



AUSTRALIAN MAJOR PERFORMING ARTS GROUP

Exposure draft: Tax Laws Amendment (2012 Measures No. 4) Bill
2012: tax exempt body 'in Australia' requirements

Submission to:

Philanthropy and Exemptions Unit
Indirect Tax Division
The Treasury

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About the Australian Major Performing Arts Group

AMPAG is the umbrella association of 28 not-for-profit major performing arts companies (see Appendix A) from around Australia.

The companies present theatre, dance, ballet, circus, opera, orchestral and chamber music performances around Australia as well as educational and access programs. In 2010 there were nearly 2.3 million attendances at mainstage capital city performances by the AMPAG members. In addition, the companies presented 340 seasons in 128 regional centres around the country and more than 600,000 young Australians attended 4,600 education performances. As well as their extensive national tours the member companies in AMPAG tour internationally. Their audiences are also rapidly building through online and digital broadcasting.

The AMPAG companies provide employment to over 8,000 people annually, representing 71 per cent of total employment in the federally subsidised Australian performing arts industry.¹

Their combined turnover exceeds \$400 million with 37 per cent coming from state and federal governments and the remainder from box office (43 per cent), private sector support such as sponsorship and philanthropy (13 per cent), and 'other' (7 per cent) which includes fees and some related commercial activity.

Between 2001 and 2010 the percentage of philanthropic support grew as a percentage of company turnover while government subsidy reduced—private sector support increased from 11 per cent to 13.2 per cent of turnover; core funding reduced from 35 per cent to 34 per cent of turnover.

Without that private sector support and the related commercial activity, and in the absence of an increase in government core subsidy, most of these companies would be unable to continue to operate

'In Australia' special conditions

AMPAG supports the overall purpose of the 'in Australia' special conditions for income tax exempt entities, as expressed in the Explanatory Memorandum:

- 1.7 The purpose of the introduction of 'in Australia' special conditions for income tax exempt entities, which took effect from 1 July 1997, was to address tax avoidance arrangements which could use charitable trusts and certain other not-for-profit organisations to shift untaxed funds overseas.
- 1.8 Subsequently, the 'in Australia' special conditions have also operated to minimise the risk of income tax exempt entities being used for terrorist financing and money laundering, and to ensure the proper operation of not-for-profit entities and their use of public donations and funds.

We also endorse the policy intent that entities' funds are used to 'benefit the Australian community'.

¹ Australia Council Arts Organisations 2010 Annual Report
www.australiacouncil.gov.au/about_us/our_structure/arts_organisations

However, the proposed revised special conditions for tax concession entities (including the 'in Australia' conditions), give us great concern in the scope of their application to both gift deductibility and income tax exemption. Essentially, we are concerned that the following terms used in the Exposure Draft appear to extend to activities undertaken for the encouragement of the performing arts:

- for gift deductibility, that the fund, authority or institution operates and pursues its purposes '**solely** in Australia'
- for income tax exemption, that the entity operates and pursues its purposes '**principally** in Australia'.

In addition to the scope of these limitations to the activities of AMPAG members generally, the draft legislation appears to apply in relation to either:

- an income year or
- any part of an income year.

Consequently, on the current drafting, any activity that is not 'solely' or 'principally' in Australia during an income year or any part of an income year will deny both gift deductibility status and income tax exemption for the entirety of the entity's activities for that income year.

On this basis, the approach of the draft legislation does not:

- reflect the stated policy of gift deductibility and exemption, or
- address tax avoidance and terrorist financing.

'Solely in Australia'—gift deductibility

The 'solely in Australia' condition for gift deductibility of a fund, authority or institution is contained in proposed section 30-18 of the *Income Tax Assessment Act 1997*:

30-18 Fund, authority or institution must operate in Australia etc.

- (1) A fund, authority or institution satisfies the conditions in this section if:
 - (a) it is established in Australia; and
 - (b) it operates **solely in Australia**; and
 - (c) it pursues its purposes **solely in Australia**.
- (2) Despite subsection (1), a fund, authority or institution that operates or pursues purposes outside Australia does not fail the conditions in paragraphs (1)(b) and (c) if:
 - (a) its activities outside Australia **are merely incidental to its activities** in Australia; or
 - (b) its activities outside Australia **are minor in extent and importance** when considered with reference to its activities in Australia.

The terms 'solely', 'merely' and 'minor' are qualitative terms with multiple levels of interpretation and meaning.

