ACFID Response to the *Charitable Fundraising Regulation Reform* Discussion Paper

April 2012

Submission to the Treasury

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Table of Contents

1. **Introduction** 3
2. **Recommendations** 3
3. **Is there a need for national fundraising regulation?** 5
4. **What activities should be regulated?** 8
5. **Smaller charities** 10
6. **Registering for fundraising activities** 12
7. **Regulating conduct** 13
8. **Disclosure at the time of giving** 14
9. **Disclosure after giving** 15
10. **Internet and electronic fundraising** 16
11. **Fundraising by third parties** 18

Submission to the Infrastructure, Competition and Consumer Division of Treasury on the Charitable Fundraising Regulation Reform Discussion Paper

5 April 2012

1. Introduction

1.1 The Australian Council for International Development (**ACFID**) is the peak body for Australian non-government organisations working in the field of international aid and development. ACFID's 76 members operate in more than 100 developing countries.

1.2 ACFID has assisted the Australian international aid and development sector since 1965. ACFID's membership is supported by over $850 million per year donated by over 2 million Australian households (2009/10). ACFID's members range between large organisations with hundreds of employees, with revenues in the hundreds of millions of dollars to small organisations with only a handful of employees.

1.3 ACFID has operated a Code of Conduct since 1999 (the **ACFID Code**). All of ACFID's members, and about 50 other organisations, are signatories to the ACFID Code. The ACFID Code is regarded as good practice for the provision of overseas aid, including governance, fundraising, financial transparency and transparency in delivery of programs. Its value and effectiveness is demonstrated by the fact that a condition of AusAID core funding to Australian international aid organisations is compliance with the ACFID Code.

2. Recommendations

2.1 ACFID has made recommendations throughout its submission; they are highlighted in bold. These recommendations are as follows:

(a) National fundraising regulation should not commence until all States and Territories agree to remove their fundraising regulation over organisations that will be subject to the federal regimen.

(b) National charitable fundraising regulation should apply to all non-commercial fundraising.

(c) Over-regulation must be avoided.

(d) The definition of "fundraising activities" should incorporate an element of representation or offer to the public or a section of the public.

(e) The following activities should also be exempt from fundraising regulation:

(i) Money, property or in-kind assistance received by a charitable entity from related entities within the same organisation or from different charitable organisations

(ii) Membership fees

(iii) Donations (whether monetary, or gifts) from members or staff of a charitable organisation

(iv) Income received from fees charged for the delivery of a service (including training, seminars, and consultancies) or product (including training or educational materials)

(v) Income received from interest on investments or other commercial income sources.

(f) Smaller charities should fall within the national fundraising framework, and be subject to the same regulation of conduct in terms of calling hours and ACL application, but be relieved of some of the compliance obligations of disclosure etc.

(g) Fundraising should be automatically permitted for all charities registered with ACNC, without further conditions.

(h) ACNC should have a separate category of registration solely for fundraising purposes, designed for small or new organisations, which has lesser disclosure and administrative requirements in recognition of their size.

(i) Insolvency should not be a ground for preventing an organisation from fundraising. Instead, a positive obligation requiring executive officers not to engage in fundraising activities whilst insolvent may be preferable.

(j) Any legislation which suspends a charity from fundraising should be carefully drafted, limited to serious cases, afford natural justice, not exceed one year, and should be limited to the particular type of fundraising activity during which the breach occurred.

(k) Only unsolicited approaches at a prospective donor's home, whether by telephone or face to face, should be regulated in relation to calling hours. The hours should not mirror the ACL provisions, but extend to, at least, 8pm on weekdays and include Sundays.

(l) ACFID does not support the application of Division 2 of Part 3-2 of the ACL to donations of cash or other property.

(m) ACFID supports the requirement that all fundraising solicitations disclose the name of the charity, its ABN and address; whether the collector is paid or volunteer; and whether there is a specific purpose for the donations.

(n) Compliance with any requirement to disclose whether a gift is tax deductible should be able to be satisfied by a collector verbally advising a prospective donor.

(o) Any requirement that a charity provide contact details for the ACNC should be limited to the charity's annual report and website.

(p) No additional disclosure should be imposed on charities subject to ACNC annual reporting requirements. All reporting should be included in the annual information statements required by the ACNC.

(q) Clear standard definitions, developed specifically for the not-for-profit sector, need to be developed.

(r) There should not be a blanket prohibition on internet or electronic fundraising except where registered with the ACNC. Electronic fundraising should be permitted, subject to the same disclosure and other requirements under fundraising regulation, where money is received within Australia or for Australian beneficiaries.

(s) Volunteer third parties fundraising for charities should not be required to register with ACNC in order to use the internet or other electronic forms of fundraising.

(t) Any regulation of third party fundraisers should not extend to volunteer individual or community group initiated fundraising for a charity. It should be limited to paid third party fundraisers.

(u) Care must be taken when drafting any legislation dealing with paid third party fundraisers to recognise that not all conduct traditional unsolicited face to face fundraising.

