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Treating Customers Fairly. A concept. A framework. An alternative?

Australian Law Reform Commission Review of the Legislative Framework for Corporations and Financial Services Regulation

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27 JULY, 2021

I. Principles-based regulation, outcomes-based regulation, and Treating Customers Fairly

Treating Customers Fairly ('TCF') regimes are a form of financial services regulation which are outcomes focused, in that they set out the key outcomes to be achieved by firms to demonstrate that they have complied with the TCF standards. Rather than rely on prescriptive rules, firms are given the opportunity and responsibility to determine how they will ensure that they treat customers fairly in the context in which they operate. While prescriptive rules will still exist in addition to the TCF regime, compliance with those rules does not necessarily mean that the firm will have met the TCF outcomes.

The TCF regime very much focuses on culture and governance within the regulated firms, requiring them to 'engage in a process of comprehensive self-evaluation, design, and management of their operations, internal governance, and controls so as to ensure that customers are treated fairly'.[1] This includes reporting to the regulator on how they are ensuring that customers are treated fairly. This model of regulation has features which might be described as both principles-based regulation and outcomes-based regulation.

According to Julia Black, principles-based regulation relies on 'high-level broadly stated rules or principles to set the standards by which regulated firms must conduct business',[2] thus providing standards of conduct that are to be met, rather than requiring financial service providers to adhere to strict methods of compliance that would arise in a rules-based approach.

One of the perceived benefits of utilising a principles-based regulatory approach when implementing financial services regulation, is that it allows financial service providers to determine the way in which they will meet those standards.[3] Gilad has argued that stricter approaches may reduce 'normative commitment and internalization of regulation', 'leave little room for innovation' and may not be flexible enough to adapt within 'heterogenous and fast-moving industries' – such as the financial services sector.[4] Utilising principles-based regulation enables a much more flexible approach that allows for innovation in the means by which regulatees choose to meet the required standards. As noted by the ALRC, regulatees can interpret and respond to the high-level principles and standards in a manner that is compatible with their own context and priorities.[5]

Further, Lovric argued that there are advantages such as allowing greater readability and preventing the use of loopholes, and additionally explained that principles-based legislation often

[1] Andromachi Georgosouli (2011) 'The FSA's 'Treating Customers Fairly' initiative: What is so good about it and why it may not work' 38(3) *Journal of Law and Society* 405, 416-7.

[2] Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 217, 230.

[3] Ibid., p 247.

[4] Sharon Gilad, 'It Runs in the Family: Meta-Regulation and Its Siblings' (2010) 4 *Regulation & Governance* 485.

[5] Australian Law Reform Commission, *Financial Services Legislation*, (Interim Report A, 30 November 2021).

more closely reflects original policy decisions and the true intention of those drafting such pieces of legislation.[6]

As highlighted by the ALRC, a perceived disadvantage of principles-based regulation is that these standards of conduct can appear vague and sometimes self-contradictory, leading to uncertainty as to how regulatees can ensure compliance.[7] The Productivity Commission observed similar drawbacks, highlighting that less complex legislation sacrifices certainty, by allowing for wider provisional interpretations over unspecified scenarios.[8]

Black noted that the principles may facilitate communication, for example through dialogue about approaches to achieving the desired outcomes, but can also hinder it, for example due to 'mindset gaps' between regulators and regulated entities leading to uncertainty and mistrust.[9]

Perceived disadvantages can generally be overcome. For example, by providing clear examples of various means of achieving the outlined standards, by providing a small number of recommended methods or by implementing methods to preapprove or confirm proposed methods of ensuring compliance. Black suggests that constructive and effective dialogue can be achieved as follows:

> *Firms have to accept responsibility for thinking through the application of the Principles or rules in their own particular context. The [regulator] has to support firms in exercising this responsibility by giving firm commitments to the acceptability or otherwise of the responses firms develop to the Principles as part of the supervisory process.*[10]

Such a response avoids what Black refers to as the risk of 'over-zealous/ hindsight-driven enforcement' by the regulator.[11]

Further suggestions for practical implementation of principles-based regulatory regimes made by Black include implementing a 'tiered approach', wherein detailed rules still underpin principles where required, but also utilise principles in a more general manner to 'thwart strategies' and reduce inconsistencies and prevent the use of loopholes.[12] Further, Bant and Paterson suggest increasing the role of soft law sources to provide more guidance regarding the practical application of the principles, such as utilising codes of conduct.[13]

Black cautions, however, against a 'proliferation of guidance' and 'regulatory creep and blurring of the distinction between minimum standards and best practice.'[14]

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[6] Daniel Lovric, 'Principles-Based Drafting: Experiences from Tax Drafting' [2010] (3) *The Loophole* 16, 24-25.

[7] Australian Law Reform Commission, *Financial Services Legislation*, op cit.

[8] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Australian Government, 2014) 184.

[9] Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 200.

[10] Ibid, 204.

[11] Ibid, 196.

[12] Julie Black, 'Forms and Paradoxes of Principles-based Regulation', (2008) 3(4) *Capital Markets Law Journal* 425, 429.

[13] Elise Bant and Jeannie Paterson, 'Statutory Interpretation and the Critical Role of Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 301.

[14] Black et al, ibid., p 196.

Often overlapping with the concept of principles-based regulation is outcomes-based regulation, which focuses primarily on the outcomes that are 'sought to be achieved' rather than 'on the processes that the regulated population should follow to achieve those outcomes'.[15] Like principles-based regulation, this form of regulation moves away from providing detailed, prescriptive rules, and instead provides high-level, broadly stated outcomes that must be achieved.

When considering what outcomes-based regulation would look like in practice, the ALRC stated in Interim Report A:

> *For example, outcomes-based regulation does not require that a financial investment must generate a particular level of return to demonstrate compliance on the part of investment managers, product issuers, and financial advisers. Rather, in recognition that financial decisions carry a level of unavoidable risk, outcomes-based regulation seeks to articulate appropriate outcomes in the context of the interaction between regulated entities and consumers.*[16]

It is interesting to note that in 2013, the Australian Productivity Commission considered that outcomes-based regulation should be the default regulatory mode, though acknowledging that doing so may not be feasible in certain circumstances – such as where well-established standards do not exist or are not appropriate.

Lovric argues that by prescribing required outcomes which need to be achieved, rather than expressly stipulating the means of achieving those outcomes, 'masses of complicated detail' that would be otherwise unnecessary will be avoided.[17] In the financial services sector, not only would this provide the freedom for regulatees to develop their own solutions to deliver the outcome, but it would also allow them to implement a more tailored approach that best fits their operation strategies.

By modelling regulation on both outcomes-based regulation and principles-based regulation, a regulatory scheme can allow the freedom and innovation that principles-based regulation offers, while reducing the risk of confusion or communication errors that scholars have perceived to be a risk of principles-based regulation, by making required outcomes clear.

The argument for stipulating outcomes but allowing financial service providers to implement their own means of achieving the stipulated outcomes is compelling, for the institutions and their managers are 'better placed than regulators to determine what processes and actions are required'.[18] Black et al. suggested that regulators should 'step back and define the outcomes that they require firms to achieve', rather than 'prescribing the processes or actions that firms must take'. Therefore, while regulators may require financial institutions to ensure customers can trust and rely upon any financial advice given, they would not provide strict rules as to how the financial institutions should attain that outcome.

However, there are challenges and perceived difficulties with outcomes-based regulation. As highlighted by Black et al., a perceived challenge of this method is that it can be unclear how to

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[15] Australian Law Reform Commission, *Financial Services Legislation*, op cit., [2.118].

[16] Australian Law Reform Commission, *Financial Services Legislation*, op cit., [2.119].

[17] Daniel Lovric, 'Principles-Based Drafting: Experiences from Tax Drafting' [2010], op cit., p 23.

[18] Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 192.

measure the achievement of outcomes, and further that it can be unclear what consequences will flow from failure to meet the expectations set by the financial services regulators.[19] As observed by Malvazos, the use of outcomes-based regulation is straightforward in cases where non-compliant behaviour can be clearly identified by measurable outcomes;[20] however, challenges arise where outcomes are not as easily measured – especially in circumstances where the objectives are not easily quantifiable as noted by Coglianese, Nash and Olmstead.[21]

As is highlighted in our recommendations below, clear communication between the regulator and regulates, as well as guidelines to help inform appropriate steps to meet the standards set, seem to be essential, in order to avoid both a 'morphing' into intrusive, rule-like measures and arbitrary penalties applied when measures have proven inadequate only with the benefit of hindsight. A mechanism for measuring success will also be important in informing any adjustments to the regime to achieve desired outcomes for consumers.

[19] Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007), op cit., p 193.

[20] Michael Malavazos, 'A Model for Environmental and Health and Safety Regulation for the Mining and Upstream Petroleum Industries' (Thesis, August 1998) 51.

[21] Cary Coglianese, Jennifer Nash and Todd Olmstead 'Performance-Based Regulations: Prospects and Limitation in Health, Safety and Environmental Protection.' (2002) *Harvard University-John F. Kennedy School of Government* 5 referred to in Government of Canada, 'Literature Review to Assess the Relevance of Outcome-Based Regulations to Innovation' (Report, 2013).

II. TCF as an example of principles and outcomes-based regulation

The Treating Customers Fairly ('TCF') regime, first implemented in the UK, has been described as "reasonably successful" in making financial services more conscious of their obligations to consumers.[22] The initiative arose after multiple financial scandals which rocked the United Kingdom in the late '90s as a result of relaxed stringency in the name of "self-regulation".[23] In order to remedy this situation, the TCF regime was introduced. TCF is principles-based, to which outcomes-determined is added (principally in response to its initial failings, as evidenced by the GFC).[24] The principles themselves are rules, some aspects of which have had to be fleshed out in more detailed, prescriptive rules.[25] But, "[b]y contrast, principles are adaptive. They do not require frequent changes to the overarching statute."[26]

TCF attempts to create a regime encompassed around widely recognised concepts and "tests" for fairness, instead of strict rules that would not keep pace with an ever-changing industry.[27] TCF can serve as a benchmark regulation to create more targeted rules as industry evolves. The UK adoption of TCF was not considered to be a miracle fix, instead it allowed a "gap analysis" to highlight areas in a business that were not meeting the duty to treat customers fairly, and which firms could then use to fix any shortcomings; with the firm being the agent to clear priorities and targets in satisfying TCF.[28] In so doing TCF aims to compel every firm participating in the financial services industry to create policies that directly align with the TCF provisions; with failure to do so resulting in the regulator initiating actions that might result in public censure or a penalty.[29]

TCF is a multi-faceted regulatory framework, which in addition to being described as principles and outcomes-based, has also been described as management-based, and process-orientated.[30] Management-based, in that firms are tasked with developing plans and systems to

[22] Paul Resnik, "Submission to the Inquiry into Financial Products and Services in Australia", series edited by Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, 31 July 2009, p 4.

[23] Andromachi Georgosouli (2011) 'The FSA's 'Treating Customers Fairly' initiative: What is so good about it and why it may not work', op cit., p 408-9.

[24] Penelope Hawkins, "Treating Customers Fairly", series edited by Feasibility (Pty) Ltd, in *A discussion paper prepared for the Financial Services Board*, Feasibility (Pty) Ltd, April 2010, p 63/4.

[25] Financial Services Authority, United Kingdom, "Treating customers fairly – towards fair outcomes for consumers", series edited by Financial Services Authority, in *Treating Customers Fairly*, no. 2624, Financial Services Authority, July 2006, p 5.

[26] Australian Government, The Treasury, "Financial Services Royal Commission. Submission Interim Report", Australian Government,, The Treasury,, 3 January 2019, p 7, § 45.

[27] Financial Services Authority, United Kingdom, "Treating customers fairly: Progress report", series edited by Financial Services Authority, Financial Services Authority, June 2002, p 4, § 7.

[28] Clive Briault, "Treating customers fairly: progress and future plans", Paper presented at the FSA Treating Customers Fairly Conference, London, UK, in 'Speeches', 4 October 2005

[29] Jonathan Edwards, "Treating customers fairly", *Journal of Financial Regulation and Compliance*, Vol. 14, no. 3 (2006), p 244.

[30] Andromachi Georgosouli (2011) 'The FSA's 'Treating Customers Fairly' initiative: What is so good about it and why it may not work', op cit., p 411.

meet the outcomes of TCF.[31] Process-orientated, in that firms must have a comprehensive process through which product design, creation and implementation is assessed and evaluated.[32] It satisfies the definition of principles and outcomes based regulation as described above in that outcomes provide the measure by which the principles-based policies are ultimately judged for their effectiveness.[33] These areas are designed to overlap and complement each other and synergise together.

Prescriptive regulation is often ill-suited to dynamic industries such as the financial sector.[34] As process-oriented regulation, TCF involves more than producing tailored systems and controls.[35] Rather, it involves incorporating regulatory objectives into firm culture.[36] By way of example, the UK Financial Conduct Authority (and its predecessor, the Financial Services Authority) have and continue to produce extensive guidance as to how firms should approach their obligations under TCF.[37] Compliance with the initiative is then measured against the processes undertaken by firms, and the extent to which they deliver against these outcomes.[38] The idea underpinning this, is that the initiative compels firms to design and evaluate their own organisational processes against the desired regulatory outcomes.[39] The benefit of this initiative is the ability to shift the onus on firms to promote a desirable organisational culture within the firm, and to be responsible for meeting the required regulatory outcomes.[40]

TCF as a regulatory model imposes a positive duty to act in accordance with set principles, not merely a negative duty not to break the law. Accordingly, entities must do more than, for

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[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Dan Awrey, William Blair & David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?", *Delaware Journal of Corporate Law*, Vol. 38, no. 1 (2013), p 219; Bryane Michael, Say-Hak Goo & Svitlana Osaulenko, "Does Objectives-Based Financial Regulation Imply a Rethink of Legislatively Mandated Economic Regulation? A Literature Review", *Journal of Legislation*, Vol. 46, no. 2 (2019), p 254.

[35] Dan Awrey, William Blair & David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?", (2013), op cit, p 219.

[36] Ibid, p 219; Financial Services Authority, United Kingdom, "Treating customers fairly – towards fair outcomes for consumers", July, 2006, op cit, p 11; Julia Black, "Forms and paradoxes of principles-based regulation", *Capital Markets Law Journal*, Vol. 3, no. 4 (10 September, 2008), p 428/454.

[37] Dan Awrey, William Blair & David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?", (2013), op cit, p 221; Sharon Gilad, "Institutionalizing fairness in financial markets: Mission impossible?", *Regulation & Governance*, Vol. 5, no. 3 (19 July, 2011), p 317; Financial Services Authority, United Kingdom, "Treating customers fairly – guide to management information", series edited by Financial Services Authority, in *Treating Customers Fairly*, Financial Services Authority, July 2007, p 3.

[38] Dan Awrey, William Blair & David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?", (2013), op cit, p 221; Financial Services Authority, United Kingdom, "Treating customers fairly – towards fair outcomes for consumers", July, 2006, op cit, p 5, § 1.9.

[39] Dan Awrey, William Blair & David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?", (2013), op cit, p 221; Financial Services Authority, United Kingdom, "Treating customers fairly – towards fair outcomes for consumers", July, 2006, op cit, p 9; Sharon Gilad, "Institutionalizing fairness in financial markets: Mission impossible?", (19 July, 2011), op cit, p 319ff.

[40] Dan Awrey, William Blair & David Kershaw, "Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?", (2013), op cit, p 221; Financial Services Authority, United Kingdom, "Treating customers fairly – guide to management information", July, 2007, op cit, p 1.

example, say they have done A, B and C. Rather, they must articulate why the implementation of specific policies actively protects customers and ensures fairness. As such, TCF may also be described as an outcomes-, principles-,[41] and norms-based[42] regulatory approach that intends to ensure fairness in outcomes for consumers, delivered by financial institutions, by increasing transparency and self-discipline.[43]

[41] Financial Services Board, Republic of South Africa, "Treating Customers Fairly. The Roadmap", series edited by Financial Services Board, in *Financial Services Board Policy Document*, Financial Services Board, 31 March 2011.