Many of AMPAG's member companies, especially those considered national organisations, regularly perform overseas. In 2011 companies like the Sydney Dance Company, Bangarra, Belvoir, the Sydney Theatre Company, Sydney Symphony, the Australian Chamber Orchestra and Circus Oz—companies across the spectrum of the performing arts—performed in countries all around the world, from Korea to Germany, from Japan to Spain, from the UK to the US.

These visits are crucial for these companies for many reasons, including:

Professionalism—performers, musicians and artists experience the best the world has to offer, and must also compete at a comparable level.

Reputation—such visits enhance Australia's reputation as a country where the arts are encouraged and flourish, a country of sensibility, excellence and artistic significance.

Education—many performing arts companies conduct master classes and other training activities with universities, schools and other institutions overseas.

Cultural exchange—through the world-wide exchange of musicians, performers, conductors, composers, artists, all countries enhance their understanding of each other.

Diplomacy—the performing arts are a vital component of Australia's cultural diplomacy, offering embassies and high commissions around the world the opportunity to showcase Australian talent both on and off the stage.

Cultural exchange as a method of developing country to country diplomacy is not new. Indeed China has targeted Australia in such a way over the past year, hosting an Australian Year of Chinese Culture 2011–12 (http://www.yearofchineseculture.com/content_common/pg-yearopen-blog-en.seo).

The necessity for Australia to position itself internationally through our arts companies performing overseas has been articulated by the Federal Government itself in Foreign Affairs and Arts policies. Australian and host country ministers and ambassadors often use the performance event on foreign soil as a platform from which to deliver key Australian messages.

The National Cultural Policy Discussion paper sets out Goal 3:

To support excellence and world-class endeavour, and strengthen the role that arts play in telling Australian stories both here and overseas.

It goes on to say:

More than ever before, Australia is connected with the rest of the world. On the one hand, this means Australian artists, cultural organisations and cultural products need to compete on the world stage. On the other hand, it means that Australians have expanding access to a broader range of arts and cultural content from around the world which competes in Australia with our own culture.

This is an explicit acknowledgment that many subsidised arts organisations, including AMPAG members, perform overseas—often to great acclaim—and that this is part of their overall cultural remit. Indeed, the requirement to tour overseas has been a part of a number of major performing arts companies' funding agreements with the Australia Council and is set out in their key performance indicators.

Last year, in his Opening Night Reception speech in Washington for *Uncle Vanya*, Australia's ambassador to the US, the Hon. Kim Beazley said:

Sydney Theatre Company achieved more for Australian public diplomacy in three hours in the theatre tonight than I have in two years.

Of course, while acknowledging the typically Australian self-deprecation, Mr Beazley's sentiment is clear—performing arts are an effective and well-recognised diplomatic tool.

The tour last year of the Sydney Symphony to Korea was an important part of the 2011 Year of Friendship between Australian and Korea, marking 50 years of diplomatic relations between the two countries.

Through its touring, the Sydney Symphony demonstrated the role music can play in enhancing diplomatic relations between Australia and the countries in which the orchestra tours. As Bruce Miller, Australian Ambassador to Japan, said:

It helps me advance our bilateral agenda with Japan to have the orchestra coming through.

John Conde, chair of Sydney Symphony and highly respected Australian businessman with an extensive knowledge of many sectors, including the arts, said:

International touring is not only a means of displaying the calibre of Australia's arts organisations to the rest of the world, but it also creates opportunities to develop closer commercial and cultural relationships—both diplomatic and corporate—for Australians in the tour region, in this case, Japan and Korea.

And in relation to a tour of the Australian Youth Orchestra, Minister Simon Crean said:

International touring, of course, is one of the best avenues we have to showcase the results of Australia's elite music training.

The Department of Foreign Affairs and Trade regularly uses cultural performances to strengthen country-to-country ties and promote Australian products. A response from DFAT to a 2011 Musica Viva tour to India:

Austrade used the performance at Chowmahalla Palace to promote Australian wine and beer (Pearls Wines and Wolf Blass Wines). This followed a separate wine promotion the previous evening at the Taj Deccan Hotel. The two events together gained good publicity and significantly boosted the profile of Australia in Hyderabad. The launch of the India Vision Institute the following day capped off this week of promoting Australia in Hyderabad.

