

TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES



Australian Major Performing Arts Group submission

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Who we are

The Australian Major Performing Arts Group, or AMPAG, is the umbrella group for Australia's major performing arts companies (MPAs)—see list of companies in Appendix 1.



The MPAs are world-class performing arts companies dedicated to the pursuit of artistic excellence. They are an integral and vibrant part of Australia's arts ecology, reaching large audiences in Australian cities, regional and remote communities and overseas.

Sector response to DGR reform opportunities as set out in the Government discussion paper released 15 June 2017

AMPAG has prepared this response to the Treasury discussion paper on possible reforms relating to Tax Deductible Gift Recipients (DGR) through consultation with its members (see Appendix 1). A summary of AMPAG recommendations are listed in Appendix 2.

The discussion paper examines governance of DGRs. It proposes:

- harmonising reporting obligations for organisations with DGR status by ensuring all but government organisations with DGR status are charities
- changing reporting requirements and the implementation of agency-led reviews of charities' potential noncompliance in regard to allowable advocacy activities
- changing the administrative process for applying for DGR status.

Public Value of DGR policy

There is an assumption in the discussion paper that funds gained by charities with the support of the DGR mechanism are the beneficiaries of government. It is important to note that the act of generosity is not from government, although the role and support of government is highly regarded, the generosity is derived from private individuals who donate. These donors give far more than the tax deductibility amount they in turn receive. Therefore DGR status leverages greater public funding support for a public good than could be raised through taxation alone. Advancing that public good through charitable gifts relieves, to an extent, government's own public burden.

Consultation Questions 1–3

1. What are stakeholders' views on a requirement for a DGR (other than government entity DGR) to be a registered charity for it to be eligible for DGR status? What issues could arise?
2. Are there likely to be DGRs (other than government entity DGRs) that could not meet this requirement and, if so, why?
3. Are there particular privacy concerns associated with this proposal for private ancillary funds and DGRs more broadly?

These questions are slightly miscast. A DGR is not an organisation rather an organisation may have DGR status. The paper considers administrative and structural changes through the commonality of entities who all have DGR status, but there are differences between charities and not-for-profits that have not been fully analysed in the paper.

The questions should therefore be recast as:

- a) What are stakeholders' views on a requirement for an *organisation with DGR status* (other than government entity DGR) to be a registered charity for it to be eligible for DGR status? What issues could arise?
- b) Are there likely to be *organisations* (other than government entity DGRs) that could not meet this requirement and, if so, why?
- c) Are there particular privacy concerns associated with this proposal for private ancillary funds *and organisations with DGR status* more broadly?

Organisational structures DGR eligibility

AMPAG members are all either charities with DGR status or government bodies with DGR status. They would not be directly impacted by DGR eligibility being limited to charities and approved government bodies however there may be unintended impacts to the NFP sector, for example, if NFPs do not meet the definition of a charity. This has the potential to create instability.

There may be wholesale disqualification of NFPs currently with DGR status who fail to meet the eligibility requirements legislated for charities. Given the previous, very detailed, government consultation process ahead of legislative changes to the definition of charities, any new pressure to change the

definition to address NFPs needs will create more red tape and is therefore of concern.

A less disruptive approach is to require all organisations with DGR status to report to the Australian Charities and Not-for-profits Commission (ACNC) in the first instance. This does not remove the possibility of requiring non-government organisations with DGR status to be or to become charities in the future, but it does provide an orderly progression for the sector and government. It enables the ACNC to assess issues regarding compliance and to consider the material reporting differences between NFPs that are not charities and charities and the public benefit of further reforms.

Reporting

Introducing the requirement that all organisations with DGR status, charitable and NFP, report to the Australian Charities and Not-for-profits Commission ACNC will strengthen insight and compliance across the sector. This in turn helps to build confidence and integrity in the charitable sector, and contributes to a more equitable governance environment for organisations with DGR status.

While there are understandably differences in organisation structures and governance requirements between government and non-government entities with DGR status, they operate within the same public space to attract philanthropic support. A small proportion of AMPAG members are themselves government statutory bodies and their reporting requirements are comparable to our other members yet this data is not lodged with the ACNC. There are also larger government agencies that are actively competing for philanthropic support. Analysis of philanthropic support, organisational purpose and trends would be far more valuable to the sector if government DGR fundraising results were included in ACNC's sector analysis.