(v) Third party fundraisers:

(i) should not be required to register with the ACNC

(ii) do not need separate obligations which repeat obligations required of charities; they will be required to give all the same disclosure as a charity as they are its agent

(iii) could be required to enter into written contracts with charities which oblige them to meet the disclosure requirements on giving, and to provide the beneficiary charity with sufficient information about the income and costs associated with the fundraising activity.

(w) Third party fundraisers should disclose the fact they are paid and the name of their employer (the corporate entity of the third party fundraiser).

(x) Any regulation of paid third party fundraisers should be carefully designed so that it does not:

(i) reduce competition in the fundraiser industry

(ii) negatively impact on small charities which need to rely on third party fundraisers

(iii) reduce the dollar value of face to face fundraising to the charitable sector.

3. **Is there a need for national fundraising regulation?**

State by State regulation must not remain

3.1 In principle, ACFID supports the establishment of a national, independent regulator and, with it, the reduction in red tape which reduces the effectiveness of the international aid sector, and the not-for-profit sector in general.

3.2 The differing regulation of charitable fundraising across Australia creates significant time and financial compliance costs. ACFID supports the reduction of the regulatory burdens

associated with the State by State based fundraising legislation and, to the extent the introduction of national fundraising regulation achieves that, ACFID gives in principle support to national fundraising regulation.

3.3 Having said that, ACFID has three broad concerns with the proposal for national fundraising regulation:

(a) The introduction of national fundraising regulation, in the absence of clear agreement from the States and Territories, will increase, rather than decrease, the regulatory burden for the not-for-profit sector

(b) The restriction of national fundraising regulation to organisations which fall within the final definition of "charity", and are registered with ACNC, could create confusion as fundraising is presently undertaken by a broader group of not-for-profit organisations

(c) Over-prescriptive regulation will increase compliance burden (contrary to the *National Compact*), tends not to deliver much benefit to the public, and may be unnecessary given the legislation and powers that already exist.

3.4 We address each of these points in turn.

State agreement must happen first

3.5 The introduction of national fundraising regulation, in lieu of State based regulation, will reduce red tape for the sector. Reduction of red tape is the purpose of the *National Compact* with the sector.

3.6 It is important to remember that the Productivity Commission found that the not-for-profit sector contributes $4.3 billion to the Australian GDP (4.1%) and was responsible for 8% of employment in 2006/2007.[1] Too much regulation will reduce the effectiveness of the not-for-profit sector and will stifle the increasing contribution of the sector to the Australian economy. Reduction of red tape is not just for the benefit of the sector – it will also benefit the Australian economy.

3.7 With this in mind, it is essential that the introduction of national fundraising regulation only happens with the agreement of the States and Territories to remove their regulation for those organisations. Otherwise, it will just add a further layer of regulatory burden on the sector.

Recommendation: National fundraising regulation should not commence until all States and Territories agree to remove their fundraising regulation over organisations that will be subject to federal regimen.

It should cover the field

3.8 The restriction of national fundraising regulation to organisations that can register with ACNC is understandable, from a practical perspective. However, if it will not apply to every organisation that is presently regulated by State fundraising laws, there is a real concern that it will cause confusion in the public and within the sector and possibly increase the compliance burden.

[1] *Contribution of the Not for Profit Sector*, Productivity Commission Report, February 2010.

3.9 The Victorian fundraising legislation regulates all fundraising for a non-commercial purpose. The NSW, WA, ACT and Tasmanian acts regulate fundraising for charitable purposes and their definitions include a limb of "any benevolent, philanthropic or patriot purpose". It is suggested by experts that "benevolent purposes" goes beyond the standard meaning of charitable purposes to include acts of goodwill to a single individual.[2] Such a purpose clearly would not meet the proposed "public benefit" test proposed by the *Definition of a Charity Consultation Paper*. Therefore, there may be organisations which are currently legally fundraising that cannot be subject to the national fundraising regulation under the present proposal.

3.10 Also, the proposal later in the discussion paper to exclude small organisations from national fundraising regulation, while laudable for its intent to minimise their regulatory burden, creates another category of organisations which will continue to be subject to state by state regulation.

3.11 The concern about having groups of organisations outside the national fundraising framework is that:

(a) It may create confusion within the sector as to which laws apply, and increase the compliance cost of getting advice etc.; and

(b) The public may not understand why some organisations are differently regulated, and it may undermine the aim of improving public confidence in the sector; and

(c) It may create a competitive advantage to those organisations which fall outside the ACNC's purview if the applicable State/s' regulation is less burdensome; or

(d) Some organisations, including but not limited to small charities, may wish to obtain the benefit of national fundraising regulation but are prevented from doing so under the proposed scheme.

3.12 One view might be that there should not be specific regulation of charitable fundraising alone, but that all non-commercial fundraising (as is done in Victoria) should be regulated in the same way, with significant concessions (i.e. relaxations from further compliance) flowing to charities that have complied with the rigorous requirements of registration with ACNC and disclosure etc. under that regimen.

Recommendation: National charitable fundraising regulation should apply to all non-commercial fundraising.