And in a 2011 Musica Viva tour of 'Band of Brothers' to Bangladesh, *The Sun* newspaper reported:

The visiting Australian musical troupe, Band of Brothers, enchanted the audience in capital Dhaka at a concert at the National Theatre ... To strengthen the cultural ties between Bangladesh and Australia, Australian High Commission in Dhaka arranged the concert as part of the Australian government's Fine Music Touring Programme contract with Musica Viva, Australia's oldest independent professional performing arts organisation.

The response our performing arts generate in reviews published in respected overseas publications not only solidifies the companies' reputations but also establishes them in the context of world standard performing arts. This reflects well on Australia's overseas standing and builds Australian confidence in the value and calibre of its own companies. The Australian Chamber Orchestra, for example, has performed to great acclaim all over the world:

Listening to the ACO is like taking a swig of a vitamin drink. Suddenly: pow! The music feels stronger, muscled, hot from the gym... If that's what Australia does for you, I'm emigrating.— *The Times*, 2008

... the tonal refinement and high-wire intensity demonstrated by Tognetti and his 16 colleagues also revealed the ACO as one of today's finest chamber orchestras. — *Chicago Classical Review*, 17 April, 2012

The energy and vibe of a rock band with the ability of a crack classical chamber group. — *Washington Post*, 2009

There is no doubt that such tours benefit the Australian public, through having on their doorstep performing arts companies of high calibre that can undertake the crucial function of soft diplomacy.

'Incidental activities'

A fundamental contradiction lies in ascribing the term 'incidental activities' to the overseas activities of the major performing arts companies. Certainly, if one were to apply a purely numerical criterion to the definition, one could say these activities were 'incidental'. For example, overseas touring might absorb 5 per cent of a company's budget; or it might account for 2 per cent of a company's audience.

But that would be to miss the importance and significance of overseas activities in the development and artistic experience of these companies and their artists. Such activities not only include touring which, in itself, brings a wealth of invaluable experience to the company, but also overseas study, the buying of instruments, educational projects, cultural and artistic exchange, and professional development. For example, it is quite literally impossible for a young Australian opera singer to acquire in this country the experience and expertise needed to be able to sing at the requisite level for Opera Australia. These young singers have no choice but to work with smaller opera companies overseas before even thinking about returning to perform with our premier opera company.

But even if one were to take a limited numerical perspective of 'incidental', such touring does not seem to fall within the criteria of 'incidental activities' as defined in Example 1.18 in the Explanatory Memorandum:

... However, deductible gift recipient funds will not be able to be used to cover the flights of the orchestra members, and other tour costs incurred while the orchestra is touring overseas, as these costs are not considered incidental to the orchestra's activities in Australia.

From our perspective, this is tantamount to the government on the one hand encouraging (and at times, demanding) performing arts companies tour overseas, but on the other hand, penalising them if they do so.

Organisations need to be able to isolate certain funds to cover foreign activities, whether those funds are derived from ticket sales, government subsidy (for which funding agreements require them to be applied across the board) or private sector donations.

For example, in 2007 the Friends of the Australian Ballet donated \$200,000 to support the company's tour of Europe performing Graeme Murphy's *Swan Lake*. If those individuals had been unable to receive a tax deduction because the funds were being used overseas, they may not have donated so generously, if at all.

The Sydney Dance Company runs its International Touring Program for donors where funds are specifically allocated to support young artists overseas (see attachment). Similarly, the Australian Brandenburg Orchestra runs an international study program for young musicians, the current one being the International Baroque Study Program (see attachment). Clearly, donors donate specifically to these international programs on the understanding that their donations will be tax deductible.

It is also unclear from the Exposure Draft and the Explanatory Memorandum whether a subset of activities that might be declared 'not incidental' would then threaten the DGR status of the entire fund, or just the proportion used for those activities.

Therefore, for the purposes of responding to the Exposure Draft as currently phrased, we would contend that AMPAG members' overseas activities are incidental and complementary to their Australian mainstage performances and work—or better still, 'allowable' under the terms of the Income Tax Assessment Act and their own funding agreements.

The government's expressed intent is that through its not-for-profit reforms it will streamline and simplify compliance reporting for charities, but the use of the term 'incidental' would substantially complicate reporting and ignores the special nature of international activities by performing arts companies.

'Principally in Australia'—Income tax exemption

Proposed section 50–50(2) will deny income tax exemption for all of the activities of an entity that fails to:

- (a) operate principally in Australia; and
- (b) pursue its purposes principally in Australia

It is apparent that this condition applies to the activities of an entity during the whole of and at all times during an income year.

