Law Council
OF AUSTRALIA

Business Law Section

4 June 2021

Ms Sandra Roussel

Assistant Secretary
Regulatory Policy Branch
Department of the Prime Minister and Cabinet
Andrew Fisher Building
1 National Circuit
Barton ACT 2600

By email: deregulation@pmc.gov.au

Dear Ms Roussel,

Regulator Performance Guide

Thank you for the extended time to comment on the draft Regulator Performance Guide (April 2021) (**Draft Guide**) recently released for consultation. This submission is made jointly by the Corporations Committee, the Competition and Consumer Law Committee and the SME Business Law Committee (**Committees**) of the Business Law Section of the Law Council of Australia.

Given the Government's intention that the new Regulatory Performance Guide take effect from 1 July 2021, the Committees recognise that there is limited scope, at this late stage, to revisit the approach to improving regulator performance adopted in the Draft Guide or in the broader performance expectation framework within which the Draft Guide sits. This may be a missed opportunity for Government, given the significant lessons about regulator governance and regulatory practice that could have been drawn from, for example, recent Royal Commissions into financial services and aged care.

This submission proceeds in two parts. First, it makes some high-level comments on the purpose and scope of the Draft Guide. Second, it sets out some more specific comments on the Draft Guide.

Purpose and scope

The purpose of the Draft Guide is to lift the performance of Commonwealth regulators, by articulating principles of best practice and providing a structure whereby regulators' performance can be measured and assessed. The Committees note that measuring regulatory performance is a sophisticated and complex task, on which there is significant academic literature. Further, under the Draft Guide, regulators will no longer be required to produce a standalone performance report (as was required under the 2014 framework) but will instead incorporate their performance reporting into their corporate plan and annual report processes under the *Public Governance, Performance and Accountability Act 2013* (Cth).

The Committees also note other elements of the performance framework referred to in the Draft Guide, including the Ministerial Statements of Expectations and Regulator Statements of Intent. We do not comment here on the use of Ministerial Statements of Expectations, other than to observe the paramount importance of maintaining an appropriate level of independence of regulatory agencies and that they should not overstep the remit of regulatory agencies as set out in their governing legislation. We would welcome the opportunity to comment separately on the question of regulator independence, which is an important principle and one that is not always well understood.

The Committees recognise that the Draft Guide is intended to be applied by many different Commonwealth regulatory agencies, that have different functions, powers, and resources. As the Draft Guide observes, these generally include 'administering, … monitoring and promoting compliance with, and enforcing regulation.'

Comments on the Draft Guide

The Committees set out some general comments on the Draft Guide below.

1. Principle 1 may be too generic to be effectively implemented by regulators or measured by stakeholders.

While continuous improvement is desirable in all organisations, it is not an end in itself. The KPI approach in the 2014 framework, while not perfect, did attempt to tie expectations about performance to actual activities undertaken by regulators (for example, making rules or policies, granting approvals, undertaking inspections or surveillance, addressing complaints about regulated entities, investigating suspected wrongdoing, taking civil or criminal enforcement action). Trust and confidence in Australia's regulatory settings is achieved through regulators exercising their powers and discharging their functions in a way that promotes substantive compliance with the regulations they are required to administer, without unduly interfering with or imposing unnecessary 'red tape', cost or delay on legitimate business activities or stifling innovation. The Principles should reflect that.

2. Principle 2 should include a reference to the cost-effectiveness of regulatory action

The Committees believe that Principle 2 should be amended to encompass the concept that regulatory action should be risk-based, **cost-effective** and data driven. Regulators should be required to assess, both prior to taking and after commencing any regulatory action, whether they are likely to achieve a cost-effective outcome in terms of achieving general deterrence or recovering penalties and costs from the business the subject of the regulatory action. For example, in some instances where court proceedings are commenced against small businesses, there is a risk that the proceedings may result in driving the small business out of business while achieving minimal levels of general deterrence due to the small size and relative anonymity of the small business in their respective markets. The Committees also note the practice of some regulators to continue legal proceedings against companies in liquidation despite the fact that an award of penalties or costs will not be recoverable. Accordingly, the Committees propose that Principle 2 be amended to require regulators to consider the cost-effectiveness of regulatory action, both before and after the regulatory action has been commenced.

3. Allowing or 'encouraging' regulators to develop their own performance measures is unlikely to achieve meaningful change.

The Committees recognise that the 'one-size-fits-all' approach to performance measures in the 2014 framework did not achieve the desired outcomes. However, we do not favour this new approach, which leaves it entirely to the regulator to select the focus and specifics of its reporting and could lead to inconsistency across time periods. It is not sufficient to encourage regulators to engage with stakeholders in

devising appropriate performance measures – they should be required to do so with the support of specialist advisers within the Department who understand the technical challenges in formulating such measures. The example performance measures given in the Draft Guide are not sufficiently tied to the types of activities actually undertaken by regulators and their impact on regulated entities or other stakeholders, including parts of the community that relevant regulation is intended to protect. The guidance provided in RMG 131 is not enough on its own to address this issue.

4. The Draft Guide should be more specific as to 'external accountability processes' and 'regular and independent performance reviews' expected of regulators.

Some of the larger Commonwealth agencies are subject to periodic capability reviews and performance assessments, including by the proposed Financial Regulators Assessment Authority. The way in which such performance reviews should be undertaken, and by whom, should not be left to individual agencies to decide. The Committees would be pleased to work with the Department in formulating guidelines for such assessments, including whether regulatory agencies are providing 'value for money' for the regulated community and the general public.

5. Libraries of best practice can be useful, but the real lessons often come from failures.

The Draft Guide should encourage regulators to reflect critically on examples of regulatory failure in their own and other agencies, and conduct rigorous ex-post reviews of regulatory programs, initiatives and actions.

Committee representatives would be happy to discuss any of the matters raised, or provide further detail. If you have any questions – please contact Committee Members Professor Pamela Hanrahan on p.hanrahan@unsw.edu.au or Stephen Newman on stephen.newman@bdo.com.au.

Yours faithfully,

Greg Rodgers

Chair, Business Law Section