



**Review of not-for-profit governance arrangements
Submission to Treasury Department's consultation paper
released December 2011**



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Break Thru People Solutions (Break Thru) welcomes the opportunity to comment on the consultation paper, Review of not-for-profit governance arrangements, December 2011.

Break Thru supports the Government reforms to implement a nationally consistent and modernised approach for NFPs via a single, regulatory body and streamlining and centralising governance arrangements to reduce red tape.

Break Thru is an Australian not-for-profit organisation whose core vision is to “Break Thru barriers & create futures” by being the leading diversity champion, courageously promoting the value, potential & inclusion of all people in the life of the Australian community. Break Thru believes work is fundamental to a fulfilling & productive life & for almost 20 years has offered free employment and training programs to the most disadvantaged in our community such as people with a disability and Indigenous Australians. The main programs offered by Break Thru include:

- **Disability Employment Services (DES)** provides specialist assistance to people with an injury, disability or health condition to obtain and maintain open employment. Break Thru staff provide short-term pre-vocational assessment & job seeking, marketing to employers, on-the-job assessment & ongoing support once placed in a job.
- **Job Services Australia (JSA):** provides one to one or group based assistance in prevocational skilling, overcoming barriers to employment, job search & job matching to employers with job vacancies. Jobseekers may experience a range of issues, including mental illness, homelessness, drug and alcohol abuse, domestic violence survivor.
- **Training Department:** delivers both accredited and non accredited vocational training, including:
 - Links to Learning - a program to engage disadvantaged early school leavers in skills based & accredited training that lead to vocational outcomes.
 - Certificate II in General Education for Adults – for those who are disconnected from the mainstream training and education system and need to obtain school certificate (or year 10 equivalent) in order to access further training or employment opportunities.

Community Programs: provide an alternative to paid employment for people with a disability who have high support needs. These programs assist people to increase their independence and participate as active members of their community.

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Date: 27th January 2012

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Consultation questions -

6.1 RESPONSIBLE INDIVIDUALS' DUTIES

1. Should it be clear in the legislation who responsible individuals must consider when exercising their duties, and to whom they owe duties to?
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?
3. What should the duties of responsible individuals be, and what core duties should be outlined in the ACNC legislation?
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?
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)?
6. Should these minimum standards be only applied to a portion of the responsible individuals of a registered entity?
7. Are there any issues with standardising the duties required of responsible individuals across all entity structures and sectors registered with the ACNC?
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?
9. Are there higher risk NFP cases where a higher standard of care should be applied or where higher minimum standards should be applied?
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?

Break Thru acknowledges that building and preserving confidence of a range of stakeholders through accountability is important. However stakeholders including; the public, clients, volunteers & donors vary significantly across NFPs and it would be difficult to develop an exhaustive list of people to whom all NFP's should be responsible. NFP's should be accountable to stakeholders and this could be clearly defined in the NFP's purpose, set out in the constitution (governing document) and promotional material.

Break Thru's preference is for the Directors' duties to be aligned with those set out in section s180 (1) of the Corporations Act as all Companies limited by guarantee already adhere to these duties and Victorian reforms to the incorporated association regime will see the introduction of statutory duties based on those contained in the Incorporations Act. This would ease the transfer to the new regulatory body and reduce any associated administration.

Adding additional requirements for directors to have minimum qualifications or particular skills, whilst good governance, could potentially be too prescriptive and stifle flexibility if trying to achieve a one-size fits all approach. As noted by Australian Institute of Company

Directors¹, that although the Australian Prudential Regulatory Authority prescribe certain requirements on entities such as banks and insurance companies, that other major public companies are not subjected to a 'fit and proper person test" . The addition of such a compliance requirement could potentially be onerous for NFP's.

However, Break Thru acknowledges that a tiered compliance approach to skill and knowledge capacity for some positions (such as secretary) in large NFP's responsible for managing large funds and donations may be appropriate.