This should not be achieved through the introduction of more red tape, rather the ACNC should be able to collect philanthropic data already reported to the relevant government entity. This may be most efficiently done through intergovernmental data sharing agreements

Recommendations

- AMPAG recommends the Government should not require all non-government organisations with DGR status to be charities at this time. Instead as a first step Government should extend ACNC's remit requiring all NFPs except government organisations to report to the ACNC directly.
- Requiring all organisations, including government organisations, with DGR status to report to the ACNC would provide better understanding of the giving culture in Australia.
- To accommodate this change ACNC's remit can be extended to include Charities and all other NFP organisations with DGR status and without DGR status.

Advocacy

Consultation Questions 4–6

4. Should the ACNC require additional information from all registered charities about their advocacy activities?
5. Is the Annual Information Statement the appropriate vehicle for collecting this information?
6. What is the best way to collect the information without imposing a significant additional reporting burden?

Compliance

The discussion paper states: *'There are also concerns that some charities and DGRs undertake advocacy activity that may be out of step with the expectations of the broader community, particularly by environmental DGRs, which must have a principal purpose of protecting the environment.'*¹

*'The ACNC's guidance for registered charities (and subsequently for DGRs) help organisations to understand their obligations, particularly for certain types of **advocacy**.'*

¹ Subsection 30-265(1) of the *Income Tax Assessment Act 1997* – Its principal purpose must be: (a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or (b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment.

*'The ACNC would clearly set out the rules applying to registered charities for the DGRs that become new registered charities, helping to ensure that they understand their obligations, particularly for certain types of advocacy. As with all registered charities, if an organisation does not meet its obligations, the ACNC would be able to take steps to facilitate compliance and **where appropriate** enforce proportionate sanctions, which could include the revocation of registration status leading to the loss of their DGR status.'*

AMPAG is aware of the ACNC guidance note regarding allowable advocacy, issued April 2016, and commends the ACNC approach, which encourages compliance through awareness and training in the first instance.

We note legislation preventing charities from certain types of direct advocacy for political parties and candidates already exists, and as charities, our members are already bound by this. The reform options set out in this paper include the requirement that all organisations with DGR status become charities (except government organisations). This may lead to deeper public debate or legal challenges on the interpretation of this aspect of the legislation.

Therefore, we reaffirm the very positive contribution charitable advocacy makes and the importance of the principle that any rulings to disallow advocacy must be free from political influence or expediency.

The ACNC's advice states: *'Charities can campaign on political issues to advance their charitable purposes, including during election periods, as long as they meet the requirements of charity law and other relevant legislation.'*² The purpose of a charity is the primary determinate—where activities that support that purpose may include support for a specific political candidate, party or policy based on the assessment that such support helps advance the primary purpose of the charity.

AMPAG does not support any illegal activities. However, it also recognises that any government assessment on eligible or ineligible advocacy must be designed very carefully so as not to undermine our civil society and the potential public benefit that will come from organisations with DGR status pursuing active engagement in the issues that affect their charitable purpose.

A charity seeking to better people's lives—for example, through services to relieve homelessness—will have specialised knowledge and a vested interest in the impacts of public policy in this area, as well as the influencing factors that

² http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx

lead to homelessness. While soup kitchens, temporary accommodation and mobile laundry services relieve the plight of homeless, taking a systemic approach will lead to better outcomes.

Advocacy by charitable organisations should not be discouraged per se—nor should an environment be allowed to grow that might intimidate charities from robust engagement in the issues that affect their charitable purpose.

A specific activity or activities of a charity do not determine an organisation's charitable status or compliance. The discussion paper confuses 'charitable purpose' and 'activities of charities', which is inconsistent with the existing approach to charity law and leaves open the possibility of reforms that bring significantly higher levels of scrutiny to lawful activities—such as advocacy—and cast doubt over the legitimacy of those activities.

A local charity may run a food festival as a way of underwriting their charitable purpose. If the organisation promotes their event, this does not make them an advertising agency, nor does the supply of food make them a restaurant. Clearing funds above the cost of putting on the festival does not mean that the charity should be deemed a for-profit business if that money is then directed to the charitable purpose.

In the process of creating art works, artists reflect and respond to their surroundings, create insights into the world and the human condition. They may highlight, celebrate or advocate particular viewpoints. For example, a dance, circus, music or theatre work could include content that explores social, institutional and political issues and forces of the day. The extent and way in which artists engage with these themes can affect artistic vibrancy and excellence, social access and public discourse. Individual works may, on occasion, be considered as political in nature, but this does not make the organisation that facilitates the artists an advocate for a political party or candidate.

