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Regulation Taskforce
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By email: info@regulationtaskforce.gov.au

Dear Sir/Madam,

SUBMISSION ON REDUCING THE REGULATORY BURDEN ON BUSINESS

Thank you for the opportunity to provide our thoughts on possible ways to alleviate the compliance burdens on business from government regulation.

The NCUA is responsible for representing the interests of member credit unions to appropriate government departments, authorities and parliamentarians, as well as advising members of all appropriate legislative and related developments and requirements.

Credit unions are financial co-operatives, owned and controlled by their members. Credit Unions operate in the financial sector and generally provide financial advice, deal in deposit products such as savings accounts and term deposits, deal in non-cash payment facilities such as EFTPOS Cards and BPay, and general insurance. Credit unions are required to hold an Australian Financial Services Licence under the Corporations Act authorising these activities. Credit unions also undertake a banking business and offer loans, and as such are an Approved Deposit Taking Institution (ADI) under the *Banking Act 1959*, and a lender under the *Uniform Consumer Credit Code* (UCCC).

There have been growing concerns from our member credit unions about rising regulatory complexity and compliance burdens. In part, additional regulation and their associated burdens are the product of a more sophisticated and diverse economy and society, with growing demands on government. Nevertheless, it is imperative that additional regulation be balanced with appropriate consideration of the costs (monetary, management time, system development), which may be imposed on regulated entities.

The Taskforce should note that the cost of implementing government regulation falls disproportionately on smaller financial institutions, as they are not able to achieve the economies of scale enjoyed by larger players. The credit union industry, although containing several larger players (akin to a small bank), is dominated by small to medium size institutions.

A recent Parliamentary Joint Committee[1] was particularly concerned about compliance costs and the lack of flexibility in some of the requirements under legislation. It believed that government needed to be aware of the difficulties borne by the smaller financial institutions in satisfying regulatory requirements and to demonstrate a commitment to keep such obstacles to a minimum. Clearly, it is essential that the cost of new regulation be examined for all entities affected, particularly the smaller to medium sized entities.

What is clear from the recent report from the Australian Government's Productivity Commission[2], is that the Regulation Impact Statement (RIS) process *"can and should be improved — including, for example, by regulators better integrating the preparation of RISs into the policy development process, increasing their commitment to consultation with stakeholders and undertaking more robust analysis of policy options"*.

The Productivity Commission report also noted that:

> *"In 2005-06, the ORR (Office of Regulatory Review) intends to further raise the minimum adequacy standards for RISs, with a particular focus on improving the standard of analysis of costs and benefits, and of compliance costs for business. The ORR will also enhance its RIS training and explore the scope to make greater use of information technology to facilitate interaction with regulators"*

This all begs the question – what about the regulations which have been implemented in the past? To what level of analysis of the costs and benefits were undertaken for those regulations?

While we note that the Financial Services Reform Act (FSR Act) is expressly excluded from this review, however the way in which it was enacted, and the level of analysis of costs and benefits does serve to highlight the deficiencies in the RIS process. We believe that the RIS for the FSR Act had serious deficiencies in analysing the cost to business and made no attempt to quantify these so as to allow a comparison with the purported benefit to consumers.

These sentiments were echoed by a report of a Parliamentary Joint Committee [3], which noted the following:

> *"The Committee believes that the licensing cost predictions in the RIS for the FSR Bill are vague and inadequate. The RIS does not disclose any reliable evidence to support the Treasury's conclusions about licensing costs. These appear to be little more than educated guesses."*[4]

We echo the Productivity's Commission's comments regarding the need for RIS to contain a more detailed examination of costs and benefits of new regulation.

Specific comments regarding particular legislative provisions, policies and other instruments are detailed in the Schedule attached. We make some general comments for the Taskforce's considerations below.

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[1] Parliamentary Joint Committee – Corporations and Financial Services, "Money Matters in the Bush", January 2004

[2] Productivity Commission, "Regulation and its Review 2004 – 2005".

[3] Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Regulation 7.1.29 in Corporations Amendment Regulations 2003 (No.3), Statutory Rules 2003 No.85, June 2003.

[4] *Ibid* at paragraph 3.60.

Legislative Winding Back

While we note that financial services reform has been specifically addressed in Treasury's Refinements Project, we do note that the project will unwind significant provisions on basic deposit products and related non-cash payment facilities. While we welcome the project, it must be recognised that the unwinding of these provisions will result in further costs to our members. Although not immediately quantifiable, there will be a cost to change systems and processes, not to mention printing and retraining of staff. The refinements have also made the costs involved in complying with the FSR Act in the first instance more unpalatable.

