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Dear

ASIC, AFCA and other regulatory concerns and red tape

I am writing to you as manager of a business with about 40 staff looking after client assets of about $600 million. I am an economist by training, a business person and entrepreneur. I have other qualifications, have lectured in economics and finance at university level and am a graduate of the Australian Institute of Company Directors.

The business I run is based in Rockhampton, a regional city which has suffered the effects of the mining downturn, consolidation of government and large business into the capital cities, and the effect of mergers and takeovers. We employ a young woman with a disability, two staff over 60 years old (our oldest staff member was 82 when he retired), university graduates and one staff member who was long-term unemployed. We sponsor a wide range of organisations in the community ranging from golf clubs to the arts, and in the interests of assisting women from disadvantaged backgrounds we organized for and sponsored a PNG national to undertake a university diploma in Rockhampton while working for us part-time. Small and medium businesses represent the only private-sector growth of our region, and government bureaucracy is killing them.

I started our business as a fee-for-service (not commission based) financial services firm in 2001. Originally comprising of just me and a desk, the business has grown in an environment where many are shrinking. I have managed the business through the implementation of the Financial Services Reform Act (FSRA) reforms, AML/CTF Reforms, Future of Financial Advice (FOFA) reforms, the GFC and now the response to the Royal Commission. As far as client service and regulation goes, we were for many years, way ahead of the curve – tailored advice, fee reports, scheduled client review meetings - but the regulatory changes are now so pervasive and inexpertly managed that it is almost impossible to work out what is going on. Frankly, despite building a successful, technically innovative, compliant and client focused business, I just can't see why I am bothering any more.

Your regulator ASIC is downright incompetent. Our experience includes recurring dithering, delays, lack of clarity, and an anti-business attitude. I guess we might expect that of a government department, but setting itself aside from the impartiality of public service, it is now headed up by a team that we see reported as "The Magnificent 7". These commissioners and deputy commissioners are supported by a "spin" department that pays no heed to the very standards ASIC says it expects of the industry it oversees. Take the recent "information" supplied by ASIC regarding Self-Managed Superannuation Funds (SMSF). Widely disseminated, it states that the cost of running an SMSF averages almost $14,000 per annum. I am in possession of the results of two formal studies that carefully analysed the costs of running SMSFs and they show costs not even close to that magnitude, and in our experience the incremental cost is more like $1,500. ASIC's "information sheet" also referred to poor returns from smaller funds. In neither case did ASIC go to any trouble to explain why it based its pronouncements on

data received 3rd hand, when more robust data is available and when the Productivity Commission itself warned that the data ASIC used (based on ATO data) was not robust enough to base conclusions on. Given that ASIC does not regulate superannuation, one wonders why it would target this sector of the industry – the one with, for members, the most transparency and flexibility. Frankly Danielle Press (the ASIC commissioner responsible) should be professionally embarrassed at this half-baked attack on the largest sector of superannuation. We can only reach the conclusion that ASIC has an agenda of seeing money to transfer to industry funds, the sector most aligned with a left-wing paradigm and most recently, aligned to Press. Meanwhile we have been working for some four months to effect a change to the authorisations on our Australian Financial Services Licence. We submit information, and despite follow up phone calls and emails, hear nothing until we insist the matter is escalated. Worse, ASIC's licensing regime is grossly flawed, serving to embed people with flawed histories, rather than bringing in quality people from other sectors of the economy.

Which brings me to Karen Chester who has publicly stated that the $10 billion in restitution paid or being paid by the financial services industry is just "the tip of the iceberg". Put in context of total superannuation balances, home loans outstanding and assets supporting insurance policies, $10 billion in restitution is actually about 4 one-hundredths of one percent (less when we consider that the restitution payments accumulated over a long period of time). Obviously, wrongdoers need to improve service delivery and make good, but to assert that these restitution payments are somehow reflective of an industry rotten to the core is downright misleading. The fact is that most people who have a home loan, insurance or who received advice regarding superannuation got what they required and are better off as a result. The Royal Commission's sole focus on wrongdoing in the Financial Services industry has caused a gross distortion of the truth. It has undermined confidence in the system and it is costing jobs.