As outlined above, AMPAG members may, at various times undertake significant performances overseas—at the encouragement and requirements of government.

The wording of the proposed amendments would appear to result in the loss of income tax exemption for the income year or part of the income year in which these tours are undertaken.

The examples in the Explanatory Memorandum confuse rather than clarify the circumstances in which organisations that are charitable institutions (established for the advancement of the arts) are unable, under the proposed changes to the law, to tour overseas. Example 1.15, which deals with ‘minor in extent and importance’ is qualified by the receipt of an exhibition from overseas and Example 1.18 expresses the view that tour costs are not ‘incidental’ to the activities ‘in Australia’.

The examples set out in relation to the ‘solely’ requirements of gift deductibility show that the expenditure on equipment, performance and bringing artists and performers to Australia are significant aspects of the encouragement of the arts in Australia and should not, in our view, put income tax exemption at risk in an effort to curb tax avoidance and terrorist financing.

The uncertainty, compliance costs and complexity of the proposed changes are too high a price for the performing arts sector to pay for the government to address the mischief at which the proposal is directed—mischief which is utterly unrelated to AMPAG members’ legitimate overseas activities.

AMPAG recommends that the proposed legislation be amended to remove any doubt that organisations that are charitable institutions on account of their advancement of the arts are not required to satisfy the ‘principally in Australia’ test.

An alternative approach may be to allow exemption from income tax for entities that are charitable institutions listed on the Register of Cultural Organisations (ROCO) or are entities to which deductible gifts can be made. This would exempt these organisations from the ‘principally in Australia’ test.

Unrelated commercial activities

AMPAG also has concerns about how ‘unrelated commercial activities’ are defined in the Explanatory Memorandum—and how the ‘in Australia’ special conditions are applied to any funds generated by such activities. Some of our members operate commercial activities for the express purpose of furthering the charity’s aim, for example the Sydney Theatre Company now runs a bar, and any surpluses will be returned directly for the benefit of the company. The Australian Ballet runs a separate entity that owns its building and car park, the profits from which support the Ballet.

We believe that these activities should not be described as unrelated, and if funds generated by such commercial activities are used for overseas touring, buying an instrument overseas, overseas educational purposes, professional development, digital recording or whatever legitimate activity a company undertakes in a foreign country, then they should not be subject to the ‘in Australia’ conditions.

Environmental exemption

The current Exposure Draft and its accompanying Explanatory Memorandum have not been written with the arts in mind as one of the critical segments of the not-for-profit sector. Rather the arts appear to have been unsatisfactorily tacked on, with contradictory and inconsistent examples—such as in Examples 1.15 and 1.18 in the Exposure Draft where flights for artworks would be allowed, whereas flights for performers would not. This approach can only lead to increased complexity and potential diminishment of the effectiveness of other related government policies, such as:

- the National Cultural Policy
- DFAT's cultural diplomacy which is currently undergoing further refinement to develop programs that will build people-to-people cultural exchange
- the policy that will emerge from the Mitchell Review on private sector giving
- the convergence review
- the policy that will emerge from the Australia in the Asian Century white paper.

AMPAG believes its members—and, indeed, the Australian public—would be best served by performing arts being treated in a similar fashion to environmental organisations and foreign aid services. Many performing arts companies, including AMPAG members, are on the Register of Cultural Organisations, which confers tax deductibility status on them. Environmental organisations listed on an equivalent register known as the Register of Environmental Organisations may undertake overseas activities, exempt from the 'in Australia' special conditions. AMPAG recommends a similar exemption be made available to companies on ROCO

We note that the Secretary to the Environment Department has the discretion to grant exemption to the 'in Australia' conditions, based on requirements likely to be:

- the entity must demonstrate a genuine need to conduct activities overseas in order to further its purpose
- the entity must demonstrate that those activities undertaken outside Australia are effective in achieving its purpose
- if the entity has an in-country partner, the entity must demonstrate that it effectively interacts and coordinates activities with its in-country partner
- the entity must comply with all Australian and foreign laws, Australia's international treaty obligations, and uphold the high reputation of Australia and its not-for-profit sector
- the entity must show it has in place current and appropriate governance arrangements for the proper monitoring of any overseas activities undertaken by both it and any in-country partners to ensure that any money and property is being used in an proper and effective manner.

The Register of Cultural Organisations provides an existing and efficient structure for such discretion to be exercised.

