



AUSTRALIAN MAJOR PERFORMING ARTS GROUP

## Consultation Paper: Review of not-for-profit governance arrangements

Submission to:

Philanthropy & Exemptions Unit  
Personal and Retirement & Income Division  
The Treasury

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## Introduction

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 subsidized 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 Australian Chamber Orchestra and Queensland Theatre Company and smaller ones such as the West Australian Ballet and State Theatre Company of South Australia.

The 28 member companies have a combined turnover (in 2010) of over \$400 million (ranging from \$3.4 million to \$66 million) with net assets of \$109 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) tends to be from 8–20 per cent, except for the symphony orchestras which have a higher government component.

## The role and regulation of NFPs

Not-for-profit 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.

AMPAG is aware that this latest consultation is one of a series of conversations with the Australian public about the not-for-profit sector that will continue into the new year. We have responded to the previous reviews and consultation papers, and aired many of our concerns in those, especially in the response to consultation paper, *Scoping study for a national not-for-profit regulator*.

As we emphasised in that response, our principal concern is any increase in compliance costs to performing arts organisations—whether financial, or in terms of staff, time and other resources.

We would support the Australian Charities and Not-for-profits Commission (ACNC) regulating the governance of NFPs, as long as it:

- places minimal costs on NFPs to allow better direction of their resources to philanthropic objectives
- removes current regulatory duplication—especially if that includes duplication across jurisdictions
- streamlines requirements, including reporting, to provide consistency and minimise compliance costs
- provides NFP entities with certainty about their rights and responsibilities
- is proportional to the size and complexity of NFP entities, and to the public monies and risks associated with NFP entities.

AMPAG provides its response to the specific questions raised in the consultation paper in Attachment A.<sup>1</sup>

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<sup>1</sup> Consultation paper: Review of Not-for-profit Governance Arrangements, <http://treasury.gov.au/contentitem.asp?NavId=037&ContentID=2252>

## **The structure of major performing arts organisations**

The majority of our member major performing arts organisations are companies limited by guarantee, one is a not-for-profit company limited by shares and three are statutory authorities. Their structure, while relevant to how they report, is less of an issue than their DGR status, for which their constitutions must have clauses disallowing distribution of surpluses or profit to shareholders and a specific winding up clause that transfers any net assets to another NFP suitably constituted (and not to the members or shareholders).

## **The state of governance across major performing arts organisations**

The Australia Council has been raising awareness among companies about governance for many years, so that now, major performing arts companies in the arts sector are at the forefront among not-for-profit organisations in implementing robust governance arrangements. Such arrangements have been in place for 10 years—ever since the Major Performing Arts Inquiry and the subsequent Nugent Report. All the major performing arts organisations who receive funding through the Australia Council must comply with its seven principles of governance, which are adapted from the ASX's *Corporate Governance Principles and Recommendations with 2010 Amendments*. These are:

1. Lay solid foundations for management and oversight
2. Structure the board to add value
3. Promote ethical and responsible decision making
4. Promote diversity
5. Safeguard integrity in financial reporting
6. Recognise the legitimate interests of stakeholders
7. Recognise and manage risk
8. Remunerate fairly and responsibly

These provide a comprehensive framework for arts organisations to respond to in devising their constitutions, rules, procedures and reporting.

## **How the major performing arts organisations report**

We consider the current levels of governance and financial reporting required of performing arts companies to be excessive.

As companies limited by guarantee, they are required to comply with corporations law and Australian Tax Office requirements and produce audited annual financial statements.

They are also required to report to the federal government, through the Australia Council—when they submit funding acquittals they acquit against the seven governance principles. They must also supply a business plan. Generally, they are party to tripartite agreements with both federal and state governments. Two companies—Opera Australia and the Australian Ballet—have four-way agreements which include two state government departments, requiring separate, and often different, reporting.

They are required to report against charities legislation in the state government where they are based. These reporting regimes are inconsistent across states. For example, in New South Wales, the definition of charitable fundraising under the Act includes ticket sales to performances. Several years ago, a harmonisation project failed to synchronise reporting across jurisdictions when several state governments added extra areas and layers of reporting for arts organisations.

Some national companies, if they fundraise in more than one state, must report on these activities in each jurisdiction, further complicating their reporting obligations. For example, Musica Viva reports not only to its arts funding bodies, but also to several state education departments.