The ACNC advice states: *'A charity's policy position on a matter of concern may be similar, or align with that of a particular political party. In such a situation, it is okay for the charity to continue to campaign on that issue, provided that this does not amount to the charity having a purpose of promoting or opposing a particular political party or candidate.'*

The ACNC advice is helpful. It also goes on to acknowledge that where the line is drawn is not clear cut. Revocations of DGR status due to advocacy activity should only occur as a final resort and where significant DGR funds have been diverted away from the advancement of the charitable purpose.

AMPAG believes such determinations require restraint and must themselves be devoid of political influence. Government is potentially conflicted and must be at arm's length from any rulings relating to determining what charitable organisation advocacy activity is or is not compliant.

The discussion paper states: '*Some charities and DGRs undertake advocacy activity that may be out of step with the **expectations of the broader community***'. The test for compliance in the legislation does not include a public expectations clause—organisations' donation revenue is collected based on public willingness to donate—and this is where public expectations are impactful. The issue of eligible or ineligible advocacy is not determined by community expectations in regard to activities; rather it is the eligibility of the purpose of the organisation. What activities will be undertaken by the charity or NFP organisation to serve the purpose of the organisation is a matter for its board. Regulators should not seek to replace the board's view with their view about 'furtherance of purpose' unless there is clear abuse and/or significant non-alignment.

The paper also refers to termination of DGR status '**where appropriate**'. This is a very broad term that requires significant interpretation by the ACNC. The ACNC approach to making determinations is materially shaped by the choice of appointments to leadership positions within the ACNC. Therefore, any such determinations to remove DGR status because of inappropriate advocacy must remain eligible for an affordable, transparent, streamlined independent process of review and appeal.

Proposed introduction of new additional advocacy activity reporting requirements

The discussion paper seeks to treat advocacy as different to other activities undertaken by charities by seeking views regarding a proposal for new reporting obligations for advocacy activities. AMPAG is very concerned about the proposal that additional reporting on advocacy and political activity is under consideration for all charities. The focus of DGR reform should be on purpose not activities. Our understanding of the Canada experience is that the previous government's introduction of additional reporting and auditing on political activities was expensive, created additional red tape and administrative burden, and failed to deliver real public value. We understand this approach has now been abandoned.

By moving to an activities-based regulatory environment, the question then moves to what other activities-based reporting requirements will follow and to what extent will charitable organisations then be required to argue the proportionate contribution that these activities make to advance an organisation's purpose. Government should not determine what minimum or maximum levels of particular activities can or cannot occur in the pursuit of a charity's purpose—that is a matter for the organisation's own governing body to determine.

To require additional reporting necessitates additional ongoing internal reporting and monitoring to meet annual formal reporting requirements, which represents a burden on organisations that are already working with scarce resources. Activities are often not completely one thing or another and it will require senior assessment to oversee the process of categorisation and apportionment—even when the organisation expects year on year to be fully compliant.

While the paper suggests there is some concern around political activities carried out by some environmental organisations—to which AMPAG makes no comment or judgement—the proposal here is suggesting a change in reporting for all organisations with DGR status. This potentially creates additional reporting burdens for thousands of organisations outside the particular area of concern, and increases the administration workload of the ACNC.

Recommendations

- The government should not require all charities to provide additional information on their advocacy activities. The introduction of such a requirement has the potential to generate more red tape for the ACNC, the ATO and the charities, and casts doubt and uncertainty over what activities a DGR entity can lawfully undertake.
- There is no evidence that the current legal approach that requires compliance to 'charitable purpose' is a fundamentally inadequate approach to regulating the sector; therefore, the primary approach to regulating compliance should be based on charitable purpose.
- The ACNC has the authority to request information or to instigate a review, and AMPAG strongly recommends this is only activated where a public complaint of substance has been made to the ACNC, or where standard reporting has identified potential compliance breaches. The expertise of

the ACNC and the ATO should be respected, and they should be allowed to independently determine what types of reviews and audits are necessary, and in what circumstances.

- If information is to be collected, it should be as part of the annual reporting requirements and should be designed as a simple single tick box to indicate if the organisation has or has not been actively engaged in political activities that do not relate directly or indirectly to the advancement of the purpose of that charitable organisation.