Clearly these costs could have been avoided had there been genuine consultation with the industry. The process of consultation with industry all too often occurs after government has already decided to regulate. Industry input at this stage is most often ignored.

The Role of the Regulator

Credit unions are corporations carrying on a financial services, banking and lending business. As such they are regulated under the following principal pieces of legislation:

- Corporations Act 2001 and Corporations Regulations 2001;
- Australian Securities and Investments Commission Act 2001;
- Banking Act 1959
- Australian Prudential Regulation Authority Act 1998; and
- The Uniform Consumer Credit Code (State based legislation).

As a result of the areas in which a credit union conducts business, they are required to deal with the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulatory Authority (APRA) and the various State government Consumer Affairs Departments.

There can be substantial costs incurred by members resulting from delays in the administration of the law. This issue is not often discussed but must be recognised as an issue with impacts on the costs and efficiency of regulation.

ASIC

While we understand that the judiciary and not ASIC is the final determinant on what the law is, we submit that it is necessary for ASIC to develop a view on what it believes the law to be and how it will administer its own policies. The current system of policy statements and practice notes should result in ASIC advising industry of its view rather than creating an extra layer necessitating interpretation. Assistance in determining whether particular situations or circumstances come within ASIC's view of the operation of the law or the scope of a policy statement should not be regarded as providing legal advice.

We submit that the administrative process adopted by ASIC to provide a response to industry must be reviewed to ensure that it remains able to deal with issues in a timely and effective manner. Failure to do so will create uncertainties and inefficiencies, which are undesirable. This is ultimately at the expense of cost effective and timely product development, management time and focus on business development.

APRA

There is no doubt that the width of the objectives of APRA has meant that quite extraordinary and wide powers are conferred on it under the various legislation

covering the activities of ADIs. This has led to a proliferation of other regulation in the form of APRA prudential standards and various rules. APRA also has very wide investigative and surveillance powers to support the laws it administers. Although these wide powers are understandable given what APRA is charged with, the unchecked use of that power results in uncertainty and inefficiencies for our members.

For example, all ADIs are required to maintain a certain level of capital adequacy. As to the appropriate level, APS 110.5 makes it clear that it is a matter for APRA to determine on the basis of risk profile of the ADI itself. While we accept this in theory, we believe that the difficulties with quantifying and objectively assessing risk has led to inefficient capital management. This inefficiency is clearly linked to the difficulties in assessing the basis for a particular capital adequacy level.

State Consumer Affairs Departments

Another aspect of the cost of regulation that is often not explored is the cost to an organisation to rectify breaches. This cost often extends way beyond the cost of compliance and manifests in both monetary terms as well as management time.

Feedback from our members suggests that regulators may often be difficult to deal with once a breach (including technical breaches) has occurred. This often results in delays in rectifying the matter to the detriment of consumers, and can be further exacerbated where there are multiple state regulators administering what is in effect defacto national legislation.

We submit that in the case of UCCC, there is insufficient distinction drawn between minor and major breaches, causing inefficiencies in its management. It is important that penalties for breaches be appropriate and commensurate with the severity of the breach and the loss caused to consumers. We have observed mismatching causing an inordinate amount of resources, and time being expended for breaches, which has not cause any loss to consumers. We submit that such a position is undesirable and untenable.

We submit that the Taskforce needs to examine the processes and timeframes for regulators to deliberate and make decisions in relation to minor and major breaches, as well as the co-operation between state regulators needed when administering state based national legislation.

Disclosure

We note that consumer advocates have labelled the Uniform Consumer Credit Code (UCCC) as "dysfunctional"[5] on the basis that, among other things, it relies too heavily on disclosure as the primary consumer protection mechanism: *"Disclosure is a hands-off regulatory mechanism that looks good, conveys all the right messages (consumer empowerment, consumer awareness etc), and perhaps best of all costs government very little. It is easy to check whether disclosure obligations have been met. It is not so easy to assess what protection those mechanisms have provided."*

We suggest that some consideration should be given to substituting extensive disclosure regimes with basic protection in legislation. We submit that disclosure will not assist consumers, particularly when it is extensive. Protection under legislation has the potential to avoid cost associated with production of lengthy and complex documents, which are unlikely to be read by consumers.

[5] "Beyond the Consumer Credit Code – the case for truly national, truly effective regulation of credit", - Tim Gough – Consumer Law Centre of the ACT

More specific comments on particular aspect of regulatory burdens are outlined in the schedule below

We would be pleased to provide any further information required in relation to the matters addressed herein.

