Now! For the Future

Submission to Treasury's Discussion Paper on Improving the Integrity of Public Ancillary Funds (PuAFs)

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Community Foundation for Ballarat, Pyrenees, Ararat, Hepburn, Moorabool & Golden Plains (western half)

Introduction

Community Foundations are in many ways quite different to other models of public ancillary funds and The Ballarat Foundation believes that it is imperative that these differences be considered in any changes being undertaken so as not to undermine the core purpose of a community foundation; that being to establish a permanent endowment to support charitable needs and endeavours in a community or communities. In the case of The Ballarat Foundation we service and support Ballarat, Victoria and the five local government areas that circle the Ballarat City Council LGA.

The Ballarat Foundation (TBF) welcomes the opportunity to comment on the discussion paper, improving the Integrity of Public Ancillary Funds (PuAFs). TBF concurs that issues of transparency, accountability and public confidence are essential for its or any Community Foundation's credibility. We further agree that it is entirely in the best interests of government and the sector that the regulatory framework is clear and simple to comply with, to monitor and administer.

This submission outlines the key features of our Community Foundation and the likely impact of each of the proposed changes on our ability to support our local community; and our viability as a community asset.

TBF is one of 30 Community Foundations operating across Australia today. The Community Foundation sector distributes around $15million in grants across Australia each year.[1]

TBF, as a Community Foundation, is a Company limited by guarantee operating a trust with DGR and Charitable status which fits into the public ancillary fund structure. It has an important and particular community role and purpose. The government and ATO rules and framework which govern Community Foundations should support the Foundation's mission and purpose, and should enhance its operation and function, which is significantly broader and more complex than Private Ancillary Funds (PAFs).

Our foundation, TBF, has since inception in 2001, built an endowment of exceeding $2,000,000. Our intent and purpose is never to lose or deplete this endowment, rather to build on it to support community needs from earnings into perpetuity.

We have during this time provided direct value and grants of $1,398,000 to over 150 community organisations. In most cases the level of support has a dramatic multiplying effect as we encourage partnerships and networks within the recipient groups. Of particular note is our capacity to fund new and emerging organisations that have not, cannot or would not get funding from other regular sources. Often this is seed funding to get them started and many have built from this to be important and capable organisations providing unique benefit to the community.

The capacity of TBF is further extended through its role in advocacy and capacity building within the community. This includes communicating to the whole community on the health of the community across a range of measures, through Vital Signs, an annual community health check, which enables the community to see areas of need and then taking actions, at any level, to address these needs. This model can then measure the impact of actions taken and even compare one community to another city and potentially state and national levels across similar attributes.

Summary Points

- Community Foundations are independent, non-profit, community-based philanthropic organisations whose goal is to encourage, facilitate and generate contributions from the community in order to address social, cultural and environmental issues.

[1] Philanthropy Australia Community Foundation Forum, 2008

- They bring together people who care about their communities and aim to strengthen community by strengthening philanthropy. They partner with donors to build permanent endowments and other funds, from which to support community projects, and by providing leadership on issues of broad community concern.

- The concept of endowment is central to all Community Foundations. They take a long term view, and are able to tackle long-term community challenges, as well as immediate needs. Donations to Community Foundations are gifts to meet community need in perpetuity.

- TBF and every Community Foundation is a very important component within the philanthropic sector at a local level. 90% of Community Foundations are in regional areas, often with few alternate community support networks and with limited bodies to fund through, which to an extent limits their capacity to distribute funds effectively. Any changes which limit the community foundation's capacity to fund its operation and to grow its endowment will be extremely detrimental to the ongoing success of these community run organisations and may dishonour the millions of dollars already received from supportive donors and bequests who offered their financial support on the very basis that it would have a long term, perpetual impact within their community.

- TBF rejects the view put by those writing the discussion paper that – "it is expected that the guidelines for public ancillary funds will take similar form to the *Private Ancillary Fund Guidelines 2009".* PAFs and PuAFs have such significant differences that many of the guidelines are not only irrelevant, but actually counter-productive to the purposes of a PuAF and particularly a community foundation. It is critical in this or any review of the rules and framework governing PuAFs that Treasury understands and supports the purpose and mission of Community Foundations.

- TBF is not aware of any evidence of specific issues that need addressing with PuAFs.