All our member companies can demonstrate compliance with these criteria. And equally, they can demonstrate a need 'to operate more broadly ... to affect change that will benefit the Australian public'. The change required is to maintain our arts at a world class standard, to further cultural exchange and diplomacy, to enhance worldwide understanding, to promote Australia and Australian artistic endeavour around the globe.

Recommendations

- Organisations on the Register of Cultural Organisations be subject to an exemption to the 'in Australia' special conditions, in a similar way to entities on the Register of Environmental Organisations.
- Overseas activities that further the purpose of the organisation be defined as 'allowable' rather than 'incidental', thereby ensuring that companies operate 'solely in Australia' and for the broad benefit of the Australian public.
- Organisations that are charitable institutions on account of their purpose of advancement of the arts are not required to satisfy the 'principally in Australia' test for income tax exemption.
- Commercial activities operated by performing arts companies, or other related entities, and whose profits are directed back to the charity for use in furthering their charitable purpose, not be defined as 'unrelated commercial activities'— and therefore not be subject to the 'in Australia' special conditions.

AMAPG would welcome the opportunity to discuss the particular characteristics of the major performing arts companies and meet with a small number of AMPAG Senior Finance Directors and legislators to consider how best to avoid unintended consequences that may work against government policy in other areas.

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

SYDNEY DANCE COMPANY

Thank you for supporting our International Touring Program

- \$ 20,000 • Local tour travel, accommodation and expenses for Amy, Rafael or Anne
- \$ 10,000 • Local tour travel and accommodation for one dancer for the tour
- \$ 5,000 • Accommodation for one dancer for the tour
- \$ 2,000 • Per diems for one dancer for the tour
- \$ 1,000 • Local physio for the company for one week of the tour
- \$ 500 • Travel Visa processing for one dancer

Support Level: \$20,000 \$10,000 \$5,000 \$2,000 \$1,000 \$500 Other \$ _____

Name _____ Phone No. _____

Cheque attached **or** Please charge to my credit card:

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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Expiry: __ / __

Signature: _____

A tax-deductible receipt will be sent to you in the coming week

Yes I would like acknowledgement in Sydney Dance Company material



SUPPORT OUR MUSICIANS' INTERNATIONAL STUDY

Melissa Farrow is the Australian Brandenburg Orchestra's principal flautist, a position she has held for the last seven years, having been in the orchestra since 1999. Meeting Melissa is to enter the world of baroque music in a whole new way. Her love of the music and the many specialist instruments she plays shines through whenever she speaks of the intricacies of the instruments and the challenges of the repertoire. This is someone who clearly loves her work!

Melissa is one of four elite level baroque flute specialists in Australia. Choosing to focus on baroque music and period instruments is not an easy artistic road. It is often a choice that involves mastering techniques that have fallen into obscurity, researching with the gimlet eye of an historian, and a lifelong commitment to learning from the best teachers in the world. Melissa has recently returned to Europe to reconnect with some of her most influential teachers for a period of intensive one to one study.

This trip was highly significant for Melissa and the Australian Brandenburg Orchestra. Melissa is already an outstanding musician and she regularly shares her knowledge and expertise with other baroque players and students. She is also a true artist, always seeking new knowledge and solutions to the complex issues of baroque performance. After all, it is not exactly as if one can dial up Vivaldi and ask him what the flute sounded like in 18th century Venice when his music was first performed!

Melissa's many hours of intense work and study help to make the music flow effortlessly, creating just one part of the glorious whole that you will hear in the concert hall during *Bach Eternal*.

The Brandenburg is the home of Australia's finest baroque musicians on period instruments, thanks to your support. To ensure that our musicians take necessary opportunities to challenge themselves, continue their research and learn from other baroque specialists, we have launched the Brandenburg **International Baroque Study Program**. This exciting program will fund regular international study tours such as the one undertaken by Melissa in 2012, and will be supported by donations.

Your participation in the **International Baroque Study Program** will assist the Brandenburg to support our musicians as they take up regular periods of intensive one to one study with the world's baroque maestros.

We are currently seeking 80 donors at the \$250 per annum level. To become an **International Baroque Study Program** donor, please visit our secure website www.brandenburg.com.au/secure/donations or phone our Philanthropy Manager, Joshua Kim, on 02 9363 2899. You may even like to consider a monthly donation of \$21 over 12 months.

We will keep you posted on Melissa's study tour, and, in the meantime, thank you for your continuing support of Australia's finest baroque orchestra.