[42] Julia Black, "The rise, fall and fate of principles based regulation", in *LSE Law, Society and Economy Working Papers*, no. 17/2010, Law Department, London School of Economics and Political Science, 2010, p 5.

[43] Financial Services Board, Republic of South Africa, "Treating Customers Fairly. The Roadmap", 31 March, 2011, op cit, p 3/7/9.

III. Comparative analysis of TCF regimes in the United Kingdom, South Africa and New Zealand

The United Kingdom

The United Kingdom was the first jurisdiction to implement an explicit TCF regime, with the obligations on firms introduced in 2006. TCF originated from the UK Financial Conduct Authority's (FCA) Handbook – a complete repository of the FCA's legal instruments.[44] Within that Handbook are set out 11 principles to which businesses should adhere.[45] These principles operate to create an ethical and fair approach to business, with an emphasis on the consumer. They range from integrity, fair treatment of customers, clear communication, conducting business with due skill, care and diligence and managing conflicts of interest.[46] They form part of the FCA's High Level Standards, and are a general statement of the fundamental obligations of firms under the regulatory system.[47] A breach of any of these Principles makes a firm liable to disciplinary action by the FCA, enabling the FCA to take enforcement action on the basis of a breach of that Principle alone.[48] In an FCA discussion paper, it justifies the Principles as an all embracing, comprehensive code of conduct

[44] Financial Conduct Authority, "Home", in *Handbook*, Financial Conduct Authority, accessed: 24 September, 2022.

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1. Integrity: A firm must conduct its business with integrity.
2. Skill, care and diligence: A firm must conduct its business with due skill, care and diligence.
3. Management and control: A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4. Financial prudence: A firm must maintain adequate financial resources.
5. Market conduct: A firm must observe proper standards of market conduct.
6. Customers' interests: A firm must pay due regard to the interests of its customers and treat them fairly.
7. Communications with clients: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
8. Conflicts of interest: A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
9. Customers: relationships of trust: A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10. Clients' assets: A firm must arrange adequate protection for clients' assets when it is responsible for them.
11. Relations with regulators: A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

[46] Financial Conduct Authority, "Principles for Businesses - FCA Handbook", Release 54 ed., September 2020, p 11.

[47] LexisNexis, "Financial Conduct Authority—Principles for Businesses (PRIN)", in *Practice notes*, Home / Financial Services / Risk management and controls / Systems and controls ed., LexisNexis Financial Services expert, 2022, accessed: 24 September, 2022.

[48] Mark Sneddon, "Policy Submission on Financial Services Royal Commission's Interim Report. A Proposal for a New Fair Treatment of Customers Standard for Financial Services and Credit Businesses in Australia", in *Royal Commission of Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report*, no. POL.9100.0001.1021_0001, Vol. 3, Royal Commission of Inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry, 26 October 2018, p 13, citing Financial Conduct Authority, "FCA Mission: Approach to Consumers", series edited by Financial Conduct Authority, Financial Conduct Authority, 17 July 2018, p 13.

intended to cover all circumstances.[49] The Principles provide for wide ranging, flexible duties of firms to act in the best interest of its customers and to treat them fairly. These Principles create obligations surrounding integrity, skill/care/diligence, management control, market conduct, conflicts of interest and regulator relationships. However, the main Principle of interest in terms of TCF is Principle 6: "a firm must pay due regard to the interests of its' customers and treat them fairly." It is from this principle that TCF emanates.[50] The TCF regime is, in turn, based upon six pillars outlined in the July 2006 FCA report, *Treating customers fairly – towards fair outcomes for consumers*:

1. *Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.*
2. *Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.*
3. *Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.*
4. *Where consumers receive advice, the advice is suitable and takes account of their circumstances.*
5. *Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.*
6. *Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.*[51]

The focus is on customer outcomes, as opposed to mere procedural compliance.[52] The overarching set of principles are coupled with Guidance Papers which are published regularly in relation to specific topics, which provide clarity and certainty for regulated entities with respect to specific expectations in certain situations, such as when dealing with vulnerable customers.[53] One notable feature of the UK system is the collaborative approach towards industry which occurs prior to finalising Guidance Papers; but equally notable is the expectation that in response, industry is expected to change its approach.[54]

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[49] Financial Conduct Authority, "Discussion Paper on a duty of care and potential alternative approaches", report number: DP18/5, Consumer Insight, July 2018, p 10.

[50] Financial Services Authority, United Kingdom, "Treating customers fairly – towards fair outcomes for consumers", July, 2006, op cit, at § 1.4, p 4.

[51] Financial Services Authority (UK), Treating customers fairly – towards fair outcomes for consumers (Report, July 2006).

[52] Andrew Godwin, Vivienne Brand & Rosemary Teele Langford, "Legislative Design–Clarifying the Legislative Porridge", *Company and Securities Law Journal*, Vol. 38, no. 5 (8 June, 2021), p 285/6.

[53] See for example: Financial Conduct Authority, "Finalised guidance. Guidance for firms on the fair treatment of vulnerable customers", FG21/1, [February, 2021].

[54] Financial Conduct Authority, "FCA Mission: Approach to Consumers", 17 July, 2018, op cit, p 35.

Initially, the response to TCF in the UK was relatively positive, with several scholars such as Georgosouli,[55] Patient[56] and Davies[57] stating that the TCF initiative demonstrated the emerging trend of focusing on 'the need to bring about cultural change down to the level of each regulated firm by way of strengthening the communicative character of regulation and relying more and more on the regulatory capacity of ad hoc interpretive practice, instead of the usual rulebook approach to regulation'.[58] Whilst commenting on the 2006 FSA report,[59] the then British Bankers Association's Chief Executive, Ian Mullen, commented that 'it is clear from the FSA's work the major banks are committed to treating their customers fairly and are making good progress in meeting the FSA's requirements', indicating an initial positive response from banking organisations.[60]

However, concerns about this regime arose as firms began to operationalise it. Georgosouli expressed concerns that TCF's approach had been 'progressively transformed into a concrete set of intrusive measures, which bear little resemblance with what was initially a gentle encouragement to abide by TCF recommendations'.[61] Georgosouli agreed that TCF 'seems to afford a more participatory and discursive approach to regulation than the rulebook approach', but was also concerned that the conditions required for TCF to thrive were not present in practice – conditions such as relatively reasonable legal certainty and predictability.[62]

Within the FCA's April 2019 Feedback Statement, the FCA analysed critiques that had arisen, where most stakeholders expressed the view that the FCA's regulatory approach was still 'too rules-based and not sufficiently outcomes-focused'.[63] Therefore, in response to this feedback, the FCA began preparing to introduce a new Customer Duty which would instead require firms to 'consistently focus on consumer outcomes'.[64]

In February 2021 the FCA released a Guidance titled, *Guidance for firms on the fair treatment of vulnerable customers* ('the Guidance'),[65] which contained further advice to ensure firms treat vulnerable customers fairly, and included examples of how to enact the Guidance.[66] The Guidance acts as a clarifying document to ensure firms in the United Kingdom are aware of what needs to be

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[55] Andromachi Georgosouli (2011) 'The FSA's 'Treating Customers Fairly' initiative: What is so good about it and why it may not work', op cit., p 405-427.

[56] J. Patient, 'Treating Customers Fairly: the challenge of principles-based regulation' (2007) 22 *Journal of International Banking Law and Regulation* 420-425.

[57] K. Davies, 'Why Treating Customers Fairly is here to stay' (2009) *Compliance Monitor* 15-18.

[58] Andromachi Georgosouli, 'The FSA's 'Treating Customers Fairly' (TCF) Initiative: What is So Good About It and Why It May Not Work' (2011), op cit., p 411.

[59] Financial Services Authority (UK), Treating customers fairly – towards fair outcomes for consumers, op cit.

[60] Simon Bain 'Banks make progress on treating customers fairly', *The Herald* (United Kingdom, 20 July 2006).

[61] Andromachi Georgosouli, 'The FSA's 'Treating Customers Fairly' (TCF) Initiative: What is So Good About It and Why It May Not Work' (2011), op cit., p 415.

[62] Ibid., p 419-420.

[63] Financial Conduct Authority (UK), A duty of care and potential alternative approaches: summary of responses and next steps (Feedback Statement 19/2, 2019).

[64] Financial Services Authority (UK), Treating customers fairly – towards fair outcomes for consumers, op cit.

[65] Financial Conduct Authority (UK), *Guidance for firms on the fair treatment of vulnerable customers* (Finalised Guidance 21/1, 2021).

[66] 'Guidance for firms on the fair treatment of vulnerable customers', *Financial Conduct Authority (UK)* (23 February 2021) <https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers>.

done to meet the outcomes contained within the Principles for Business. There are four key actions the FCA suggests firms engage in to ensure they can achieve good outcomes. Firstly, that firms understand the needs of their customer base; secondly, to ensure staff are properly trained and have the necessary skills and capability to recognise and respond to the needs of vulnerable customers; thirdly, to respond to customer needs throughout product design, as well as flexible customer service provisions and communications; and fourthly, to monitor and assess whether the firms are meeting and responding to the needs of their vulnerable customers in order to make improvements when necessary.

More recently, the FCA has implemented its proposal for a higher standard on firms. It has introduced a new, outcomes-focused duty on firms, adding a principle 12 to the FCA's high level principles. Principle 12 commenced application to new and existing products and services that are open to sale (or renewal) from 31 July 2023, and provides: ''A firm must act to deliver good outcomes for retail customers.'[67]

While TCF is not a 'magic bullet', noting that the 'Financial Lives Survey' conducted by the Financial Conduct Authority in February 2020 found that only 42 per cent of adults had confidence in the financial services industry in the UK, this was an improvement on 38 per cent in 2017. There was a further finding that only 35 per cent of adults agreed that financial firms are honest and transparent, which again was an improvement on 31 per cent in 2017.[68] There may be scope for further improvements as firms become more familiar with the TCF regime and the new Consumer Duty is implemented.

South Africa

South Africa's TCF regime features the same six outcomes as articulated in the United Kingdom's TCF regime, with only slightly different wording.[69] According to the Financial Sector Conduct Authority ("FSCA'), 'regulated entities are expected to demonstrate that they deliver the following six TCF Outcomes to their customers throughout the product life cycle, from product design and promotion, through advice and servicing, to complaints and claims handling':

1. *Customers can be confident they are dealing with firms where TCF is central to the corporate culture*
2. *Products & services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly*
3. *Customers are provided with clear information and kept appropriately informed before, during and after point of sale*

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[67] FCA Policy Statement PS22/9, Appendix 1, Consumer Duty Instrument 2022, Annex B 2.1.1, 12.

[68] Financial Conduct Authority, *Financial Lives 2020 survey: the impact of coronavirus,* <https://www.fca.org.uk/publications/research/financial-lives-2020-survey-impact-coronavirus#lf-chapter-id-consumer-trends-from-2017-to-early-2020-trust-in-financial-services>.

[69] Rob Rusconi, Paul Truyens and the Actuarial Society TCF Committee, 'Treating customers fairly: questions for the actuarial profession' (Discussion Paper, 22-23 October 2014).

4. *Where advice is given, it is suitable and takes account of customer circumstance*
5. *Products perform as firms have led customers to expect, and service is of an acceptable standard and as they have been led to expect*
6. *Customers do not face unreasonable post-sale barriers imposed by firms to change product, switch providers, submit a claim or make a complaint.*

In South Africa, and similarly to the UK, it was noted that emphasis "should not be placed entirely on the language of the stipulation, but more on what it requires and most importantly, one should note that a good set of rules ultimately support a principle." This would have the effect of pulling focus away from the letter of the law in order to foster a "client-centric culture", with the hope being that should a financial firms embrace this style of operation, principles of TCF would simply fall into place.

In November 2014, the former South African Financial Services Board ('FSB')[70] published its Retail Distribution Review ('RDR'), which proposed reforms to the existing regulatory framework for distributing financial products to consumers in light of the FSB's TCF initiative.[71] The RDR contained 55 interrelated regulatory reforms, to be implemented across several years, in three broad phases.[72] Phase 1 of implementation would involve the initial changes to be effected within the existing framework, through the use of existing legislative and administrative powers. Phase 2 would involve changes to be incorporated into the then-proposed *Financial Sector Regulation Act 2017* [73] through standards made under the *Financial Sector Regulation Act* or through amendments to other pieces of legislation.

Rusconi, Truyens and the Actuarial Society TCF Committee raised a series of challenges that the TCF regime may face in a 2014 discussion paper, presented at the Actuarial Society 2014 Convention in Cape Town.[74] Whilst Rusconi, Truyens and the Actuarial Society TCF Committee described the TCF regime as a 'game-changer in many ways',[75] they also raised concerns that the 'six fairness outcomes and three intermediate outcomes are insufficient collectively to achieve the longer-term goal', as they questioned how value for money would be established, and questioned why it was implicitly part of outcome 1 rather than an explicit requirement.[76]

A further criticism raised by Rusconi, Truyens and the Actuarial Society TCF Committee was the lack of an objective measure of success within TCF, elaborating that 'If we do not have an objective measure of success, we won't know whether we can relax in the knowledge that the initiative is working or push regulated entities harder to demonstrate their commitment to

[70] Now called the Financial Sector Conduct Authority ("FSCA").
[71] Financial Sector Conduct Authority, 'Retail Distribution Review: Status update – June 2018 (Report, June 2018).
[72] Financial Services Board, 'General Status Update: Retail Distribution Review' (Report, December 2015).
[73] Financial Sector Regulation Act 2017 (South Africa).
[74] Rob Rusconi, Paul Truyens and the Actuarial Society TCF Committee, 'Treating customers fairly: questions for the actuarial profession', op cit., p 595-625.
[75] Ibid., p 598.
[76] Ibid., p 601.

this objective'.[77] Concerns similar to this have been raised in the past by other scholars as discussed in earlier sections.

In November 2015, the FSB published an update to Phase 1 of the RDR execution plan, incorporating feedback from commentators and stakeholders. One of the concerns that arose was that varying proposed terminology was confusing and vague[78] – this is a key critique that frequently arises in both the empirical evidence analysed throughout this review, and in scholarly critique in response to newly-implemented TCF regimes. When intending to implement outcomes-focused regulations such as TCF, all terminology and proposed communication of outcomes must be so clear as to avoid confusion in this manner.

What distinguishes the South African regime, certainly since Rusconi, Truyens and the Actuarial Society TCF Committee's criticism, is the extensive array of testing and verification implemented in South Africa. This has included requiring regulatees to conduct a self-diagnosis tool,[79] the implementation of conduct of business returns (CBRs), and the testing of a CGAP developed customer-outcomes indicator framework.

The self-diagnosis tool started as a self-assessment pilot consisting of questions designed to obtain insights into the processes participating firms had in place to achieve their TCF objectives and commitments, and to identify and mitigate TCF risks, and designed to assess TCF implementation actions. The questionnaire was structured around each of the six fairness outcomes, with particular emphasis on Outcome 1 and the elements of the TCF cultural framework...."[80] Thereafter, participants' executive and senior management were required to attend in-depth interviews with the FSB, so that their answers could be interrogated, aspects of TCF and/or expectations of the regulator explained, and where necessary, firms challenged on their answers.[81] Thereafter the pilot was rolled out to all firms in the South African market.

Complementing the self-assessment tool described above, CBRs were introduced in 2013 for the insurance industry (life- and short-term insurance).[82] These are designed to assess market-conduct risks in the industry, and the insurance CBR is now in the process of being amended to create an Omni-CBR for every type of firm in the industry. These returns provide both the regulator and the regulatee with an overview of TCF compliance in the firm.

It must be stressed that the regulator (now the FSCA) does not simply take on face-value the attestations that firms provide. The FSCA compares the information provided with Ombud

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[77] Ibid 601-602.

