



Submission to the Assistant Treasurer

'Improving the integrity of public ancillary funds'

December 2010

Introduction

The Community Council for Australia commends the Assistant Treasurer for initiating this consultation and providing the Public Ancillary Funds discussion paper *'Improving the integrity of public ancillary funds'*.

This submission has been prepared through a process of consultation with the membership of the Community Council for Australia, other key organisations in the not for profit sector and a number of key stakeholders in the finance and philanthropy sectors.

It is important to note that this submission does not seek to replicate the policy positions already clearly outlined in key submissions from our members, particularly the submission from Philanthropy Australia. This submission is focused on the broader intent and practice associated with regulating Public Ancillary Funds (PuAFs) in Australia. It includes an introduction, five key recommendations and a broad discussion under the following five sub headings:

- the need to encourage and support Australians seeking to become more engaged in their communities by contributing to not for profit organisations
- the role of the ATO and the importance of appropriate interpretation and enforcement practices
- ensuring appropriate levels of transparency in the operation of PuAFs
- ensuring appropriate levels of expenditure in the operation of PuAFs
- specific responses to the questions raised in the discussion paper.

The Community Council for Australia welcomes the opportunity to provide our views on the discussion paper and would be more than willing to engage in further discussion about any of the issues raised in this submission.

The Community Council for Australia

The Community Council for Australia (CCA) is a not for profit sector led and resourced umbrella organisation with 26 members (see attached listing) all committed to driving reform in the way governments, business and the community relate to not for profit organisations.

The mission of (CCA) is to lead by being an effective voice on common and shared issues affecting the contribution, performance and viability of not-for-profit organisations in Australia through:

- providing thought and action leadership
- influencing and shaping sector policy agendas
- informing, educating, and assisting organisations in the sector to deal with change and build sustainable futures
- working in partnership with the government, the business sector, and the broader Australian community.

Recommendations

This submission makes the following six key recommendations:

1. The goal of all PuAF regulation should be to encourage and support Australians seeking to become more engaged in their communities by contributing to not for profit organisations. This goal must inform both policy and regulatory enforcement.
2. There should be a separate body (such as a Charities Commission) responsible for regulation of not for profit organisations including DGR status and associated requirements.
3. If the ATO is to be involved in this area, it needs to establish a separate regulatory capacity relating to the not for profit sector with an emphasis on stronger engagement and support.
4. The fundamental informing principles in new regulations need to be simplicity and accessibility.
5. The move to greater transparency needs to involve the community as the key audience rather than the ATO. This requires a review of existing reporting arrangements.
6. PuAFs need to have flexibility in the way they utilise funds within a system of medium term (3 year) financial and performance accountability.

Discussion

The need to encourage and support Australians seeking to become more engaged in their communities by contributing to not for profit organisations

Public ancillary funds allow individuals, organisations and communities to formalise and organise their giving through financial structures that provide them with some tax concessions. There is no doubt that the community gains significant benefits from PuAFs, not only from the redirection of personal wealth to charitable purposes, but also through the process of engagement both in raising funds and distributing them.

The tax concessions associated with PuAFs need to be seen in this broader context.

The primary policy goal in this area is to promote giving and engagement with not for profit organisations.

The primary measure of any policy position, including proposed changes to regulations, needs to be about the degree to which the proposed changes are likely to impede or enable greater levels of giving and community engagement.

It is difficult to see how this policy goal is reflected in the discussion paper.

In fundamental terms, the proposed changes seek to impose higher levels of accountability, more controls over how funds can and must be used, more limitations over who can be involved in decision making about the administration of the funds, and more discretionary control for the ATO.

The major benefit claimed for PuAFs is greater clarity and understanding of administrative requirements. Any claim for increased clarity needs to be tempered against increased discretion (uncertainty) about the way the ATO may or may not interpret the proposed changes.

Similarly, the claims that the community will benefit through increased accountability is not reflected in the proposed changes which are really about increased reporting to the ATO. How this improves accountability of PuAFs to individuals, organisations and the broader community is not explained.

The lack of a broader policy context around PuAFs, their place and their future in promoting more resilient, sustainable and inclusive communities is a clear omission.

