitable arrangements.

As indicated above, the selection of FBT as a mechanism to tax non-cash benefits was selected because 'it is extremely difficult to determine the extent to which expenditure was incurred for the purpose of earning income as distinct from private purposes'. A change to the fundamental policy framework of FBT[12] would suggest that the mischief identified in the RATS White Paper could have been addressed simply by identifying 'non-remuneration benefits'.

AMPAG does not support such a fundamental change—only for the NFP sector—to the system of FBT.

Q 43 Does the existing fundraising concession create uncertainty, or additional compliance burdens, for NFP entities that wish to engage in fundraising activities that fall outside of the scope of the concession?

Q 44 Would a principles-based definition of the types of fundraising activities that are input taxed reduce the compliance burden for entities that engage in fundraising understands that the existing concession contained the discretionary power for the Commissioner to determine eligible fund-raising events to provide a level of flexibility that would not be able to be achieve through any legislative prescription.

As indicated above in our discussion of minor benefits, the current definition of fundraising events is unduly narrow and, as a result, will not cover the type of fundraising programs that are necessary to encourage a practice of giving and monetary support from the community.[13] AMPAG would support an amendment to the law if the principles upon which it will be based can be framed in such a way as to not give rise to a new set of rules that are uncertain in their scope and interpretation.

For example, in our response to question 22 above, we have suggested that the definition of 'fundraising event' for both GST and gift deductibility purposes be expanded to encompass activities undertaken for the purpose of soliciting contributions of amounts significantly greater than the value of the goods and services acquired by the contributor.

Q 45 Should current GST concessions continue to apply for eligible NFP entities?

Subject to our comments below, AMPAG supports the existing concessions.

Q 46 Are there any other issues or concerns with the operation of the GST concessions in their current form?

Subparagraph 38-250 (2)(b)(ii) of the GST law
AMPAG has been in discussions with the Commissioner, Treasury, the Assistant Treasurer and the TIES working group since the GST began concerning the unfortunate wording of the subparagraph.

[12] That legislative rules would define the value of fringe benefits and tax would be paid at the employer level on those values.
[13] The definition in 40-165 excludes any event that forms 'any part of a series or regular run of like or similar events'.

Consistent with our representations[14] on this matter, the Commissioner released ATO ID 2012/78 on 21 September 2012, recognising the difficulties and stating that:

> Subparagraph 38-250(2)(b)(ii) provides that a supply (that is not a supply of accommodation) made by an endorsed charitable institution is GST-free if the supply is for consideration that is less than 75% of the consideration the supplier provided, or was liable to provide (the consideration provided), for acquiring the thing supplied.
>
> A strict literal interpretation of the phrase 'acquiring the thing supplied' would mean that subparagraph 38 250(2)(b)(ii) would only apply where the things acquired are the things supplied. This would restrict the operation of the provision to a narrow ambit (such as an endorsed charitable institution acquiring a blanket for the purposes of making an on-supply of the blanket).
>
> Accordingly, we consider the phrase 'acquiring the thing supplied' should be interpreted to include both things that are acquired and on-supplied and things that are acquired and 'used' in combination in making a supply of something else.

The Commissioner's private rulings and the Charities Consultative Committee Resolved Issues Document (CCC RID) confirm, in principle, this approach to interpretation. However, the terms upon which the Commissioner will allow an 'absorption costing' approach are prescriptively defined so that access to the Commissioner's interpretation is complex, inconsistent and uncertain in its operation.[15]

The Commissioner's required methodology is so complicated that he has been forced to construct a 'software tool' to assist some sectors to perform the calculations in question.

For the performing arts sector, the Commissioner's required methodology for calculating the GST that should be charged on tickets—that is, tickets sold by NFP companies developing cultural works and providing them to the community through essentially a non-commercial sales model—is complex, confusing and leads to GST being charged inappropriately on an activity which is non-commercial.

The price placed on tickets for performances are often differentiated based on seating positions, time between purchase and actual show date and overall demand. All AMPAG companies receive a combination of state and federal funds, philanthropy and corporate sponsorship and box office. The resulting sources of income over the last 10 years clearly demonstrates that ticket sales do not cover anywhere near 75 per cent of the cost of the overall output of the company. On average ticket sales cover around 40–50 per cent of the total show costs of the company.

Subparagraph 38-250(2)(b)(ii) of the GST law has created unreasonable compliance costs, imposes unnecessary administrative costs, distorts the GST treatment of similar goods and

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[14] Our most recent letter to the then Assistant Treasurer, Senator Sherry, was dated 8 February 2010 and a TIES issue was logged suggesting a redraft of the subparagraph on 11 May 2010.