[78] Financial Sector Conduct Authority, 'Retail Distribution Review: Status update – June 2018, op cit., p 3.

[79] Financial Services Board, 'Treating Customers Fairly, The self- assessment pilot, Feedback report: December 2011,' (December 2011), <https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/Treating%20Customers%20Fairly%20-%20Feedback%20report%20on%20self-assessment%20pilot.pdf>.

[80] Ibid., p 5.

[81] Ibid., p 8.

[82] Financial Services Board, 'Conduct of Business Returns ("CBR's"). Revised Categorisation, questions and reporting levels. Response to industry comments," <https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/CBR%27s%20-%20Final%20Draft%20Mapping%20to%20amended%20Insurance%20Bill%2011122015.pdf>.

data (which provides comprehensive root-cause analysis of complaints), as well as news reports, mystery shopping and social-media analysis.[83]

Finally, and by way of a highly significant development internationally, is the creation of a customer-outcomes indicator framework by the Consultative Group to Assist the Poor (CGAP, a division of the World Bank).[84] This entailed the creation of a measurement framework by which TCF could be measured in South Africa. After some refinement, the framework as deployed in the South African financial industry included 20 indicators (qualitative and quantitative).[85]

Feedback from the FSCA has been positive and they have indicated that they will deploy these measurements in their Omni-CBR, currently under development.[86] The GCAP report also contains a comprehensive analysis of how other regulators, elsewhere in the world, can adopt and deploy similar measurement frameworks.[87]

Another notable recommendation in implementing TCF strategies into South African legislation was the encouragement for financial firms to establish a "TCF working committee" to ensure they receive "input from all departments and the outcome of all complaints or queries where clients feel that they have been treated unfairly."[88]

One initiative arising out of TCF in South Africa, is the introduction of documents issued to consumers in the financial services industry which explain the product/service in language that can be easily understood and that is concise.[89]

New Zealand

After the New Zealand Financial Markets Authority ("NZFMA") and the Reserve Bank of New Zealand ("RBNZ") published two joint reviews into the conduct and culture of banks and life insurance providers in New Zealand in 2018 and 2019,1 several issues were identified similar to those observed by the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in Australia in 2018.

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[83] Research conducted by Schmulow, Andy, during his involvement in the creation of the CGAP customer-outcomes indicator framework, through interviews with FSCA officials and selected financial service providers from December 2019 onwards.

[84] CGAP, 'Customer Outcomes-Based Approach to Consumer Protection: A Guide To Measuring Outcomes. Lessons from a South Africa pilot,' (June, 2022), <https://www.cgap.org/sites/default/files/publications/slidedeck/2022_06_Reading_Deck_Customer_Outcomes_Based_Approach_Consumer_Protection.pdf>.

[85] Ibid., p 21.

[86] Ibid., p 32.

[87] Ibid., p 33ff.

[88] Hein Visser and Gerhard van Wyk, 'The impact of the treating customers fairly Legislation on the short-term insurance industry: Santam claims specific' (2016) 7(2) E3 *Journal of Business Management and Economics* 044-049, 048.

[89] Department: National Treasury of the Republic of South Africa, Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa (Discussion Paper, December 2014) 50 ('TCF South Africa'). 53.

On 11 December 2019, the New Zealand Government introduced amendments to the existing legislation, announcing a *Financial Markets (Conduct of Institutions) Amendment Bill* ("the Bill") to amend the *Financial Markets Conduct Act 2013*. The *Financial Markets (Conduct of Institutions) Amendment Act 2022* was passed into law on 29 June 2022. The legislation introduces a new regime regulating the conduct of financial institutions that is planned to come into force in early 2025. Financial institutions will need to "establish, implement and maintain effective fair conduct programmes throughout their businesses that ensure they meet the requirement to treat customers fairly."

This legislation will introduce a Subpart 6A into the *Financial Markets Conduct Act 2013*, which includes section 446C providing for 'the fair conduct principle'. Section 446C(2) will contain a requirement that a financial institution must treat consumers fairly, including by:

(a) paying due regard to consumers' interests; and
(b) acting ethically, transparently, and in good faith; and
(c) assisting consumers to make informed decisions; and
(d) ensuring that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers; and
(e) not subjecting consumers to unfair pressure or tactics or undue influence.

Unlike the South African approach of drawing primarily from the United Kingdom TCF regime in implementing South Africa's TCF regime, it appears as though New Zealand is structuring its TCF framework to respond directly to the issues identified within its own country, with potential influences from international TCF regimes.

IV. Assessing the current Australian regime against the TCF principles

As discussed above, the TCF regimes that have been implemented in the United Kingdom and South Africa have a number of key features:

1. An over-arching principle of treating customers fairly.
2. An express statement of the key outcomes to be achieved by firms to achieve the TCF principle.
3. Less reliance on prescriptive rules to set out expectations of firms; instead, firms are given the opportunity and responsibility to work out for themselves what it means for them to treat customers fairly. Some prescriptive rules, still exist, but compliance with them does not necessarily mean that the firm has complied with the TCF outcomes.
4. A focus on culture and governance issues.
5. Requirements for firms to "engage in a process of comprehensive self-evaluation, design, and management of their operations, internal governance, and controls so as to ensure that customers are treated fairly". This includes reporting to the regulator on how they are ensuring that customers are treated fairly.
6. The regulator has enforcement powers to act if a firm is failing to meet the TCF outcomes.
7. Consumers can take private action, including through complaints to an Ombudsman, if they believe that they have not been treated fairly, and the Ombudsman schemes take into account fairness in their decision making and can require a firm to provide redress to a complainant.

It is useful to examine the extent to which the current regulatory framework in Australia also demonstrates these key features. This next section focuses on Australian financial services legislation. Although many entities in the financial services sector are also regulated by industry codes of practice or other self-regulatory instruments, the extent to which these self-regulatory instruments demonstrate the above features is not addressed in this submission, as the different instruments do not have universal application.

4.1 Overarching principle of fair treatment of customers

The Australian financial services legislation does not have an overarching principle focused on the fair treatment of consumers. However, there are references to fairness expectations on firms in the legislated objects.

For example, referring to Chapter 7 (Financial Services and Markets), s 760A of the *Corporations Act 2001* (Cth) ('*Corporations Act*') provides:

The main object of this Chapter is to promote:

(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and

(aa) the provision of suitable financial products to consumers of financial products; and

(b) fairness, honesty and professionalism by those who provide financial services; and

(c) fair, orderly and transparent markets for financial products; and

(d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities. (emphasis added)

Promoting fairness is identified as an object in relation to financial services providers and in relation to financial markets. However, as an objects clause, s 760A does not directly impose any obligations on financial services providers.

The *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') includes an Objects provision in s 1(1), however, the stated objects focus on the establishment of ASIC and other bodies, and providing for ASIC's functions, powers and business. The provision also notes that, in performing its functions, ASIC must strive to, among other things, 'promote the confident and informed participation of investors and consumers in the financial system',[90] however, there is no specific reference to fairness. There is no objects clause for the consumer protection provisions, set out in Part 2, div 2 of the *ASIC Act*.

The *National Consumer Credit Protection Act 2009* (Cth) ('*NCCPA*') does not include an objects clause.

Fairness principles are, however, tied to licensing requirements for financial services providers and credit businesses. Financial services licensees and credit licensees have a statutory obligation to do all things necessary to ensure that the financial services or credit activities covered by the license are provided 'efficiently, honestly and fairly'.[91] This is a stand-alone obligation, so even if a financial services provider has complied with all the other general obligations, the conduct may still contravene the 'efficient, honest and fair' obligation. Similarly, contravention of this standard 'does not require contravention or breach of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise'.[92]

Failure to comply with the 'efficient, honest and fair' obligation can result in the imposition of a civil penalty on the licensee, and can be grounds for suspending or cancelling a licence, and/or banning or disqualifying a person from providing financial services or credit services.[93] The civil penalty for non-compliance with the 'efficient, honest and fair' obligation came into force on 13 March 2019, and was introduced to give ASIC more scope to take appropriate regulatory action and to provide an effective deterrent against licensees failing to adopt appropriate systems and

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[90] ASIC Act s 1(2)(b).

[91] Corporations Act 2001 (Cth) ('Corporations Act') s 912A(1)(a); National Consumer Credit Protection Act 2009 (Cth) ('NCCPA') s 47(1)(a).

[92] Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3) [2020] FCA 208 [512].

[93] For example, *Corporations Act* s 912A(5A).

processes. This highlights the significant importance now placed on this obligation in the regulatory framework.

However, this obligation is perhaps not as wide as a 'treating customers fairly' obligation. Fairness is not a stand-alone component of the obligation and cannot be considered in isolation. Instead, 'the words must be read as a compendium', with the phrase said to describe a person who goes about their duties 'efficiently having regard to the dictates of honesty and fairness, honestly having regards to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty'.[94] Fairness is to be considered have regard to the interests of both parties, and not just the interests of the customer.[95]

4.2 Statement of outcomes to be achieved

Similarly, the financial services regulatory regime does not expressly set out the key outcomes to be achieved by firms in their dealings with customers. As noted above, the main object of Chapter 7 Corporations Act includes promotion of specific outcomes, including that consumers are making confident and informed decisions and that products are suitable for customers.

However, the specific regulatory obligations are not framed as outcomes, but are framed in a more process-based manner, where the conduct to be done (or not done) is specified. Many of the obligations in the financial services and credit legislation will be relevant in achieving outcomes similar to the outcomes prescribed in the TCF regimes (as shown in Table 1 below). However, the obligations themselves are not specifically identified as seeking to achieve any particular outcome.

4.3 Reliance on principles-based, outcomes-based and/or prescriptive standards

In the TCF regimes, there has been a focus on using principles-based standards to achieve good consumer outcomes.

As discussed above, principles-based standards are expressed as high-level, broadly stated rules for firms, and this gives firms the responsibility and opportunity to work out for themselves what conduct is required to meet the relevant standard. This contrasts with more prescriptive rules, which prescribe particular steps or conduct that must (or must not) be engaged in by the business.

There are several examples of principles-based standards in the financial services legislation in Australia. These include:

- The general license obligations, including the obligations to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'; to 'take reasonable steps to ensure that its representatives comply with the financial services laws'; and to 'have available adequate resources … to provide

[94] Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus) [2022] FCA 515, [64] (reasons for judgment).

[95] Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3) [2020] FCA 208.

the financial services covered by the licence and to carry out supervisory responsibilities'.[96]

- The obligation to word and present information in the Financial Services Guide, the Statement of Advice, and the Product Disclosure Statement in a 'clear concise and effective manner'.[97]
- Obligations in the credit legislation to make 'reasonable inquiries' about a consumer's requirements, objectives and financial situation, and to take 'reasonable steps' to verify a consumer's financial information.[98]
- Various open-textured standards, including prohibitions against, or remedies for, unconscionable or unjust conduct and unfair terms.[99]

Many of these principles-based or open-textured standards are accompanied by very detailed regulatory guidance. For example, the regulatory guide on responsible lending (covering the obligations to make 'reasonable' inquiries about the prospective borrower's needs and financial circumstances, and to take 'reasonable' steps to verify their financial information) is 87 pages in length (excluding appendices).[100] Although this guidance does not have the force of law, in practice, businesses are likely to find it highly persuasive, and ensure that their actions are consistent with this guidance, to minimise the risk of ASIC investigation.

In addition, several of these types of obligations are accompanied by legislative guidance to be used when assessing whether the relevant standard has been met. For example, in relation to the prohibition against unconscionable conduct in s 12CB *ASIC Act*, there is:

- A statement about the conduct that will not, by itself, be considered unconscionable conduct (e.g., instituting legal proceedings) (s 12CB(2));
- A list of interpretative principles (s 12CB(4)); and
- A list of non-exclusive matters that a court may have regard to when determining whether conduct is unconscionable (s 12CC(1), (2)).

Thus, many of the principles-based obligations in the financial services and credit legislation do not leave a great deal of room for firms to work out what they need to do.

Also, while there are some principles-based and open-textured standards scattered throughout the financial services legislation, the preponderance of the legislative obligations are likely considered to be prescriptive, with specific conduct requirements set out for businesses. In contrast to a principles-based standard, these types of obligations leave no room for businesses to use their own initiative or particular context to determine the specific actions that will meet the relevant standards.

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[96] For example, *Corporations Act* ss 912A(1)(a), (1)(ca), (1)(d).

[97] For example, in relation to a Financial Services Guide, see *Corporations Act* s 942B(6A).

[98] For example, *NCCPA* s 130.

[99] For example, *ASIC Act* ss 12BF, 12CB; National Credit Code (schedule 1 to the *NCCPA*), s 76.

[100] Australian Securities and Investments Commission, *Credit Licensing: Responsible Lending Conduct* (2019, Regulatory Guide 209).

The provisions covering the mandatory disclosure documents illustrate this prescriptive approach. For Product Disclosure Statements, ss 1013B, 1013C, 1013D, 1013G of the *Corporations Act* set out extensive content requirements, and there are also additional content requirements for particular types of products or circumstances (for example, *Corporations Act* ss 1013H, 1013I, 1013J, 1013K).

Similarly, in the consumer credit context, there are detailed content requirements for the credit contract and pre-contractual statement, with s 17 of the National Credit Code ('NCC') consisting of 17 paragraphs that explain the different categories of information that must be included. There are also specific prescriptive requirements for how certain financial information is to be presented in the contract document and pre-contractual statement,[101] and a minimum font size to be used for NCC documents.[102]

4.4 Culture and governance

In recent years, there has been an increasing legislative and regulatory focus on issues of culture, governance and accountability in the financial services sector. One example of this is the Banking Executive Accountability Regime ('BEAR') which has introduced strengthened responsibility and accountability measures for Authorised Deposit-Taking Institutions ('ADIs') and their senior executives and directors. Under this regime, ADIs must (among other things):

- Meet accountability obligations, including obligations to conduct its business with honesty and integrity, deal openly with APRA, and ensure that it takes reasonable steps to prevent matters impacting negatively on the prudential reputation or standing of the ADI.
- Take reasonable steps to ensure its subsidiaries meet accountability and other obligations under the BEAR.
- Fill all 'accountable person' roles and register accountable persons with APRA.
- Give APRA statements that detail the roles and responsibilities of each accountable person, and accountability maps that identify lines of responsibility through the ADI.
- Implement a remuneration policy consistent with the BEAR obligations, and this must include deferral of a proportion of an accountable person's variable remuneration for a minimum period of four years (or a shorter period approved by APRA).[103]

The Hayne Royal Commission also recommended that a similar regime be introduced for other financial businesses. This recommendation was accepted by the then government, and the Financial Accountability Regime Bill 2023 is currently before the Australian Parliament.

Also, all financial services licensees and credit licensees already have obligations in relation to governance and accountability, including license obligations to:

[101] NCC s 16(4), National Consumer Credit Protection Regulations 2010 (Cth) reg 72.
[102] NCC s 184(1)(b); National Consumer Credit Protection Regulations 2010 (Cth), reg 110.
[103] See generally, *Banking Act 1959* (Cth), Part IIAA.

- do all things necessary to ensure that the activities covered by the licence are provided efficiently, honestly and fairly;
- have in place adequate arrangements for the management of conflicts of interest;
- have available adequate resources (including financial, technological and human resources) to provide the services covered by the licence and to carry out supervisory arrangements;
- maintain the competence to provide the relevant services;
- ensure that representatives are adequately trained and are competent to provide the relevant services; and
- have adequate risk management systems.[104]

ASIC has set out expectations in relation to compliance, including that businesses allocate to a director or senior manager responsibility for overseeing compliance measures and reporting to the businesses governing body.[105] ASIC has also emphasised the importance of improving culture in speeches and other material, including in its most recent corporate plan, where it indicates that – among other things – it is seeking to instil 'strong governance controls that support sound decision making and a culture of achieving fair and efficient outcomes'.[106]

4.5 Self-evaluation and reporting on TCF outcomes

As noted above, in the TCF regimes, businesses are required to 'engage in a process of comprehensive self-evaluation, design, and management of their operations, internal governance, and controls so as to ensure that customers are treated fairly', and to report to the regulator on how they are ensuring that customers are treated fairly.

