25. Financial Consumer Protection: Issues and Australian Experience

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25.1 Introduction

Financial Systems perform valuable economic services for end-users such as individuals, businesses and governments. These include providing opportunities for saving and investing, facilitating access to finance, payments services, risk management. These take the form of financial products and services provided to customers involving transactions creating explicit or implicit contracts between financial firms and their customers. Where well informed parties decide to voluntarily engage in what they perceive to be mutually beneficial transactions, economic efficiency is promoted. Unfortunately that is not always the case particularly where transactions involve individuals who may have limited financial literacy, are operating with imperfect information, and face significant resource/transactions costs in undertaking financial activities.

As a result financial consumers are exposed to a number of potential risks in making financial decisions which they may not fully understand and which may have substantial adverse effects on their well being. These can include fraud, being sold financial products unsuitable for their circumstances, being sold overpriced products, being given incorrect advice, not being aware of the risks associated with particular financial products. (See for example, (Akerlof & Shiller, 2015). While, in principle, legal remedies may exist to deal with such situations ex post, financial consumers will not generally have the financial resources to utilise the legal process against large financial firms, or may find that the counterparties have disappeared such that no compensation is possible. Moreover, because many financial products and services are credence goods (Dulleck & Kerschbamer, JEL, 2006), whose likely value is not ascertainable until some later date – if ever, the potential for financial consumer loss can be high.

A further issue arises from the effects of unequal bargaining power, imperfect information, customer inertia, and inadequate competition on the sharing of benefits from transactions. Financial institutions may capture the bulk of the gains from trade. For example, the bank may need a 10 per cent return on a loan to make normal profits and the customer willing to pay up to 11 per cent, but the rate charged may be much closer to 11 than 10! Ideally competition amongst lenders would shift the rate down, giving more benefits to the customer willing and able to investigate available options, but competition is not always that robust or effective.

Consequently, governments and their regulatory agencies take a range of actions aimed at providing financial consumer protection and ensuring "fair" treatment. While the basic problems are the same world-wide, different approaches can be found internationally reflecting factors such as historical experiences, institutional arrangements, legal systems, state of financial and economic development.

There are three main considerations which need to be taken into account in designing Financial Consumer Protection (FCP) policies).

The first is that FCP policy should be structured to reflect what we know about behavioural biases of individuals – not based on a hypothetical assumption of informed, rational, economic, utility maximizing individuals. Even though some "homo-economicus" may exist (and drive market outcomes) they need little protection beyond adequate disclosure. But for the majority, reliance on disclosure, education and advice (the standard economics prescription) is inadequate – other interventions are also required.

The second theme is that the types of product and service providers to financial consumers vary dramatically in terms of size, ethics, objectives etc. Approaches should be tailored where possible to reflect the resulting potential differences in consumer risk. Regulations based on problems arising from one group of providers will, unless appropriately tailored, have compliance and other adverse impacts on others for whom they may not be necessary. "Principles – based" regulation, giving flexibility to providers of financial products and services to meet desired standards in various ways most suitable to them has merit here. However, unlike "black letter law" it can create uncertainty for firms as to whether regulatory requirements are being met and whether the firm is thus inadvertently exposed to risk of prosecution and penalties. It can also be subject to regulatory evasion by unscrupulous operators which can be difficult to prosecute.

Third, the location of FCP responsibility needs to take account of the institutional structure of regulatory agencies and legal powers. In Australia, for example, responsibility rests with ASIC the securities and market conduct regulator, whereas in some countries (such as the US, Canada, China) specialised FCP agencies have been established. There is unlikely to be any unique best model for allocating FCP responsibility, and its mandate and powers will need to reflect the nature of the legal system and thus the opportunities for individuals to seek redress and the deterrence effects from such actions.

25.2 Why Financial Consumer Protection?

What is special about financial consumer protection? Why is it different to consumer protection in general? There are two main reasons. First, confidence in the financial sector is important for economic development and growth, and this can be undermined if financial consumers are poorly treated. Second the potential for purely redistributive, unethical or immoral, activities is potentially greater in the world of finance than elsewhere.

The two reasons are interrelated. Economic development generates increasing household involvement with the financial sector. Financial development leads to increasing complexity of financial products and services. However, financial literacy is generally low (Lusardi and Mitchell, JEL, 2014), creating opportunities for miss-selling and overcharging to occur and to become significant problems, particularly given individuals' gullibility and greed. Some providers of financial products, services, and advice may have questionable ethics, poor governance, and misaligned incentives. Resulting financial failures, miss-selling, scams, and consumer losses reduce confidence and cause sub-optimal use of the financial sector which impedes economic growth and development.