- Unlike (PAFs), TBF (as a PuAF) reports to ASIC annually and to the ATO in respect to investments and Franking Credits and is also regulated by Fundraising Guidelines at a state level, as our purpose is charitable and we act as a fundraising vehicle. Given this TBF would like to think that future regulation and reporting would be singular and simpler rather than adding any additional level of reporting.

- Integral to our Foundation are Sub-funds which offer people and all organisations on all incomes the opportunity to experience local giving akin to that which Private Ancillary Funds offer people of high net worth. Typically PAFs require a contribution of around $500,000 to make them financially viable[2], putting them out of reach individuals of average means. We currently manage a growing list of eighteen Sub-funds. We could not support any changes which diminish the effectiveness of these Sub-funds or opportunity to expand the number of our Sub-funds.

- Philanthropy is not just for the wealthy and effective giving is not just about money. At the heart of TBF's model is the opportunity for donors who would not or could not consider establishing their own PAF to participate in philanthropy through our community foundation. We handle all the governance and encourage person's to start with small regular amounts within their financial capacity and to grow their charitable giving over time. Mandating a high level of annual distribution will negate this and will effectively limit philanthropy to the wealthy.

- Requiring (particularly lower income donors who have set up named sub-funds) to distribute more than high net worth individuals (through their PAFs) is counter intuitive and will greatly diminish the ability of Community Foundations to stimulate, grow and support philanthropy from the broader community.

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[2] Myer Family Office letter to potential PAF initiators. 26 May 2010

Key responses to the discussion paper:

- Distributions – TBF is not convinced that there is a case for change. The current requirements work and support the mission and purpose of our and other Community Foundations.

  The concept of endowment is central to Community Foundations. They take a long term view, and are able to tackle long-term community challenges, as well as immediate needs. Donations to Community Foundations are gifts to meet community need in perpetuity. It is essential that Community Foundations have a good balance between minimum distribution requirements and the ability to accumulate capital.

- Increasing Regulatory Powers – TBF may support the use of <u>relevant</u> scaled penalties for breaches; however the standards should be suitable to and reflective of the non-profit nature of Community Foundations and of their voluntary directors. Due to their open and public nature, there is significantly less opportunity for abuse than is the case for PAFs and the penalty regime should reflect this.

- Fit and Proper Persons Requirements - TBF notes that the Responsible Persons requirement for PuAFs is already greater than that of a PAF. Meeting this criterion can in existing terms be difficult to meet in small or regional communities. If anything TBF believes the current requirements on Community Foundations should eased or a greater range of responsible person's criteria be available.

- Donation Limitation - A requirement limiting directors' donations to our or any Community Foundation makes absolutely no sense. Our directors are usually generous donors and generate other persons to donate, largely leveraged off the director's own actions. *Is a person who makes a large donation to say the Children's Hospital restricted from sitting on their Board for reason of the donation?*

- Investment Rules –There are two PAF investment rules which would be inappropriate for TBF and Community Foundations:

  "The fund must not carry on a business" - This is definitely not appropriate for Community Foundations. As a NFP community organisation, TBF needs to carry out fundraising businesses in order to generate enough resource to at a minimum cover administration expenses.

  "The fund must not accept donations in any financial year totaling more than 20% of the value of its assets" - This is clearly irrelevant for Community Foundations and other PuAFs which are required to seek donations from the public and where any limit on donations makes no sense at all.

- TBF with the support of other Community Foundations recommends consideration of three further issues not covered in the discussion paper:
  - (i) Community Foundations should be eligible for the same FBT concessions as per other qualifying non-profit organisations.
  - (ii) Where a PAF is no longer able to or wants to operate independently, it should be able to transfer the assets into a sub-fund of a Community Foundation, where it can continue to operate, but with all the subsequent support and administration provided by the Community Foundation.
  - (iii) Currently Community Foundations are not able to receive donations from other PuAFs or from PAFs, relating to DGR type and the rules that define these types. This is an outdated rule that severely limits the capacity for Community Foundations to solicit support for community works that the community foundation itself may either facilitate or execute. This is particularly a problem in regional areas where the community foundation has an even more pressing and important role and where other PuAFs and PAFS rarely engage or participate. Currently the Foundation for Rural and Regional Renewal has special powers that enable this activity, however it is our belief that this should be extended directly to Community Foundations.

Response to consultation questions as per the discussion paper

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

TBF understands that, by moving towards annual distribution rates as a % of assets Treasury aims to ensure that philanthropic foundations actually distribute grants each year.

