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Submitted online

Regulatory Policy Branch
Department of Prime Minister and Cabinet
PO Box 6500
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Dear Regulatory Policy team

Submission: consultation on draft Regulator Performance Guide

Thank you for the opportunity to provide feedback on Prime Minister and Cabinet's draft Regulatory Performance Guide (**Draft Guide**).

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

We engage with a range of Commonwealth regulators that will be subject to the Draft Guide, once finalised. Our work with regulators gives us a strong understanding of the role and impact they have in marketplaces and society. In particular, we currently regularly engage with the following Commonwealth regulators:

- Australian Securities and Investments Commission (**ASIC**)
- Australian Prudential Regulation Authority (**APRA**)
- Australian Financial Security Authority (**AFSA**)
- Australian Communications and Media Authority
- Australian Energy Regulator
- Australian Competition and Consumer Commission (**ACCC**).[1]

We support the Government's planned introduction of a new framework to replace the existing 2014 Regulator Performance Framework (**Old Framework**), which is considerably flawed and outdated. The Draft Guide improves upon the overall focus of the Old Framework, as it is predicated on a slightly broader view of the purpose of regulators, and the goals they should seek to achieve.

That said, there is still substantial room for improvement. The Draft Guide still only sets out expectations that speak to some of the goals and principles that are necessary to deliver effective regulation. There is a concerning absence of any real focus on measuring regulator performance by the extent to which they perform their legislated role, and protect (or otherwise benefit) the general public.

A summary of recommendations is available at **Appendix A**.

[1] As a registered charity, Consumer Action is also regulated by the Australian Charities and Not-for-profits Commission.

General comments

It is essential that strong and effective regulators exist in marketplaces to help protect consumers and improve consumer outcomes. This is the fundamental reason for the existence of regulators.

Though the Draft Guide may be an improvement upon the Old Framework and the three principles of best practice identified by the Government appear to be sound, we are concerned that the Draft Guide suffers from a glaring lack of focus on the fundamental end goal of all regulators – being to improve the conduct of regulated entities and the outcomes to consumers that they provide. While not to the same extent at is predecessor, the small print in the Draft Guide still disappointingly too often frames the three key principles primarily from the perspective of regulated entities, rather than the public. The Government's three principles of best practice absolutely can be consistent with good consumer outcomes, but the message the framework sends could be substantially improved upon by shifting the overall tone in the detail towards emphasising that end goal.

This problematic tone is clear from the first paragraph of the message from the Assistant Minister, where he refers to the impact regulation has on businesses, markets and the economy, without mentioning consumers or the general public. We strongly encourage the Assistant Minister to frame this issue differently from the start, by referencing the general public that regulators (and Government as a whole) exist to serve.

We recommend that rather than focusing so prominently on reducing regulatory burden, the Draft Guide should instead encourage regulators to adopt a focus on outcomes-based regulation. Encourage a regulatory model where a regulator sets out particular outcomes that regulated entities must meet, but where there is flexibility and discretion in how these outcomes are achieved. This would still allow for innovation and a reduction in regulatory burden, without compromising the end goals of regulation.

RECOMMENDATION 1. Make greater explicit reference in the Draft Guide to the effectiveness of regulators in delivering positive outcomes for consumers and the general public.

Principle 1: Continuous improvement and building trust

We support the best practice Principle 1 and most of the related guidance set out in the Draft Guide. The Principle itself, and many aspects of the guidance are uncontroversial and relatively straightforward. However, there are some parts of the guidance that should be revised. The detail in the description of Principle 1 crucially misses an opportunity to emphasise the vital role that a regulator's ability to improve consumer outcomes and effectively deter misconduct by regulated entities plays in building trust amongst the community. Additional valuable direction could be provided without adding any great length to this section.

Community expectations and public confidence

We strongly support the statement in the third body paragraph on Principle 1, where the Draft Guide references the need for regulators to take into account, and respond to, community expectations, in order to build trust and public confidence. However, this part of the Draft Guide fails to properly address (and in some cases, arguably contradicts) some aspects of what we consider to be key for a regulator to meet community expectations.

<u>Proactive and influential regulators</u>

The general public expects regulators to have a positive influence on the conduct of regulated entities, enforce laws, and improve the related community outcomes. As stated above, this is the primary goal of regulators, and the main reason they exist.