On the second point, redistributive activities can range from pure theft to simple overpricing of financial products. At the pure theft end of the spectrum, one might place practices such as placement of underpriced company shares to outside investors or friends of the management, diluting the equity of existing shareholders. However, ambiguity arises because such placements may provide a faster and cheaper way of the company accessing finance, ultimately to the benefit of all shareholders. At the other end of the spectrum apparent overpricing of financial products could instead simply reflect different perspectives on the risk involved and compensation appropriate for bearing that risk.

It is these ambiguities which make the issues of financial consumer protection both interesting and challenging. (See for example Campbell (AER, 2016).

These issues are particularly pertinent at the current time due to the dramatic changes to financial systems being wrought by technology. "Fintech", the application of new practices and development of new financial products and services based on digital technology, creates new challenges for governments and regulators. There are opportunities for significant improvements in economic and social welfare from fintech, but there are also significant risks to financial consumers – since likely success or failure of many of the innovations is extremely difficult to predict.

A number of these issues and international approaches to financial consumer protection have been considered by international agencies. For example, the World Bank conducted a [Global Survey on Consumer Protection and Financial Literacy] in 2013, finding that 72 per cent of financial regulators surveyed had a dedicated financial consumer protection unit. Staff from the World Bank produced a [paper] in 2014 on establishing a financial consumer protection function in regulatory agencies.

25.3 Forms of Financial Consumer Protection

There is a large range of forms of financial consumer protection activities found in varying forms internationally. These overlap with measures aimed more directly at investor protection which also encompasses protection of informed and wholesale investors. These include:

Measures protecting consumers from unsuitable financial contracts

- Regulators having powers to ban the sale or provision of certain financial products or services, or alternatively being required to provide explicit approval for supply or regulating allowable design features.
- Limiting the sale of particular financial products to only certain types of counterparties such as wholesale or sophisticated customers and excluding "retail" customers.
- Requiring provision of sufficient information about product features to facilitate informed decision-making and precluding deceptive advertising
- Restricting remuneration arrangements of agents in the financial sector to ensure better alignment of their incentives with the interests of financial consumers
- Imposing legal obligations on product and service suppliers to take into account customer interests (such as responsible lending obligations)
- "Nudges" via government specification of default products or other means
- Regulation of product/service comparison web-sites
- Financial literacy initiatives

Measures to improve the quality of financial products and services available

- Requiring minimum skill and knowledge levels for certain types of financial market participants such as financial advisers

- Licensing requirements for providers of financial products and services
- Imposing limits on allowable fees and charges
- Prohibiting inclusion of clauses in financial contracts which are unlikely to be clear to the customer and provide the supplier with options which could be exercised to the detriment of the customer

Measures to reduce potential losses to financial consumers when bad outcomes occur

- Government provision of deposit insurance or higher priority for retail depositors in event of a bank failure
- Restrictions on ability of non-resident financial firms to provide financial products and services to domestic financial consumers
- Requirements for segregation of client money
- Required establishment of industry-funded compensation funds to provide compensation for customer losses due to certain activities of members of the industry.

Measures to substitute for individual legal action to resolve problems

- Requirements for internal dispute resolution schemes for firms providing financial products
- Industry-wide external dispute resolution schemes
- Provision for class-action law suits
- Regulator initiated prosecutions and remedies

Regulatory Structures and Complexities

These measures can come under the responsibility of different types of government agencies, including securities regulators, prudential regulators, central banks, consumer protection agencies etc. In some countries, a relatively recent innovation has been the establishment of *Financial Consumer Protection Bureaus*.

Because of the novelty of approaches to provision and design of financial products and services arising from fintech, governments and regulators are faced with the prospect of designing new types of regulations to deal with these innovations. One response in a number of countries has been the creation of *"regulatory sandboxes"* aimed at facilitating limited trials of novel products and services by innovators.

Other issues include:

Increasing opportunities for cross border provision of financial products and services to individuals – how do regulatory approaches to this differ?

International agencies (Basel, IOSCO, IAIS, IADI, FSB) have provided prudential and other standards for regulation of banks, insurance, markets etc. But no one clear international agency for financial consumer protection.