Avoid over-prescription

3.13 Analysis undertaken on the effectiveness of overseas not-for-profit watchdogs suggests that a majority of non-corporate donors do not use a watchdog's information about the charity.[3] With that in mind, a real balance must be struck when regulating fundraising by charities. As mentioned earlier, excessive regulation reduces the effectiveness and

[2] See *Fundraising Legislation in Australia: The Exemptions and Exceptions Maze*, McGregor-Lowndes and Hannah, QUT Business School, p.21, footnote 35 for case citations.

[3] *Nonprofit Watchdogs: Do they serve the average donor?*, Cnann, Jones, Dickin and Salomon, Nonprofit Management and Leadership, vol 21, no.4, summer 2011; *Charity Watchdogs and the Limits of Information-based regulation*, Szper and Prakash, Voluntas (2011) 22:112-141.

productivity of the sector. Many of the behaviours that the discussion paper seeks to prevent may already be effectively covered (and more easily monitored and enforced) under other legislation, such as police powers (for public nuisance), consumer powers for misleading conduct. Financial transparency has already been highly prescribed in the ACNC Exposure Draft. Over-regulation must be avoided as it will only increase the compliance burden in breach of the *National Compact.*

Recommendation: Over-regulation must be avoided.

4. **What activities should be regulated?**

4.1 The definition of "fundraising activities" proposed by the discussion paper is very broad, and, in the absence of exemptions, encompasses all solicited and unsolicited receipt of money and property – that is, all income of a charity. It is ACFID's position that the definition is too broad and will require too many exemptions in order to avoid regulating sources of income that are clearly not "fundraising" and not appropriate to be regulated as such.

4.2 The proposed national definition is broader than what is regulated in most States and Territories at present – it does not have the qualification that there be some representation, soliciting or invitation to the public about the charitable purpose for the fundraising.

4.3 This element of representation to the public is what captures the main intent of fundraising legislation: protecting the public. Any fundraising regulation should be directed to what is commonly understood as "fundraising" – the soliciting of money from the general public on the representation that the money will be used for the charitable purpose of the organisation. Extending the definition of "fundraising activities" to essentially all sources of income of a charity will significantly increase the administrative burden of charities and defeat the purpose of the *National Compact* and one of the intents of fundraising regulation (namely to avoid inefficiency).

4.4 Such a broad definition requires too many exemptions to avoid regulating sources of income that are clearly not appropriate to regard as "fundraising". To avoid a cumbersome list of exemptions, there must be some element of representation or offer to the public or section of the public within the definition of "fundraising activities". The concept of an offer to the public or section of the public has a well understood body of law attached to it, as it was part of corporate law prior to 1990 for the regulation of corporate fundraising from investors.

Recommendation: The definition of "fundraising activities" should incorporate an element of representation or offer to the public or a section of the public.

4.5 The exemptions proposed by the discussion paper are also narrower than presently exists. The exemptions proposed are appropriate and necessary, but not enough.

4.6 Some of the categories of income which would be, inappropriately, caught by fundraising regulation in the proposed form of the definition and exemptions include:

(a) Money, property or in-kind assistance, which is given a value in the accounts, received by a charitable entity from related entities within the same organisation or between different charitable organisations

(b) Membership fees

(c) Donations (whether monetary, or, for example, gifts for prizes) from members or staff of a charitable organisation

(d) Income (more often a nominal amount, charged just to cover the costs of providing said service) received from:

(i) delivering services for a fee (for example training)

(ii) registration or entrance fees for attendance at a seminar put on for members and supporters, and sometimes the broader public, about an issue relevant to the sector

(iii) the sale of educational materials to raise awareness of issues in the development sector

(iv) the provision of consultancy services in the development area

(e) Income received from interest on investments or other commercial income sources.

4.7 One of the purposes, stated in the discussion paper, of fundraising regulation is information asymmetry – that donors do not have sufficient information or power to properly assess a charity before giving and to ensure the donation was used appropriately after giving. The exemptions listed in the discussion paper are said to be justified on the basis that there is not any real information (or power) asymmetry in those contexts. <u>It is ACFID's submission that the categories of income listed in sub-paragraphs (a) to (e) above fall within the same category and should also be exempted.</u>

4.8 Many of our members have more than one legal entity within their organisational structure. This is sometimes because of requirements of a particular government grant etc., the size of the organisation or merely a matter of historical development. Regardless of the cause, there is often money, assets or services passing between entities within the same organisation. It is entirely inappropriate for such sources of income to be regulated by fundraising laws. The income is not from the public and is entirely an internal organisational transfer. The initial input of income into the organisation, if it was raised from the public, would have been subject to fundraising regulation and the requirements for disclosure etc. To require the movement of money between entities to be regulated would impose a double administrative burden on an organisation.

4.9 Also, some of our members fund, or receive funds from, other charitable organisations to deliver a particular project (etc.). This receipt of income from a charity is also not from the public. There is no information or power asymmetry. The donor organisation would ordinarily be in the position to, and probably would be required to, monitor the application of the funds given. That source of income should not be subject to the burdens of fundraising regulation.