While we agree that the community expects regulators to be mindful of the regulatory burden involved in their actions and work collaboratively with the regulated industry when possible, regulators still need to be influential. The repeated references to reducing regulatory burden under Principle 1 in the Draft Guide, and lack of any encouragement for regulators to actually have an impact, gives the impression that regulators should solely be

seeking to reduce their overall impact on society. This is not a message that is consistent with community expectations or good regulator outcomes.

One of the key messages drilled home by the Financial Services Royal Commission (**FSRC**) was that ASIC and APRA were not doing enough to enforce the law. In his Interim Report, Commissioner Hayne strongly encouraged ASIC in particular to change its approach toward regulation to more proactively use its enforcement powers where misconduct occurs, "because society expects and requires obedience to the law".[2] The Draft Guide appears to have been written with no real regard for the lessons from the FSRC. We strongly encourage the Government to revise the Draft Guide to document those lessons and encourage regulators to influence and impact the markets they regulate. Impact does not have to amount to burden. This message can still be delivered while being consistent with the goal of reducing regulatory burden.

We recommend that this part of the Draft Guide be amended to specifically clarify that to meet community expectations, regulators should seek to undertake work that impacts the shape and conduct of markets, to ensure they operate in a way that most benefits the public. Clarification that this includes proactive involvement in shaping markets would also be valuable, as well as emphasising the deterrent value in enforcement activities, where misconduct does occur.

RECOMMENDATION 2. Specify under Principle 1 that the community expects regulators to undertake impactful work directed at both proactive market shaping, and using enforcement powers to punish and deter misconduct.

Encourage monitoring and responding to market changes

Consistent with the point above, we recommend providing additional guidance and emphasis on the reference at the fifth dot point under Principle 1 for regulators to take a broad perspective of the regulatory environment. In particular, we recommend explicitly referring to the need for regulators to quickly identify changes in the market and new business models, especially where this occurs on the fringes of the regulatory environment.

While market changes can bring about improvements in efficiency, they also risk bringing consequences that may prove detrimental to consumers, particularly if they are driven solely by profit focused market players. Identifying these changes early can help regulators identify when they need to make early proactive interventions. If change is necessary to prevent negative outcomes, an early intervention while the change is still taking shape can help reduce the associated burden on industry. This includes where new business models emerge.

Focus on market activity on the edge or just outside legal remit of regulators

One area we strongly recommend drawing attention to in the Draft Guide is where market changes or new business models pop up on the perimeter of a regulator's legal remit, or just outside. Business models designed to avoid the legal framework or established regulatory regimes should warrant increased regulator attention. The Draft Guide should encourage regulators to be proactive in monitoring entities that seek to avoid their remit, or otherwise engage in avoidant conduct.

One example of the potential for harm of this nature can be seen regarding recent proceedings commenced by ASIC addressing a consumer credit model that the entities involved claim operates outside the *National Consumer Credit Protection Act 2009* (**NCCP Act**). The model was being used to issue loans that were similar to small amount credit contracts (short term loans of up to $2,000), but with associated fees often amounting to many times the amount legally chargeable for loans of an equivalent amount, if subject to the NCCP Act. The entities using this model were effectively using a two-contract model, where one entity issued the loans, while the other imposed hugely expensive fees and charges. The two-contract model appeared to be designed in a way to exploit an arguable loophole in the NCCP Act and avoid being subject to regular consumer credit laws.

[2] Financial Services Royal Commission, 2018, *Interim Report Vol 1*, page 277.

Consumer Action received a large amount of calls from people experiencing, or at risk of, financial hardship, who had been left with debts owed through these loans. The amount allegedly owed often rapidly amounted to many times the original amount borrowed. It was causing consumers serious financial hardship and distress.

While arguably falling outside the strict remit of the credit laws, ASIC subsequently used its product intervention power to issue an order to ban the business model being used.[3] Following this, one of the companies involved adopted a similar second model with another company, making use of another arguable loophole in the NCCP Act. ASIC has since commenced proceedings against the two companies over unlicensed credit activity – alleging that this lending model is actually within the remit of the NCCP Act.[4]

Regardless of whether or not the model does fall within the boundaries of the NCCP Act, action needed to be taken to stop consumer harm, and ASIC was the relevant regulator. If ASIC deemed that they had no jurisdiction to oversee these loans and no powers to change this, it would have been hugely important that they informed their relevant Minister to encourage them to consider law reform to address the loophole.