25.4 A Wide Range of Issues - Examples

Financial consumer protection issues range from large-scale systemic problems through to more specific problems affecting individuals, or small numbers of consumers. At the large scale end there have been a number of major mis-selling issues over recent decades, shown in Table 1.

In the UK for example there were in the 1980s - 1990s major mis-selling episodes involving personal pensions and also endowment mortgages. In the 1990s stretching into the 2000s the UK also had major problems associated with sales of payment protection insurance, which has led to banks making provisions for compensation currently in the order of £20 billion.

In the US the most obvious example is the sub-prime mortgage scandal starting in the 1990s and ultimately triggering the global financial crisis which emerged in 2007 and 2008. At that time the Madoff Ponzi scheme was also exposed.

In Asia during the 2000s, both Hong Kong and Singapore experienced the mis-selling of “mini-bonds” which involved very complex credit link note structures. In Europe there has recently been a spate of problems with widespread use of foreign currency loans in some countries where homebuyers have taken out loans in foreign currencies of economies with significantly lower interest rates. The borrowers are therefore exposed to risk of currency devaluation and ultimately large increases in the cost of their borrowing.

It is worth noting that Australia had a similar foreign currency loan scandal several decades ago. In fact, that case was arguably even worse because it involved dealers at the originating banks having the authority to switch the borrower between different currencies, thus incurring bid- ask spreads and transactions costs as well. Most recently, widespread problems with “misbehaviour” by Australian financial institutions in their dealings with retail customers have been publicised via the Hayne Royal Commission.

Table 1: Some major miss-selling scandals internationally

When/where	Name	Features
1980s-90s (UK)	Personal Pensions Miss-selling	Introduction of personal pension schemes led to large commission based casual salesforce encouraging individuals (often family/friends) to shift from defined benefit company pension schemes to personal defined benefit schemes
1980s-90s (UK)	Endowment Mortgages	Property mortgages involving either interest only or final balloon payments of principal and interest attached to savings plans invested in stock market. Sold on "promise" that invested amount would grow sufficiently to at least meet required final mortgage payment.
1990s – 2000s (UK)	Payment Protection Insurance	Sold in conjunction with new mortgages, loans, credit cards, offering protection to meet loan obligations if loss of income due to unemployment, illness etc. Highly profitable for providers - claims payouts / premiums around 15 per cent. Inappropriate for many borrowers, marketed as "essential". FSA actions from 2006, GBP 20 billion estimated compensation bill at February 2014.
1990s-2000s (USA)	Subprime Mortgages	Mortgages sold to borrowers without adequate repayment prospects or initial equity position, with some originators misstating borrower financial position. "Teaser" initial interest rates with subsequent major upward adjustment, and premised on assumption that increased property prices would enable refinancing of mortgage on new terms.
1990s-2000s (USA)	Madoff Ponzi Scheme	Fraudulent managed investment scheme where high stable returns reported. New investor contributions were used to make distributions to or credit returns to accounts of existing investors.
2000s (HK & Singapore)	Minibonds	Complex credit- linked note structure issued by a special purpose vehicle related to Lehmans and sold by banks to over 40,000 investors. Projected returns were high, but would diminish if there were default events of a small number of high quality companies/sovereigns, through a credit default swap agreement. However, investor capital was invested in risky CDOs (rather than risk free securities) such that much value was lost when Lehmans collapsed – although subsequent recoveries of principal amount have been quite high.
2000s (Europe)	Foreign Currency Loans	Home-buyers offered loans in foreign currencies where interest rates are significantly lower and being exposed to the risk of home currency devaluation and substantial increases in the ultimate cost of the borrowing.

These are extreme cases. (See also Reurink, JES, 2018). But there are many examples, brought to prominence by the financial crisis, of unsuitable products, miss-pricing, conflicted advice, financial firm failures and investor losses. In Australia, for example, the financial crisis exposed a variety of problems. They included:

- Failures of Agribusiness managed investment schemes where projections of returns were excessively optimistic and investor assets were not adequately protected. Indeed, investors often borrowed funds from an associated company of the management firm which remained owing when the scheme failed.
- Margin Lending arrangements which involved a securities lending structure whereby ownership of the equities involved was transferred to the lender (rather than retained by the borrower) and title the transferred to the lender's financiers. When the lender went into insolvency due to operational risk events, the borrowers faced substantial losses (although eventually, for reputational reasons, the large banks which financed the margin lender provided compensation).
- Sales of unsuitable CDOs and Credit Linked Note products to retail (and other) investors.
- Freezing of unlisted mortgage and property funds which offered withdrawal facilities but held mainly illiquid assets (a repeat of similar events at the start of the1990s)
- Failures of finance companies and other financial firms raising funds by issue of debentures and engaging in related party loans (often for property development).
- Managed fund frauds where investments were made offshore and funds unrecoverable.