[15] We note that the agenda for the NTLG GST subcommittee meeting of 5 December 2012 states that there is 'tension, if not direct inconsistency' between the CCC RID and the ATO view in ATO ID 2012/78 concerning the treatment of capital costs under subparagraph 38-250(2)(b)(ii).

services supplied by charitable institutions, and distorts companies' engagement in the market place.

The ATO's administrative approach to the application of the subsection, while intended to give a concessional interpretation of it, is contrary to a strict legal interpretation and is complex and contradictory in its operation. [16]

AMPAG has surveyed its members about the impact of this GST rule on the day-to-day operations of the companies. We are seriously concerned the current GST rule is negatively affecting the companies' revenue income from their box office and requiring tax to be paid on an activity that is, when taken in its entirety, subsidised by government and philanthropy. AMPAG companies on average receive 40 per cent of their income from box office, the remainder from a combination of state and federal grants and private philanthropy.

The purpose of section 38-250 is to ensure that GST is not paid on 'non-commercial activities' of charities. The Commissioner's approach, however, does not assess the 'commercial' nature of 'activities' but measures each separate supply. Consequently, some sales of a non-commercial activity can be taxable while others are not.

Currently the system requires GST to be charged on any tickets that are priced at 75 per cent or more of the cost of the show. Determining the individual cost of delivering the show to an individual ticket buyer is not straightforward and a tax ruling was created over 10 years ago to try to put in place an approach that was fair and equitable. The system is cumbersome, inaccurate and, in administering the policy on forecast individual sales, delivers an outcome that is neither in the spirit of this policy nor one that supports the overall policy aims of federal government support for these companies. It also deters companies from raising ticket prices for fear of crossing the 75 per cent threshold which would then lift what was to be a modest increase by a further 10 per cent of the cost of the ticket. The GST therefore distorts ticket prices and is a disincentive for companies to fully explore opportunities for dynamic ticket pricing or for subtle price increases that won't disengage or disrupt their audience relationship.

The GST collected across the group is less than $2 million from a total group box office of $176 million with total company costs across all the major companies of over $403 million of which around 85 per cent ($342.5 million) are actual costs relating to the individual shows. Box office clearly does not cover anywhere near 74 per cent of the cost of shows produced by the major performing arts companies. Yet companies are required to go through an artificial estimation of cost of show, against the likely tickets sold and then determine the average seating price.

Yet to maintain the live experience it is essential to build an audience. If the average ticket cost price for a house filled to 60 per cent capacity was $100 per ticket and tickets were priced at the following categories: $50, $74, $100 and $140 even if the majority of tickets sold were at the lower prices of $50 and $74 per ticket and the house only achieved 55 per cent capacity the tickets sold at $100 and $140 would, under the current ruling, attract GST.

[16] See footnote 14 and, in addition, the discussion at pages 34-36 of the Agenda referred to in footnote 14 concerning the inconsistency between the CCC RID and GSTD 2012/4 concerning the approach to the provision of accommodation and meals.

Similarly companies who are keen to develop their ticket prices and build audience willingness to accept slightly higher ticket prices hit a market price increase barrier or sensitivity when trying to traverse the calculated GST threshold. For example, if a show's calculated GST threshold is $75 a ticket then a company charging anywhere between $74 and $82.50 earns no additional income on the higher priced tickets. On a micro level the policy distorts companies' pricing, and leads to conservative pricing to comply. On the macro level GST is being collected on an activity that does not cover anywhere near 75 per cent of its costs.

The law should reflect the policy that charitable institutions are able to make GST-free supplies where the activity is 'non-commercial'. A measure that would better reflect this policy would be if the total price that is obtained for a class of supplies (see more detailed comments under question 47 below) 'is less than 75 per cent, or is reasonably likely to be less than 75 per cent of the total costs incurred by the supplier' in making those supplies.

Q 47 Would an opt-in arrangement result in a reduced compliance burden for charities that would otherwise need to apply apportionment rules to supplies made for nominal consideration?

Q 48 If an opt-in arrangement is favoured, would the preference be to treat the supplies as taxable or input taxed? Why?

Q 49 Is there an alternative way of reducing the compliance burden associated with apportionment for supplies made for nominal consideration?

AMPAG does not believe the complication of GST on tickets is solved by companies opting in or out of GST.

The government policy was and continues to be that non-commercial activities of charities should be GST-free. The suggestion of an opt-in to a treatment that imposes a GST cost on the charities is inconsistent with government policy AMPAG believes it would be unreasonable for charities to be forced to suffer input taxation on non-commercial activities merely to avoid complexity and uncertainty of compliance with a badly drafted provision.