4.10 As to sub-paragraph (b) above, membership fees are also clearly not the type of income that should be governed by fundraising regulation. The payment of a membership fee entitles, ordinarily, the member to participate in the organisation and have a say, at general meetings at the very least, in the running of the organisation or to see the accounts of the organisation. There is no information or power asymmetry and members

have rights within the constitution of the organisation if they are unhappy with decisions made by the organisation. Similarly, donations made by staff or members within an organisation (sub-paragraph (c) above) are akin to the exemptions already proposed by the discussion paper and should also be exempted.

4.11 The sources of income listed at sub-paragraph (d) above are received by many of our member organisations and probably most not-for-profit organisations within Australia. Awareness raising, empowering and informing the sector or the broader public is one of the significant contributions made by the not-for-profit sector to the Australian society. More often than not, the training, seminars, educational materials, consultancy etc. is provided to members and supporters of the organisation, other community groups (such as schools, churches, other charitable organisations), and government departments. The fees charged are, for most organisations, nominal and are designed to cover the costs associated with providing the service or educational material. They are, for most organisations, not conducted for the purposes of fundraising monies, but rather to perform a vital community role. The imposition of additional administrative burdens on charities which provide these services may well dissuade some from delivering them in the future.

4.12 If income received by charities as a fee for delivering services (etc.) is regulated by fundraising law, charities will be regulated more than their non-charitable, commercial competitors, which provide them primarily for a profit and not for the betterment of the Australian community. Charities should not be treated more harshly. The free market economy is based on the premise that the market will drive efficiency and good value. Inappropriate conduct, or poor product or service delivery, is penalised by a lack of return business or resort to contractual remedies, and is also regulated by laws applicable to all, including, for example, competition and consumer laws. The regulatory burdens associated with fundraising law should not be placed on charities seeking to further their charitable purposes through delivery of services (etc.) for a fee.

4.13 Similarly, it is clearly inappropriate to impose fundraising regulation on income received from investments or other commercial enterprise.

Recommendation: The following activities should also be exempt from fundraising regulation:

(a) Money, property or in-kind assistance received by a charitable entity from related entities within the same organisation or from different charitable organisations

(b) Membership fees

(c) Donations (whether monetary, or gifts) from members or staff of a charitable organisation

(d) Income received from fees charged for the delivery of a service (including training, seminars, and consultancies) or product (including training or educational materials)

(e) Income received from interest on investments or other commercial income sources.

5. **Smaller charities**

5.1 The cost to smaller charities and new charities to navigate the State by State based fundraising regulations is, in our view, a significant barrier to the growth of new and innovative charities. ACFID agrees that there is a need to differentiate between small charities and the larger organisations in order relieve smaller charities from some of the administrative burdens associated with fundraising regulation.

5.2 Having said that, the proposal that charities which fall below a defined threshold should remain subject to existing State or Territory fundraising laws relies on two false assumptions.

5.3 It incorrectly presumes that all smaller organisations are not national, but are only based in one State. Many small organisations, particularly in the development and aid sector, are not limited by a geographical boundary of a particular State. They seek membership and funds from across Australia. They may be small merely because their purpose or project direction is confined or focussed, or because they have just started up. They too have to grapple with the complexity of differing State fundraising regulation. For those which primarily rely on volunteer assistance, this task of fundraising compliance can consume significant volunteer hours (or limited staff hours).

5.4 The proposal that smaller charities remain subject to State by State regulation also incorrectly presumes that smaller organisations do not use the internet or electronic forms of communication to solicit funds. The proposed prohibition on this form of fundraising unless registered with ACNC has this effect. This could not be further from the truth. Invariably, new organisations, particularly youth-run or youth focussed, might rely exclusively on the internet and e-mail. Social media has transformed the stage on which many fundraising appeals are conducted. It is a cheap and effective way for new organisations to begin.

5.5 As discussed above in paragraphs 3.8 to 3.12, having some charities not subject to national regulation could lead to significant confusion within the sector but also within the broader community. What happens if an organisation earns $51,000 one year, or if it wants to use the internet or email to advertise a particular fundraising event? Why should one charity be able to doorknock at a particular time and others cannot? Why should some be permitted to engage in misleading conduct without consequence and others cannot? The intent of improving public confidence and reducing red tape could be lost if there is not uniformity across the sector.

5.6 ACFID submits that all charities should be subject to the national fundraising framework, but there be a tiered approach to compliance requirements.

5.7 Given the significant compliance burdens associated with registration with the ACNC, this does not mean that charities that fall under a defined threshold should necessarily be registered with ACNC. However, they should be permitted to do so if they wish to. For example, if the prohibition on fundraising over the internet remains unless an organisation is registered, a small charity may wish to register in order to be able to conduct appeals via e-mail. This is discussed further in the next section about registration.

5.8 It is ACFID's submission that the threshold should be used to dictate the level of disclosure or other compliance obligations required of the smaller charity. For example, under ACFID's Code of Conduct, organisations with revenues of less than $250,000 per year are

able to submit a short form of financial accounts instead of the more detailed accounts required of the bigger organisations. This is in recognition of the accounting cost etc. that such disclosure will impose on a small organisation.