Consultation questions

6.2 DISCLOSURE REQUIREMENTS AND MANAGING CONFLICTS OF INTEREST

11. What information should registered entities be required to disclose to ensure good governance procedures are in place?
12. Should the remuneration (if any) of responsible individuals be required to be disclosed?
13. Are the suggested criteria in relation to conflicts of interest appropriate? If not, why not?
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)?
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'?

Transparency and disclosure are important elements to gaining public trust and confidence in NFP organisations and Break Thru supports the findings from a large scale survey of Companies Limited by Guarantee conducted by Woodward² regarding public disclosure. The majority of survey respondents were in favour of all NFP's disclosing annual financial summaries, (rather than fully audited accounts) and lodgement of basic information about corporate activities tailored to stakeholder interests.

Remuneration:

As few Not for Profit Boards pay their Directors and most are voluntary³, and usually only receive reimbursement for any personal costs incurred as a result of their company duties, the requirement for individual Director remuneration to be disclosed is unnecessarily over prescriptive and could be counter-productive, particularly if Not for profit organisations are required to comply with any future Government executive pay reforms to give members/shareholders more say in Director salaries. According to independent research by *Business Review Weekly*⁴, a study of the remuneration levels of the highest-paid chief

¹ Australian Institute of Company Directors *scoping study for not for profit regulator*, 18 February 2011, <http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions/2011/Submission-to-Treasury-on-National-Not-for-Profit-Regulator>

² Woodward, Susan and Marshall, Shelley D., *A Better Framework: Reforming Not-for-Profit Regulation* (2003). The university of Melbourne, 2004, Chp 8, <http://cclsr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation-project/index.cfm>

³ Woodward, Susan <http://cclsr.law.unimelb.edu.au/not-for-profit/finalreport/Final%20PDFs/Chapter%205%20BOARD%20SIZE.pdf>, 19th February 2004

⁴ *Business Review Weekly's* independent research on executive pay, February 2011 http://www.brw.com.au/p/sections/features/executive_pay_on_the_money_sq0dVcu1Tmc65jLWe4AKP



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executives, demonstrates that there is little evidence of big pay rises at companies that are not delivering for shareholders. Australian Company boards have done a good job of self-regulating since the introduction of the corporate governance reforms in 2004.

Break Thru supports the continuation of self-regulation and internal review to scrutinise individual Directors' remuneration instead of public disclosure. However, Break Thru is supportive of existing reporting arrangements under the Australian Accounting Standards to disclose an aggregate of Director salaries on an annualised basis.

The types of conflict of interest that responsible individuals in NFPs should disclose could be based on the Corporations Act understanding of material personal interest and the four main legal duties; 1) duty to act in good faith, 2) duty to act with reasonable care and skill, 3) duty not to improperly use information or position and 4) the duty to disclose and manage conflicts of interest.

It would be useful if the national regulator had a link on the information site to a guide such as Pilch Connect's Guide to the legal duties of not for profit committee members, September 2011. This provides case studies and easy to understand references to the types of potential conflict of interest.

6.3 RISK MANAGEMENT

Consultation questions

16. Given that NFPs control funds from the public, what additional risk management requirements should be required of NFPs?
17. Should particular requirements (for example, an investment strategy) be mandated, or broad requirements for NFPs to ensure they have adequate procedures in place?
18. Is it appropriate to mandate minimum insurance requirements to cover NFP entities in the event of unforeseen circumstances?
19. Should responsible individuals generally be required to have indemnity insurance?

Break Thru acknowledges that as a Not for profit organisation in control of managing public funds, effective risk management is essential. However, the introduction of any additional mandated risk management requirements will increase the burden of legal risk on Directors and the focus of Directors' tasks will be on risk avoidance rather than meeting organisational strategic goals.

Good risk management with regard to an investment strategy requires an NFP to balance investment priorities such as minimizing investment risk whilst having the capacity to obtain access to the funds when needed, and to earn a reasonable rate of return. To manage and control these issues, NFPs should seek advice to develop and implement sound investment policies and strategies rather than have a national regulator mandate investment strategies.