Chester, during a presentation in Brisbane, and she and others at sister organisation APRA elsewhere in the media, claimed that the recent downturn in bank lending was demand driven, when it is patently not. Our internal modelling shows that the biggest predictor of the movement in housing prices is the availability of bank lending. In an environment of easy monetary policy, bank lending was grossly constrained by the requirements of ASIC and APRA that detailed analysis of all borrowed spending was required before a loan could be advanced. Against the background of the Royal Commission, banks were unable to keep up with this additional compliance requirement, and consequently lending dried up. It is no coincidence that lending has recovered somewhat following ASICs failure to prosecute their case in the courts (the Wagyu and Shiraz case).

Then we have APRA which attempted to prosecute IOOF for breaches of its duty to superannuation members. APRA ignored the basic fact that reserves are not for the benefit of individual members. The courts found there was no such breach, but only after the CEO has been hauled through the court of public opinion and had lost his job.

Senator, your regulators are incompetent, biased and in no position to take a leadership role in one of the most important sectors of the Australian economy. Frankly, they are killing our economy, yet we find their influence expanded often by virtue of their own will. ASIC, recently exempted from public service conduct requirements, expands this influence through regulatory guides that are in many cases almost impossible to read, and related agencies such as AFCA, FASEA and the mooted professional standards board. Worse, ASIC is funded by an industry levy that simply reflects its costs – whatever they are.

There is almost no scope to call these errant agencies to account. FASEA for example, proposed a set of ethical standards, and then unilaterally changed them, in such a draconian manner that they are

unworkable. The organisation wants to include a code that says "you must not advise, refer or act in any other manner where you have a conflict of interest or duty". FASEA offers no definition of conflict, and in any event, recognising that conflicts can arise in myriad ways (and not always to the detriment of clients) the law says that conflicts need to be managed, not eliminated. The standard is supposed to take effect from 1st January, 2020.

FASEA is also responsible for setting education standards for the financial services industry and in particular financial advisers. The education standards have been inconsistent and a long time in being settled, so much so that we have had to hire a full-time training manager. Two FASEA board members have stood down on account of their own conflicts of interest. Meanwhile, here I am with qualifications and experience significantly beyond most financial advisors and many of the regulators themselves, and I have to undertake another four university level subjects.

The Australian Financial Complaints Authority (AFCA) is another problem. We are required to be a member of it by virtue of the Corporations Act, but as members we cannot challenge decisions in court, even when AFCA's predecessor (the Financial Ombudsman Service) was found to have fabricated file notes (Goldie Marketing Pty Ltd v Financial Ombudsman Services [2015]). Members cannot insist that a complainant be tested for the validity of their complaint, and typically when a complaint is lodged, AFCA helps the complainant dig around for other angles by which a compensation payment might be made. Of course, it is much easier just to make some ex-gratia payment than it is to work through the AFCA process. Savvy clients know this and play it for what it is worth. Now, in the weekend papers, we have the head of AFCA commenting on Fair Work matters, which are not at all in its jurisdiction.

What of Fair Work? Let me share a recent experience where an originally useful staff member commenced a lunch-time extramarital affair. The employee started taking very long lunches, her work suffered, and one task critically linked to service provision ended up being behind by three months. This employee spent time visiting lawyers to find out her position should she leave her husband, at the same time that she was calling up her husband to assist with tasks at work. At the time I was not aware of the background, and was keen for her performance to be managed - in the hope of getting her back on track. Unfortunately, she did not respond to performance management and just before the process was to this end, she instructed solicitors to demand payment from our firm for bullying (which she most certainly was not). We paid her a few weeks' pay in the hope that would be the end of the matter, only to be confronted with a Workcover claim for stress. That was denied by the insurer, and now we are faced with a conciliation hearing.