Reducing complexity

Authorising agency

Consultation Question 7

7. What are stakeholders' views on the proposal to transfer the administration of the four DGR Registers to the ATO? Are there any specific issues that need consideration?

The discussion paper states: *'It is proposed this would simplify the application process for DGRs, if the administration of the four DGR Registers could be transferred to the ATO'*.

The proposal outlined in the discussion paper is that the ROCO list would no longer be administered by Department of the Arts; instead, applications would be received by the ACNC and administered by the ATO.

Almost all AMPAG members are already on the ROCO registry and are not affected by the current administrative delays that new applicants experience, which the proposed new administrative arrangements seek to address. However, we are aware of peers seeking DGR status who have expressed anguish because the administrative systems move so slowly.

The extraordinary delays are not necessarily because of a specific department's involvement. Treasury's approval is also required and Treasury's priorities can be diametrically opposed to those of specific departments currently managing their specific DGR registries. There is a tension created by Treasury and the ATO granting DGR status—a status that provides a vehicle to generate funds towards a public good by forgoing government revenue—given both Treasury and the ATO have a core focus of collecting government revenue.

The discussion paper suggests the changes proposed would deliver a one-month DGR application process. Such a speedy turnaround would be a welcome development if the process supports making the 'right' decisions. Moving the registries to the ATO in and of itself does not guarantee a better and faster process.

The discussion paper sets out the process as follows:

'Under this proposal, all new applicants would need to apply once to the ACNC for registration status and nominate to be considered for endorsement under one of the general DGR categories, which includes the four DGR Registers. Once registration status is approved, the ACNC would pass the information to the ATO to assess an organisation's eligibility against the requirements of the tax law in respect of that general DGR category. It is expected that this process could be completed within a month of the correct information being supplied in the application. A Treasury Minister would continue to have oversight of administration.'

*'When the four DGR Registers were established, it was considered that each agency should administer their specific register as they would have the expertise to assess applications against the requirements of the Income Tax Assessment Act 1997.³ Under the proposed transfer, the ATO would assess applications against the requirements of the tax law. The **ATO would be able to call on the expertise in the relevant government agency** on a case- by-case basis, if required.'*

The discussion paper proposes an administrative system that is likely to streamline requirements for all charities to gain DGR status by empowering the ACNC to determine charitable status as well as make recommendations to the ATO on DGR eligibility. However, as we have stated, there is potential conflict of interest given the ATO, as an agency that seeks to effectively raise government revenue, is then the authority that grants DGR status, which potentially reduces the government's tax base.

By moving the process away from the specified portfolios' Ministers and their departments, there is the possibility that specialised knowledge and insight is removed from this process and could lead to decisions that are not in the best interests of the public good that the applying organisation is seeking to support. The proposed process does allow the ATO to seek input, but does not grant

³ For example, for environmental organisations, see section 30-290 of the ITAA 1997
http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s30.250.html

government agencies with specialised knowledge special access or status in the application process.

It is stated that it is the ATO that determines if it does or does not choose to be informed by specialised knowledge.

In the case of the Arts, the Minister for the Arts and the relevant agency have a specific role in supporting the public good that the Arts create, and are the most suitable authority for input should speciality knowledge be helpful for the applicant **or** for the ATO.

Recommendations

Streamlining the DGR application process is broadly supported with the following amendments in relation to the involvement of specialised knowledge in the assessment process:

- A separation of powers within the ATO to ensure revenue raising priorities do not cloud ATO assessment of DGR eligibility against the legislation on its own merits.
- Government resources and reporting mechanisms ensure processing timelines meet one-month targets.
- AMPAG recommends the Ministers and their departments currently responsible for administration of the four registries are not simply able to be called upon to provide expert knowledge or information by the ATO, but that they must be consulted in instances where the ATO has delayed or rejected approval.
- The related Minister or their department may also instigate the call for specialist information to be considered in the assessment process at any time.
- The ATO must be obliged to act on ACNC recommendations regarding eligibility for DGR status unless there are substantial errors at law.
- Any rejection of an application for DGR status by ATO must be made public in a timely manner and low-cost appeal process be put in place to enable either the ACNC and or the applying organisation an effective independent process to appeal the ATO's determination.

The discussion paper proposes: *'The public fund requirement for DGRs that are charities could be removed and DGR entities could apply to be endorsed across multiple categories.'*

Consultation Question 8

8. What are stakeholders' views on the proposal to remove the public fund requirements for charities and allow organisations to be endorsed in multiple DGR categories? Are regulatory compliance savings likely to arise for charities who are also DGRs?