We would support the ACNC developing a single set of core principles for NFPs to report against. As we explained in our response to the consultation paper, *Scoping study for a national not-for-profit regulator* our member companies, while larger than some other arts organisations, are 'mean and lean'. And as reporting to government authorities and other bodies has increased over the years, the burden on companies has escalated—yet, government subsidy as a proportion of total income has reduced. Not-for-profit performing arts companies provide a multitude of information to funders—financial reports and fundraising reports, risk assessments, OHS plans, artistic vibrancy plans, marketing plans, business plans, strategic plans, directors reports etc. As well, quarterly online data is requested on various aspects of a company's business, through Standard Business Reporting (SBR) implementation.

For example, one NSW-based company advised that the *regular* reporting they are required to do comprises:

- Australia Council and Arts NSW—business plans, acquittals, online quarterly data input, other periodic reporting, changes in Board and senior staff
- Register of Cultural Organisations (ROCO)—half yearly return on all donations received (either from individuals or corporate donors)
- Australian Bureau of Statistics—quarterly return
- Australian Taxation Office—quarterly BAS, annual FBT return, withholding tax declarations
- Charities NSW—specific annual report information
- ASIC—AGM, changes in Board Directors etc.
- Workers Compensation—salary information on staff (which is already provided to ATO).

For smaller organisations, the compliance costs are unsustainably onerous. For example, a small performing arts company in 2010 spent \$12,000 of its \$60,000 grant on accounting and audit compliance.

Some smaller performing arts companies employ 'arts consultants' to prepare applications, acquittals and business plans to comply with government requirements because they find it difficult to understand the language used and sometimes fail to obtain funding because of how applications are structured, rather than the quality of the work produced. Reporting to government is not the core business of performing arts companies—it is simply a necessary requirement for them to continue to obtain funding and thus to provide their primary purpose: delivery of live performances, educational programs and their communications objectives.

## **The scope of streamlined governance**

AMPAG would welcome the introduction of streamlined governance arrangements, to avoid inconsistency and duplication across different reporting regimes. As suggested in the *Final Report of the Scoping Study for a National Not-for-profit Regulator*, we would support governance rules taking into account the size of the entity, the risks it presents through its activities, its turnover and the level of government funding it receives—in much the same way that the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* has different levels of governance obligations for different sized organisations.

*For larger organisations:* We would suggest that the governance reporting should depend on its level of public funding and should incorporate principles-based governance reporting already provided by the major performing arts organisations to the Australia Council.

*For smaller performing arts organisations:* We would suggest that the principles-based governance reporting already provided to the Australia Council be considered adequate for bodies registered by the ACNC. If necessary, simplified model rules for smaller performing arts organisations could be developed, so that they can reduce the unsustainable (up to 30 per cent) expenditure on reporting and, instead, target the funding to their core business.

While AMPAG acknowledges the need for not-for-profit organisations to be properly transparent and accountable, we believe there is undue emphasis on reporting. There is a need to engage a 'light touch' in delivering funding to the arts sector where businesses have been successfully run for many years. The ACNC could apply a 'risk management' approach to its governance reporting requirements from funded organisations.

## **Implementation timeframe**

We believe the timeframe of the new reporting regime, starting for year ending 30 June 2013, is not achievable. Any changes in reporting procedures will have to begin from 1 July 2012, leaving little time for organisations to prepare efficiently. Also, because the legislation defining a charity won't be in place until 1 July 2013, some organisations that are deemed a charity under the new law may be required to undertake different reporting for the previous year. To ensure a transition to new requirements is as seamless as possible, we think it would be less complex and risky if the new reporting regime were to start for year ending 30 June 2014.

## **Our recommendations**

- That reporting across regimes and jurisdictions be harmonised, to minimise duplication and the financial and resource burden on arts organisations.
- That in developing new rules and governance reporting, the ACNC take a risk management approach, taking into account the size of the entity, the risks it presents through its activities, its turnover and the level of government funding it receives.
- That for larger organisations, the governance reporting should depend on its level of public funding and should incorporate principles-based governance reporting already provided by the major performing arts organisations to the Australia Council.
- That for smaller organisations, the principles-based governance reporting already provided to the Australia Council should be considered adequate for bodies registered by the ACNC.
- That if necessary, simplified model rules for smaller performing arts organisations be developed, to reduce their unsustainable (up to 30 per cent) expenditure on reporting.
- That the new reporting regime should be postponed until the legislation governing the definition of a charity is properly in place.
- That new governance rules and reporting are written in plain English.

## **AMPAG's response to questions raised in the consultation paper, *Review of not-for-profit governance arrangements***

### **1. Should it be clear in the legislation who responsible individuals<sup>2</sup> must consider when exercising their duties, and to whom they owe duties to?**

Because of the differing objectives, structures, funding sources and audiences of performing arts companies, AMPAG believes that the legislation should not prescribe who should be considered when responsible individuals exercise their duties. If the ACNC feels it ought to be set out in the legislation, it should do so in high level, strategic terms—however, this is already achieved through the Corporations, Workplace Health and Safety and other legislation.