There are no directly equivalent obligations on financial services and credit businesses in Australia: businesses are not required by legislation to report on the extent to which particular outcomes are achieved, nor to report on the steps taken to ensure that customers are treated fairly. However, businesses in Australia are expected to self-evaluate and report on their performance against their regulatory requirements, and these obligations have increased in recent years.

For example, as explained above, financial services and credit licensees have a general obligation to do all things necessary to ensure that the services covered by the licence are provided 'efficiently, honestly and fairly'. ASIC's regulatory guide also makes it clear that it is the responsibility of businesses to decide how to comply with this and the other general obligations, but sets out its

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[104] For example, *Corporations Act* s 912A(1).

[105] See generally, Australian Securities and Investments Commission *AFS licensing: Meeting the general obligations* (Regulatory Guide 104, June 2022).

[106] Sean Hughes (ASIC Commissioner), *Pursuing the best outcomes for customers: ASIC's approach and the work of internal auditors* (Speech to Financial Services Assurances Forum, 25 November 2021), available at https://asic.gov.au/about-asic/news-centre/speeches/pursuing-the-best-outcomes-for-customers-asic-s-approach-and-the-work-of-internal-auditors/.

expectations around documenting, implementing, monitoring, reporting and reviewing measures to ensure compliance with these general obligations.[107]

Financial services and credit businesses also have specific obligations to self-report certain matters to ASIC, although again, these reporting obligations are not tied explicitly to a treating customers fairly objective.[108]

The value of this reporting to ASIC is identified in the explanatory material to the most recent changes:

> *Breach reporting is a cornerstone of Australia's financial services regulatory structure. Breach reports allow ASIC to detect significant non-compliant behaviours early and take action where appropriate. It also allows ASIC to identify and address emerging trends of non-compliance in the industry.*[109]

Businesses must report to ASIC all 'reportable situations' within 30 days of first becoming aware that, or are reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen.[110] A reportable situation includes:

- a significant breach of a core obligation (which includes the 'efficient, honest and fair' obligation);
- an inability to comply with a core obligation, where the breach, if it occurs, will be significant;
- an investigation into a possible significant breach of a core obligation where that investigation continues for more than 30 days;
- gross negligence;
- serious fraud.[111]

However, with the exception of references to gross negligence and serious fraud, this reporting regime relates to breaches or potential breaches, and not to the overall conduct of the business, and/or performance in meeting particular objectives or outcomes.

4.6 Enforcement by the regulator

In the TCF regimes, the regulator given enforcement powers to act if a firm is failing to achieve the TCF outcomes.

Under the Australian regime, the regulator does have a wide range of enforcement powers, including powers to accept complaints, seek information from businesses, investigate business activities, institute legal proceedings to seek civil penalties, injunctions, compensation orders,

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[107] Australian Securities and Investments Commission *AFS licensing: Meeting the general obligations* (Regulatory Guide 104, June 2022).

[108] See *Corporations Act* Pt 7.6, div 3, subdiv B; *NCCPA* Pt 2-2, div 5.

[109] Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020, para 11.3.

[110] *Corporations Act* ss 912DAA, 912DAB, *NCCPA* ss 50B, 50C.

[111] Corporations Act s 912D, NCCPA s 50A.

community service orders, and corrective advertising.[112] ASIC also has various non-litigious powers, including powers to issue an infringement notice,[113] seek an enforceable undertaking,[114] cancel or suspend a licence, and ban a person from the industry.[115]

However, ASIC can only exercise its enforcement powers in relation to alleged contraventions of the financial services legislation. For example, s 12GBC(1) of the *ASIC Act* provides that ASIC many institute proceedings to recovery a pecuniary penalty referred to in s 12GBA, and under s 12GBA(1), the court may order a person to pay a pecuniary penalty if it is satisfied that, among other things, a person has contravened, or attempted to contravene a relevant provision.

So, for example, if ASIC is of the view that consumers are not being provided with clear information about the features of a particular product (suggesting that TCF Outcome 3 is not being achieved), it would have to identify one or more specific contraventions of the relevant legislation before it could take enforcement action. This might be, for example, that information or advertising about the product is misleading or deceptive in contravention of s12DA *ASIC Act*. Or that the content requirements of a Product Disclosure Statement (in s 1013D *Corporations Act*) have not been met. In the absence of a specific contravention of one or more provisions in the relevant legislation, ASIC cannot take enforcement action simply because it believes that consumers are not being provided with clear information about a product.

However, the introduction of a civil penalty for non-compliance with some of the general licence obligations (including the 'efficient, honest and fair' obligation) in 2019 does potentially give ASIC greater enforcement powers in relation to fair treatment compared to the situation that previously existed.

Also, although not directly about the regulator's ability to act if a business is failing to achieve TCF outcomes, ASIC's recently acquired product intervention power can also potentially play a role in reducing the risk of customers not being treated fairly. This is because the power enables ASIC to issue a Product Intervention Order when it is satisfied that a product has resulted in, or will or is likely to cause, significant detriment to retail clients.[116] The new design and distribution obligations might also be seen as a mechanism for reducing the risk of unfair treatment, as they require businesses to consider the appropriate target market and marketing and distribution mechanisms for products and prepare a Target Market Determination, and require businesses to take reasonable steps to ensure distribution is consistent with the relevant Target Market Determination.[117]

4.7 Rights of private action

In Australia (as in the TCF regimes), consumers have private rights of action in the courts and in independent dispute schemes.

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[112] See for example, *ASIC Act* Pt 2, div 2, subdiv G.
[113] *ASIC Act* Pt 2, div 2, subdiv GB.
[114] *ASIC Act* Pt 3A.
[115] For example, *Corporations Act* Pt 7.6, div 4, div 8.
[116] Corporations Act s 1023D.
[117] *Corporations Act* ss 994B, 994E.

In relation to the courts, consumers have a right to take private action if there has been a contravention of a relevant legislative provision. If a contravention is found by the court, the court can award damages or compensation, an injunction, and/or make a range of other orders.[118] However, as above, consumers rights here are dependent on there being a contravention of a relevant legislative provision. A consumer seeking to take court action under the legislation simply on the grounds that they have not been treated fairly, or because a TCF outcome has not been met, will have no success unless they can identify a relevant contravention.

Consumers also have a right to bring complaints to the Australian Financial Complaints Authority (AFCA). AFCA is an independent dispute resolution body, and it is a licence condition for financial services licensees and credit licensees to have membership of AFCA.[119] There is no application or other fee for complaints to AFCA. AFCA will try to assist the parties to resolve the complaint, but it also has the power to issue a determination as to how the complaint should be resolved if the parties cannot agree on a resolution. An AFCA determination that is accepted by the complainant within the required time is binding on the business.[120]

Legal principles are relevant to AFCA decision making, however, they are only one of several considerations and unlike a court, AFCA is not bound by the relevant legal principles. Instead, the guiding principle for AFCA decision making is fairness. An AFCA decision maker must what he or she considers is fair in all the circumstances, having regard to (a) legal principles, (b) applicable industry codes or guidance, (c) good industry practice, and (d) previous relevant determinations of AFCA or predecessor schemes.[121]

4.8 Mapping the Australian regime to the Hayne norms and to the TCF outcomes

The above discussion provides an overview of the extent to which the current regulatory framework for financial services in Australia incorporates key elements of the UK and South African TCF regimes. As noted above, the Australian regime is not explicitly outcomes focused. Despite this, it is clear that much of the current financial services legislation in Australia can contribute to outcomes consistent with the TCF outcomes. Some illustrative examples are set out in Table 1 below, which maps examples of legislative standards in Australia against the Hayne norms and the six TCF outcomes of the UK and South Africa.

[118] For example, a person who has suffered loss or damage due to a contravention of relevant provisions in the ASIC Act can bring an action for damages: *ASIC Act* s 12GF.

[119] *Corporations Act* s 912A(1)(g), 912A(2)(c); *NCCPA* s47(1)(i).

[120] Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021), A.15.3.

[121] Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021), A.14.2. Note that there is a different decision-making approach to superannuation complaints, see Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021), A.14.1.

Table 1: Mapping norms, TCF outcomes and current statutory provisions

Hayne's six norms	TCF Outcomes	Example provisions in the ASIC Act	Example provisions in the CA	Example provisions in the NCCPA	Example provisions in the NCC
Obey the law		N/A	s 912A(1) - licence conditions to (c) 'comply with the financial services laws' and (ca) take reasonable steps to ensure representatives comply with the law	s 47(1) - licence conditions to (d) comply with the credit legislation and (e) take reasonable steps to ensure representatives comply with the credit legislation	N/A
Do not mislead or deceive	**Outcome 3 (UK):** Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale. **Outcome 3 (SA):** To give clear information to clients and keep them informed before, during and after the time of contracting.	S12DA (prohibition against misleading or deceptive conduct)	Obligations for pre-contract disclosure (e.g., s 1012B in relation to Product Disclosure Statements). Requirement for mandatory disclosure documents to be worded and presented in a 'clear, concise and effective manner' (e.g., 942B(6A)). Obligation to disclose material changes and events (s 1017B). Obligation to give a periodic statement (s 1017D).	Obligations for pre-contractual disclosure (e.g., Key Facts Sheets for standard home loans (s 133AC) and credit cards (s 133BC)).	Obligations for pre-contractual disclosure (e.g., information about the credit, information statement on rights and responsibilities, s 16). Obligation to provide periodic statement of account (s 33). Obligation to provide default notice (s 88). Requirement that documents be easily legible and clearly expressed (s 184), and in a minimum 10-point font (reg 110)

Hayne's six norms	TCF Outcomes	Example provisions in the ASIC Act	Example provisions in the CA	Example provisions in the NCCPA	Example provisions in the NCC
Act fairly	**Outcome 1 (UK):** Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture. **Outcome 1 (SA):** Clients are confident that they are dealing with firms where the fair treatment of customers is central to the firm culture.	Right to have an unfair contract term declared void (s 12GND) Prohibition against unconscionable conduct (ss 12CA, 12CB)	Licence condition: to do all things necessary to ensure financial services are provided efficiently, honestly and fairly (s 912A(1)(a))	Licence condition: to do all things necessary to ensure activities are engaged in efficiently, honestly and fairly (s 47(1)(a)) Right to seek remedy for unfair or dishonest conduct (s 180A)	Right to seek remedy for unjust transaction (s 76)
	Outcome 6 (UK): Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint. **Outcome 6 (SA)**: Clients do not face unreasonable post-sale barriers to change product, switch provider, submit a claim or make a complaint.	Right to have an unfair contract term declared void (s 12GND) Prohibition against unconscionable conduct (ss 12CA, 12CB)	Right to return financial product (cooling off period) (s 1019B) Licence condition to have an internal dispute resolution scheme and belong to AFCA (for retail clients) (s 912A(1)(g), (2))	Licence condition to have an internal dispute resolution scheme and belong to AFCA (for retail clients) (s 47(1)(h), (i))	Rights to pay out contract and obtain a pay-out figure (ss 82 – 84).
Provide services that are fit for purpose	**Outcome 2 (UK):** Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly. **Outcome 2 (SA):** The products and services marketed and sold are designed to meet the needs of identified customer groups and are targeted accordingly.	Prohibition against unconscionable conduct (ss 12CA, 12CB). Implied contract term that services will be reasonably fit for purpose that is made known to supplier (s 12ED(2))	Design and distribution requirements (Part 7.8A) – these also apply to consumer credit products. Power for ASIC to make Product Intervention Orders (Pt 7.9A)	Specific product design requirements for small amount credit contracts (Pt 3-2C) and reverse mortgages (Pt 3-2D) Power for ASIC to make Product Intervention Order (Pt 6.7A)	Specific product design requirements for 3rd party mortgages and guarantees (Pt 3, div 1 and 2)

Hayne's six norms	TCF Outcomes	Example provisions in the ASIC Act	Example provisions in the CA	Example provisions in the NCCPA	Example provisions in the NCC
Deliver services with reasonable care and skill	**Outcome 4 (UK):** Where consumers receive advice, the advice is suitable and takes account of their circumstances. **Outcome 4 (SA):** Where clients receive advice, the advice is suitable and takes account of their circumstances.	Implied contract term that services will be provided with due care and skill (s 12ED(1))	Obligation to provide a statement of advice (s 946A). Obligation to act in the best interests of the client when providing personal advice (s 961B)	Obligations to assess unsuitability (e.g., s 128) and prohibitions on entering into credit contract that is unsuitable for the debtor (e.g., s 133). Obligations for credit assistance provider to act in best interests of consumer (e.g., s 158LA)	N/A
When acting for another, act in the best interests of that other		N/A	Obligation to act in the best interests of the client when providing personal advice (s 961B)	Obligations for credit assistance provider to act in best interests of consumer (e.g., s 158LA)	N/A
	Outcome 5 (UK): Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect. **Outcome 5 (SA):** The performance of products and service levels are according to our clients' expectations.	Prohibition against misleading or deceptive conduct (s 12DA). Implied term that services will be provided with due care and skill (s 12ED(1)) Implied contract term that services will be reasonably fit for purpose that is made known to supplier (s 12ED(2))	Obligations to provide pre-contractual information about terms and conditions, significant benefits and risks, and similar matters (s 1013D(1)).	N/A	Obligation to provide pre-contractual information about terms, including rights and obligations (s 16)

The regulatory regime for financial services in Australia has some similarities with the TCF regimes in the UK and South Africa, particularly in relation to private rights of consumers to take action in a forum where fairness will be the primary criterion (AFCA), and in relation to an increasing focus on culture and governance. The Australian regime also includes an enforceable fairness obligation (albeit one that is to be read with the principles of efficiency and honesty). This has long been imposed through licence conditions, but ASIC now has greater enforcement options available to it in the event of non-compliance. There are also recent legislative provisions (product intervention orders, design and distribution obligations) that can effectively provide a greater emphasis on preventing unfairness and improving consumer outcomes.

The Australian regime also includes many obligations that can, if complied with, facilitate the achievement of the TCF outcomes. However, these are scattered throughout the legislation, and not presented with an outcomes focus. Also, while there are some principles-based standards, overall, the regime is focused on detailed, prescriptive, and process-based obligations, de-emphasising the opportunities and responsibilities for businesses to work out how they can best ensure that customers' needs are met, and that their customers are treated fairly within the context of their own business operations and environment.

Overall, then, the structure and approach of the Australian regulatory regime is quite distinct from the TCF regimes, however, fairness is becoming of increasing relevance, and existing (prescriptive) provisions are potentially conducive to progressing outcomes similar to those made explicit in the TCF regimes.

V. Experiences and expectations of Australian consumers as relevant to the TCF outcomes

The above discussion explains the differences and similarities between key aspects of the 'law on the books' in Australia and key features of the TCF regimes in the UK and South Africa. However, it is also instructive to examine how the law is experienced in practice in TCF and non-TCF regimes. Consumer surveys can give some insight into how consumers in Australia experience the financial services sector operating under the current regulatory framework, and can be compared with other information on consumer experiences, including information identified through the Hayne Royal Commission and other recent inquiries.

To explore whether the TCF outcomes are being achieved under the existing regulatory regime in Australia, we conducted a survey of Australian consumers, with the assistance of representatives from the ALRC and CHOICE. The consumer research reported here was designed to understand the public's view of the norms of behaviour they experience with, and expect of, the financial industry, as well as determining the extent to which consumers believe they are/should be treated 'fairly' by financial institution. A snapshot of these issues was gained from a cross-sectional survey, using an online questionnaire. Data was collected from 2,026 participants on the Online Research Unit consumer panel in March 2022. Participants were drawn proportionally from the different states, with a pre-specified gender and age split.