5.9 Having said that, it is ACFID's position that the conduct of all charities should be regulated in the same way, including calling hours and the application of certain consumer laws.

Recommendation: Smaller charities should fall within the national fundraising framework, and be subject to the same regulation of conduct in terms of calling hours and ACL application, but be relieved of some of the compliance obligations of disclosure etc.

6. **Registering for fundraising activities**

6.1 If fundraising is to be regulated, ACFID's position is that it should be national regulation which is streamlined with ACNC registration. The requirements for registration with ACNC, and the requirements which flow from registration, are rigorous and, in many cases, exceed what is currently required by fundraising laws. There is no need for further obligations. Fundraising should be automatically permitted for all charities registered with ACNC.

Recommendation: Fundraising should be automatically permitted for all charities registered with ACNC, without further conditions.

6.2 As foreshadowed in the discussion above in relation to smaller charities, organisations should be able to register for fundraising without needing to register with ACNC. Start-up or new charities may take some time before they are eligible for registration with ACNC or small organisations may find the burdens associated with registration with ACNC mean they do not wish to register. These organisations, however, should not be prevented from fundraising or fundraising over the internet etc. For all the reasons discussed above in section 5, they should not be required to run the gauntlet of State by State regulation either. There should be an ability for small or start up organisations to register with the ACNC for fundraising, without being subject to the stringent administrative requirements associated with general ACNC registration.

Recommendation: ACNC should have a separate category of registration solely for fundraising purposes, designed for small or new organisations, which has lesser disclosure and administrative requirements in recognition of their size.

6.3 The paper proposes insolvency and other significant wrongdoing in the course of fundraising as grounds to ban a charity from fundraising. Banning is a significant penalty given that the definition of fundraising activity is so broad, and it could prevent an organisation from receiving any income during the ban and it could ultimately result in the insolvency of an organisation.

6.4 While insolvency is a ground for a charity to be de-registered from the ACNC, there is no need for it to be a separate ground for banning fundraising. If it is removed as a ground for de-registration, there is an argument that it should not be a ground to ban an organisation from fundraising per se, as it could prevent any external administrator from being able to salvage an organisation and find a way for it to operate in a viable way, as it would take away all income streams, apart from government or corporate funding, from an organisation. In order to prevent organisations from soliciting donations while

insolvent, it may be preferable for a positive obligation to be included in fundraising legislation that executive officers of organisations do not undertake fundraising activity whilst insolvent in the same way as directors are obliged to not trade whilst insolvent under the *Corporations Act 2001*.

Recommendation: Insolvency should not be a ground for preventing an organisation from fundraising. Instead, a positive obligation requiring executive officers not to engage in fundraising activities whilst insolvent may be preferable.

6.5 ACFID agrees that, at a broad level, there is a case for having certain conduct result in a suspension from fundraising as opposed to de-registration of a charity. Any proposal to suspend charities from fundraising should be carefully drafted and limited in the following ways:

(a) Suspension should be limited to serious cases of misleading and deceptive conduct, unconscionable conduct, false or misleading representations or harassment and coercion only

(b) there should be a clear process which affords natural justice to a charity prior to any suspension (including notice prior to suspension, opportunity to be heard, and reasons for decision)

(c) there should be short periods of suspension, on a sliding scale that does not exceed one year

(d) there should also be a clear limit on the type of fundraising activity that cannot be undertaken during a suspension - that is, it should be limited to the type of activity during which the breach occurred, e.g. public face to face unsolicited requests for donations, and not broadly to all income sources which are currently caught by the broad definition of "fundraising activity".

Recommendation: Any legislation which suspends a charity from fundraising should be carefully drafted, limited to serious cases, afford natural justice, not exceed one year, and should be limited to the particular type of fundraising activity during which the breach occurred.

7. **Regulating conduct**

7.1 ACFID agrees that the following provisions of the Australian Consumer Law (**ACL**) should apply to fundraising activities:

(a) Misleading and deceptive conduct

(b) Unconscionable conduct

(c) False or misleading representations

(d) Harassment and coercion.

7.2 ACFID's Code of Conduct, and many of the FIA's standards, already requires our members not to engage in that sort of conduct.

7.3 ACFID, however, is greatly concerned about the application of the calling-hours provision to charitable fundraising as it ignores the reality of the sector.

7.4 Firstly, some of our members advise us that a significant proportion of the unsolicited face to face fundraising occurs between 6-8pm on weekdays. Some have advised that if that fundraising was prohibited during those times, they could potentially lose hundreds of thousands of dollars in income and may need to reduce their program work. It should also be remembered that some charities rely heavily on volunteer door knockers, often school students, to collect on weekends, including Sundays.