### **2. Who do the responsible individuals of NFPs need to consider when exercising their duties? Donors? Beneficiaries? The public? The entity, or mission and purpose of the entity?**

A Canadian study in 2003 found that arts managers from the performing arts ranked their most important group of stakeholders to whom they were accountable as funding bodies and boards; second was artists, promoters, donors; and third was volunteers, community, critics (Professor Johanne Turbide, Professor in Accounting, HEC Montreal).<sup>3</sup> The Australian landscape is likely to be similar. As companies limited by guarantee, we believe responsible individuals should be primarily responsible to their boards which have been set up to pursue the objectives of the organisation—and invariably in their mission statements, companies pursue arts excellence for the benefit of the Australian public, that is, their audiences. They should also be responsible to their donors, funding bodies, volunteers etc.

### **3. What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?**

AMPAG supports the duties, both high level and general law duties, set out in the consultation paper. Our main concern is that they are harmonised across all reporting regimes and jurisdictions.

### **4. What should be the minimum standard of care required to comply with any duties? Should the standard of care be higher for paid employees than volunteers? For professionals than lay persons?**

When handling public monies, a high level of care and accountability should be exercised by employees and volunteers, both professional and lay. However, minimum standard of care for most duties should generally be lower for volunteers in NFPs than paid employees. Rather than making delineation between paid employees and volunteers it would be more useful to distinguish standards of care according to the size of the Public Fund. Small Public Funds that have an annual turnover of, say \$50,000 should be treated quite differently from Public Funds that turn over, say \$1,000,000.

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<sup>2</sup> 'Responsible individuals' are defined in the discussion paper as a director or officer of the entity, a trustee, an individual who makes decision that affect its activities or finances and a receiver/liquidator—see p.15 of the discussion paper.

<sup>3</sup> Johanne Turbide, Claude Laurin, 'Performance Measurement in the Arts Sector: The Case of the Performing Arts', *International Journal of Arts Management*, 11(2009)2(Winter.56-70), 2008

**5. Should responsible individuals be required to hold particular qualifications or have particular experience or skills (tiered depending on size of the NFP entity or amount of funding it administers)?**

AMPAG supports professional qualifications or particular experience, depending on the size of the arts organisation and its level of funding. Smaller organisations should not be held to the same levels of qualification and experience. Under the Corporations Act, a small company limited by guarantee has annual revenue less than \$250,000 which do not have DGR status; a medium company limited by guarantee has annual revenue less than \$250,000 that have DGR status, or companies with annual revenue between \$250,000 and \$1 million; a large company limited by guarantee has annual revenue of \$1 million or more

**6. Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?**

Again, it depends on the size of the organisation—the application of standards of governance should be higher for larger organisations than smaller. However, minimum standards should apply to responsible individuals of all organisations.

**7. Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?**

As set out in the consultation paper, the standard of care and diligence expected of individuals would depend on the size of the entity, the amount of public monies it receives, the person's qualifications, the position they hold and, importantly, the risk of the entity's activities.

**8. Are there any other responsible individuals' obligations or considerations or other issues (for example, should there be requirements on volunteers?) that need to be covered which are specific to NFPs?**

The various state legislations governing obligations to and of volunteers needs to be made uniform (but this may be beyond the scope of this enquiry).

**9. Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?**

Only, as previously stated, where the level of public funding is high. Otherwise, in the arts, the risks in delivering the objects of the company are well known and are subject to regular review as part of the funding application and assessment process.

Governance, of course, is not just about procedural care but also care of individuals, employees and contractors. In the performing arts sector, companies frequently employ child actors and their care is subject to state regulation, and is closely monitored and reported against.

**10. Is there a preference for the core duties to be based on the Corporations Act, CATSI Act, the office holder requirements applying to incorporated associations, the requirements applying to trustees of charitable trusts, or another model?**

AMPAG believes the most important consideration is that they are consistent across regimes and jurisdictions.

**11. What information should registered entities be required to disclose to ensure good governance procedures are in place?**

We believe organisations should comply generally with the seven core principles of governance published by the Australia Council.

**12. Should the remuneration (if any) of responsible individuals be required to be disclosed?**

Depending on the level of public funding and the size of the organisation, NFP organisations should declare remuneration in a similar way to government organisations.

**13. Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?**

AMPAG agrees with the suggested criteria and notes that this is standard practice for its member organisations and has been for many years.