The rationale and design of the survey was submitted to the Social Sciences Human Research Ethics Committee (Ref. 2022/007) at the University of Wollongong.

5.1 Overview of the survey

The complete questionnaire included questions covering:

- Ownership of different financial products and whether complaints had been made;
- When a complaint had been made, the type of action(s) taken by the consumer;
- Where consumers looked for information on financial products and services (people and media sources);
- Whether different financial service providers (superannuation, banking, credit card, general insurance, buy now pay later services) meet or exceeded consumer expectations;
- Behaviours related to 'shopping' for financial services;
- What financial services currently do, and what they should do, related to treating customers fairly;
- Use and usefulness of product disclosure statements;

- Use of financial intermediaries, including how well financial intermediaries (financial advisor, mortgage/finance broker, insurance broker, comparison website) looked after them as a client, and how they should be looked after as a client.

In the analysis below, the following groups were used for comparisons:

- Gender: 1008 – male; 1013 – female. Other groups (e.g., non-binary) were too infrequent to include in comparisons.
- Age: 623 – 18-34 years old; 696 – 35-54 years old; 707 – 55-75 years old. Participants were between the ages of 18 and 75, with the age distribution mirroring the age distribution in the range in the Australian population. There were, however, proportionally more people aged 25-54 years old, and slightly fewer aged 55-75, in the sample than in the Australian population.
- Income: 521 – $50,000 or less; 598 – $50,001 to $100,000: 696 – over $100,000. Ten per cent of participants did not disclose their income.
- Capital/non-capital: 1390 – from state or territory capital city; 636 from non-capital cities.
- Financial well-being: 727 – low; 664 – medium; 635 – high. The items in the financial well-being scale were combined to give an overall score for financial well-being, then participants were divided into three financial well-being categories (low, medium, high) based on those scores.

In the next sections, we present the key results from the online survey, analysed by groups where relevant.

5.2 Ownership of financial products and extent of fair treatment

Most (96%) people have bank accounts (everyday) (Table 1). A lot of people have general insurance 82%), superannuation (77%) and one or more credit cards (64%). Few people (less than 20%) have a mortgage/financial broker, a financial advisor, a personal loan, or cryptocurrency, and only 1% of the sample had none of the financial products listed.

Seventy eight percent (78%) of those with financial products did not note any issues with being treated unfairly. However, given that there were 942 instances of consumers noting unfair treatment across 434 survey participants, this does indicate that many consumers noted multiple instances of unfair treatment. With this 22% of participants that noted unfair treatment, perceptions of unfair treatment in all areas apart from cryptocurrency (at 16%), were around 10% of those with a specific product. Perceptions of unfair treatment were slightly higher (10% or more) with credit cards, mortgages, personal loans and financial advisors, and slight lower (7%) with general insurance and superannuation.

Participants who reported unfair treatment were also asked what, if any, action they took in response to the unfair treatment. Looking at the four types of providers where the most unfair treatment was reported, people were least likely to act with their everyday bank accounts, and most likely to act with their credit card provider. Direct contact was the commonest form of action taken across all four types of provider,

while going to an independent party (e.g., ombudsman) was least likely (Table 2 and Figure 1).

Table 2: Ownership, unfair treatment and consumer responses

	P1: Have	P2: Treated unfairly	P3: Response to unfair treatment				
			No action	Direct contact		Third party	Don't recall
				1 issue	1< issue		
	(n=2026)	*(n=P1 count)*	*(n=P2 count)*				
Bank account (everyday)	1941(96)	145(8)	49(34)	35(24)	37(26)	9(6)	15(10)
General insurance	1657(82)	109(7)	30(28)	35(32)	28(26)	11(10)	5(5)
Superannuation	1553(77)	103(7)	27(26)	25(24)	31(30)	10(10)	10(10)
Credit card	1296(64)	156(12)	34(22)	49(31)	42(27)	21(14)	10(6)
Mortgage	796(39)	90(11)	24(27)	28(31)	22(24)	11(12)	5(6)
Shares etc	742(37)	60(8)	17(28)	12(20)	19(32)	8(13)	4(7)
Bank term deposit	571(28)	44(8)	10(23)	12(27)	12(27)	7(16)	3(7)
Buy now, pay later	521(26)	46(9)	13(28)	11(24)	10(22)	8(17)	4(9)
Life insurance	498(25)	43(9)	10(23)	11(26)	14(33)	5(12)	3(7)
Mortgage/finance broker	352(17)	33(9)	9(27)	9(27)	6(18)	6(18)	1(3)
Financial adviser	344(17)	34(10)	10(29)	9(27)	9(27)	3(9)	3(9)
Personal loan	316(16)	34(11)	8(24)	6(18)	11(32)	7(21)	2(6)
Cryptocurrency	282(14)	45(16)	8(18)	9(20)	13(29)	12(27)	3(7)
Nil/None	29(1)	1563(78)					*Cells: Count(%)*

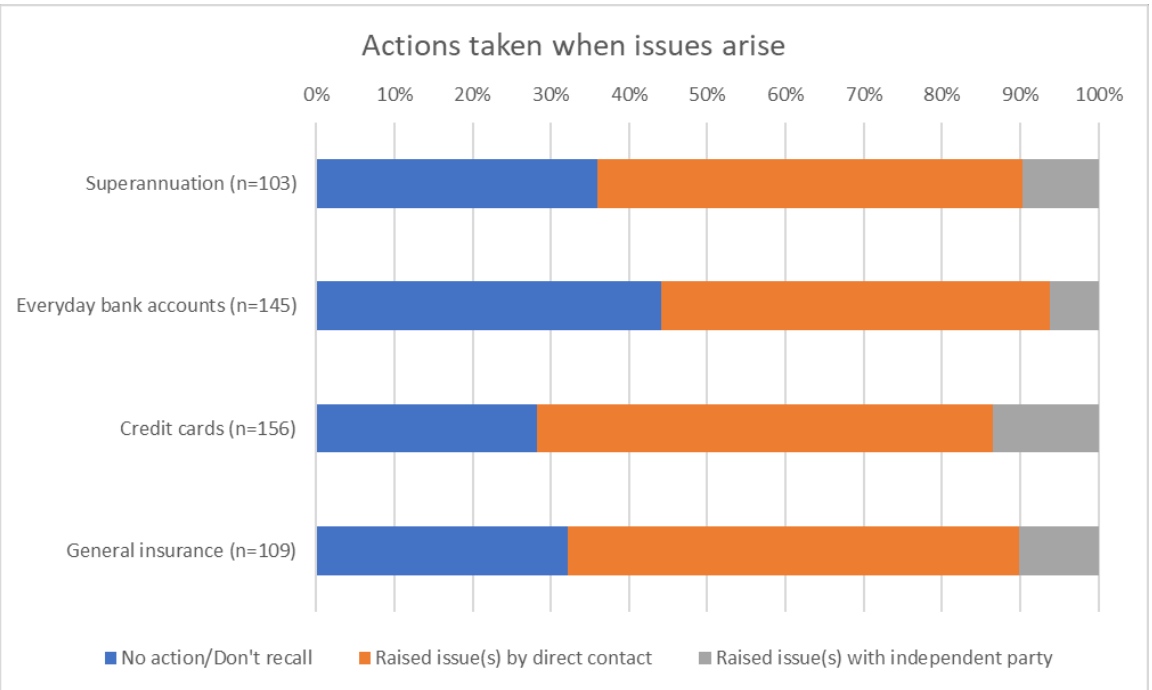

Figure 1: Action taken in response to unfair treatment

5.3 Perceptions of being treated unfairly across different groups

Looking at those areas where more than 5% of the total sample have indicated they were treated unfairly (i.e., Everyday bank accounts, General insurance, Superannuation and Credit cards), we considered whether perceptions of unfair treatment were different across groups. Overall, income did not make a difference to perceptions of unfair

treatment across the four types of provider, while gender with general insurance (proportionally more males reported unfair treatment) and age group with credit cards (older group proportionally less likely to report unfair treatment) impacted on perceptions of unfair treatment. In contrast, people who lived in a state/territory capital versus those who did not, and those with low or medium levels of financial well-being versus those with high levels of financial well-being, noted perceptions of unfair treatment more often with superannuation and everyday bank accounts.

5.3.1 Frequency of consumer behaviours and impact of unfair treatment

Table 3 summarizes the overall frequency of different types of behaviour (using percentages) and considers how those frequencies differ alongside perceptions of unfair treatment. It is worth noting that we do not know whether these behaviours occurred before or after any unfair treatment.

Not surprisingly, those who reported unfair treatment related to specific service providers also reported higher frequencies of having a made a complaint about a financial product or service in the last two years. However, even 10.4% of participants who did not report a problem with a specific provider indicated that they had occasionally made a complaint about a financial product/service. The discrepancy between the two questions may indicate how responsive, proactive, or speedy the financial service provider was in dealing with the complaint.

Those who had been treated unfairly indicated higher frequency of all the behaviours considered. That is, they were more likely to indicate that they 'sought out easy to understand guides about their consumer rights', 'looked for a better product/service to suit their needs', and 'read financial service laws to learn about their consumer rights'. While we have no direct evidence that issues occurred before these behaviours, it is not unreasonable to think that having a problem with a financial service provider leads people to thinking about their product/service needs, and motivates them to understand their consumer rights.

Table 3: Overall frequency of behaviours (percentages)

	All	Treated unfairly	Fair treatment		All	Treated unfairly	Fair treatment
a. Seek out easy to understand guide about my consumer rights				***b. Look for a better product/ service to suit my needs***			
n=	*1847*	*411*	*1436*	*n=*	*1860*	*414*	*1446*
Always	2.4	**4.9**	1.7	**Always**	5.6	**7.7**	5.0
Often	8.1	**10.2**	7.5	**Often**	17.0	**24.4**	14.9
Occasionally	26.0	**34.1**	23.7	**Occasionally**	39.0	38.6	**39.1**
Rarely	27.9	**33.6**	26.3	**Rarely**	22.3	18.6	**23.3**
Never	35.6	17.3	**40.8**	**Never**	16.0	10.6	**17.6**
c. Have made a complaint about a financial product/ service				***d. Read financial services law to learn about my consumer rights***			
n=	*1859*	*412*	*1446*	*n=*	*1852*	*412*	*1440*
Always	2.7	**3.4**	2.6	**Always**	3.1	**4.6**	2.7
Often	4.0	**10.4**	2.1	**Often**	5.6	**8.7**	4.7
Occasionally	15.0	**30.8**	10.4	**Occasionally**	19.6	**27.4**	17.4
Rarely	25.4	**35.4**	22.6	**Rarely**	27.8	**36.2**	25.3
Never	52.9	20.1	**62.2**	**Never**	43.9	23.1	**49.9**

5.3.2 Frequency of consumer behaviours and the impact of financial well-being, age and income

Different levels of financial wellbeing were associated with different frequency of all behaviours (Table 4). Those with higher levels of financial wellbeing are more likely to seek out easy to understand guide about their consumer rights, they are also more likely to look for product or services that better suit their needs. In contrast, people with high levels of financial wellbeing are less likely to have made a complaint (possibly because they a better at navigating the financial services available to them). While those with medium levels of financial wellbeing are more likely to have tried to learn about their consumer rights by reading financial services laws.

Table 4: Impact of financial wellbeing on frequency of behaviours

		Financial Wellbeing			
		Low	**Med**	**High**	**Total**
Seek out easy to understand guide about my consumer rights	Always	8	16	21	45
	Often	43	56	53	152
	Occasionally	167	173	144	484
	Rarely	186	159	176	521
	Never	263	192	212	667
	Total	*667*	*596*	*606*	*1869*
Look for a better product or service to suit my needs	Always	29	31	46	106
	Often	95	99	125	319
	Occasionally	271	237	223	731
	Rarely	159	140	119	418
	Never	122	92	94	308
	Total	*676*	*599*	*607*	*1182*
Have made a complaint about a financial product or service	Always	16	21	16	53
	Often	27	24	24	75
	Occasionally	112	111	56	279
	Rarely	181	146	153	480
	Never	335	296	363	994
	Total	*671*	*598*	*612*	*1881*
Read the financial services law to learn about my consumer rights	Always	16	22	21	59
	Often	27	43	35	105
	Occasionally	120	149	98	367
	Rarely	188	152	179	519
	Never	320	225	278	823
	Total	671	591	611	1873

Red text indicates values greater than expected values.

Differences by age: The overall results (Table 5) indicate that younger people are more likely than older people to look for more information about their consumer rights, look for products/services that fit their needs better or make a complaint.

Table 5: Impact of age on frequency of behaviours

		Age Group			
		18-34	**35-54**	**55+**	**Total**
Seek out easy to understand guide about my consumer rights	Always	16	15	14	45
	Often	54	66	32	152
	Occasionally	182	169	133	484
	Rarely	170	185	166	521
	Never	141	206	320	667

		Age Group			
		18-34	35-54	55+	Total
	Total	563	641	665	1869
Look for a better product or service to suit my needs	Always	38	32	36	106
	Often	122	124	73	319
	Occasionally	220	262	249	731
	Rarely	111	141	166	418
	Never	71	88	149	308
	Total	562	647	673	1882
Have made a complaint about a financial product or service	Always	15	20	18	53
	Often	31	37	7	75
	Occasionally	104	107	68	279
	Rarely	172	161	147	480
	Never	240	320	434	994
	Total	562	645	674	1881
Read the financial services law to learn about my consumer rights	Always	14	25	20	59
	Often	42	39	24	105
	Occasionally	140	133	94	367
	Rarely	166	187	166	519
	Never	199	253	371	823
	Total	561	637	675	1873

Red text indicates values greater than expected values.

Differences by income: While people with higher incomes are proportionally more likely to seek out easy to understand guides for their consumer rights and look for products/services that better suit their needs (Table 6), those with mid-level incomes are more likely to make a complaint or read the financial services law to learn about their consumer rights.

Table 6: Impact of income on frequency of behaviours

		Income			
		<$50,001	$50,001-$100,000	$100,001+	Total
Seek out easy to understand guide about my consumer rights	Always	12	11	19	42
	Often	18	63	63	144
	Occasionally	102	149	189	440
	Rarely	113	163	196	472
	Never	230	182	188	600
	Total	475	568	655	1698
Look for a better product or service to suit my needs	Always	23	27	48	98
	Often	51	101	140	292
	Occasionally	164	218	272	654
	Rarely	124	133	126	383
	Never	122	85	71	278
	Total	484	564	657	1705
Have made a complaint about a financial product or service	Always	16	17	14	47
	Often	12	26	35	73
	Occasionally	58	83	110	251
	Rarely	115	159	170	444
	Never	287	281	324	892
	Total	488	566	653	1707
	Always	16	20	20	56

		Income			
		<$50,001	$50,001-$100,000	$100,001+	Total
Read the financial services law to learn about my consumer rights	Often	17	45	35	97
	Occasionally	69	112	150	331
	Rarely	114	168	192	474
	Never	263	219	254	736
	Total	479	564	651	1694

Red text indicates values greater than expected values.

5.4 Information use

Survey participants were asked about sources of information used to find out about their financial products and service rights. Most commonly, 30% of the 2026 participants indicated that they did not have any questions about their financial product or service rights (Table 7), meaning that 70% of participants in our sample did have questions. Internet searches (27%) the provider websites (23%), and personal contacts (family, friends, colleagues) (22%) were all important sources of information that were commonly used, as were the product disclosure statements. More general sources (e.g., lawyer, industry codes of conduct, financial advisor) were accessed by less than 10% of participants.