Perhaps more importantly the exclusive focus on the need for tighter control reinforces the view within the not for profit sector that the proposed changes are not about good policy, but about stronger regulation and enforcement.

Recommendation:

1. The goal of all PuAF regulation should be to encourage and support Australians seeking to become more engaged in their communities by contributing to not for profit organisations. This goal must inform both policy and regulatory enforcement.

The role of the ATO and the importance of appropriate interpretation and enforcement practices

There appears to be a fundamental mismatch in the purpose of PuAFs and the role of the Australian Taxation Office (ATO). The discussion paper states:

The rationale for a government providing a philanthropic concession is that donated funds are allocated more efficiently and effectively by the charitable sector rather than if a government had taken the revenue forgone (by way of tax concessions) and given it directly to the charitable sector.

(page. 4 'Improving the integrity of public ancillary funds')

This rationale clearly implies that the more involved a government becomes in seeking to control and limit the operations of PuAFs, the less likely they are to be efficient and effective.

The Australian Taxation Office has as its main purpose to collect revenue for governments to use in funding services for the Australian community. This is reflected in its key performance targets, reporting and accountability (*see ATO website*).

An organisation primarily focused on ensuring companies and individuals pay appropriate levels of tax tends to take an antagonistic mind set and cultural approach to enforcement of taxation rules and regulations. In fact the ATO states that being firm with those who avoid taxation is one of its core values (*see ATO website*).

The ATO clearly has a key regulatory role in overseeing tax concessions provided to PuAFs. The question is how best to ensure this role is carried out effectively without the ATO creating barriers to those acting in good faith and trying to support not for profit organisations?

58. The ATO has found that not-for-profit organisations generally show a strong desire to 'get it right,' but often have a low level of knowledge about how the tax and superannuation systems work. Where compliance issues arise, they are mainly due to mistakes or a lack of knowledge.

(page. 11 'Improving the integrity of public ancillary funds')

If compliance is the issue for the ATO, engagement has to be the solution. Engaging with not for profit organisations to achieve greater compliance needs to be about taking an educative and supportive approach rather than adopting the role of enforcer.

Recommendations:

2. There should be a separate body (such as a charities commission) responsible for regulation of not for profit organisations including DGR status and associated requirements.
3. If the ATO is to be involved in this area, it needs to establish a separate regulatory capacity relating to the not for profit sector with an emphasis on stronger engagement and support.
4. The fundamental informing principles in new regulations need to be simplicity and accessibility.

Ensuring appropriate levels of transparency in the operation of PuAFs

The not for profit sector is committed to greater transparency and accountability. In fact, many not for profit organisations invest significant resources of their own in ensuring they are not only transparent, but also effective in their service delivery and responsive to need.

In the case of PuAFs, the level transparency could be improved. People who have given money to a PuAF should know what their contribution is being used for and what benefits it has delivered.

Unfortunately this kind of transparency is not the primary focus of the discussion paper or the proposed changes. The level of public reporting around the activities of PuAFs does not increase under the proposed changes. Reporting to the ATO may increase, but the ATO is not in the business of informing the community about the operations of individual organisations or the performance of individual funds.

Given the importance of active engagement by funds in attracting funds and reporting on how they are used, there is a need to review current reporting to investors, to the broader community, and to regulatory authorities.

Recommendation:

5. The move to greater transparency needs to involve the community as the key audience rather than the ATO. This requires a review of existing reporting arrangements.

Ensuring appropriate levels of expenditure in the operation of PuAFs

As noted in the following section, there are very significant concerns with the ATO imposing a blanket annual level of expenditure on all not for profits, particularly when the percentage expenditure is based on the total capital assets of the PuAF.

The broader policy context of encouraging and supporting greater investment in not for profit organisations needs to drive the performance measures for PuAFs. The fact that a given percentage of the assets of a PuAF have been spent in a given year does not mean it is achieving the desired policy goal. The accountability and compliance issues must involve a level of both public reporting of activities and public commitments around ongoing expenditure. The actual commitment should be flexible to match both the strategy and purpose of the PuAF, and the asset position (both short and medium term) of the PuAF.

