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Business Council of Australia

Regulator Performance Guide submission

May 2021

Overview

The BCA welcomes the opportunity to provide a submission to the Regulator Performance Guide consultation, and strongly supports the initiative. It will be critical for the Guide to be supported by improved accountability to ensure it helps drive meaningful change in regulator performance.

Australia has weathered the dual health and economic crises from the COVID-19 pandemic better than many other countries. Good public health outcomes contributed to relatively good economic performance, together with an innovative and large set of temporary fiscal measures. These measures were further supported by regulators who provided pragmatic and flexible solutions to the unique and new challenges faced by businesses.

The economic recovery is underway, but the gains need to be locked in and there will be further challenges on the road ahead, including from an ageing population, shifting global economic forces and increased digitisation. Australia's regulatory system – both from a policy and an administrative perspective – must be fit-for-purpose to ensure we are ready to tackle these challenges and continue the recovery.

A key component of a strong regulatory system includes regulators that better understand and recognise the commercial realities and challenges that businesses face – particularly around the urgency of critical commercial decisions. Another critical element emphasised by the Guide is a “proportional approach to risk and genuine engagement with regulated entities and the broader community.” Regulator culture must reflect an efficient, nationally consistent regulatory environment and the removal of unnecessary red tape. The behaviour of regulators is estimated to account for up to 50 per cent of unnecessary regulatory compliance costs.¹

The Commonwealth Government is leading the way with the Guide. It provides a template for all states and territories to emulate with their regulators, and should be considered by all jurisdictions.

Key recommendations

- The BCA supports the Regulator Performance Guide and its principles. In particular, the shift to a more outcomes-focused and principles-based approach to regulation is welcome. This should include genuine collaboration and consultation with regulated entities.
- The Guide must be supported by an effective accountability mechanism for regulators. This is critical for driving change and shifting the mindset of regulators to a more outcomes-focused and principles-based approach to regulation.
- The Guide could consider three common performance measures across all regulators:
 - cost to comply for regulated entities
 - time taken by regulator to perform key functions e.g. approvals
 - degree of certainty within the regulatory process for regulated entities.

Additional information

Principles of regulator best practice

The BCA supports the three proposed principles of regulator best practice, which provide a solid framework for improving regulator performance and accountability. The Guide provides each regulator with the flexibility to

¹ Productivity Commission, *Shifting the Dial: 5-year productivity review (Appendix B)*, 2017, p. 241

determine the best approach based on their own circumstances, and in line with stakeholder and government expectations.

The flexibility in selecting performance measures is appropriate, but consideration should be given for a common set of performance measures. This would allow for comparability across regulators and reflect the way regulators impact regulated entities which, in turn, can help drive the outcomes-based approach the Guide seeks to achieve. Three common, relatively simple and meaningful performance measures could be:

- cost to comply for regulated entities
- time taken by regulator to perform key functions e.g. approvals
- degree of certainty within the regulatory process for regulated entities.

Additional feedback on the principles is outlined below.

Principle 1: Continuous improvement and building trust

- The BCA strongly endorses the notion that this principle includes the idea that regulators should identify and minimise duplication and overlap across other regulators. However, consideration should be given as to how this may be better achieved in practice. For example, where regulators identify duplication/overlap, which regulator is expected and empowered to address the issue?
- There should be a greater emphasis on building staff capability – and its prominence in the Guide could be elevated. This could be achieved through many channels, including hiring staff with expertise from regulated entities and better training staff about the business practices and commercial realities within regulated entities. At the same time, steps should be taken to guard against ‘regulator capture’.
- A principle of continuous improvement and building trust should include stakeholder feedback on problem solving and compliance costs. Stakeholders should be asked how the regulator’s conduct addressed the underlying issue raised, unnecessarily created compliance costs, and how those costs could have been avoided or reduced. An adversarial approach will not drive cultural change.

Principle 2: Risk-based and data driven

- The BCA supports the notion of a risk-based and data driven approach to regulation and allocating resources. Regulators should be required to justify where they deviate from this approach. The experience with some regulators is that scarce resources are not necessarily allocated this way. For example, some may instead focus on publicity around perceptions or ‘wins’ rather than solving an underlying problem.
- A performance measure common to all entities under this principle could be the number of decisions taken where risk of non-compliance is low. This will also help demonstrate whether the Guide is driving change.
- Where regulators assess the costs of non-compliance by regulated entities as being so minimal as to not necessarily be enforced, consideration should be given to repealing the relevant rule.
 - For example, consideration could be given to making permanent the temporary changes to regulations in response to the pandemic – without compromising the impact on consumers and employees.

Principle 3: Collaboration and engagement

- The overarching statement should be explicit about reflecting the business practices and commercial realities of regulated entities i.e. *Collaboration and engagement: regulators are transparent and responsive, implementing regulations in a modern and collaborative way that also **reflects the business practices and commercial realities of regulated entities***. This is lacking in many regulators which in turn impacts the regulations they set and how they are enforced.

- For example, businesses face delays and uncertainty due to slow decision making from regulators for urgent commercial decisions. Timely decision making would demonstrate a collaborative approach from regulators and provide businesses and investors with greater certainty.
- Continuous improvement should also be reflected in real time regulator performance feedback. Regulators should seek stakeholder feedback on their performance immediately following an engagement. Delays in feedback risk reducing the quality and currency of the feedback provided.
- A demonstrated understanding needs to show that the regulator properly understands, and has even 'lived through', the experience of being a regulated entity.

Accountability

The Guide does not include external validation of performance reporting, but consideration should be given for how to improve accountability to help drive change. It will be difficult to drive meaningful change without an effective mechanism to ensure regulators are truly accountable and engaged in a continuous improvement process. To illustrate, where a regulator does not embrace the change in mindset sought by the Guide, what is the available mechanism for a regulated entity to raise issues and have them resolved? Greater scrutiny from Parliament and the Auditor General is welcome, but regulators must be held to account for their performance in a way that drives improvement.

Other issues

- The streamlining of performance reporting requirements will help improve transparency and accountability around regulator performance. A more consistent and accessible approach to reporting that is comparable across regulators can be used to hold regulators to account for their performance and to support continuous improvement. It also lays a foundation for future changes and improvements to performance reporting.
- The BCA supports the initiative to review the Guide in two years, followed by a regular five-year review.

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