Table 7: Number of 'yes' responses

Total number of participants	2026	100%
Not had any questions[1]	616	30%
Done internet search	555	27%
Looked on provider website	472	23%
Asked family, friends or colleagues	453	22%
Looked at the Product disclosure statement (PDS)	376	19%
ASIC's MoneySmart website	179	9%
Gone to a financial advisor	177	9%
Looked at the laws	109	5%
Looked at industry codes of conduct	86	4%
Gone to a lawyer	45	2%
No information sources accessed	356	18%

[1] *NB, as the question is negative 'No' indicates that there were questions.*

5.5 Use of information sources across different groups

Differences between groups were considered for those information sources that were accessed by more than 5% participants.

Those who had been treated unfairly were proportionally more likely than those who had been treated fairly to report that they had used each information sources ($p<.001$ to .047).

The location of the participant (capital city or not) did not have much of an impact on the use of information sources. However, those in capital cities were more likely to have accessed ASIC's MoneySmart website ($p<.001$), while those outside capital cities were more likely to have gone to a financial advisor ($p=.014$).

In contrast, differences in age, gender, income and financial well-being, impacted on the use of multiple information sources. Differences were consistent across different levels of financial well-being, income and gender. Those with the highest level of financial well-being were consistently more likely to have gone to information sources beyond family, friends or colleagues (p ranging from <.001 to .36), with the exception of 'going to the laws' where there was no difference with different levels of financial well-being. Those with higher levels of income were more likely to access most information sources (p<.001), but no differences were found with the use of financial advisors or 'going to the laws'. Males, were more likely than females to have accessed websites, gone to the laws, and looked at the product disclosure statement (p ranged from <.001 to .007).

The results for age showed different patterns of access to information across groups. Younger consumers were more likely to ask people, look at the provider website, use the ASIC MoneySmart website or go to the laws (p<.001), whereas older consumers were more likely to do an internet search or go to a financial advisor (p<.001 and p=.038 respectively).

5.6 Use of Product Disclosure Statements

Most participants received a Product Disclosure Statement ('PDS') and read some or all of it (51%). Nevertheless, 22% of those that had not experience unfair treatment, and 19% of those that had experience unfair treatment had received, but not read, a PDS (Table 8). The remaining participants were either not aware of what a PDS was (~18%), didn't receive a PDS (6%) or stated that they were aware of all the information so didn't need to read the PDS (4%).

Table 8: Use of Product Disclosure Statements

	Treated unfairly		Fair treatment		
	No.	%	No.	%	All
I received a PDS, and I read some of it	179	41%	596	38%	775
I received a PDS, and I read all of it	65	15%	177	11%	242
I received a PDS, but I did not read it	83	19%	346	22%	429
I don't know what a PDS is/not aware	63	15%	295	19%	358
I didn't receive a PDS the last time I purchased/renewed a financial product/service	31	7%	91	6%	122
I don't need to read PDS, I am aware of all the information	13	3%	58	4%	71
Total	**434**		**1563**		**1997**

When looking at the quality of PDSs (Table 9), there is general agreement across all participants that PDSs are too long, with complicated language, making them difficult to understand. Participants are neutral about whether PDSs are helpful and or answer all the questions they have. Those who have reported unfair treatment are more likely to indicate that PDSs are intended for financial professionals only when compared to those who have not reported unfair treatment, though both groups are relative neutral in this respect. Those who have only reported fair treatment in the last two years are more likely

to disagree with the statement regarding PDSs being clear and easy to understand than those who reported unfair treatment.

Table 9: Usefulness of Product Disclosure Statements

	Means			
	All participants	Treated unfairly	Fair treatment	p-value
I find PDS are helpful	2.77	2.78	2.76	.775
PDS are too long	1.97	2.04	1.95	.073
PDS are difficult to understand	2.33	2.31	2.33	.786
The language in PDS are too complicated	2.25	2.26	2.25	.912
PDS are intended for financial professionals only	2.80	2.62	2.86	<.001
PDS answers all the questions I have	3.00	3.00	3.00	.988
PDS are clear and easy to understand	3.40	3.24	3.45	<.001

NB 1 indicates strongly agree, 5 strongly disagree

5.7 Consumers evaluation of actual and desired treatment by financial institutions

A series of questions explored how consumers were treated by financial institutions and intermediaries and how they wanted to be treated. Prior to considering any differences, the data were checked to show that the questions that asked about current treatment were distinct from those that asked about desired treatment. Factor analysis, with a forced two factor solution, clearly grouped the questions related to current treatment together, and the questions related to desired treatment together.

5.8 Consumers evaluations of financial service providers

To determine whether there were differences between actual and desired treatment by financial service providers, a series of paired samples t-tests were used to determine whether there were differences between current and desired treatment by financial service providers (i.e., banks, superannuation, credit cards, general insurance). Table 10 below summarises these results (possible values range from 1 to 5, with 1 indicating strong agreement, 3 neutral, and 5 strong disagreement with the statement). Across all items customers' desired treatment is significantly different from their current treatment. That is, consumers feel that the actual performance of financial service providers is less than the level of performance they desire.

Table 10: Actual versus desired evaluations of financial service providers by consumers

	Mean		p-value
	Actual	Desired	
Find it easy to understand my rights about financial products or services	2.72	1.81	<.001
Rights (should/are) well protected when it comes to financial products and services	2.54	1.71	<.001
(Should be clear/know) what to do if I need to make a complaint about a financial service or product	2.64	1.74	<.001
Complaints heard and dealt with fairly	2.53	1.64	<.001

Australian financial institutions (do/should) treat customers fairly	2.77	1.62	<.001
If I want to switch banks it (should be/is) easy to do	2.44	1.70	<.001
If I want to switch insurance provider it (should be/is) easy to do	2.30	1.71	<.001
I (should be/feel I am) kept well informed and up to date about products and services by financial providers	2.57	1.82	<.001

5.8.1 Differences between those who have, and have not, experience unfair treatment

Table 11 below summarises the differences between those consumers who have, and have not, reported unfair treatment. While consumers who have been treated unfairly do not exhibit differences from those who have experienced fair treatment with respect to understanding their rights and knowing how to make a complaint, across all other questions there are differences between the two groups. Overall, however, when differences exist between these two groups of consumers, consumers who have reported unfair treatment have lower evaluations in all areas (possible values range from 1 to 5, with 1 indicating strong agreement, 3 neutral, and 5 strong disagreement with the statement). Consumers who have reported unfair treatment are also have lower expectations of how financial institutions should behave. This is shown by their lower levels of agreement with the statement concerning how financial institutions should behave.

Table 11: Impact of unfair treatment on evaluations of financial service providers

	Means		
	Treated unfairly	**Fair treatment**	**p-value**
Actual			
I find it easy to understand my rights about financial products or services	2.79	2.71	.144
Rights are well protected when it comes to financial products and services	2.74	2.48	<.001
Financial products and services are too complex[1, 2]	2.23	2.36	.012
I know what to do if I need to make a complaint about a financial service or product	2.61	2.66	.373
I trust that if I have a complaint, it will be heard and dealt with fairly	2.75	2.47	<.001
Australian financial institutions do treat customers fairly	2.88	2.74	.015
If I want to switch banks it is easy to do	2.62	2.39	<.001
If I want to switch insurance provider it is easy to do	2.51	2.23	<.001
I feel I am kept well informed and up to date about products and services by financial providers	2.71	2.53	<.001
Desired			
I should find it easy to understand my rights about financial products or services	1.98	1.76	<.001
My rights should be well protected when it comes to financial products and services	1.89	1.61	<.001
Financial products and services should not be too complex[2]	1.98	1.74	<.001
It should be clear what to do if I need to make a complaint about a financial service or product	1.93	1.69	<.001

	Means		
	Treated unfairly	Fair treatment	p-value
Complaints should be heard and dealt with fairly	1.87	1.57	<.001
Australian financial institutions should treat customers fairly	1.88	1.53	<.001
If I want to switch banks it should be easy to do	1.90	1.63	<.001
If I want to switch insurance provider it should be easy to do	1.92	1.62	<.001
I should be kept well informed and up to date about products and services by financial providers	1.98	1.77	<.001

[1] As complexity is negative, more agreement with this statement indicates a poorer evaluation.
[2] Actual and desired items are in not equivalent, so were not previously compared to each other.

5.8.2 Consumer expectations of financial service providers

Participants were asked the extent to which specific types of financial service provider (banks, superannuation providers, credit cards, general insurance, and buy now pay later) met their expectations in relation to trustworthiness, customer service, relevant products/services, ease changing products, and making complaints (Table 12). With the following scale values: 1 = Far below my expectations; 2 = Below my expectations; 3 = Meets my expectations; 4 = Above my expectations; and, 5 = Far exceeds my expectations. Generally speaking, providers met or slightly exceeded expectations.

It is worth noting that depending on the expectations of participants, these results may not be indicating that they, as consumers, are satisfied with the performance of the financial service providers, especially as satisfaction is often conceptualised as exceeding expectations (i.e., scores of 4 or 5).[122]

Table 12: Consumer expectations of financial service providers

	Superannuation	Bank account	Credit card	General insurance	Buy now, pay later
Trustworthy (TCF1)	3.24	3.26	3.16	3.19	3.31
Provides good customer service (TCF3,5)	3.26	3.32	3.21	3.30	3.36
Provides relevant products/advice to suit my needs (TCF2,4)	3.19	3.21	3.18	3.26	3.40
Easy to change products (TCF6)	3.22	3.26	3.16	3.23	3.32
Easy to make a complaint (TCF6)	3.21	3.23	3.12	3.17	3.23

When the expectations of those who have been treated unfairly by any financial service provider in the last two years are compared with those who have been treated fairly are compared, there are clear differences between the two groups of consumers. Across all five criteria and types of financial service, those who have faced unfair treatment with a provider (though not necessarily the provider being evaluated in this question) are more likely to report expectations not being met and less likely to report

[122] Richard L Oliver, 'A Cognitive Model of the Antecedents and Consequences of Satisfaction Decisions' (1980) 17 (September) *Journal of Marketing Research* 46.

that providers meet their expectations. Nevertheless, in some cases, this same group is more likely to state that the provider exceeded their expectations when compared to those who have not encountered unfair treatment. This counter-intuitive result may be because it is not the service provider being evaluated that has treated them unfairly.

5.9 Consumers evaluation of financial intermediaries

Consumers were randomly asked about one intermediary – with 198 consumers asked about financial advisors, 217 about mortgage or finance brokers, and 80 about insurance brokers. While more consumers had not had complaints about financial services for financial advisors (FA), and mortgage brokers/finance broker (M/FB), 5/8ths of consumers allocated to the insurance broker (IB) questions had had reason to complain about financial service providers in the last 2 years. The relatively small number of responses, and the balance of response towards those who had experience issues (i.e., unfair treatment), may skew the responses related to insurance brokers.

Consumers evaluated the performance of the different financial intermediaries more positively than negatively (Table 13). In most cases the evaluations intermediaries' actual performance did not differ from each other. However, when differences did occur (understanding financial needs and acting fairly towards the consumer) financial advisors and mortgage/finance brokers were evaluated more positively than insurance brokers. This split between the different types of intermediaries is also shown with what consumers believe each intermediary should do. More is expected of financial advisors and mortgage/finance brokers than is expected of insurance brokers.

Table 13: Consumer evaluations of financial intermediaries

	Means			p-value
Actual	**FA**	**M/FB**	**IB**	
[intermediary] understood my financial needs	2.16	2.35	2.74[1]	<.001
I am in a better financial position as a result of advice from [intermediary]	2.39	2.59	2.71	.054
I am in no doubt [intermediary] made recommendations in my best interest	2.36	2.53	2.64	.122
[intermediary] acted fairly towards me	2.14	2.26	2.68[1]	.001
The fees I paid were reasonable for the advice/service I received	2.57	2.41	2.62	.182
Overall, my experience with [intermediary] met my expectations	2.33	2.41	2.62	.163
Desired				
[intermediary should understand my financial needs.	1.95	2.04	2.48[1]	<.001
I should be in a better financial position as a result of advice from [intermediary]	2.13	2.11	2.62[1]	<.001
I should be in no doubt [intermediary] made recommendations in my best interest	1.99	2.14	2.43[1]	.006
[intermediary] should act fairly towards me	1.85	1.98	2.35[1]	.002
The fees I paid should be reasonable for the advice/service I received	2.05	2.10	2.32	.184

Overall, my experience with [intermediary] should meet my expectations	2.02	2.22	2.29	.075

[1]Post-hoc tests indicate this group differs from the other two.
FA = financial advisors, M/FB = mortgage brokers/finance broker, and IB = insurance broker

5.9.1 Performance of financial advisors

Of the 198 people who answered questions about their financial advisors, 146 had no complaints about their treatment while 52 indicated that one or more financial institutions or intermediaries had treated them unfairly. Financial advisors were rated less favourably (i.e., lower mean scores), by those who had reported unfair treatment than those who had not (Table 14). This was consistent for both experienced behaviour (i.e., 'do' questions) and desired behaviour (i.e., 'should' questions). This indicates that experience of unfair treatment impacts not only on current evaluations, but also on what can ideally be expected.

Table 14: Evaluations (means) of financial advisors

	Perception of treatment		
Actual	**Unfair**	**Fair**	**p-value**
[intermediary] understood my financial needs	2.59	2.01	<.001
I am in a better financial position as a result of advice from [intermediary]	2.76	2.26	.006
I am in no doubt [intermediary] made recommendations in my best interest	2.92	2.16	<.001
[intermediary] acted fairly towards me	2.72	1.94	<.001
The fees I paid were reasonable for the advice/service I received	3.06	2.41	<.001
Overall, my experience with [intermediary] met my expectations	2.76	2.18	<.001
Desired			
[intermediary should understand my financial needs.	2.46	1.76	<.001
I should be in a better financial position as a result of advice from [intermediary]	2.58	1.96	<.001
I should be in no doubt [intermediary] made recommendations in my best interest	2.44	1.83	<.001
[intermediary] should act fairly towards me	2.45	1.64	<.001
The fees I paid should be reasonable for the advice/service I received	2.56	1.87	<.001
Overall, my experience with [intermediary] should meet my expectations	2.52	1.83	<.001

5.9.2 Performance of mortgage/finance broker

Of the 217 people who answered questions about their mortgage or finance broker, 137 had no complaints about their treatment while 80 indicated that one or more financial institutions or intermediaries had treated them unfairly. The findings (Table 15) related to mortgage/finance brokers mirror those found with financial advisors except for the should question related to making recommendations in the clients best interests where these is no different between those who reported unfair treatment and those who did not.

Table 15: Evaluations (means) of mortgage/finance broker

	Perception of treatment		
Actual	**Unfair**	**Fair**	**p-value**
[intermediary] understood my financial needs	2.68	2.14	.001
I am in a better financial position as a result of advice from [intermediary]	2.95	2.38	<.001
I am in no doubt [intermediary] made recommendations in my best interest	2.75	2.38	.020
[intermediary] acted fairly towards me	2.60	2.07	<.001
The fees I paid were reasonable for the advice/service I received	2.60	2.29	.031
Overall, my experience with [intermediary] met my expectations	2.77	2.20	<.001
Desired	**Unfair**	**Fair**	**p-value**
[intermediary should understand my financial needs.	2.32	1.86	.002
I should be in a better financial position as a result of advice from [intermediary]	2.45	1.91	<.001
I should be in no doubt [intermediary] made recommendations in my best interest	2.29	2.03	.082
[intermediary] should act fairly towards me	2.19	1.84	.015
The fees I paid should be reasonable for the advice/service I received	2.39	1.92	.003
Overall, my experience with [intermediary] should meet my expectations	2.65	1.97	<.001

5.9.3 Performance of insurance broker

Of the 80 people who answered questions about their insurance broker, 29 had no complaints about their treatment while 51 indicated that one or more financial institutions or intermediaries had treated them unfairly. Fewer differences are found between those who have experienced unfair treatment and those who have not when looking at insurance brokers (Table 16). Nevertheless, where differences are found, those who report experiencing unfair treatment give less favourable responses than those who did not.