This was a clear example of conduct on the edge of ASIC's remit, but which was causing significant consumer harm. It shows the increased risks that are posed by market changes and conduct on the edge of a regulatory regime. We strongly recommend that the Government amend the Draft Guide to insert specific encouragement for regulators to monitor conduct on the edges of their regulatory regime, including business models potentially designed to avoid their legal remit, and seek to act quickly where significant consumer risks are identified.

RECOMMENDATION 3. Specifically encourage regulators to actively monitor market changes and new business models that may cause community or consumer harm, including those on the edge of, or just outside, their legal remit.

Consistent and comparable reporting

Another important goal mentioned under Principle 1 in the Draft Guide that we support, but which could be articulated in more detail, is the need for transparent external accountability processes. We support encouraging proactive accountability both in terms of what regulators publish about themselves, as well as about their regulated industry.

The importance and value of public reporting in consumer protection regulators was the central focus of the first recommendation in the 2020 edition of our *Regulator Watch* report, released in February last year.[5] A key part of the value the public gets out of regulators comes from the information they publish, both in terms of informing regulated entities, and the wider community. In *Regulator Watch*, we recommended that a consistent minimum standard of public reporting on enforcement activities be adopted, with a key focus on comprehensive information being disclosed in a consistent fashion.

While the Draft Guide may be more broadly targeted than just at consumer protection regulators, we still consider that it could strongly encourage more consistent and comprehensive publication of the data regulators hold. Examples of extremely valuable sources of data that could be released by regulators to better inform the public include:

- Details about the types of actions taken by regulators, broken down by the types of actions taken (for example, enforcement activities) as well as the target entities
- Details about the numbers and types of complaints received about specific regulated entities

[3] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-250mr-asic-makes-product-intervention-order-banning-short-term-lending-model-to-protect-consumers-from-predatory-lending/

[4] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-226mr-asic-commences-proceedings-against-cigno-and-bhf-solutions-over-unlicensed-credit-activity/

[5] https://consumeraction.org.au/wp-content/uploads/2020/03/RegulatorWatch_Report_Compressed.pdf, see Part 4, page 37 onwards.

- Qualitative information about market trends
- Information about the internal allocation of budgets by the regulator, and reasons why.

Publishing this kind of information can help better inform the public of the track records of regulated entities, and potentially relevant information. More importantly, increased transparency would also help drive compliance – no business wants to be known as the entity that is the subject of the most complaints to a regulator.

There is encouragement in the Draft Guide for regulators to increasingly use data and information – particularly in relation to Principle 2. Consistent with making the most of their data, regulators also should be encouraged to publish as much data as possible, in a way that is easily accessible and easy to understand.

RECOMMENDATION 4. Clarify that regulators should publish as much of the data and information they hold as possible, particularly in relation to the performance of regulated entities, in terms of compliance and complaints received.

Working with other regulators

We also support the specific encouragement for regulators to harmonise and avoid duplication with other regulators, at the 6th dot point in the Principle 1 section. That said, this is again an issue that is only addressed from a regulatory reduction perspective in the Draft Guide.

There is a need to recognise that separate regulators have different functions, and most operate separately for good reason. For example, while many financial services entities are overseen by both ASIC and APRA, the two regulators have quite different roles. ASIC is a conduct regulator, while APRA is the prudential regulator. This division is necessary because their mandates can conflict. For example, as the mandate of APRA is to ensure the financial institutions have the necessary capital to pay their depositors, APRA imposing heavy fines or seeking to engage their regulated entities in litigation imposes an inherent conflict to some extent, as this can harm their capital. This only gets worse if a regulated entity has liquidity issues, which may also coincide with concerns over the quality of their services. This can mean that aspects of ASIC's role (eg large scale enforcement activities) could negatively impact some of the focus of APRA.

While ASIC and APRA absolutely should be encouraged to share data and reduce regulatory burden where it does not impact their mandates, there is still a necessity for both to undertake their own goals separately, which is a limit that should be set out in the Draft Guide.

Consistent with the goal of improving public reporting, we also recommend that regulators be encouraged to publicly explain the differences in their roles. Much of the debate surrounding the Government's proposed watering down of responsible lending laws[6] has seemingly focused on the idea that there is overlap between APRA and ASIC's functions. In reality, these two regulators perform significantly different roles, and there is a clear lack of understanding of this distinction in the Parliamentary and public debate. Where necessary, regulators should engage with all aspects of the public, to explain their roles and distinguish between the functions of other regulators.

RECOMMENDATION 5. Amend the Draft Guide to specify that regulators should work together to the extent that their mandates allow it without causing conflict.