Yours sincerely,
National Credit Union Association Inc.

Joe Tham
Legal Manager

SCHEDULE

REGULATION	SUGGESTED CHANGES	RATIONALE
Financial Services Reform Act (FSR), as incorporated into the Corporations Act	All deposit products (not just basic deposit products) should be exempt from the product disclosure statement (PDS), statement of advice (SOA), and financial services guide (FSG) requirements. Training on non-basic deposit products under ASIC policy statement PS146 should also be reduced to that applicable to basic deposit products.	The current definition/distinction between basic deposit products and non-basic deposit products is arbitrary. The regulation has been applied without regard to the simplistic and low risk nature of non-basic deposit products. FSR has taken a "one size fits all" approach, regulating high risk products such as derivatives and managed funds in the same way as non-basic deposit products. For example, under the current definition, a 2 year term deposit is a basic deposit product. Consequently can take the benefits of exemptions from the SOA, FSG and soon the PDS requirements. A 3 year term deposit however, with exactly the same terms and conditions, attracts the full disclosure regime. Other than the term of the deposit we fail to see any other features that would differentiate the two products. This distinction for deposit products has resulted in a reduction of the number of products offered by our members, to the detriment of choice for the consumer. The majority of our members no longer offer a term deposit greater than 2 years. The current regulations have the potential to shift investment from longer-term deposit products to riskier debenture instruments. Training requirements for non-basic deposit products are required at the higher Tier 1 level, in line with more complicated products and services such as derivatives and managed funds. We do not believe this is appropriate. As there is little differentiation between a basic deposit product and a non-basic deposit product, we submit that the different training regimes are unwarranted, and causes additional expense and resources.
Chapter 2C of the Corporations Act and Regulation 12.8.06	The right to inspect and get copies of a mutual's member register should be restricted to legal purposes carried out in accordance with the law and controlled by the mutual, such that the information on the member's register remains confidential.	Since the enactment of the Financial Sector Reform (Amendments and Transitional Provisions) Act (No.1) 1999, credit unions were deemed to be registered as a public company under the Corporations Act. This was despite industry concerns that the Corporations Act does not readily apply to organisations structured as mutuals. An example is the right of third parties to inspect and get copies of the member register. In the case of a mutual, the member register is the client list of that organisation. We submit that the current regime for access is inappropriate and do not take into account the unique position of mutuals. We believe that access should not be allowed to any third parties and that if communication with members is required it must be undertaken legally with either the mutual or a third party mailing house

		distributing the materials. The current protective mechanisms in regulation 12.8.06 are insufficient to adequately protect the confidentiality of the register. ASIC has indicated that it would approve access to the register for the purposes of making a offer for securities notwithstanding that: • member shares are not transferable, • the appropriate mechanisms under the takeover provisions have not been followed; and/or • the demutualisation provisions in Schedule 4 have not been followed. Treasury is current seeking submissions on other ways to protect the confidentiality of a member register. We will be providing more detailed comments in response to Treasury's discussion paper.
ASIC policy statement PS147	Review of PS147 required.	ASIC policy statement PS147 encapsulates principles of mutuality. This policy is used by ASIC to determine whether an organisation is, or remains a mutual following variation corporate actions where member rights may be affected. We submit that the principles of mutuality in PS147 are outdated due to industry trends, and are in fact hindering the growth of credit unions. Generally, other than paid up capital from member share subscriptions and retained earnings, a credit union has limited options to raise capital. As a result, credit unions have been continually challenged to come up with capital raising solutions which do not offend PS147, even though it may clear that they remain mutuals organisations. The application of PS147 has become such a hindrance on credit unions that they now experience difficulty in making any change to their constitution, notwithstanding that the fundamental tenant of one member one vote remains intact.
ASIC policy statement PS139 and PS165, and reporting requirements from external dispute resolution schemes	Extensive reporting by external dispute resolution (EDR) schemes unwarranted.	Under the Corporations Act, all Australian Financial Service License (AFSL) holders are required to belong to an approved EDR scheme. The level of reporting to ASIC required for an EDR scheme is extensive and unjustified. This results in significant costs both in monetary terms and management time. The Taskforce should note that EDR schemes are funded by subscriptions from AFSL holders in order to provide a cost free dispute resolution alternative to consumers. We submit that given an EDR scheme's objectives and method of funding, excessive regulatory costs and reporting become more objectionable.