Notably, the losses experienced by retail (and other) investors from such events did not lead to government compensation – since they involved investments and activities outside of the prudentially regulated sector. Having a clear demarcation of the boundary between prudentially regulated and non-regulated sectors has been one strength of the Australian system.

Since then numerous examples of bank and other financial institution misbehaviour affecting retail financial consumers were brought into prominence by the Hayne Royal Commission which is discussed in Chapter 7. Among them has been the behaviour of "debt management firms", some of whom have preyed on individuals in financial trouble, offering their services to consolidate and manage excessive debts, but in fact worsening the situation for the individual via their fees and charges. In April 2021 a debt management licensing regime came into operation (via categorising such services as a credit activity requiring the holding of an ACL) which should provide ASIC with greater powers to prevent unscrupulous operators in the sector.

25.5 International Developments

The world-wide experiences have meant that Consumer Financial Protection has emerged as a prominent issue in the global regulatory agenda, with the G20 producing a set of high level principles (Table 2) and other international agencies (and national authorities) paying increased attention to the topic. The World Bank, for example, has produced guidance on good practices for financial consumer protection on an industry basis. But what guiding economic philosophy should underpin the process is a matter for debate.

"This renewed policy and regulatory focus on financial consumer protection results inter alia from the increased transfer of opportunities and risks to individuals and households in various segments of financial services, as well as the increased complexity of financial products and rapid technological change, all coming at a time when basic access to financial products and the level of financial literacy remain low in a number of jurisdictions. Rapid financial market development and innovation, unregulated or inadequately regulated and/or supervised financial services providers, and misaligned incentives for financial services providers can increase the risk that consumers face fraud, abuse and misconduct. In particular, low-income and less experienced consumers often face particular challenges in the market place." G20 High-Level Principles on Financial Consumer Protection (Oct. 2011)

Table 2: G20 High Level Principles

Legal, Regulatory & Supervisory Framework	FCP an integral part of the framework, reflect financial system and user features, good legal underpinnings, appropriate regulation of product /service providers and agents
Role of Oversight Bodies	FCP oversight bodies with mandates, authority, independence, accountability
Equitable, Fair Treatment of Consumers	Fairness should be an integral part of governance / culture of providers and agents
Disclosure and Transparency	Provision of key information expected on product benefits, risks, terms and conflicts of interest. Honest promotional material. Standardised disclosures allowing comparisons.
Financial Education and Awareness	Promote financial literacy and information on rights. Implement OECD INFE principles
Responsible Business Conduct of Providers and Agents	Customer best interests should be an objective and reflected in remuneration structures. Provider accountability for actions of agents.
Protection of Consumer assets against Fraud and Misuse	Information, control and protection mechanisms expected to protect consumer assets.
Protection of Consumer Data and Privacy	Control and protection mechanisms expected to protect consumer information and clarify permissible uses.
Complaints Handling and Redress	Jurisdictions should ensure accessible mechanisms. Providers and agents should have mechanisms for complaint handling and redress, and recourse available to independent process

Competition	Promote competitive markets to give consumer choice and ability to switch, and to promote product development and quality

25.6 Alternative Philosophies and Approaches

At the risk of caricature, Figure 1 indicates a spectrum of ideological / philosophical positions which can be adopted as the basis for financial consumer protection policies. At one extreme is the "free markets" / libertarian approach, consistent with the world of introductory economics textbooks. Markets should be allowed to operate freely, individuals should take responsibility for their actions, and have access to the legal system for the resolution of disputes. In this view, decisions of informed individuals will promote efficiency, and "rule of law" and reputational considerations will deter unethical behaviour by suppliers of financial products and services. Governments may need to ensure adequate information is provided, and if individuals are unable to assess the worth of financial products and services, it could be expected that skilled advisers would be available, for a fee, to assist.

Starting from this philosophical position, which influenced the development of Australia's FCP framework following the Financial System (Wallis) Inquiry in 1997, until recent changes, the main ingredients of policy are disclosure, education and advice (which I'll refer to as DEA). Of course, for the policy to work what is really needed is "perfect" DEA, although "good" DEA, however that might be defined, would probably be seen as adequate by most. In practice, both in Australia and elsewhere, achieving "good" DEA has proven problematic.