7.5 Many of our members conduct other types of formal and informal fundraising outside of the proposed calling hours, such as fundraising dinners, seminars, concerts or other evening or weekend events. Sometimes an organisation may have a stand at a weekend festival to raise the profile of the organisation or a particular issue. At the events, the fundraising may be the advertised purpose of the event so it arguably may not be regarded as an unsolicited approach. However, sometimes the promoting of an organisation or fundraising for a particular cause may be a spontaneous or side part of an event, or not part of the event's advertising, so it could be regarded as unsolicited. Some of our member organisations are faith based and fundraising can be informally requested at church gatherings or events which occur on Sundays or in the evenings. Our members also advise that a lot of fundraising today is initiated by individuals or community groups who hold personal dinners or gatherings with friends on evenings or weekends to raise money for their organisation without the organisation knowing until they receive the funds.

7.6 Charitable organisations should not be prevented from conducting fundraising activities of those types in the evenings or on the weekend. Those activities allow members of the organisations, and members of the public, to engage with the issues being raised, to attend an event or activity of interest, to help raise funds for a cause close to their hearts – all of which make our sector vibrant and engaged.

Recommendation: Only unsolicited approaches at a prospective donor's home, whether by telephone or face to face, should be regulated in relation to calling hours. The hours should not mirror the ACL provisions, but extend to, at least, 8pm on weekdays and include Sundays.

7.7 It is unclear to ACFID whether the discussion paper is seeking to apply the provisions in Division 2 of Part 3-2 of the ACL to donations of cash or other property. Those provisions are entirely inapplicable to donations as donations, by their very nature, are freely given and not subject to a contract between the donor and the beneficiary charity.

Recommendation: ACFID does not support the application of Division 2 of Part 3-2 of the ACL to donations of cash or other property.

7.8 We are not aware of any adverse impacts of the application of that division to the unsolicited provision of goods or services for a fee in excess of $100 by our members.

8. **Disclosure at the time of giving**

8.1 ACFID's Code of Conduct requires our members to provide disclosure, at the time of giving, of a number of matters, including identification of the charity, its ABN and address, and to identify if the collector is paid or volunteer.

8.2 ACFID also requires its members to clearly state if there is a specific purpose for the donations.

8.3 ACFID supports the proposal that a charity disclose that a gift is tax deductible.

8.4 Some of our members have indicated the practical problems associated with requiring organisations to make a negative statement on their printed materials – that is, the donation is not tax deductible. Many organisations, particularly new organisations, are in a long process of obtaining DGR status. If this negative disclosure was required to be printed on all of their materials, and then the organisation is successful in obtaining DGR status, there could be significant waste of precious resources required to replace all brochures etc. Some flexibility in how this information can be disclosed is necessary. The requirement could be satisfied by an obligation that the collector verbally advise if the donation is tax deductible.

8.5 Our members have indicated that, in principle, they have no difficulty with providing a reference to the ACNC and a link to the ACNC website on some of their public documents, such as "Registered with ACNC: www.acnc.gov.au". However, if more information was required, such as street address or phone number of the ACNC, it would be impractical and cumbersome on most documents, apart from, for example, a website and annual report. Even the basic notation would be problematic if it was required on all advertising materials, as some are quite small (DL size only), have sophisticated graphic design and/or are already dense with information. Requiring organisations to acquire brand new letterhead, to include such a notation, would also be very costly. Given this sort of notation is not required for companies registered with ASIC, it is difficult to understand the purpose behind the proposed requirement. If it is to inform the public of the right to complain about a charity to the ACNC etc., ACFID suggests that disclosure of ACNC's details need only be included on an organisation's website and annual report. This is what ACFID currently requires of its members under its Code of Conduct.

Recommendation: ACFID supports the requirement that all fundraising solicitations disclose the name of the charity, its ABN and address; whether the collector is paid or volunteer; and whether there is a specific purpose for the donations.

Recommendation: Compliance with any requirement to disclose whether a gift is tax deductible should be able to be satisfied by a collector verbally advising a prospective donor.

Recommendation: Any requirement that a charity provide contact details for the ACNC should be limited to the charity's annual report and website.

9. **Disclosure after giving**

9.1 To a significant extent, ACFID's members are already required, by the ACFID Code of Conduct, to disclose most of the proposed information in their annual reports and financial statements relating to fundraising.

9.2 ACFID's Code of Conduct, at obligations 2a and 2c of Principle C.2.1, requires annual reports to include a description of the organisation's purpose, objectives/aims and values and a description of the most significant aid and development activities undertaken during the reporting period and their impact. The Implementation Guidance for Principle C.2.2 (financial statements) requires organisations to set out their income from all donations and gifts (differentiating between monetary and non-monetary) and their fundraising costs. Obligation 3 of principle C.3.2 requires disclosure of any specific purpose for which a donation is sought at the time of giving. The Implementation Guidance for Principle C.2.2 also requires the production of a Table of Cash Movements for Designated Purposes to disclose the amount of cash that has been raised for a designated purpose, disbursed and remains unspent at the end of the reporting period. ACFID recommends reference to its Code of Conduct and Implementation Guidance (**attached**).