We totally reject the notion that there should be any percentage of required distribution and that if there was we reject that it would be based on the asset value at a particular date annually.

a/ Firstly, Community Foundations already make distributions annually based on their capacity which takes into consideration endowment growth, income and costs such as administration. Many already use a figure such as 80% of income being the minimum distribution. The key is to ensure that the endowment continues to grow at a level being at a minimum the level of inflation to ensure the long term future of the community foundation assets. The discussion paper's view of having a required distribution of a minimum of 5% of assets would destroy Community Foundations overtime and more rapidly in periods of low investment yields such as we have experienced in recent years.

b/ Secondly, there is a real risk that an asset valuation on a given day can be eroded on the next and so a decision at one point of what is required to be distributed into the future, could in fact be unaffordable without eroding capital at the time of distribution. This also potentially impacts on the capacity to invest in fixed term investments or may necessitate the selling of stocks at a time when values are low.

c/ Thirdly, Community Foundations know from experience that the community demands to see the benefits of their contributions resulting in suitable distributions being made. They understand that unless their Community Foundation is distributing on an adequate and regular basis the community will not continue support them through donations. Even Community Foundations in their infancy find it necessary to make distributions, often when they can least afford it, to engage the community and build their profile and credibility.

d/ Fourthly, any non liquid assets owned by foundations, such as buildings, which are included in the asset valuation mean that the amount distributed is not balanced with the available liquid assets and therefore the liquid assets would be drawn down disproportionately and unfairly. Ultimately this could cause a foundation with a workable balance of cash and property to reach a point where they do not hold enough cash to operate effectively which may then put undue pressure on their capacity to hold the property asset.

TBF already has formal commitments to provide grant funding through a number of Funds and Sub-funds either annually or more often.

TBF is strongly of the view that the sustainability of philanthropy centres on the ability to grow capital today to ensure that projects can be funded tomorrow and at tomorrow's prices. Our endowment growth ambitions are entirely premised on the increased income this will return for the community each year.

Community Foundations are community assets that are intended to benefit the community in perpetuity. It is the perpetual nature of Sub-funds, and the associated legacy, that donors nominate as one of the major incentives behind their decision to get involved in structured giving. An endowment model offers sustainability and ensures that funds are on hand to support the community, especially when negative economic conditions decrease the number of people able to make donations.

The Victorian Government recognised the value of the enduring nature of Community Foundations by committing $3,6million in funding to Community Foundations in Victoria. In 2009-10 our Foundation received $300,000 in funding from the Victorian Government. It was a condition of this funding that 100% was to be invested into the endowment to ensure our annual grant program was boosted in perpetuity.

Recommendation

TBF recommends that Community Foundations be given scope to distribute 80% of earnings less reasonable administration fees and a component that is reinvested to offset inflation. Further that those Community Foundations with less than $5,000,000 in endowment have the capacity to ease this requirement if they can show that they are not distribution funds in order to grow the endowment to a point where the foundation is sustainable, or at least better able to balance growth versus distribution.

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?

TBF has since inception revalued its assets every quarter. This provides us with reasonable frequency of data and allows us to better track the movements in valuations whilst not being too onerous.

It is our understanding that we already provide revaluations of assets within our annual reporting to ASIC. Duplication or another separate form of reporting would seem simply to add burden to Community Foundations. Further this information is available in our annual reports which are assessable by the public.

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

Yes the valuation rules that apply to PAFs are appropriate for PuAFs.

Note: Our concerns lie with using the Asset valuation as the basis for calculating distributions as detailed in 1. above, not in the method for calculating a regular asset valuation.

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

In the case of TBF and most other Community Foundations, we operate as a public company limited by guarantee which manages the Trust (our PuAF). Therefore we are required to comply with and report under the Corporations Act 2001. We therefore already lodge annual returns with ASIC. We also have reporting obligations in regard to fundraising activity reported at a state level.

As a Community Foundation we understand our public accountability obligation to the community, donors and the general public.

Provided that there is not duplication in reporting requirements, Community Foundations would be able to lodge an annual return with the ATO.

Recommendations

- Adopt the recommendation to The Productivity Commission's recent inquiry into the *Contribution of the Not for Profit Sector* which relates to reducing the burden of red tape on not for profit organisations. "*The Registrar should implement the principle of 'report once, use often' by providing a single reporting portal and form for annual reporting on community purpose, governance arrangements, financial accounts and fundraising activity".*

- The application of any grants, the activities undertaken and annual financial statements and accompanying directors' and auditors reports would be considered the key reporting requirements.