Then let's look at Centrelink, an agency which many clients rely on for part of their retirement incomes. By my estimation (and I have been doing this for 18 years). At least one in three interactions with Centrelink is unsatisfactory. This government agency continually makes errors in asset records, cuts pensions off for no reason, and threatens "consequences". Almost always, Centrelink has misplaced information provided previously, incorrectly allocated assets to the relevant categories, or made an assumption without checking the facts. These problems are so pervasive that we have a full-time employee tasked with dealing with Centrelink.

Finally, we have the RBA, which says that they have been liaising with all their overseas counterparts and cannot understand why cash rates are so low, and economic growth is poor. It is only in the last few months that the RBA has admitted that the issue is demographic – which means that in the West, baby boomers are net savers holding massive cash and asset balances (whether in superannuation or not), the value of which is not circulating in the economy. But the RBA is geared up to undertake

Quantitate Easing, which is a measure that protects current asset values, but undermines the value of work.

Basically, we have an economy where unaccountable bureaucrats are rewarded better than almost everyone else, and overseas comparisons and over-regulation is seen as a panacea. The whole thing is masked by lower and lower interest rates, and quantitative easing such that asset prices keep buoyant and none of the underlying issues are addressed.

What should be done

1. Restructure ASIC and AFCA

   ASIC should have its administrative, law-making activities separated from its consumer protection and licensing activities. Consumer protection activities should be moved to a special division of the ACCC, and dealt with through an in-house court dedicated to the process. Rules of evidence should apply, and the complainant needs to be able to furnish evidence of their claims. Since licensing processes are similar across many sectors, licensing activities for all activities where licences are required (financial services or not) should be undertaken by a new department.

2. Insist that consumers take responsibility for their investment decisions

   Financial services providers should be able to prima-facie rely on information provided in formal documentation. That is, they should be able to assume that a Statement of Advice has been read by the client. This is no different to any other contractual obligations. Perhaps a mandatory 14 day cooling off period should apply before any recommendations are implemented.

3. Operation of the complaints court

   A nominal fee should apply to lodge a financial services complaint and the methods of the restructured AFCA should not involve a conciliation stage. The current situation gives financial services licenses an incentive simply pay out complainants, rather than to test the extent of liability. In fact, many financial services companies are accepting responsibility when arguably none should apply. This means the underlying facts are never revealed and the law remains opaque. The time for conciliation is within the 45-day time frame under which the licensee has to consider and respond to the complaint, not at AFCA level. Consumers are not trying to resolve matters with the licensee and are simply going to AFCA because they think they will get a sympathetic hearing. If the matter gets to AFCA level it should be dealt with formally in a court environment.

4. Centrelink

   Accredit FASEA approved financial planners (possibly with an accreditation course) to become a conduit between social security recipients and Centrelink. Such a relationship would mirror that which exists between accountants and the ATO, in that accountants are able to essentially be the front end of the ATO's interaction with taxpayers. The result would be reduced workload for Centrelink and far fewer errors.

5. Cease reviews of the financial services industry

There should be no more reviews of the financial services industry for at least a decade. All players need to be able to digest and implement changes that are already in train. The Royal Commission has been especially damaging in terms of reduced lending and loss of jobs in the financial services sector.

6. Productivity

Economic growth over coming decades is likely to be very soft. This is because of baby boomers asset balances, which do not contribute directly to economic growth. Quantitative easing supports these asset prices, while diminishing the value of incomes earned by other generations. While it is popular to suggest increased investment by government will reinvigorate growth, such initiatives are only sensible if economic growth is expected to recover in the future (thereby justifying temporary stimulus). If economic growth remains weak over two or three decades, then government will have to keep spending. Again, this detracts from taxpayers in favour of owners of assets. The only answer to this situation is an increased focus on productivity. A critical aspect to that is lighter and more efficient regulation, where rules are clear and consumers take much more responsibility.

7. Emission trading

There are far too many distractions making it into government. Some of these, Global Warming for example, are best dealt with through markets (an emission trading scheme) rather than regulation. Such an approach largely takes the matter out of the hands of government, leaving government to pursue other matters for greater beneficial effect.

I appreciate your attention in these matters and would be happy to meet with you to discuss further.

Yours sincerely,

David French
Managing Director