Table 16: Evaluations of insurance broker

	Perception of treatment		
Actual	**Unfair**	**Fair**	**p-value**
[intermediary] understood my financial needs	2.94	2.35	.035
I am in a better financial position as a result of advice from [intermediary]	2.84	2.46	.144
I am in no doubt [intermediary] made recommendations in my best interest	2.80	2.36	.099
[intermediary] acted fairly towards me	2.92	2.26	.026
The fees I paid were reasonable for the advice/service I received	2.68	2.50	.051

Overall, my experience with [intermediary] met my expectations	2.76	2.36	.120
Desired			
[intermediary should understand my financial needs.	2.71	2.07	.030
I should be in a better financial position as a result of advice from [intermediary]	2.86	2.15	.013
I should be in no doubt [intermediary] made recommendations in my best interest	2.55	2.21	.170
[intermediary] should act fairly towards me	2.51	2.07	.121
The fees I paid should be reasonable for the advice/service I received	2.47	2.04	.105
Overall, my experience with [intermediary] should meet my expectations	2.38	2.14	.396

5.9.4 Difference between actual and desired

For all but one item (related to insurance brokers) the actual experience (what financial intermediaries do) does not match up to what they should be doing (i.e., desired level of service). This is consistent across all three types of financial intermediaries. Table 17 details these results.

Table 17: Actual versus desired service from financial intermediaries

	Means		p-value
Financial advisor	**Actual**	**Desired**	
[intermediary] understood/should understand my financial needs	2.14	1.94	<.001
I am/should be in a better financial position as a result of advice from [intermediary]	2.37	2.11	<.001
I am/should be in no doubt [intermediary] made recommendations in my best interest	2.34	1.99	<.001
[intermediary] acted/should act fairly towards me	2.09	1.83	<.001
The fees I paid were/should be reasonable for the advice/service I received	2.56	2.02	<.001
Overall, my experience with [intermediary] met/should meet my expectations	2.32	2.01	<.001
Mortgage/finance broker	**Actual**	**Desired**	**p-value**
[intermediary] understood/should understand my financial needs	2.33	2.03	<.001
I am/should be in a better financial position as a result of advice from [intermediary]	2.57	2.08	<.001
I am/should be in no doubt [intermediary] made recommendations in my best interest	2.52	2.12	<.001
[intermediary] acted/should act fairly towards me	2.25	1.96	<.001
The fees I paid were/should be reasonable for the advice/service I received	2.41	2.07	<.001
Overall, my experience with [intermediary] met/should meet my expectations	2.39	2.20	.005
Insurance broker	**Actual**	**Desired**	**p-value**
[intermediary] understood/should understand my financial needs	2.74	2.49	.025
I am/should be in a better financial position as a result of advice from [intermediary]	2.71	2.59	.308
I am/should be in no doubt [intermediary] made recommendations in my best interest	2.64	2.38	.014
[intermediary] acted/should act fairly towards me	2.68	2.33	<.001
The fees I paid were/should be reasonable for the advice/service I received	2.62	2.28	.002
Overall, my experience with [intermediary] met/should meet my expectations	2.62	2.29	.022

5.10 Mapping consumer survey responses to the TCF Outcomes

The above discussion provides detailed results from our consumer survey. For reference, Table 18 below aligns the key survey questions to the most relevant TCF outcome or outcomes.

Table 18: Survey questions mapped to TCF outcomes

TCF Outcome	Question focus	Relevant survey questions	Reference
TCF Outcome 1 (Fair treatment)	General	Have been treated unfairly or had complaints in past two years	Table 2
		Have made a complaint about a financial product / service	Tables 3, 4, 5, 6
	Financial services provider	Is trustworthy	Table 12
		My rights are / should be well protected when it comes to financial products and services	Tables 10, 11
		Australia's financial institutions do / should do treat customers fairly	Tables 10, 11
	Financial services Intermediary	I should be in no doubt intermediary made / should make recommendations in my best interest	Tables 13, 14, 15, 16, 17
		Intermediary acted / should act fairly towards me	Tables 13, 14, 15, 16, 17
		Fees I paid were / should be reasonable for the advice/service I received	Tables 13, 14, 15, 16, 17
TCF Outcome 2 (Appropriate product design and targeting)	Financial services Provider	Provides relevant products / advice to suit my needs	Table 12
		Financial products and services are not / should not be too complex	Tables 10, 11
	Financial services Intermediary	I am / should be in a better position as a result of advice from intermediary	Tables 13, 14, 15, 16, 17
TCF Outcome 3 (Clear information)	General	Sources of information used to find information about financial product and service rights	Table 7
		Use of a PDS	Table 8
		Views on the usefulness of the PDS	Table 9
		Sources of information used to find information about financial product and service rights	
	Financial services provider	Provides good customer service	Table 12
		I do / should find it easy to understand my rights	Tables 10, 11
		I am/should be kept well informed and up to date about my products and services by financial providers	Tables 10, 11
	Financial services intermediary	Overall, my experience did / should meet my expectations	Tables 13, 14, 15, 16, 17
TCF Outcome 4 (Suitable advice)	Financial services provider	Provides relevant products / advice to suit my needs	Table 12
		I am / should be kept well informed and up to date about my products and services by financial providers	Tables 10, 11
	Financial services intermediary	Did / should understand my financial needs	Tables 13, 14, 15, 16, 17
		Fees I paid were / should be reasonable for the advice/service I received	Tables 13, 14, 15, 16, 17
		I am / should be in a better position because of the advice from intermediary	Tables 13, 14, 15, 16, 17
TCF Outcome 5 (Products, services perform as expected)	Financial services provider	Provides good customer service	Table 12
		Financial products and services are not / should not be too complex	Tables 10, 11
TCF Outcome 6 (No unreasonable post-sale behaviours)	General	Frequency of making a complaint	Tables 2, 3, 4, 5, 6
		Action taken in response to unfair treatment	Table 2, Figure 1
		Sources of information used to find information about financial product and service rights	Table 7
	Financial services provider	Ease to change products	Table 12
		Ease to make a complaint	Table 12
		It is / should be clear what to do to make a complaint about a financial product or service	Table 10
		Complaints are / should be heard and dealt with fairly	Table 10
		If I want to switch banks, it should be easy to do so	Table 10
		If I want to switch insurance provider, it should be easy to do so	Table 10

VI. Discussion and recommendations

Discussion

The above provides an overview of key features and benefits of a TCF regime for regulating financial services, information on the implementation of TCF regimes in other jurisdictions, recent data on the behaviours, experiences and expectations of Australian consumers in their dealings with financial service providers, and an assessment of the extent to which the structure and policy of financial services legislation in Australia is similar to the TCF regimes that have been implemented in other jurisdictions. As we note above, a TCF regime is a radically different approach to regulating financial services than is currently the case in Australia, but it is our submission that such a regime can provide real benefits to consumers and to firms. Among other things, implementing a TCF approach would reduce the incidences of regulatory arbitrage, unintended outcomes like that which we respectfully submit were witnessed in ASIC v Westpac,[123] creative compliance, box-ticking, and generally upholding the letter but not the spirit of the law.

We note that the ALRC's inquiry is limited to considering technical issues that do not change existing policy settings, and we are very supportive of many of the ALRC's proposals that will – if implemented – be likely to lead to improvements in the current regulatory framework, such as proposals to reduce duplication (e.g., Proposals **C2, C3**), to restructure and reframe key obligations (e.g., Proposals **C1, C4, C7, C8**), and to introduce an outcomes-focus in relation to product disclosure (e.g., Proposal **C5**).

We also support the proposal for a Financial Services Law ('FSL') (Proposals **C9, C10**), and are of the view that incorporating key norms at the start of the FSL will be helpful in framing the legislative obligations.

However, even with these changes, a high level of prescriptive detail will likely be retained, and there will not be an explicit outcomes-focus throughout the legislation. We think a more ambitious approach will ultimately be needed to achieve improved outcomes for consumers. In the interim however, we suggest that a Treating Customers Fairly approach could be incorporated in the norms to be set out in the Financial Services Law. We suggest that a TCF obligation also be included at the start of the schedule, listed, specifically, in Section 6. This will support consumers with an easy to remember pneumonic: 'my six fundamental rights in Section 6', which in turn can become 'my six for six rights'. That in turn facilitates finding (an easy search through Google), as in 'what are my six for six rights', and equally easy as a tool by which to educate consumers.

[123] *Australian Securities and Investments Commission v Westpac Banking Corporation [2020]* FCAFC 111, the so-called 'Wagyu beef and Shiraz case', in which the court found that Westpac was required to collect information on a borrower's expenses, but once collected, was not required to apply that information to the loan. That in turn raises the question as to why collect the information in the first place?

While a TCF regime would be a radical change compared to what we have at present (in terms of form, structure of legislation etc), the outcomes sought are similar.

What TCF does do is address the problems identified by ALRC in this Inquiry, and by Commissioner Hayne during the Royal Commission, in respect of complexity, a tick-a box mentality, and an emphasis on 'can we' instead of 'should we'. These in turn will only be partially overcome by the ALRC's recommendations of reframing and restructuring (meritorious though they are). We are of the view that the focus still seems to be very much on more prescriptive legislation, with a limited role for a principles-based, outcomes-determined regulatory regime, in which Commissioner Hayne's six key norms of behaviour are enlivened.

By contrast, a TCF regime would be a very different approach, but one which we believe would lead to better consumer outcomes. To that end our consumer surveys show that there are still problems, and that consumers have high expectations of fair treatment, and other matters relevant to the TCF outcomes. So, while we accept the ALRC Inquiry is primarily about technical, rather than policy matters, we are nonetheless of the view that this Inquiry is an opportunity to flag future change; to recommend a structure and / or other changes that would facilitate a TCF approach, or a process for further investigation.

This could start with adding a high level TCF obligation in the FSL; introducing TCF-compliance reporting requirements; identifying consumer protection outcomes in the FSL; a concomitant consumer education initiative around TCF outcomes (starting with "six for six") etc. Consequently, we recommend that the taskforce identified in Proposal **C12** be given a specific role in examining the implementation of a TCF regime in Australia.

APPENDIX A

UK CONSUMER DUTY: A MODEL TO SURFACE FROM A MORASS?

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TITLE: UK CONSUMER DUTY: A MODEL TO SURFACE FROM A MORASS?

I. INTRODUCTION

Australian and U.K legislators share a common challenge in re-modelling financial services legislation to tackle the consumer harm that has eroded trust.[1] The UK's new Consumer Duty represents a paradigm shift in financial services with its regulator, the Financial Conduct Authority (FCA), imposing principles-based regulation focusing on consumer outcomes. From 31 July 2023, three cross-cutting rules and four outcomes will clearly define the FCA's expectations on what might otherwise be a woolly "Consumer Principle" requiring financial firms to "act to deliver good outcomes", backed by assertive supervision and enforcement action.[2]

The UK system offers comparative guidance in much of what the Australian Law Reform Commission (ALRC) are looking to achieve. The ALRC's three-year review necessitates reducing legislative complexity by making recommendations for the simplification of financial services laws to promote meaningful compliance and lay "foundations for an adaptive, efficient and navigable regulatory framework".[3] This essay briefly explains the complexity of Australian financial services law before examining aspects of the UK Consumer Duty regime (UK Duty) that compliment or support what the ALRC is trying to achieve.

II. COMPLEXITY AND PRESCRIPTION

A. Australian Financial Services Laws

The ALRC observes general consensus with stakeholders that financial services laws are unnecessarily complex and need simplification.[4] The complexity is a consequence of the laws' piecemeal evolution and

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[1] Australian Law Reform Commission, *Legislative Framework for Corporations and Financial Services Regulation – Risk and Reform in Australia Financial Services Law* (Background Paper FSL5, March 2022) 1 [4], 13 [47]-[50] ('*FSL5*'); AJ Bell Investcentre, 'On the Road: All about the Consumer Duty' (YouTube, 27 May 2022) 00:00:00-00:39:06 https://www.youtube.com/watch?v=ZQJ5REyCxDc ('*On the Road'*).

[2] *On the Road* (n 1); Financial Conduct Authority, *A new Consumer Duty: Feedback to CP21/13 and final rules* (Policy Statement PS22/9, July 2022) 8 [1.34], 5 [1.15], 32 [4.7] ('*PS22/9*').

[3] Australian Law Reform Commission, *Report A: Summary - Financial Services Legislation* (ALRC Report 137, November 2021) 5[9] ('*Report A: Summary'*).

[4] *Report A: Summary* (n 3) 8 [12]; Australian Law Reform Commission, *Legislative Framework for Corporations and Financial Services Regulation – Complexity and Legislative Design* (Background Paper FSL2, October 2021) 8 [33] ('*FSL2*'); See, eg, *Ku*

responses to firms requesting greater clarity and certainty of obligations, resulting in layers of prescription.[5] Commissioner Hayne, during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (FSRC), stated "simplification of financial services laws is broadly supported. However, financial services laws will always involve a measure of complexity".[6] Yet with legislation imposing rights, obligations and prohibitions, it must be transparent, navigable, limited in complexity and effectively managed - particularly in common law jurisdictions.[7] Legislative complexity causes "the regulated community to lose sight of what the law is intending to achieve and instead see the law as no more than a series of hurdles to be jumped or compliance boxes to be ticked".[8]

Indeed, complexity created uncertainty, disputes, reduced compliance and undermined consumers' ability to understand rights.[9] It has led to cost inefficiencies, with excessive compliance costs borne by businesses passed onto consumers in higher costs for services.[10]

Financial services laws are vast.[11] The legislative patchwork of the *Corporations Act* 2001 (Cth), including Corporations Regulations, ASIC legislative instruments, conditional statements, exclusions, exemptions and notional amendments totals 43,341 pages – A vast, continually evolving body of "labyrinthine" law posing substantial challenges for even experienced legal professionals to interpret, raising rule of law and access to justice concerns.[12] The ALRC also found duplication and overlap in

v Song [2007] FCA 1189 [175] where the Federal Court said "Whoever coined the expression "as clear as mud" must have been slaving over the extraordinarily, and unnecessarily, complex provisions of the Corporations Act and the Corporations Regulations…".

[5] *FSL2* (n 4) 10-11 [43]-[44]; See eg, during the FSCR, Commissioner Hayne stated "Lobbying for prescription, detail and tailoring has been a significant contributor to the current state of the law": *Royal Commission in Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) vol 1, 495 ('*FSRC Final Report*')

[6] *FSL2* (n 4) 6 [24]; *FSRC Final Report* (n 5) vol 1, 491.

[7] *FSL2* (n 4) 5 [20].

[8] Ibid 7 [29]; Commissioner Hayne made this statement in *Royal Commission in Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 28 September 2018) vol 1, 162. ('*FSRC Interim Report'*).

[9] *FSL2* (n 4) 7-8 [29]-[31], 29 [127].

[10] Ibid 7 [30]; See, eg Chris Dastoor, 'Quarter of advisers plan to leave industry within five years', *Professional Planner* (online, 5 September 2022) <https://www.professionalplanner.com.au/2022/09/quarter-of-advisers-plan-to-leave-industry-within-five-years/>.

[11] *FSL2* (n 4) 2 [8].