The problems are inherent in all parts of the DEA approach which had been used in Australia. First disclosure documents are used more as a legal protection device by financial product producers than as information documents, making them large and, generally, unintelligible to the typical individual. There is considerable work also to be done in identifying the best way of presenting information about risks, costs, expected returns etc in ways that resonate with readers. In 2019 ASIC acknowledged (in a joint report with the Dutch regulator) that disclosure should not be the default mechanism for trying to achieve financial consumer protection (and in some cases "disclosure and warnings can backfire").

That is compounded by the fact that financial literacy standards, even though relatively high by world standards, are inadequate for even moderately complex financial products. Lusardi and Mitchell (2014) have recently surveyed the evidence on, and developments in, financial literacy and conclude that "researchers have demonstrated that low levels of financial knowledge are pervasive, suggesting that it will be quite challenging to provide the tools to help people function more effectively in complex financial and credit markets requiring sophisticated financial decision making." They note that we have little evidence on what types of financial decision making can be improved by enhanced financial literacy

Finally, the financial advice industry has been characterised by conflicts of interest, conflicted remuneration structures with reliance on commissions from product suppliers rather than up front fees, and with many advisers employed by large financial product producers such as banks and life insurance firms. The level of qualifications has often been inadequate, quality of advice has often been poor, and recent advice scandals have involved advisers placing individuals into products inconsistent with their desired objectives and risk tolerance.

The Hayne Royal Commission (see Chapter 7) exposed many failings in the area of financial advice, particularly in the case of large banks and other financial institutions. ASIC had already begun investigating such failures, producing a report on "Financial advice: Fees for no service" in 2016. Subsequently in 2017 it produced another report focusing on how effectively these institutions oversaw their financial advisers. As at June 2022 ASIC reported that the six large institutions involved (major banks, Macquarie and AMP) had paid or offered $3.6 billion in compensation "to customers who suffered loss or detriment because of *fees for no service* misconduct or *non-compliant advice"*. While those payments were over a number of years and reflect past wrongdoings, some perspective on the magnitude is given by noting that for NAB and Westpac (who had the largest compensation amounts) the payments were in the order of 20-25 per cent of annual profits.

The problems exposed have meant that regulatory approaches have moved somewhat along the spectrum shown in Figure 1.

Philosophies and Policies: a caricature

Approach	Free Markets/ Libertarian	Asymmetric Information	Behavioural Finance	Paternalism
Assump tions	Rationality Competition Rule of Law Full Information Caveat Emptor	Imperfect Information, "credence" goods	Behavioural biases	Inability to assess needs & products, exposure to unethical suppliers, and limits to legal system redress
Policies	Education, Advice Disclosure	Codes of conduct, dispute resolution, standardised products / contracts sophisticated – retail distinction, facilitate switching, standard products / contracts	Default options, product marketing rules	Product bans and approval processes, product design rules

Pre-crisis

Post-crisis

Figure 1: Approaches to Financial Consumer Protection

As well as the demonstrated failings of the DEA approach (although better DEA is always sought) two factors (as well as lots of bad experiences) are intertwined in influencing that shift away from the perfect markets paradigm. One is the increasing recognition of the pervasiveness of asymmetric information in financial markets, which is particularly relevant due to the inter-temporal nature of financial contracts. Assessing the reliability of a counterparty's promised future commitment to pay, or the risks associated with contracts with uncertain payoffs, or the true value of a financial product or service, are fundamental problems for financial decision-making. This is compounded by a second factor of widespread deficiencies in financial literacy which mean that individuals are generally unable to make such an assessment even if provided with large amounts of information relevant to such risks. A third factor is that relying on *ex post* compensation for wrongdoing by suppliers of financial services and products is problematic due to the imbalances of economic power and knowledge between suppliers and consumers, and high costs of litigation relative to potential compensation. Consequently, if the expected costs of wrongdoing, miss-selling, or overcharging (relative to true worth) are low relative to potential benefits, deterrence effects may be inadequate to achieve good social outcomes. This problem is amplified by the fact that many financial products may be thought of as "credence goods" in which the purchaser relies on the credibility of the seller or adviser and is unable, perhaps even with the benefit of hindsight, to assess the true worth of the product or service purchased (Dulleck & Kerschbamer, 2006).