Collaboration with regulated entities while maintaining appropriate independence

Finally, the Draft Guide's focus on regulators building and maintaining collaborative relationships with entities they regulate needs to be tempered, having regard to community expectations. While collaborative relationships

[6] Via the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020*.

are an appropriate goal, regulators also need to consider that as the body responsible for overseeing these entities, they should be seen to be independent and impartial, rather than as 'buddies' with industry.

The general public expect regulators to be able to enforce laws in a way that is consistent with the public purpose justifying their existence, including their disciplinary tools. Further, regulator collaboration with the public or the consumers in the market is just as important as collaborating with regulated market players.

This issue is addressed in more detail under the Principle 3 section.

Principle 2: Risk-based and data-driven

The way 'risk-based' regulation translates into application can depend significantly upon interpretation and regulatory culture. By the very nature of their role and the inevitably limited resources available, regulators will always need to take a risk-based approach to some extent. No regulator is in a position where they can absolutely oversee every aspect of the law they are tasked with applying, so they need to identify where they prioritise their resources, and how they perform their role.

We strongly agree that the risk of potential harm and detriment for members of the public should be the driving force in regulators making this decision, and support identifying these priorities with reference to data, evidence and intelligence. However, in some circumstances, the concept of 'risk-based' regulation can be (and has been) interpreted as placing enforcement as a reactive activity, underselling the importance of its role in market shaping, deterrence and clearly establishing the boundaries of the law.

While prioritising where regulators focus their resources is essential and proportionality is obviously important, regulators are still responsible for ensuring that there is accountability for breaches of the law. In the FSRC Final Report, Commissioner Hayne commented on the expanding use of infringement notices as a proportionate response to minor infringements. While he recognised the practical value in their use in some situations, he expressed concern about their expansion into areas beyond purely regulatory matters, as they are a course of action that is unlikely to have any real deterrent effect.[7] The message sent by Commissioner Hayne to ASIC from the FSRC was that the key question to be asked should be, 'why not litigate?'.[8]

The repeated references in describing Principle 2 to reducing compliance burdens and fostering the growth of regulated entities risks suggesting regulators interpret the Draft Guide to mean that they should only focus on 'softer' regulatory action unless serious harm is identified. A soft touch regulatory approach was part of what led to the horrendous conduct in the financial services sector that was uncovered by the FSRC. This is contrary to what Commissioner Hayne recommended – his message being that effective enforcement of substantive breaches of the law are essential to improve market conduct.

Beyond enforcement, regulators also have a role in shaping market outcomes through a range of other activity, from public statements about expected market outcomes; producing regulatory guides or interpretation; to obtaining less public or intrusive but beneficial administrative outcomes (e.g. negotiation with a business to change its practice). The use of these sorts of tools are particularly relevant in emerging or rapidly changing markets. In such markets, businesses will be experimenting with new business models and marketing strategies in an uncertain regulatory environment. Under a risk-based approach, the regulator could sit on its hands and wait for harm to occur, or it could play a role in shaping the market by sending early messages that particular types of conduct will not be tolerated. We obviously prefer the latter.

We recommend that explicit reference be included in the description of Principle 2 of the Draft Guide to clarify that substantive breaches of the law still need to prompt enforcement responses that will deter repeat conduct. We also recommend that the meaning of risk-based approaches not be interpreted as 'wait for harm before acting'

[7] FSRC Final Report, Volume 1, page 437-438.
[8] Ibid, page 427.

Clarifying these points would help ensure that the message to focus on harm and the risk of harm is heard by regulators, while ensuring that a 'risk-based' regulation strategy does not translate into soft touch regulation. This can still very much be consistent with a reduction in regulatory burden for all market players that substantively play by the rules.

RECOMMENDATION 6. Amend the Draft Guide to clarify that the meaning of 'risk based' does not limit the regulator from being proactive, both in enforcement activity where breaches have occurred and in market-shaping activities to prevent the risk of harm.

Other comments on Principle 2

Data driven assessments need to be ongoing

Consistent with the need for regulators to continually monitor the broader market, the data and evidence-based risk assessments that determine where harm is occurring need to be ongoing. The risk of harm in an area may dramatically increase by a change in market conditions, conduct or due to external factors. In these situations, new developments may quickly create a pressing need for a change in regulator focus. We recommend inserting a statement clarifying that regulators need to be reviewing risk assessments regularly, or conducting them on an ongoing basis.