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A national regulator's information website could provide best practice guidance similar to that which is provided by the UK Charity Commission's The Hallmarks of an effective charity.⁵

Indemnity insurance should be allowable but it should be a Board's responsibility to conduct a risk assessment to determine need rather than be mandated.

6.3.1 Internal and external reviews

20. What internal review procedures should be mandated?

Internal review best practice and self-regulation should be determined by the board. A tiered approach based on size and public funds should determine whether external reviews such as externally audited annual accounts should be mandated.

6.4 MINIMUM REQUIREMENTS FOR AN ENTITY'S GOVERNING RULES

Consultation questions

21. What are the core minimum requirements that registered entities should be required to include in their governing rules?
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?
23. Who should be able to enforce the rules?
24. Should the ACNC have a role in the enforcement and alteration of governing rules, such as on wind up or deregistration?
25. Should model rules be used?

Examples of model rules such as those listed on the Consumer Affairs Victoria website could be provided to NFPs as a guide. However, one model only as a one-size fits all approach would not be suitable to cater for the variety of NFP's.

6.5 RELATIONSHIPS WITH MEMBERS

Consultation questions

26. What governance rules should be mandated relating to an entity's relationship with its members?
27. Do any of the requirements for relationships with members need to apply to non membership based entities?
28. Is it appropriate to have compulsory meeting requirements for all (membership based) entities registered with the ACNC?

⁵ Hallmark 5, Financially sound and prudent, version July 2008, <http://www.charity-commission.gov.uk/Publications/cc10.aspx#h5>

7. SUMMARY

Consultation questions

29. Are there any types of NFPs where specific governance arrangements or additional support would assist to achieve in better governance outcomes for NFPs?
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?
31. What principles should be included in legislation or regulations, or covered by guidance materials to be produced by the ACNC?
32. Are there any particular governance requirements which would be useful for Indigenous NFP entities?
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?

Standardised principles

A principles-based approach for all NFP's complemented by supportive material such as a Good Governance code has been implemented by the UK charity commission. The ACNC could adopt a similar approach and include the following 6 principles or Hallmarks.

Hallmark 1: Clear about its purposes and direction

Hallmark 2: A strong board

Hallmark 3: Fit for purpose

Hallmark 4: Learning and improving

Hallmark 5: Financially sound and prudent

Hallmark 6: Accountable and transparent

An essential element underlying all principles should be that of embracing equality and diversity.

Reduction in red tape

All governance requirements, centralised within one regulator would diminish the need for duplication of reporting. Reporting requirements could be proportional based on the size of the NFP and at base level, reporting could be achieved on-line. It would also be beneficial to evaluate the work done by New South Wales, Victoria, Queensland and Tasmania who have reviewed their Associations Incorporation Acts in an effort to simplify auditing and reporting requirements.

Regulator educational and compliance initiatives

Break Thru support the recommendation by Pilchconnect⁶ for the national regulator to play a role in providing NFPs with accessible information and guidance material to assist NFP's to

⁶ pilchconnect's submission to Treasury's Consultation paper, scoping study for a national not-for-profit regulator, Section 8, p14, Feb 2011,

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understand their obligations. In addition, Break Thru suggest that the use of technologies such as webinars and an information site such as that provided by The UK charity Commission⁷ with links to tailored training offered by intermediaries such as peak bodies and sector-based support services could further facilitate education around Governance best practice and compliance.

[http://www.pilch.org.au/Assets/Files/PilchConnect%20submission%20to%20Treasury%20Consultation%20Paper%20\(Feb%202011\).pdf](http://www.pilch.org.au/Assets/Files/PilchConnect%20submission%20to%20Treasury%20Consultation%20Paper%20(Feb%202011).pdf)

⁷ UK Charity Commission website, http://www.charity-commission.gov.uk/Charity_requirements_guidance/default.aspx, 23 January 2011