The second factor influencing a shift in focus is the increasing body of evidence that most individuals do not act like the "homo economicus" of the textbooks. Rather than rational beings making self interested decisions which maximize utility, most of us are subject to a range of behavioural biases and, given limits to our information processing ability, tend to act in accordance with various heuristics or rules of thumb. This means that decisions made may not be in one's best interest, and such decisions may be easily influenced by the way in which financial products are constructed and marketed. It is sometimes said that consumers do not "buy", but are "sold" financial products.

The problem that recognition of these factors gives rise to, is how to design FCP policies without going to the other extreme of government paternalism (fixing prices, banning products etc) – which will typically involve significant economic inefficiencies.

The behavioural economics approach raises the question of to what extent appropriate policies might instead involve removing some financial products and services from the choice sets available to individuals, or appropriately designing the "choice architecture" to influence or "nudge" individuals towards making decisions policy-makers believe would be in their best interests. That "libertarian paternalism" approach (Thaler and Sunstein, 2009) assumes that individuals are not the rational economic man or woman of the economic textbooks, on which so much of financial regulation has been inappropriately based, but are behaviourally biased. And to the extent that is true, it raises the question of how best to also design financial literacy and education programs which recognise the pervasiveness of behavioural biases.

Several approaches consistent with the imperfect information and "liberal paternalism" perspectives have been adopted in Australia (although not explicitly referred to as such), and some examples follow.

Recognising the problems individuals face in assessing financial risk, most countries provide a "safe haven" for savings in the form of insured or guaranteed bank deposits. This provides FCP against counterparty risk of institutions inside the prudential perimeter. Australia, now does this, but prior to the financial crisis did not have such a scheme, relying instead on the assumption that depositor priority would be sufficient to both protect investors and remove uncertainty and consequent risk of "runs". While depositor preference may have provided sufficient protection, it certainly did not provide adequate comfort to depositors during the financial crisis – with few even aware of their priority position and some uncertainty existing about the extent of implied government guarantees.

The dilemma with providing a "safe haven" via deposit insurance is, of course, that it creates moral hazard – individuals no longer need to assess the riskiness of institutions covered. This puts increased onus on the regulators to ensure, via regulation and supervision, that excessive risk taking creating threats to the taxpayer or insurance fund does not occur. Particularly in the absence of risk-based deposit insurance premiums, an expected consequence can be tougher regulation and more intensive supervision.

Recognising the fact that behavioural biases lead individuals to discount the future too heavily, and thus make inadequate savings for retirement, many countries – Australia included – mandate compulsory long term pension savings (superannuation) out of employee incomes and provide tax incentives for such savings. This can, itself, generate other FCP concerns. In Australia, for example, when individuals reach retirement age and can access accumulated savings, they may lack sufficient expertise to manage those funds and, potentially be prey to unscrupulous counterparties. This was the case in Australia involving the "Storm Financial" advice scandal, where retirees were induced to use retirement savings (often augmented by funds from remortgaging their home) as the investor's equity in highly levered margin lending arrangements. When the stock market collapsed in 2007-8, substantial losses and hardship resulted. As another example, Self Managed Superannuation Funds (where individuals manage investment of their own retirement savings) have grown significantly in Australia, potentially exposing such individuals to sellers of unsuitable investment products. (A recent example of the problems which can arise has been the UK case of sales of "mini-bonds" (small denomination bonds of corporate issuers) to ISA's (Individual Retirement Savings Accounts) where investors may not be aware of the credit risk and are not adequately diversidied.

25.7 Challenges in the Design of FCP Policies

Financial regulators face three main challenges in designing appropriate protection regimes for consumers of financial products and services such as savings and investment products, borrowings, payments services, insurance, and financial advice. One is the potential for "moral hazard", where government guarantees and support reduce consumer incentives for assessing and taking responsibility for risks. A second is identifying an appropriate perimeter within which additional protection beyond that afforded by the normal "rule of law" may be warranted. The third is understanding the determinants of consumer behaviour such that legislation and regulation can be fashioned appropriately to lead to desired outcomes.

More generally, policy involves both ex ante (prevention) and ex post (redress) aspects. They are inter-related via the role of deterrence. In general, the likelihood of undesirable practices occurring will depend on: the probability of exposure and punishment, which in turn depends upon individual access to courts, regulator mandate and resources, and "gatekeepers" (such as accountants, auditors, trustees, custodians, advisers) as well as the size of potential punishment (fines, licensing restrictions, reputation effects).