RECOMMENDATION 7. Clarify that risk assessments by regulators need to be undertaken on an ongoing basis, to ensure that any increased risks to community or consumer detriment caused by changes in market conditions are quickly identified.

Voluntary compliance

There is certainly a place for voluntary compliance strategies in regulation. However, we recommend clarifying in the 4th dot point that this approach only be taken where risk of harm is minimal to non-existent, and where there is a long history of very high levels of compliance.

ABCC Case Study

We also question the value of case study 2 in this section. The example performance measures listed are particularly problematic. The idea that reductions in decision making times are a universal indicator of improvement is concerning. While this may be a good outcome for low risk applications, there needs to be a focus on the quality of decisions and the impact it has on the public for higher risk applications. It also originates from a position of assumed compliance, without necessarily having the justification for it. What if there are major issues to be identified, which require additional attention or measures to be taken? In some situations, long decision making times may be indicative of high risk or a lack of sufficient resourcing.

We recommend ensuring the case study's performance measures include measures to be adopted where the risk of non-compliance is high.

RECOMMENDATION 8. Amend case study 2 to ensure performance measures respond to full range of non-compliance risks.

Principle 3: Collaboration and engagement

We support the high-level summary of Principle 3 – transparency, responsiveness and collaboration are all appropriate goals for a regulator, as is remaining up to date (or 'modern'). However, the details in the Draft Guide on Principle 3 do not quite get the balance right on how collaboration and engagement should look, in a couple important of ways.

Increase emphasis on broad stakeholder consultation

As noted above, the Draft Guide represents a considerable improvement on the Old Framework in terms of the way it frames the interests that regulators should consider in how they conduct themselves, beyond simply that of just making life easier for the regulated industry. This section reflects this somewhat, by making explicit reference to the need to consult with the wider community, general public and other agencies, as well as regulated entities.

However, there are some parts of the description of Principle 3 that still place too much emphasis on engagement with regulated entities as a primary means of collaboration. For example, in the third paragraph the focus on making compliance easier for regulated entities, and allowing the adoption of innovative technology, appears to suggest that compliance should primarily be considered from the perspective of the regulated entities. A better way to go would be to focus on the outcomes sought by the regulator; this then allows entities to apply innovation to deliver the outcomes sought. There is also no mention of how these changes might impact community or consumer outcomes, or any prompt for the regulator to engage with the public (or representatives acting in the interests of the public) when assessing compliance requirements.

The example performance measures in Principles case study 3 also suffer from a similarly disappointing focus on the views of regulated entities. The measurements of performance listed at the bottom of the case study include the number of workshops held with stakeholders, explicitly listing only regulated entities and industry peak bodies (both seemingly voices from the regulated industry), and the portion of regulated entities that rate the regulator's approach as 'good' or 'excellent'. Regulated entities are probably going to rate a regulator higher if they let them get away with misconduct, and worse if they enforce important laws in a strict manner. While there is a brief reference to Financial Counselling Australia and ASIC in the body of the case study, it seems that their involvement in the process and their views on AFSA's performance were not relevant to the assessment of performance.

RECOMMENDATION 9. In any case study that considers the measurement of regulator performance, ensure measures consider the views of a wide range of stakeholders, rather than just regulated entities and their advocates.

Balancing collaboration with regulated entities with regulatory purpose

We also recommend inserting a caution into this section to regulators, flagging that engagement with regulated entities should not compromise their independence or their regulatory purposes related to benefiting consumers, the economy or society more broadly.

Regulatory capture, where a regulatory agency, which was created in the public interest, instead advances the political or commercial concerns of the very companies or entities it is supposed to be regulating, is a significant issue. We consider that the guide could be enhanced by pointing this out, and incorporating principles that address the risk of regulatory capture. Research suggests that regulatory capture is connected to social identification with the regulated sector, that is, finance regulators are more likely to be 'captured' if they consider themselves a 'finance professional' rather than a 'public official'.[9]

Regulators should be encouraged to ensure that their collaborative work with regulated entities maintains appropriate boundaries and is still guided by the overarching purposes for which the laws underpinning the role of the regulator exists. Regulators are accountable primarily to the public and the broader community. While the actions of regulators should benefit regulated entities insofar as they ensure that their competitors are playing by the rules and they promote a level playing field, this relationship primarily is about ensuring that the regulated

[9] Veltrop, Dennis and de Haan, Jakob, I Just Cannot Get You Out of My Head: Regulatory Capture of Financial Sector Supervisors (January 27, 2014). De Nederlandsche Bank Working Paper No. 410, Available at SSRN: https://ssrn.com/abstract=2391123 or http://dx.doi.org/10.2139/ssrn.2391123.

entities obey the law. Requests by regulated entities to reduce compliance burdens or otherwise change regulator conduct should only be granted where it will not impact the purpose of the underlying regulation.