ASIC policy statements and information releases	Further examination of how these policy instruments are used.	These instruments essentially constitute ASIC's interpretation of relevant legislation and are not legally enforceable. However their status as policy instruments, interpretive of what the law is, for the principal regulator, has resulted in them being treated as mandatory. These instruments have become defacto law. Often complicated and containing significant qualifications, they can impose an additional regulatory burden over and above relevant legislation. This often results in creating an extra layer necessitating interpretation. Assistance in determining whether particular situations or circumstances come within ASIC's view of the operation of the law or the scope of a policy statement should not be regarded as providing legal advice. On the contrary, communication of what ASIC believes the law to be and the scope of a policy statement should be promoted. The current administrative system is lacking in this respect. This issue causes significant uncertainty for credit unions and often results in unnecessary costs being expended.
Credit union code of practice and Electronic Fund Transfer (EFT) Code	The need for an industry code of practice should be removed. The EFT Code should be reviewed such that it only contains provisions dealing with the allocation of liability for unauthorised transactions.	It is our understanding that ASIC continues to require the credit union industry to maintain a code of practice. While we can understand the benefits of such a code, its utility in a heavily regulated sector is questionable. We would argue that a code represents a further document that must be interpreted and applied to a credit union's business. While we do not envisage departure from the already extensive FSR provisions, differences in language, and expression will invariably arise, resulting in additional interpretive burdens for credit unions. In relation to the EFT code, we suggest that it be reviewed and amended to avoid regulatory overlap with the FSR Act. Provisions other than those dealing with the allocation of liability are generally covered by the FSR Act and existing contractual terms. It is noted both the credit union code of practice and the EFT Code is presently being reviewed.
ASIC Form 388 and FS70 & FS71	The requirement that AFSL holders lodge with ASIC an FS70 and FS71 should be removed.	ASIC Form 388 requires a credit union to provide its annual financial statements and report. Annually, the holder of an AFSL is also required to provide their annual accounts to ASIC in form FS70. Further ASIC requires an audit signoff in form FS71 to the effect that the AFSL holder has complied with its obligations under the FSR Act. We submit that an FS70 and Form 388 are repetitive and that FS70 should be removed. FS71 increases the cost and resources, not to mention time, needed for a credit union to complete its year-end process. We submit that it is not appropriate for an AFSL holder to expend cost on certifying compliance with the FSR provisions.

		Certifying compliance is an administrative function which ASIC itself has been charged and resourced to undertake. It is not appropriate for this expense to be shifted to industry.
ASIC's guide to good transaction fee disclosure for banks, building society and credit unions deposit and payment products (Transaction Accounts)	ASIC's annual survey of compliance with the guide should be streamlined.	Questions that are repetitive, with credit unions providing the same answers from year to year should be removed. The survey should only require respondents to indicate where significant changes have occurred since the last return. There is a requirement for credit unions to verify that its product disclosure statement specifies all fees and charges that apply to the relevant product. We submit that this verification is unnecessary. As the FSR Act already requires "costs": to be detailed in the PDS, we do not see the benefit in requiring further verification by credit unions.
Financial Sector (Collection of Data) Act 2001	Consolidate the returns required to be submitted to the ABS, APRA and ASIC, so that only one government regulator collects the statistics and returns on behalf of the others.	Despite a project by APRA in 2001 to consolidate government reporting into one set of returns, the ABS still requires financial institutions to complete numerous surveys. Often these surveys duplicate the information required. This is an unnecessary burden in terms of time and resources for credit unions.
APRA's Draft APS 510, APR 520 and AGN 520.1	APRA's should adopt an "if not why not" approach to governance for ADIs consistent with the ASX approach. Short of this, APRA must adopt a separate standard for mutual organisations. APRA's proposed fit and proper requirements should be made consistent with overlapping provisions in the Corporations Act and ASIC's requirements in relation to responsible officers under the FSR licensing provisions. The standards and guidance from APRA should refer to these other requirements rather than reproduce the requirements with slightly altered wording. This will reduce interpretative uncertainties.	The draft corporate governance standards apply strictly to ADIs. APRA has chosen not to follow an "if not why not" approach adopted by the ASX. The rationale, which APRA has provided for adopting a strict approach, is that the "if not why not" model is not consistent with prudential regulation. While we understand this to some extent we believe that a strict approach it is inappropriate for the ADI industry. The strict approach does not recognise the diversity in structure between mutuals and a publicly listed bank. A "one size fits all" approach, particularly where organisational structures are so varied, is likely to lead to unusual situations for credit unions. We submit that APRA should consider providing some flexibility by adopting an "if not why not" approach or separating mutuals into a different standard altogether. Fit and proper standards appear in numerous guises under various legislative provisions. For example the Banking Act has requirements for directors of ADIs, the Corporations Act has general requirements for directors, and also "responsible officers" under the FSR provisions. Fit and proper requirements for "responsible persons" adds yet another class of persons to be checked, but also provides for different criteria for assessment, some of which are consistent with existing requirements. The existence of various, semi parallel obligations, cause unnecessary duplication,