Annual valuations are not that useful in the context of achieving longer term goals for PuAFs. Fluctuations in investment values and returns mean at least three year planning is often required to ensure both adequate returns on capital investments and appropriate levels of payments to not for profits. Many PuAFs have longer term strategies such as acquiring a building or key piece of equipment to give to a not for profit. If this is consistent with their purpose and they are transparent to the community and regulators about their strategy, they should not have to spend a set 5% of their assets each year.

Recommendation

6. PuAFs need to have flexibility in the way they utilise funds within a system of medium term (3 year) financial and performance accountability.

Specific responses to the questions raised in the discussion paper 'Improving the integrity of public ancillary funds'

The discussion paper sets out 12 questions to be answered as part of the consultation. As noted previously CCA has considered the individual submission of its members and is generally supportive of the positions adopted by key member organisations. The CCA response to the 12 questions will therefore draw heavily from their views and, in particular, the excellent submission from Philanthropy Australia.

1. What is an appropriate minimum distribution rate for a public ancillary fund and why?

CCA does not support a set percentage of capital being distributed each year. The current arrangements requiring a set percentage of income to be distributed provide more flexibility than the changes proposed.

At the very minimum, CCA supports the recommendation from Philanthropy Australia that: *'the minimum distribution rate for Public Ancillary Funds remain at the current level based on a minimum percentage of earned income (e.g., interest and dividends) and that the guidelines specify that level.'*

2. Are there any issues that the Government needs to consider in implementing the requirement to ensure public ancillary funds regularly value their assets at market rates?

CCA does not see the benefit of annual valuations given fluctuations in capital values and the need for many PuAFs to operate with longer term investment strategies.

At the very minimum, CCA supports the Philanthropy Australia position that: *'any distribution rate allows trustees to average valuation over a rolling 3 year period, to enable trustees to offset a low year with a higher year.'*

3. Are the valuation rules that apply to private ancillary funds also appropriate for public ancillary funds? If not, why not?

The valuation rules applying to PAFs are appropriate for PuAFs.

4. Are there any issues with requiring public ancillary funds to lodge a return?

If PuAFs are to have to complete a return to the ATO, it should be to a dedicated not for profit area within the ATO that has the capacity to act outside of normal ATO processes and procedures.

As noted in the Philanthropy Australia submission: *'the Government has accepted the recommendations of the Productivity Commission that there is urgent need for a national regulator for the not-for-profit sector, to reduce the costly and wasteful regulatory burden on the sector by provide a single reporting point for not-for-profit corporate and financial information. Given this need for reporting reform, Philanthropy Australia suggests that any reporting requirement be developed as part of the reform process currently being undertaken by the National Office for the Non-Profit Sector. It would be preferable for Public Ancillary Funds to only report once, rather than to have to file separate returns with ASIC, the ATO, the various state fundraising authorities, and the proposed national regulator.'*

5. Are there any issues with imposing greater public disclosure requirements on public ancillary funds? What information should remain confidential and what information should be disclosed and why?

The CCA has real concerns about how this requirement might be imposed on PuAFs, the administrative resources required and the potential to impede the collection of funds.

As noted in the Philanthropy Australia submission: *'it would be extremely time-consuming and difficult for PuAFs to provide a full list of individual donors. Many PuAFs will have thousands of individual donors. In fact for some PuAFs which rely on the 'rattling of tins' on street corners to raise funds this requirement will either be impossible to meet or an important source of funds will be lost. The requirement to provide a list of all donors should therefore be omitted.'*

6. Is the administrative penalty regime (including magnitude of penalties) that applies to private ancillary funds suitable for public ancillary funds?

While it may be appropriate to provide a more proportionate level of penalties, the concern of the CCA is the capacity of the ATO in its current operations to appropriately engage with the not for profit sector. Given that appropriate engagement is the key to more effective compliance, a more flexible regime of penalties will only be beneficial if the ATO are prepared to operate less as enforcers and more as educators and supporters of PUAFs trying to do the right thing.

7. Are there any difficulties in requiring public ancillary funds to have a corporate trustee?

The CCA support the position outlined in the Philanthropy Australia submission calling for grandfathering as part of any change in this area. New PuAFs will be able to comply more readily than existing PuAFs which may have been set up with different requirements for Trustees.

