‘Focus on cowboys, not compliance’, new-look ASIC urged

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Top corporate lawyers and advisers to the financial services industry are hoping James Shipton’s replacement as ASIC chairman will bring a focus on red-tape reduction and healthy respect for business to the job.

Treasurer Josh Frydenberg announced on Friday that Mr Shipton would leave the corporate regulator once a replacement is found, despite an independent report into an expenses scandal finding no wrongdoing on his part.

His exit will follow that of barrister and deputy chairman Daniel Crennan, QC, who was also cleared of any wrongdoing over relocation expenses, but resigned in October.

The shuffling of deckchairs at the corporate cop has presented an opportunity to reset its strategy and potentially develop a better working relationship with industry, according to lawyers who engage with the regulator often.

Simon Carrodus, a former senior corporate counsel at the Commonwealth Bank and now solicitor director of financial services law boutique The Fold Legal, said he was hopeful the next chairman would acknowledge businesses were struggling under mountains of regulatory red tape.

“Over-regulation is a major obstacle to efficient delivery of financial services in Australia,” Mr Carrodus told *The Australian Financial Review*.

“Most of the current legislation and guidance was drafted in order to regulate face-to-face delivery of financial services. Many of the obligations simply cannot be satisfied without human intervention.”

ASIC should acknowledge the detriments of over-regulation, says The Fold Legal’s Simon Carrodus.

He praised Superannuation Minister Jane Hume, who has spearheaded controversial reforms of the industry and urged financial services providers to provide feedback to ASIC more readily, especially on the issue of an affordability crisis in financial advice, which the regulator is investigating.

“I’m confident [Senator Hume] will seek out and listen to ASIC’s opinion on how the regulatory regime needs to change in order to be fit for purpose for the next 20 years,” he said.

ASIC’s leadership should be willing to influence Treasury and together make business efficiency a public policy priority, said the lawyer, who worked in ASIC’s financial services regulation team from 2004 to 2006.

“[Royal Commissioner Kenneth] Hayne called for the rules and regulations governing financial services to be simplified,” he said.

“So far we’ve seen the exact opposite from Treasury and ASIC. Let’s hope there is a course correction soon.”

Sources were hopeful there might be a reset also of the Hayne-inspired strategy favoured by Mr Shipton and Mr Crennan of pursuing court actions rather than backroom deals.

Asked whether the so-called “Why not litigate?” strategy would now be abandoned, one top corporate lawyer said: “Let’s hope so.”

Some suggested that the much-maligned regulatory tool of enforceable undertakings (EUs) may even make a comeback, despite being slammed by the Hayne royal commission and other critics for being a slap on the wrist rather than a real mechanism for accountability.

Herbert Smith Freehills partner Michael Vrisakis, a trusted adviser to big bank boardrooms, said industry would welcome a more “balanced” approach from the new ASIC leadership.

“I’m not talking a grandiose ‘scales of justice’ type balance but more a practical kitchen type scales,” he said.

The ideal regulator would “go hard after predatory and morally bankrupt players” but recognise that many companies are “genuinely compliant- minded and [their] only transgression has been to struggle with opaque, obscure and sometimes impenetrable legislation”.

Another financial services lawyer, who asked not to be named, agreed that ASIC should shift focus away from cracking down on inadvertent non-compliance to unscrupulous operators targeting vulnerable consumers.

“They should focus on cowboys like Mayfair101, not big companies who sometimes make honest mistakes,” he said.

But ASIC had long come under strong pressure from politicians and consumer groups for being too lenient on big business and the major banks in particular, while focusing efforts on fringe-dwelling licensees.

It changed tack and by September 2019 had more than 80 investigations afoot into the big four banks and AMP.

Phil Anderson of the Association of Financial Advisers said his industry was hopeful that the new leadership would take a “very close interest in the issue of improving access and affordability of financial advice”.