9.3 In order to achieve the purposes of the *National Compact*, and reduce red tape, it is imperative that no additional disclosure (or form filling) is required of charities which are already subject to ACNC reporting requirements. The Annual Information Statement asks for enough information in relation to fundraising that no further forms or disclosure are necessary.

9.4 As has been highlighted in our submission in relation to the ACNC Implementation Design, it is important that clear definitions should be drawn from the Standard Chart of Accounts, and also developed specifically for the not-for-profit sector, to ensure ease of application by the sector and consistency of reporting across the sector. For example, "fundraising costs" should mean the same thing for each and every organisation in order for the disclosure to have any meaning.

Recommendation: No additional disclosure should be imposed on charities subject to ACNC annual reporting requirements. All reporting should be included in the annual information statements required by ACNC.

Recommendation: Clear standard definitions, developed specifically for the not-for-profit sector, need to be developed.

9.5 To the extent that the discussion paper is suggesting continuing on the requirement of many States and Territories that all monies raised must be banked into a separate bank account, ACFID urges caution against the proposition. Not-for-profit organisations are already subject to many different obligations in terms of their bank accounts by the ATO, government departments who give grants etc. The requirements invariably conflict and can cause practical difficulties within organisations to implement. ACFID's Implementation Guidance for its Code of Conduct requires organisations to provide a Table of Cash Movements for Designated Purposes, which, as briefly mentioned above, requires organisations to disclose the amount of cash that has been raised for a designated purpose, disbursed and remains unspent at the end of the reporting period. How an organisation ensures they are able to comply with this obligation is a matter for them, but this disclosure requirement is arguably more effective in ensuring transparency, and providing an ability to trace monies, than merely requiring a separate bank account.

10. **Internet and electronic fundraising**

10.1 A prohibition of fundraising via the internet or e-mail, unless registered with the ACNC, will have a broader impact than possibly intended. The prohibition will affect those small charities which fundraise under the proposed $50,000 threshold which are, under the proposed discussion paper, not to be registered with ACNC. The prohibition would also affect start up or new organisations that are not yet able to register as a charity with the ACNC. The prohibition also affects many not-for-profit organisations which were previously regulated by State fundraising laws but may not fall within the legal definition of a charity, in that they have broader philanthropic, benevolent or community purposes, and therefore are unable to be registered with the ACNC (including sporting groups). It will also affect one of the burgeoning forms of fundraising: through social networking or social media sites.

10.2 It is ACFID's view that the starting premise for the proposed prohibition is incorrect. Organisations or entities overseas can solicit donations over the internet without regulation as they have no legal/ territorial connection with Australia. The starting point should be that electronic fundraising should be permitted, subject to the same disclosure and other regulations, where money is received within Australia or for Australian beneficiaries.

Recommendation: There should not be a blanket prohibition on internet or electronic fundraising except where registered with the ACNC. Electronic fundraising should be permitted, subject to the same disclosure and other requirements under fundraising regulation, where money is received within Australia or for Australian beneficiaries.

10.3 As discussed in section 6 above, there should be an ability for small charities, under any monetary threshold, new organisations and organisations not technically a charity, to be able to fundraise on the internet or electronically. Any national fundraising laws should allow internet and electronic fundraising by such organisations, whether that be by way of registration with the ACNC under a different category, or some other means. The small charities or start up organisations should also be relieved from some of the administrative burden associated with fundraising regulation in order to achieve the intended purpose of the threshold. The recommendations articulated by ACFID in section 6 partly achieve this. Further thought, however, needs to be given to all of those not-for-profit organisations that are not charitable, such as sporting clubs, and will not be falling within the ACNC's purview at the outset, but will still need to able to fundraise over the internet etc.

10.4 ACFID's members advise us that a relatively new, and expanding, form of fundraising is fundraising initiated by individuals through the use of social media, such as GoFundraise, Inspired Adventures, and EveryDayHero. Individuals may choose to undertake, for example, a triathlon, and seek to raise funds for a particular charity. They would sign up to one of the internet based fundraising companies which set up the portal/website and acts as the collector of the funds (and which is ultimately paid a fee by the charity), and the individual would solicit donations, and discuss their athletic journey etc., over the internet in social media sites or by e-mail to their friends and colleagues. The internet and e-mail is an integral part of the fundraising. The beneficiary charity is rarely made aware of the fundraising effort until the third party fundraising internet organisation remits the raised funds. This type of grass roots, organic fundraising should not be hindered by over-regulation. The individuals should not be required to register with ACNC in order to use the internet. It would completely stifle this form of fundraising.

Recommendation: Volunteer third parties fundraising for charities should not be required to register with the ACNC in order to use the internet or other electronic forms of fundraising.

10.5 The discussion paper also proposes to require organisations to state their ABN on all internet or electronic fundraising. This does not seem to be an unreasonable requirement; indeed, it is one required by obligation 2 of principle C.3.2 in ACFID's Code of Conduct.

11. **Fundraising by third parties**

11.1 ACFID's members are not homogenous when it comes to the use of third party fundraisers. Many do not use paid third party fundraisers. Others rely heavily on them. Many receive the gratuitous support of individuals or groups who voluntarily raise money on their behalf on their own initiative.