The legal/regulatory framework is crucial in this regard. For example, when can redress be sought? Will a court rule on compliance with strict “terms and conditions” (even if unlikely to have been understood by the individual) or by applying a “reasonable expectations” doctrine? How are abusive practices defined and what duty of care is required of the product supplier?

Also important is the range of ways by which redress can be sought, ranging from individual legal action, through legislated dispute resolution schemes and government agency (enforcement) roles. The Australian approach has placed significant emphasis on requirements for both internal and external dispute resolution schemes, but another significant development has been the emergence of class actions and litigation funders. While these provide a mechanism for poorly resourced individuals to jointly seek redress, they also create potential problems of opportunistic lawsuits.

Another challenge for FCP policy is that financial product/service suppliers range from unregulated individuals (eg payday lenders) to large global financial institutions. Moreover, suppliers can be “for profit”, cooperatives / mutuals, government owned, each with different incentives and therefore potential for creating FCP problems. One size of regulation is unlikely to fit all, and supplier culture, ethics, integrity, governance, incentive structures are all relevant.

This raises two related issues. The first is the merits of “principles – based” regulation versus a “black letter law” approach. The former gives flexibility to different types of providers of financial products and services to meet required standards in different ways most suitable to them. The “externality” of regulation targeted at one group of providers adversely affecting others for whom it is not necessary is removed. However, unlike “black letter law” it can create uncertainty for firms as to whether regulatory requirements are being met and whether the firm is thus inadvertently exposed to risk of prosecution and penalties. It also can make prosecution more problematic compared to cases where explicit regulations have been breached.

The second issue concerns the culture, governance, and incentive structures of financial service providers. In an ideal world, providers would act in a “fair” manner, not exploiting consumer lack of knowledge or behavioural biases for gains at the expense of the consumer. Of course, in the free markets paradigm, fairness does not emerge as an issue, since it is assumed that transactions are entered into because they are believed to be mutually beneficial. We do, however, know that not all individuals adhere to ethical standards which incorporate “fairness” as a consideration, even though psychological evidence suggests that fairness is a potentially important influence on decision-making of many individuals (Fehr and Gachter, JEP, 2000). Unfortunately, there is also substantial evidence that fairness considerations can be driven out of decision making considerations, and replaced by pure self-interest, by the institutional arrangements within which transactions are made.

Some would argue that "fairness" can get indirectly incorporated into corporate cultures by the need to preserve a reputation as a good counterparty. If repeat transactions with the same customer (or others who are aware of that customer's experience) are desired, unfair treatment can threaten reputation and subsequent business. But that perspective relies on two assumptions – neither of which are necessarily appropriate for many financial transactions. First, many financial transactions are one-off or infrequent (such as taking out a mortgage to buy a house) so that the potential for information acquisition by the customer by learning by doing is limited. Second, many financial products and services are arguably "credence" goods, where quality and value added cannot be ascertained by the customer, even after the contract has expired.

And, digressing somewhat, even if the customer can assess that a product is not suitable after entering into the transaction, there may be impediments to switching to another supplier. Exit fees are one such impediment, and one response to this in Australia has been to ban exit fees on variable rate mortgages.

The need to ensure "fairness" makes corporate culture an important factor in FCP considerations. However, achieving a desired culture in a competitive world is a problematic issue for policy makers. One response, applied in Australia, is to impose requirements on financial firms to behave fairly. As well as general prohibitions on "unconscionable conduct", lenders are now required to ensure that loans are suitable for the characteristics of the borrower – switching the onus for assessing product suitability from the borrower to the lender.

Probably the most problematic area is that of remuneration structures, and particularly in the area of financial advice. In Mid 2012 the Australian government introduced Future of Financial Advice (FOFA) reforms involving introduction of explicit fiduciary duty for advisers and prohibition of conflicted remuneration structures such as commissions and volume based payments. In December 2013 the new government proposed amendments "weakening" some of the provisions, but tightening of requirements initially followed. These included the introduction of new licensing requirements for financial advisers, including educational requirements. These, including a specific exam, commenced in 2019, and were overseen by FASEA (the Financial Adviser Standards and Education Authority) created under 2017 legislation. However in 2020 the government announced that FASEA would be abolished and a financial adviser disciplinary panel created in ASIC.

In 2020-21, the coalition government also attempted to remove or weaken the Responsible Lending Obligations (RLOs) which protect individual borrowers. However this was met with significant opposition and did not proceed through Parliament.

At the start of 2023 the Final report of a Quality of Advice Review was released, containing a controversial recommendation to replace the "best interests of the client" duty with a "provision of good advice" duty.