Further, many international surveys have found that partial input taxation is one of the most complex areas of the value-added tax system.

A relatively simple amendment to the law to reflect the apparent government policy would allow charitable organisations to adopt their own reasonable costing models to ascertain in advance whether the revenue from their activities would exceed 75 per cent of their costs.

An amendment to correct the unfortunate drafting of subsection 38-250(2) which reflects the accepted government policy is as follows:

38-250 (2) A supply is ***GST-free*** if:

(a) the supplier is a charitable institution, a trustee of a charitable fund, a *gift-deductible entity or a *government school; and

(b) the supply is for *consideration that is less than 75%, or is reasonably likely to be less than 75% of the costs incurred by the supplier in making the supply.

The term 'supply' in this context can be interpreted in the singular or plural but must measure the commercial character of the 'activity'.[17]

Q 52 Should the mutuality principle be extended to all NFP member-based organisations?

Q 53 Should the mutuality principle be legislated to provide that all income from dealings between entities and their members is assessable?

Q 54 Should a balancing adjustment be allowed for mutual clubs and societies to allow for mutual gains or mutual losses?

Q 55 Is existing law adequate to address concerns about exploitation of the mutuality principle for tax evasion? Should a specific anti-avoidance rule be introduced to allow more effective action to be taken to address such concerns?

AMPAG supports the existing position that mutual income is not assessable income. In this regard we would be concerned to ensure that, if any particular activities of an NFP failed to meet the requirements of exemption under the current statutory rules, the organisation could rely on the mutuality principles for its member income.

In general, we consider that the taxation law has not benefitted from the substitution of statutory rules for common law distinctions. The current preference is that a principles-based approach will be taken to the drafting of taxation law, yet there are many examples of situations where the taxation law has sought to 'codify' the principles that courts have determined apply to distinguish one thing from another. The inherent difficulty with such an approach is that it reduces the 'principles' to a set of inflexible rules that do not lend themselves to purposive interpretation. The strength of the common law system is that the principle can grow and be modified over time to fit a changed social and economic environment. Statutory rules are not able to be so readily adapted, even if rules could be framed to encapsulate the common law principle as it is understood today. Consequently, we prefer the common law rules for mutuality to continue.

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.

Q 56 Are there any areas in which greater streamlining of concessions could be achieved?

AMPAG has made comments about this in relation to fundraising donations and non-commercial activities of charities.

[17] For a similar approach to GST-free status for a group of connected supplies see GSTR 2002/5 at, for example, paragraph 18H.

Q 57 Do you have any ideas for reform of NFP sector tax concessions within the terms of reference that have not been considered in this discussion paper?

In our comments above, we have often referred to the very high compliance costs of the taxation system as it applies generally but to the NFP sector in particular, given the scarce resources available to it.

AMPAG submits that, in its review of taxation concessions, the Working Group consider not merely the tax expenditures of concessions but also the considerable deadweight costs of the sector in compliance with the taxation system.

The sector would benefit from less engagement with the taxation system.

Appendix 1

AUSTRALIAN MAJOR PERFORMING ARTS GROUP

List of AMPAG Members	**State**
Adelaide Symphony Orchestra	South Australia
Australian Brandenburg Orchestra	New South Wales
Australian Chamber Orchestra	New South Wales
Bangarra Dance Theatre	New South Wales
Bell Shakespeare	New South Wales
Belvoir	New South Wales
Black Swan State Theatre Company	Western Australia
Circus Oz	Victoria
Malthouse Theatre	Victoria
Melbourne Symphony Orchestra	Victoria
Melbourne Theatre Company	Victoria
Musica Viva Australia	New South Wales
Opera Australia	New South Wales
Opera Queensland	Queensland
Orchestra Victoria	Victoria
Queensland Ballet	Queensland
Queensland Symphony Orchestra	Queensland
Queensland Theatre Company	Queensland
State Opera South Australia	South Australia
State Theatre Company of South Australia	South Australia
Sydney Dance Company	New South Wales
Sydney Symphony	New South Wales
Sydney Theatre Company	New South Wales
The Australian Ballet	Victoria
Tasmanian Symphony Orchestra	Tasmania
Western Australian Ballet	Western Australia
West Australian Opera	Western Australia
West Australian Symphony Orchestra	Western Australia

Appendix 2

When people donate money to a theatre company it's because they **value the arts,** know that we can't survey on ticket sales and government grants alone and want to be **more connected** to the company or the gallery than just through 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.

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