11.2 ACFID's members have indicated that there is a fourth, very important, category of third parties who fundraise for charities which is not mentioned in the discussion paper. There are many individuals, community groups, schools, etc. who initiate and conduct fundraising on behalf of a charity, often without contact with the organisation until the cheque is delivered. These individuals and groups act purely on a volunteer and altruistic basis. They may do it merely by e-mail to friends, by use of social networking sites, by holding a dinner party, by a sausage sizzle at a school fete or other gathering. This type of activity is of benefit, not only to the ultimate beneficiary charities, but it is an important part of the social fabric of society and gives those individuals and community organisations significant satisfaction and happiness. It should not be limited or hindered by excessive regulation.

Recommendation: Any regulation of third party fundraisers should not extend to volunteer individual or community group initiated fundraising for a charity. It should be limited to paid third party fundraisers.

11.3 Some ACFID members have advised that there is another category of third party fundraisers: consultants who are engaged by charities to cultivate substantial gifts and bequests from high net worth individuals. This must be remembered when shaping any regulation of paid third party fundraisers – these consultants are very different to the traditional unsolicited face to face fundraiser and do not raise many (if any) of the concerns associated with the traditional unsolicited collector.

Recommendation: Care must be taken when drafting any legislation dealing with paid third party fundraisers to recognise that not all conduct traditional unsolicited face to face fundraising.

11.4 It is ACFID's view that the discussion paper misunderstands the legal position of third party fundraisers. By collecting on behalf of a charity, third party fundraisers are agents of that organisation and therefore are obliged to meet the requirements that the charity must meet when conducting fundraising activities. That is, third party fundraisers should provide all the same disclosure at the time a person gives as a charity itself must do. Third party fundraisers arguably must also give sufficient information to its beneficiary charity to allow the charity to provide adequate disclosure of the income received and costs incurred as a result of the fundraising activity.

11.5 There is, therefore, no need for separate obligations on a third party fundraiser which repeat the obligations on charities. For the sake of clarity, national fundraising legislation could impose on charities an obligation to have written contracts with third party fundraisers that oblige them to meet the disclosure requirements on giving and to provide the charity for which they are fundraising with sufficient information about the income and costs associated with the fundraising activity.

11.6 With that safeguard in place, there is no need for a third party fundraiser to be separately registered with the ACNC.

Recommendation: Third party fundraisers:

(a) should not be required to register with the ACNC
(b) do not need separate obligations which repeat obligations required of charities; they will be required to give all the same disclosure as a charity as they are its agent
(c) could be required to enter into written contracts with charities which oblige them to meet the disclosure requirements on giving, and to provide the beneficiary charity with sufficient information about the income and costs associated with the fundraising activity.

11.7 The proposal that a third party fundraiser should disclose that they are paid is similar to obligation b in principle C.3.4 of ACFID's Code of Conduct, and, therefore, supported by ACFID. Identification of the corporate third party fundraiser employer could assist charities to respond to any complaints about someone collecting on their behalf, including identifying any third party fundraiser who has engaged in inappropriate conduct during fundraising activity or identifying where someone is fraudulently soliciting donations in their name.

Recommendation: Third party fundraisers should disclose the fact that they are paid and the name of their employer (the corporate entity of the third party fundraiser).

11.8 There is not agreement amongst ACFID members as to whether a third party fundraiser should disclose the amount they are paid/ the amount that the beneficiary charity will receive. Some of our members have advised that they already do this. Others say that it would be impossible as they engage different third party fundraisers and the amounts differ between each and the fee structures are more complicated than a bare percentage. Fee structures are often performance based and can change once certain monetary markers are reached.

11.9 The desire for transparency of fees paid to third party fundraisers could be met by disclosure in annual reports. This is done in the United States where the professional fundraising fees paid by an organisation in a year must be disclosed along with total fundraising expenses.

11.10 There is concern that too strict regulation of third party fundraisers may put small ones out of business, and reduce the competitiveness in the industry and ultimately negatively impact on charities. There is also concern that some small charities have to rely on third party fundraisers as they do not have the capacity to undertake that role themselves. Those organisations would have, therefore, a greater amount in any professional fundraising fees line and may be unjustly penalised by the public. That impact could be

lessened if there is clarity in the definition of general fundraising expenses to include the cost of salaries of the persons employed by a charity to conduct fundraising.

11.11 There is also concern about the impact of over-regulation on the dollar value of face to face fundraising. Each year more than 180,000 people in Australia make regular monthly donations to charities, and between 80-90% signed up with a face to face fundraiser. The value of a long term commitment to an organisation is immense – it allows organisations to plan and implement long term projects. This should not be discouraged or made more difficult because of the actions of a few rogue fundraisers.

Recommendation: Any regulation of paid third party fundraisers should be carefully designed so that it does not:

(a) reduce competition in the fundraiser industry

(b) negatively impact on small charities which need to rely on third party fundraisers

(c) reduce the dollar value of face to face fundraising to the charitable sector.