8. Are the rules for suspension or removal of trustees of private ancillary funds suitable for public ancillary funds?

As noted by Philanthropy Australia, suspension or removal of trustees, *'could only apply to Trustees that are corporations and there is no data on what proportion of the existing 1600 PuAFs are individual Trustees and unable to transition to a Corporate Trustee owing to State Trust Law limitations.'*

9. What fit and proper person requirements should be imposed on trustees of public ancillary funds?

CCA supports the Philanthropy Australia position that: *'a fit and proper person test will add no additional accountability than is already offered by the Responsible Person test.'*

10. What transitional arrangements are required for existing public ancillary funds to conform to the new arrangements?

CCA supports the Philanthropy Australia position that: *'at the very least the current rules apply until the end of the 2013/14 financial year, which is also the final date for PAFs to implement compliance with the new regime.'*

11. Should the term ‘public fund’ be codified in the guidelines in accordance with the principles set out in ATO Taxation Ruling TR 95/27?

No. CCA is not sure what the implications of this might mean, particularly if it is going to apply to all public funds. The implications of such a measure would need to be more widely consulted upon.

12. Can the investment and risk minimisation rules that apply to private ancillary funds be suitable applied to public ancillary funds?

Allowing PuAFs flexibility in their investment strategy to match their purpose and their capital base is critical to maximising effective management of PuAFs. PuAFs already have to meet Trust Law requirements. The concern with extending investment risk and minimisation rules from PAFs to PuAFs as outlined by Philanthropy Australia is that: *‘PAF Guidelines prohibit the fund from carrying on a business and that the issue of whether a PuAF can carry on a fundraising business to generate operational funds – as item 1 DGRs are permitted do – is not addressed in the Discussion Paper.’*

Conclusion

The ATO may see its role in terms of raising funds to support the Australian community, but it is critical that the opportunities for individuals, organisations and communities to become engaged in supporting not for profit organisations are actively supported and encouraged.

Regulations of PuAFs are necessary and the ATO has a critical role to play to ensure that the tax concessions provided to PuAFs are based on real benefits to the Australian community through greater investment in not for profit organisations.

Balancing the need for compliance against the broader policy goal of increasing investment in not for profit organisations is a very difficult task. It is a task that should not be left up to the ATO.

There are two levels of accountability that are clearly more desirable. One is the establishment of a not for profit regulatory body that could perform many of the critical compliance tasks without the engagement of the ATO. The second is greater public accountability, a measure that will require considerably more consultation and engagement with the Australian community.

At the very least, the blanket rule and enforcement approach of the ATO needs to be mediated through establishment of a more appropriate not for profit engagement strategy.

To better support PuAFs and work towards a more sustainable, resilient and inclusive community requires thinking well beyond the scope of the discussion paper.

The CCA hope this consultation process is one that can and will inform real policy reform in this important area.



List of Members – The Community Council for Australia
1 December 2010

1. Aboriginal Employment Strategy Ltd. – Danny Lester
2. Associations Forum Pty. Ltd – John Peacock
3. Australian Indigenous Leadership Centre – Rachele Towart
4. Connecting Up Australia – Doug Jacquier
5. Good Beginnings Australia – Jayne Meyer Tucker
6. HammondCare – Stephen Judd (Director)
7. Illawara Retirement Trust – Nieves Murray
8. Lifeline Australia – Dawn O’Neil
9. Maroba Lodge Ltd. – Viv Allanson
10. Mental Health Council of Australia – David Crosbie
11. Mission Australia – Toby Hall (Director)
12. Musica Viva Australia – Mary Jo Capps
13. Opportunity International Australia – Rob Dunn
14. Philanthropy Australia – Gina Anderson
15. RSPCA Australia – Heather Neil
16. Social Ventures Australia – Michael Traill
17. Surf Life Saving Australia – Brett Williamson
18. The Big Issue – Steven Persson
19. The Benevolent Society – Richard Spencer
20. The Smith Family – Elaine Henry (Director)
21. The Centre for Social Impact – Peter Shergold
22. Volunteering Australia Inc. – Cary Pesticini
23. Wesley Mission – Keith Garner
24. WorkVentures Ltd. – Arsenio Alegre
25. World Vision Australia – Tim Costello (Chair)
26. YMCA Australia – Bob Nicholson