		and confusion. As the Taskforce will note, our member credit unions are regulated under the Corporations Act, hold and AFSL, and are licensed to carry out a banking business under the Banking Act. Accordingly they are subjected to the full gamut of differing approaches.
APRA's introduction of BASEL II standards	The rationale for adoption of this standard should be analysed to determine its appropriateness for mutuals operating substantially in domestic situations.	While we appreciate the underlying ideals of ensuring better prudential standing of financial sector participants, the cost to industry must not be overlooked. Basel II was a standard that was originally devised to apply to international banking. It has not been applied for instance to the thousands of credit unions in the United States and Canada. Consequently we fail to understand the rationale for imposing such complex prudential standards on credit unions, which are essentially wholly domestic, regionally based institutions. The cost and expense of implementing these prudential standards are not insubstantial, and the benefits remain questionable. Costs in the nature of professional legal and accounting advice, not to mention management and board's time all detract from the objective of servicing the consumer.
Disclosure regime in the Uniform Consumer Credit Code (UCCC)	Simplify the disclosure regime by reducing the numerous mandatory disclosures, warnings and pre-contractual disclosures. The Taskforce should consider replacing the current regime with some form of legislative protective mechanism.	Feedback from our members suggests that the UCCC has significantly increased the cost of documenting a loan without the commensurate benefit of improved comprehension by consumers. Although not a direct monetary cost, the time needed for a consumer to take out a loan has risen significantly as a result of the explanations required for the various items of disclosure. This has lead to inefficiencies in operations to the frustration of both credit union management and the consumer.
Mandatory Comparison Rates (MCR) under the UCCC.	MCRs should be removed as a requirement.	Industry strongly objected to the introduction of the MCRs both on the grounds of its cost impact and on the basis that it was likely to mislead consumers because the complexity and variety of financial products prevented a simple comparison measure. It was also open to abuse by unscrupulous lenders who could manipulate the fees and charges to inflate the amount of the loan and thus lower the comparison rate. We note that MCRs are again under review, given that that the original regulations applied until 30 June 2006. We are hopeful that the regulators will acknowledge the failure of mandatory comparison rates to achieve its objective. This is perhaps most poignantly highlighted by the view from the Queensland Government noting that the advertising of indicator or reference rates for the purposes of informing existing borrowers did not require disclosure of MCRs and was

		to be distinguished from advertising of interest rates. We submit that such a distinction is a fiction, which further serves to highlight the ineffectiveness of the MCR as a benefit for consumers. A similar scheme of comparison rates has been repealed in New Zealand because it was not meeting its objective. The 2001 NZ review concluded that effective consumer protection cannot rely on disclosure of comparison rates alone, due to the complexity of modern credit products and the poor financial literacy of consumers.
Anti Terrorism and Anti Money Laundering legislation	Although the Financial Action Taskforce (FATF) recommendations lock the Federal Government into various matters, there remains scope for the legislation to be flexible and reflective of the relative risks of participants in the financial sector. The FATF recommendations are principles based and general in nature. Consequently we would hope that regulators recognise their ability to be flexible in its implementation. The Anti Terrorism legislation should also be consistent with the agreements reached between government and industry through the extensive consultations already undertaken.	While we understand that the Federal Government has committed Australia to implementing the recommendations of the FATF on anti-money laundering, it is imperative that consultation with industry is effective. There is no doubt that anti-money laundering has the potential to result in significant system and other implementation costs for our members. It goes without saying that implementation of a system that is dysfunctional to the point of requiring unwinding (as per the FSR) must be avoided. A "one size fits all" approach in this matter is inappropriate for credit unions, which in the main deal with local communities or a particular workforce. They have no international dealings directly. Their circumstances should be recognised as quite different to the major banks. The Anti Terrorism legislation received little to no consultation with industry despite the parallels it has with the Anti Money laundering legislation. It is imperative that government ensure that both regimes operate seamlessly together and not counter to principles agreed already in consultation with industry on anti money laundering. Failure to achieve cohesion between these two regimes will result in substantial cost, system, and implementation difficulties for credit unions.