Allowing organisations to be endorsed in multiple DGR categories will help address the issue of charitable organisations active in more than one charitable area from failing the eligibility test, and would therefore remove red tape.

- 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—experiencing difficulties in gaining DGR status.

Consultation Question 9

9. What are stakeholders' views on the introduction of a formal rolling review program and the proposals to require DGRs to make annual certifications? Are there other approaches that could be considered?

The discussion paper proposes; *'Regular reviews could be undertaken by the ACNC and/or ATO to ensure an organisation's DGR status was up to date and to provide confidence to donors wishing to claim tax deductions for donations. In addition, DGRs could be required to certify annually that they meet the DGR eligibility requirements, with penalties for false statements.'*

- AMPAG does not support additional red tape and notes that charities already supply reviewed or audited annual returns to the ACNC. Bringing all organisations with DGR status under the ACNC will provide opportunities for broader analysis of sector data. The ACNC can regularly review the data supplied—this is appropriate and does not introduce additional red tape.
- In the first instance, the ACNC and not the ATO is the appropriate body to undertake individual or sub-sector reviews or seek further information where a series of 'red flags' are raised suggesting noncompliance.

End_____

Appendix 1

The 28 Australian Major Performing Arts Companies

Adelaide Symphony Orchestra



Orchestra Victoria



Australian Brandenburg Orchestra



Queensland Ballet



Australian Chamber Orchestra



Queensland Symphony Orchestra



Bangarra Dance Theatre



Queensland Theatre



Bell Shakespeare



State Opera South Australia



Belvoir



State Theatre Company 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



West Australian Ballet



Opera Australia



West Australian Opera



Opera Queensland



West Australian Symphony Orchestra



TAX DEDUCTIBLE GIFT RECIPIENT REFORM OPPORTUNITIES

Summary of AMPAG recommendations

1. AMPAG recommends the Government should not require all non-government organisations with DGR status to be charities at this time. Instead as a first step Government should extend ACNC's remit requiring all NFPs except government organisations to report to the ACNC directly.
2. Requiring all organisations, including government organisations, with DGR status to report to the ACNC would provide better understanding of the giving culture in Australia.
3. To accommodate this change ACNC's remit can be extended to include charities and all other NFP organisations with DGR status and without DGR status.
4. The government should not require all charities to provide additional information on their advocacy activities. The introduction of such a requirement has the potential to generate more red tape for the ACNC, the ATO and the charities, and casts doubt and uncertainty over what activities a DGR entity can lawfully undertake.
5. There is no evidence that the current legal approach that requires compliance to 'charitable purpose' is a fundamentally inadequate approach to regulating the sector; therefore, the primary approach to regulating compliance should be based on charitable purpose.
6. The ACNC has the authority to request information or to instigate a review, and AMPAG strongly recommends this is only activated where a public complaint of substance has been made to the ACNC, or where standard reporting has identified potential compliance breaches. The expertise of the ACNC and the ATO should be respected, and they should be allowed to independently determine what types of reviews and audits are necessary, and in what circumstances.

7. If information is to be collected, it should be as part of the annual reporting requirements and should be designed as a simple single tick box to indicate if the organisation has or has not been actively engaged in political activities that do not relate directly or indirectly to the advancement of the purpose of that charitable organisation.

Streamlining the DGR application process is broadly supported with the following amendments in relation to the involvement of specialised knowledge in the assessment process:

8. A separation of powers within the ATO to ensure revenue raising priorities do not cloud ATO assessment of DGR eligibility against the legislation on its own merits.
9. Government resources and reporting mechanisms ensure processing timelines meet one-month targets.
10. The Ministers and their departments currently responsible for administration of the four registries are not simply able to be called upon to provide expert knowledge or information by the ATO, rather they must be consulted in instances where the ATO has delayed or rejected approval.
11. The related Minister or their department may also instigate a request for specialist information to be considered in the assessment process at any time
12. The ATO must be obliged to act on ACNC recommendations regarding eligibility for DGR status unless there are substantial errors at law.
13. Any rejection of an application for DGR status by ATO must be made public in a timely manner and low-cost appeal process be put in place to enable either the ACNC and or the applying organisation an effective independent process to appeal the ATO's determination.

In addition

14. 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—experiencing difficulties in gaining DGR status.