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?**

As our donations are from the general public in the form of ‘donations from known persons or businesses’; ‘donations from unknown persons or businesses’ and from general fundraising activities, it would be very labour intensive and add to an already high administrative burden to be required to provide details of each and every individual donor (donation). This is in stark contrast to PAFs where donations are usually from one person or perhaps a limited number of family members and therefore easily reported.

Recommendations

- The requirement to provide a list of all donors should therefore be omitted.

- In terms of confidentiality, some of our donors do not wish to be named, so there must be an allowance for that.

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

The introduction of a scaled proportionate penalty regime is not objected to by TBF.

However in contrast to PAFs where any penalty is likely to be paid by the founder, the trustees of Community Foundations, including TBF, are drawn from the community and participate on a voluntary, pro bono basis.

The public nature of the foundation means that there is significantly less opportunity for abuse than is the case in a PAF.

Almost without exception errors for Community Foundations would be a result of lack of knowledge rather than a deliberate attempt to step outside any rules. Education and training using consistent guidelines is the key to improvement in this area.

Recommendations

- Ensure any penalties are established with the understanding that the trustees are acting on behalf of the community in a voluntary, pro bono capacity.

- Ensure that suitable programs of education and training and refreshers are provided (even required) on a regular and consistent basis.

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

As indicated above, TBF and most other Community Foundations that include a PuAF within their legal structure already has a corporate trustee. This is a very effective model and brings with it public accountability through having to comply with the Corporations Act 2001.

In the case of Community Foundations the trustees have a broad responsibility, not just financial and governance, but also in areas of allocation and distribution which require a broader community understanding.

Recommendation

- Consider a requirement for PuAFs or at least Community Foundations to adopt the corporate trustee model.

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

TBF trustees are bound by the Corporations Act 2001.

Recommendation

- Any rules for suspension should reflect trustee's current obligations under the act.

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

The responsible Person Test particularly limits regional and smaller communities in soliciting interested and committed persons. Usually a few people end up being on numerous Boards and restricts others with strong interest, enthusiasm and time to participate.

In the case of Community Foundations it is likely that trustees are also donors, some significant. Trustee structures need to able to accommodate this without limitation; whilst maintaining balance and managing any potential conflict of interest.

It is a fundamental requirement of giving that *'you can't ask someone else to give if you haven't contributed yourself'*. It is imperative that trustees are not restricted from this as they have great capacity to solicit contributions from other persons.

Recommendations

- In defining Fit and Proper Persons Requirements – consider adopting requirements that ensure diversity on Boards, encompassing skills, gender, age, culture and knowledge of the community with defined terms.

- Not withstanding the point above, ease the Fit and Proper Persons Requirements to allow for a broader range of responsible person's criteria as regional and smaller communities in particular can struggle with the availability of suitable people available to participate as trustees.

- Ensure there is no limitation on a trustee that restricts or stops that trustee(s) from contributing to the fund or a specific Sub-fund within the community foundation.

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

Recommendations

- TBF and Community Foundations are largely under resourced and often rely on voluntary assistance at all levels including boards. To this end extended transitional arrangements for any changes would be required.

- Changes should not be retrospective, so as to preserve any agreements already entered into with donors and particularly including bequests written into wills that have not yet been executed.

- A practical kit of tools and training to assist any transition would be a distinct advantage.

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?

TBF is unclear as to the meaning of this question and believe it is open to many possible interpretations.

TBF is concerned that this ruling may be likened to a conduit or temporary repository for moneys and may not account for perpetual endowments.

Recommendations

- We request further consultation on this question with all affected entities.

- Whatever the outcome, it MUST reflect the requirement for Community Foundations to maintain the capacity to account for the perpetuity of ancillary funds.

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

Yes, TBF's understanding is that there is consistency for PAFs and PuAFs and relates to the Trust Law requirements which already apply to PuAFs.

Recommendation

- TBF is concerned however that we operate as a business and therefore the issue of allowing PuAFs to carry on a fundraising business to generate operational funds – as item 1 DGR's are permitted to do MUST be addressed.

I would welcome further opportunities to share dialogue on these matters to ensure that the Community Foundation's model is improved and not diminished through this review process.

Sincerely

Noel Trengove
Chief Executive Officer
The Ballarat Foundation