In Australia FCP is an ASIC responsibility v ACCC (general consumer protection) v separate FCPB (USA, China, others). Issues it addresses include: unconscionable conduct, miss-selling, disclosure, product/security design etc. ASIC issues Regulatory Guides, class orders, enforceable undertakings, banning, fines, court actions (civil v criminal) etc. ASIC has recently been granted Product Intervention Powers (PIP) enabling it to impose a temporary ban unsuitable products and services, and legislation has also introduced manufacturer and distributor product design and distribution obligations. Legislation has also introduced Design and Distribution Obligation (DDO) responsibilities for producers and distributors of financial products and services requiring them to identify the target markets and the suitability of the products and services for those markets. In July 2022 ASIC issued its first "stop notices" against firms who were trying to market investment products because of inadequate target market determinations (TMDs).

One area of concern has been the activities of some debt management firms offering credit repair and debt negotiation services to financial consumers who find themselves in with excessive debt obligations to one or more providers of finance. In some cases, the fees charged by unscrupulous operators have led to a significantly worsened position for their clients. Indeed, a 2019 Senate Committee Report stated that "these services rarely improve a consumer's financial position". Until a change in regulation as a result of legislation in April 2021, providers of these services did not require an ACL. The changed regulations provide ASIC with powers to take action against such firms where necessary, and should (hopefully) inhibit activities of potentially unscrupulous operators.

Conditions of AFSL and ACL require internal dispute resolution schemes and membership of external schemes. There has been a recent merging of several schemes into Australian Financial Complaints Authority (AFCA).

25.8 Royal Commission and Compensation Scheme of Last Resort

While the Hayne Royal Commission was about misbehaviour/misconduct in the financial services sector, that is essentially the same as examining failings in financial consumer protection. The Royal Commission identified a range of inappropriate behaviours and provided a suite of recommendations which are discussed here. Chapter 7 provides more detail on the Royal Commission.

One of the Hayne RC recommendations (Number 7.1) was for the establishment of a Compensation Scheme of Last Resort (CSLR) as had been proposed by the Ramsay Review. This reflects the fact that even when financial consumers have proven that they have incurred losses due to bad advice or being sold inappropriate products, the failure of the firm involved has made it impossible for them to obtain compensation from the firm. In mid 2021, the government consulted on the precise form of the CSLR which "will provide limited compensation where a determination issued by the Australian Financial Complaints Authority (AFCA) remains unpaid and the determination relates to a financial product or service within the scope of the scheme". Thus an applicant for compensation would first need to have had the merits of their claim agreed to by AFCA.

Legislation to introduce the CSLR was introduced to Parliament in September 2022.The proposed details of the CSLR involve an industry-funded scheme available to individuals and small business. It would cover losses from unpaid claims specified under an AFCA determination arising from: personal advice on relevant financial products to retail clients; credit intermediation; securities dealing; credit provision; and insurance product distribution. However, losses arising from dealings with financial firms that are voluntary members of AFCA (rather than required to be members by legislation associated with AFSL and ACL licensing) would not be covered. The proposed maximum compensation is $150,000. For the financing of the scheme a maximum total levy of $250 million p.a. is proposed (with "sector" caps applied to levies associated with different types of financial products covered by the scheme).

The legislation does not appear to provide for compensation for investors in Managed Investment Schemes where those investments were made under the category of wholesale/sophisticated investors. Given the ease with which individuals and trustees of SMSFs can be designated as such, there appear to be many investors in failed schemes such as the Sterling Group, Mayfair 101 (see Chapter 23) who may not be eligible. This probably suggests a need to re-examine the wholesale/sophisticated investor classification process and its inappropriate use by financial advisers and operators of the resulting exemption regarding marketing financial products, rather than a shortcoming of the CSLR.

25.9 Conclusion

Designing effective or optimal CFP policies is challenging. The main lessons from Australia's experience I would argue are: (1) the inadequacy (albeit importance) of a DEA approach; (2) the importance of establishing a clear demarcation line between prudentially regulated institutions and products (where government support is expected) and the remainder of the financial sector where *caveat emptor* is the dominant principle. The challenges however are that (1) prudential regulation occurs also for financial stability reasons and may potentially lead to a wider range of products than desired being captured within that boundary, and (2) establishing a suitable set of CFP arrangements outside that boundary which reflect imperfect information, behavioural biases, and realistic assumptions about financial literacy is difficult.