**14. Are specific conflict of interest requirements required for entities where the beneficiaries and responsible individuals may be related (for example, a NFP entity set up by a native title group)?**

Not relevant.

**15. Should ACNC governance obligations stipulate the types of conflict of interest that responsible individuals in NFPs should disclose and manage? Or should it be based on the Corporations Act understanding of 'material personal interest'?**

AMPAG believes the governance obligations should be consistent with the Corporations Act, and that the ACNC could use its education role to provide examples of types of conflict that should be disclosed and managed.

**16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?**

All funded companies in the AMPAG membership are required to submit risk management plans and report against them each year to receive funding. The detail of the plan should be commensurate with the level of funding.

**17. Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?**

AMPAG thinks this would be difficult to mandate but that investment guidelines should be issued for NFPs to follow. If a particular investment strategy were to be mandated it could run counter to the government requirement that major performing arts organisations seek income from other sources.

**18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?**

This depends on what the company does—and it also depends on the size of the company. In the performing arts where risk is often a feature of its activities, risk is closely scrutinised. In recent years the costs of insurance have escalated dramatically and we would be concerned that much of the funding for small companies would be consumed by compliance and insurance costs. If the ACNC has to mandate minimum insurance requirements, AMPAG believes it should be done as a compact with insurance companies that would then deliver discounts to organisations as an inducement to take up insurance policies.

**19. Should responsible individuals generally be required to have indemnity insurance?**

Almost all performing arts boards have indemnity insurance. In the arts, it is difficult to see how more general indemnity insurance would provide a benefit that was in line with the costs. If the NFP attracts a particular risk, that is a matter for the board to consider and to take appropriate steps—one of which may be insurance.



**20. What internal review procedures should be mandated?**

It may be appropriate to mandate that the board annually consider: (1) the risks that the NFP's activities attract and the steps it takes to meet those risks; (2) that all of the activities of the NFP accord with the Objects and Purposes provisions of its constitution; (3) that the board maintains an up-to-date register of conflict of interest; (4) that the governance requirements of the Public Fund have been complied with; that the corporate reporting obligations have been complied with; (5) the performance of the chair, individual members of the board and the CEO; (6) the strategic plan of the organisation and, in particular, the financial ability of the organisation to achieve that plan.

**21. What are the core minimum requirements that registered entities should be required to include in their governing rules?**

Again, this should comply with the Corporations Act default rules and the current rules of the Register of Cultural Organisations.

**22. Should the ACNC have a role in mandating requirements of the governing rules, to protect the mission of the entity and the interests of the public?**

This could be useful as ASIC is not really suitable for the majority of NFPs. That said, it is most important that the ACNC have a commitment to educating NFPs and assisting them when required.

**23. Who should be able to enforce the rules?**

As above. However, as long as enforcement is consistently applied and not duplicated, AMPAG doesn't have a strong view on this.

**24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind-up or deregistration?**

See above.

**25. Should model rules be used?**

Yes, as long as amendments and alternatives can be used, as in the Corporations Act.

**26. What governance rules should be mandated relating to an entity's relationship with its members?**

The current procedures set out in clauses 162 and 163 are adequate.

**27. Do any of the requirements for relationships with members need to apply to non-membership based entities?**

Many arts organisations have moved from membership models to non-membership because of the cost of servicing member requirements. This does not appear to have resulted in any lowering of governance standards because the greatest protection of governance is the rigour of the public funding bodies rather than the power of the members under legislation.

**28. Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?**

Yes, but the requirements should reflect the size of the organisation.

**29. Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?**

Smaller organisations that don't have sufficient administrative resources would benefit from extra training, education, tools, templates and support on governance issues.

**30. How can we ensure that these standardised principles-based governance requirements being administered by the one-stop shop regulator will lead to a reduction in red tape for NFPs?**

By ensuring there is harmonisation of governance requirements across jurisdictions, so that reporting is not duplicated.

**31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?**

The seven principles of governance published by the Australia Council.

**32. Are there any particular governance requirements which would be useful for Indigenous NFP entities?**

Indigenous not-for-profit organisations, like all NFPs, must have certain accountabilities and competencies to successfully do their job in a sustainable and accountable way. They may also need to be accountable back to their sector or their communities in specific ways, which may be the same or different to non-Indigenous organisations. However, AMPAG can see no grounds for the Australian Government to differentiate governance requirements on the basis of race, or on any other basis such as gender, age, disability and so on.

**33. Do you have any recommendations for NFP governance reform that have not been covered through previous questions that you would like the Government to consider?**

Not at this point.

## Appendix A: List of AMPAG Member Companies & their location

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