RECOMMENDATION 10. Emphasise that regulators should collaborate with regulated entities only to the extent that it does not harm community/consumer outcomes, and does not impact their impartiality or independence.

Performance reporting under the PGPA Act

As noted above, we support the replacement of the Old Framework with the Draft Guide, including the removal of the obligation for regulators to produce a standalone performance report. We agree that these reports are unnecessary, and can be adequately addressed in other existing reporting forms.

Ministerial Statements of Expectations and Regulator Statements of Intent

While we take no issue with Ministerial Statements of Expectations (**SoEs**), ultimately regulators are accountable to the public via the Parliament, and generally have objectives set out in the legislation. For example, the ACCC is bound by the object of the *Competition and Consumer Act 2010,* which is "to enhance the welfare of Australians through promotion of competition and fair trading and provision for consumer protection".[10] Compliance with a SoE comes second to this priority.

In describing the relationship with SoEs, the Draft Guide should remind regulators of this fact – that the SoE is subservient to the regulator's stated legislative purpose.

We also consider the recommendation of updating SoEs with every change in Minister to be unnecessary. While it may be appropriate for an incoming Minister to review the existing SoE, they should not necessarily be required to update them.

To reduce unnecessary administrative work for regulators, and to give them some certainty of the Government's expectations, updates to SoEs for new Ministers should be optional. It is perhaps rare that a cabinet reshuffle is partnered by a dramatic change in Government policy. Independent regulators should be able to continue with their mandate unless there is a necessity for change.

RECOMMENDATION 11. Specify that changes in Minister should prompt a review of relevant Ministerial Statements of Expectations, but not necessarily require that they be updated.

Conclusion

The Draft Guide represents a considerable improvement on the Old Framework. It encourages regulators to focus on more than simply reducing regulatory burden, and to consider a wider range of voices than just the regulated entities they oversee. That said, the Draft Guide still places too much focus on the goal of reducing regulatory burden and supporting the industry subject to the relevant regulation.

Regulators exist to benefit the general public primarily, and to enforce the rules contained in the relevant legislation that empowers them. This should be treated as the primary priority in the Draft Guide.

[10] Section 2.

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on 03 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,
CONSUMER ACTION LAW CENTRE

Gerard Brody | CEO

APPENDIX A - SUMMARY OF RECOMMENDATION

RECOMMENDATION 1. Make greater explicit reference in the Draft Guide to the effectiveness of regulators in delivering positive outcomes for consumers and the general public.

RECOMMENDATION 2. Specify under Principle 1 that the community expects regulators to undertake impactful work directed at both proactive market shaping, and using enforcement powers to punish and deter misconduct.

RECOMMENDATION 3. Specifically encourage regulators to actively monitor market changes and new business models that may cause community or consumer harm, including those on the edge of, or just outside, their legal remit.

RECOMMENDATION 4. Clarify that regulators should publish as much of the data and information they hold as possible, particularly in relation to the performance of regulated entities, in terms of compliance and complaints received.

RECOMMENDATION 5. Amend the Draft Guide to specify that regulators should work together to the extent that their mandates allow it without causing conflict.

RECOMMENDATION 6. Amend the Draft Guide to clarify that the meaning of 'risk based' does not limit the regulator from being proactive, both in enforcement activity where breaches have occurred and in market-shaping activities to prevent the risk of harm.

RECOMMENDATION 7. Clarify that risk assessments by regulators need to be undertaken on an ongoing basis, to ensure that any increased risks to community or consumer detriment caused by changes in market conditions are quickly identified.

RECOMMENDATION 8. Amend case study 2 to ensure performance measures respond to full range of non-compliance risks.

RECOMMENDATION 9. In any case study that considers the measurement of regulator performance, ensure measures consider the views of a wide range of stakeholders, rather than just regulated entities and their advocates.

RECOMMENDATION 10. Emphasise that regulators should collaborate with regulated entities only to the extent that it does not harm community/consumer outcomes, and does not impact their impartiality or independence.

RECOMMENDATION 11. Specify that changes in Minister should prompt a review of relevant Ministerial Statements of Expectations, but not necessarily require that they be updated.