[12] *Report A: Summary* (n 3) 9 [17], 9 [10], 11 [23]; Financial services law has been described as "labyrinthine": Andrew Godwin, Vivienne Brand, Vivienne and Rosemary Teele Langford, 'Legislative Design – Clarifying the Legislative Porridge' (2021) 38(5) *Company and securities law journal* 292 *('Legislative Design')*; Also quoted in Australian Law Reform Commission, *Unnecessary complexity in Australia's financial services laws* (Fact Sheet, 28 January 2021) 1-2.

numerous provisions of related legislation.[13] The end result, a "legislative morass" where laws contradict and strategic debates clog up courts.[14]

B. UK Duty: Simple Policy, Simple Law

"The more detailed and complex policy becomes, the more detailed and complex law tends to become and vice versa. Underpinning both law and policy is the need for clarity in articulating desired outcomes …".[15] The policy intent of the UK Duty is simple. The desired outcomes are clearly articulated. The instrument comprises 68 pages and three elements; a Consumer Principle (*to act to deliver good outcomes*), underpinned by three cross-cutting rules (*act in good faith*, *avoid causing foreseeable harm, enable and support retail customers to pursue their financial objectives*) informing four outcomes (*product and service* governance, *price and value*, *consumer understanding* and *consumer support*).[16]

The UK Duty is set to establish the "standard of care that firms should give to customers in retail financial markets."[17] It will not only apply to firms with retail clients, but also firms "in a distribution chain".[18] The Duty is principles-based, outcomes-focused and not as passive as the former obligation to act in a client's best interest. This is viewed as a particularly effective way for the regulator to establish their high-level expectation to supervise and enforce, without having to debate finer points of law.[19]

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[13] *FLS2* (n 4) 27 [117]; *Report A: Summary* (n 3) 28 [35] where "related legislation" includes but is not limited to the *Corporations Act* 2001 (Cth), *Australian Securities and Investments Commission Act* 2001 (Cth) and *National Consumer Credit Protection Act* 2009 (Cth).

[14] *Legislative Design* (n 12) 291 [1], 292 [3]. "**Legislative morass**" was used in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq)* [2012] FCA 1028 RARES J 948. The Court grappled whether s 1041H(1) of the Corporations Act or s 12DA(1) of the ASIC Act applied to a misleading or deceptive representation: "… the end result of this legislative morass seems to be the same, it is difficult to discern why … Courts must waste their time turning up and construing which of these statutes applies to the particular circumstance. Here, should it make any difference whether Grange was alleged to have engaged in conduct in relation to "financial services" (s 12DA(1)) or "a financial product or a financial service" (s 1041H(1))? Why is there a difference? Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?".

[15] Ibid 281 [A].

[16] *Consumer Duty Instrument* 2022 [FCA 2022/31] ss 2.1, 2A.2- 2A.6 ('*FCA 2022/31*'); *PS22/9* (n 2) 5 [1.15]; Financial Conduct Authority, *Finalised Guidance: FG22/5 Final non-Handbook Guidance for firms on the Consumer Duty* (July 2022) 3 [1.3], 28 [5.2], 29 [5.5] ('*FG22/5*').

[17] *FG22/5* (n 16) 3 [1.1]

[18] *FCA 2022/31* (n 16) 4.

[19] Grant Thornton UK, 'A guide to the Consumer Duty' (YouTube, 17 February 2022) 00:00:00-01:01:15 https://www.youtube.com/watch?v=0-K6ihAxOrw ('*Grant Thornton UK*').

The FCA's handbook contains 11 Principles for Business.[20] The principles are high-level standards of conduct, which all firms must comply with when adhering to the rules set by the FCA.[21] This approach is intended to be "very much focused on outcomes rather than processes". [22] The new UK Duty is set to become the 12th high-level standard, with Principle 6 being disapplied where UK Duty (Principle 12) applies.[23]

The UK Duty differs from the previous 'Treating Customers Fairly' ('TCF'). The TCF regime set out to establish a principles-based approach to regulation, by moving away from the former, rules-based approach.[24] Underpinning the TCF regime, is Principle 6, which instructs that: "A firm must pay due regard to the interests of its customers and treat them fairly".[25] In addition to Principle 6, six specific outcomes were established for firms to "analyse, design and evaluate their compliance with TCF".[26] At the heart of this approach, was the former regulator's, the Financial Services Authority (FSA), desire to "assess the outcome of an action rather than an input".[27] For example, one of the six outcomes states: "where consumers receive advice, the advice is suitable and takes account of their circumstances".[28] However, former FCA Chair, Charles Randall, revealed that a high proportion of advice firms did not adequately assess their customers' needs or provide advisers with adequate training.[29] Empirical research conducted by Sharon Gilad, revealed that regulated firms were providing the FSA with "superficial evidence of 'cultural transformation'".[30] The research found, "management communication of TCF messages through posters

[20] Financial Conduct Authority, *Financial Conduct Authority Handbook of Rules and Guidance,* PRIN 2.1 <https://www.handbook.fca.org.uk/handbook> ('*FCA Handbook*')
[21] Interview with Mark Steward, Advisory Committee member of the ALRC's Financial Services Legislation Inquiry (Andrew Godwin, Financial Services Legislation Inquiry, 7 July 2022) 00:11:48:20 - 00:12:26:08 <https://www.alrc.gov.au/wp-content/uploads/2022/07/ALRC-FSL-Interview-with-Mark-Steward-transcript.pdf>. ('Interview with Mark Steward').
[22] Ibid 00:14:12:14 – 00:14:46:02.
[23] *FG22/5* (n 16) 6.
[24] Financial Services Authority, *Treating Customers Fairly- Towards Fair Outcomes for Consumers* (July 2006) 5 [1.8]- [1.9] ('*TCF- Towards Fair Outcomes for Consumers'*)
[25] *FCA Handbook* (n 20) Principle 6.
[26] Sharon Gilad, 'Institutionalizing Fairness in Financial Markets: Mission impossible?' (2011) 5 309, 314.
[27] Charles Randell, 'Outcomes-Focused Regulation: A Measure of Success? (Speech, Building Societies Association, 6 May 2021).
[28] Ibid. See *TCF- Towards Fair Outcomes for Consumers* (n 24) 3 [1.2].
[29] *Randell* (n 27)
[30] Christine Parker and Sharon Gilad, 'Internal corporate compliance management systems: structure, culture and agency" in Christine Parker and Vibeke Lehmann Nielsen, *Explaining compliance: business responses to regulation* (Edward Elgar, 2012) 185

and training programs were cynical attempts at 'cosmetic compliance'".[31] In turn, the FSA "fell back to measuring and assessing inputs rather than actual outcomes for customers".[32] This a criticism of principles-based regulation. Arguably, it allows firms to "'backslide', and get away with the minimum level of conduct possible"; and thus, does not adequately protect consumers.[33]

Considering the shortfalls of the TCF regime, it is critical to observe the difference between the UK Duty and the TCF regime. It has been questioned whether the Duty is a "reengineered or increased approach" to the TCF regime.[34] In response to the FCA's consultation paper for the Duty, the Centre for Ethics and Law were of the view that the Duty would not substantially improve the TCF regime.[35] They argued that if TCF regime was implemented as processes by firms, then how will the Duty be any different.[36] Moreover, the TCF regime was principles-based, outcomes-focused and still had clear regulatory gaps. "Is persisting with an outcomes-focused approach a case of insanity – doing the same thing over and over again, and expecting different results?".[37] If the TCF didn't produce its desired results, should Australia still move towards a principles-based regulatory approach?

The first point to make is that the TCF regime was framed around the single principle of "treating customers fairly", without additional rules and guidance.[38] A principles-based approach will not always produce its desired results, as evidenced by the TCF regime. Principles-based regulation can be improved through detailed rules to supplement principles, official guidance to explain the principles and dialogue between the regulator and regulated entities.[39] As mentioned, the instrument for the UK Duty comprises of 68 pages to supplement Principle 12. Additionally, the FCA released non-handbook guidance to explain

[31] Ibid.
[32] *Randell* (n 27)
[33] Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [4.13] ('*ALRC Report No 108'*), citing J Black, Principles Based Regulation: Risks, Challenges and Opportunities (London School of Economics and Political Science, 2007) 2.
[34] 'Episode 24: Consumer Duty – an overhaul of consumer conduct regulation', *Financial Services Risk and Regulation Unravelled* (Grant Thornton UK LLP, 6 August 2022) 00:27:45 (*'Risk and Regulation Unravelled'*)
[35] UCL Centre for Ethics and Law, *Response to the FCA's Consultation Paper 21/13 A New Consumer Duty* (June 2021) 11.
[36] Ibid 9.
[37] *Randell* (n 27)
[38] *Risk and Regulation Unravelled* (n 34) 00:00:15
[39] *ALRC Report No 108* (n 33) [4.14].

their expectations of firms and insofar has shown a desire to work with firms to assist implementing the Duty.[40]

Another key difference is the shift to more demonstrable action being required by firms to deliver good outcomes for retail customers, in contrast to the more passive obligations of Principle 6.[41] Drawing upon the wording, "paying due regard" and "must act to deliver", the FCA are shifting the onus to firms to show they are delivering good outcomes for customers.[42] Under the TCF regime firms were not necessarily required to report on outcomes, rather the focus was treating the customer fairly at the point of sale.[43] The Duty is set to widen this focus, so that firms will have to consider the end to end and intermediate point in time outcomes across the whole of the distribution chain.[44] In order to demonstrate they are producing good outcomes for retail consumers, firms will be required to provide "evidence, data and records".[45] These were not features of the TCF regime.[46] As the ALRC considers what approach should be taken to amend the existing law, it is critical to learn from the UK's experiences with a principles-based approach.

III. STRENGTHENING CONSUMER PROTECTION

A. Clarifying Legislative Morass

Australian financial service providers must act "efficiently, honestly and fairly".[47] Regulatory reforms of the past twenty years placed increasing emphasis on consumer protections to address product and conduct risks.[48] The Future of Financial Advice (FoFA) reforms of 2013 were meant "to improve the trust and confidence of Australian retail investors in the financial services sector and ensure the availability,

[40] See, eg, 'Consumer Duty Information for Firms', *Financial Conduct Authority* (Web Page, 14 October 2022).
[41] *Risk and Regulation Unravelled* (n 34) 00:04:30.
[42] Financial Conduct Authority, 'FCA to Introduce New Consumer Duty to Drive a Fundamental Shift in Industry Mindset' (Press Release, 7 December 2021).
[43] *Risk and Regulation Unravelled* (n 34) 00:27:30.
[44] Ibid.
[45] Ibid 00:27:05 – 00:27:30
[46] Ibid.
[47] *Corporations Act 2001* (Cth) s 912A ('*Corporations Act 2001*').
[48] Australian Government the Treasury, *Quality of Advice Review: Consultation paper – Proposals for Reform* (Report, August 2022) 21 [2.11] *('Proposals for Reform');* **Conduct risk** relates to "the potential for conflicts of interest or misconduct in selling a financial product" while **Product risk** concerns financial products and consumers having to balance the potential of returns against the risk of losses: *FLS5* (n 1) 22 [77], 8 [29].

accessibility and affordability of high quality financial advice".[49] Yet in 2018, the FSRC found widespread misconduct, criticising regulators for deficient enforcement.[50] The FSRC findings have had an enduring affect resulting in a marked decrease in consumers' trust.[51] Despite financial services undergoing a professionalism uplift, there is general distrust for financial advisers as a class. Arguably "[t]o reform financial advice, start again".[52]

As Australian lawyers, industry and consumer groups lobby for substantive reforms to reduce the complexity and cost of providing financial advice, Treasury called for a Quality of Advice Review (QAR) to inform ALRC recommendations.[53] QAR propose legislators take the existing bedrock of good reforms, but reframe it as principles-based legislation to remove complexity and unnecessary elements.[54] Indeed, "an objective of legislative design should be to reduce unnecessary complexity as much as possible".[55] The ALRC considers complexity could be significantly reduced with principles legislative hierarchy - where law is deliberately drafted in general principles, leaving details to be filled in by delegated legislation and courts.[56] Prescriptive, rules-based legislative design is (erroneously) thought to be easier to comply with and enforce.[57] However, particularism of law is a false certainty.[58] "[P]rinciples are adaptive" as businesses change, innovations emerge and is less costly.[59] The UK Duty presents as a potential outcomes-focused

[49] Future of Financial Advice*, Australian Government the Treasury* (Web Page) <https://treasury.gov.au/future-financial-advice#:~:text=The%20objectives%20of%20FOFA%20are%20to%20improve%20the,accessibility%20and%20affordability%20of%20high%20quality%20financial%20advice.>; Simon Hoyle, 'Affordability and accessibility of advice unlikely to improve: CoreData research', *Professional Planner* (online, 29 July 2022) <https://www.professionalplanner.com.au/2022/07/affordability-and-accessibility-of-advice-unlikely-to-improve-coredata-research/>

[50] Lexology Getting the Deal through, 'Financial Services Compliance' (2021) (4) *Law Business Research 2021* 5 [1] ('*Financial Services Compliance'*); the FSRC found that regulators had "failed to take appropriate enforcement action in response to known compliance issues" at 8 [9]; in which Commissioner Hayne questions ASIC "why not litigate?" at 12 [23].

[51] *Financial Services Compliance* (n 50) 5 [1].

[52] Professional Planner, 'Webinar: Michelle Levy on the Quality of Advice Review' (Video, 7 September 2022) 00:00:00-01:22:25 <https://www.professionalplanner.com.au/2022/09/michelle-levy-on-the-quality-of-advice-review/?utm_medium=email&utm_campaign=Webinar%20recording%20Live%20with%20Michelle%20Levy%20on%20the%20Quality%20of%20Advice%20Review&utm_content=Webinar%20recording%20Live%20with%20Michelle%20Levy%20on%20the%20Quality%20of%20Advice%20Review+CID_843705084e22bc20903f860d5d634cf0&utm_source=Campaign%20Monitor&utm_term=watch%20the%20recording> (*'QAR Webinar'*); Alan Kohler, 'To reform financial advice, start again', *The New Daily* (online, 1 September 2022 <https://thenewdaily.com.au/finance/finance-news/2022/09/01/financial-advisers-reform-alan-kohler/>

[53] *Report A: Summary* (n 3) 36 [61]; *FSL2* (n 4) 30 [135]: Lawyers, industry, and consumer groups told the ALRC the Corporations Act is overly complex given its prescriptiveness. A principles-based drafting approach is preferred.

[54] *QAR Webinar* (n 52).

[55] *FSL2* (n 4) 5 [22].

[56] Ibid 30 [135]; *Report A: Summary* (n 3) 31 [43].

[57] *FSL2* (n 4) 11 [49]; See also *Legislative Design* (n 12) 285 [C] for inherent drawbacks of prescriptive forms of legislation.

[58] *Legislative Design* (n 12) 292 [2].

[59] Ibid 284 [Footnote 19], 286 [D]; Financial Conduct Authority, *A new Consumer Duty: Feedback to CP21/13 and further consultation* (Consultation Paper CP21/36***, December 2021) [1.25]-[1.29] ('*Consultation Paper CP21/36*').

variant of principles-based regulation for Australian legislators to model, to promote compliance with the 'spirit' of the law.[60]

B. Conduct Obligations

In his scathing assessment of the industry, Commissioner Hayne alluded to the need to re-orient the system, to better protect consumers who had been exploited.[61] Australia imposes procedural obligations to address conduct risk. Best interest duty (BID) obligations, banning conflicted remuneration, Code of Ethics and Professional Standards are reactive attempts to address agency conflicts.[62] Financial advisers must act in the best interest of clients in three (inconsistent) ways – Chapter 7 Best interest obligations, Code of Ethics and fiduciary duties in general law - yet this level of prescription has not stemmed misconduct.

QAR suggests repealing BID and replacing it with an obligation to provide "good advice".[63] Indeed, Australia might better protect consumers through outcomes, than with procedural conduct rules. Conduct risk, product governance and pricing reforms were also key areas of scrutiny for the UK regulator.[64] The FCA recognised general imbalances in the adviser-client relationship (concerning expertise, knowledge and bargaining position) asserting that "consumers can only be reasonably expected to take responsibility for their choices and decisions if firms act openly and honestly, avoid causing customers foreseeable harm and take proactive steps to empower customers to make good choices …'.[65] The UK Duty now has wider application with exacting outcomes, where firms must actively deliver, evidence, regularly review and take action to address risks to good consumer outcomes.[66] This requires a significant shift in conduct.[67] For instance, a firm is not acting in good faith, avoiding foreseeable harm if it uses targets to create demand or

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[60] *FSL2* (n 4) 11 [49]; *Legislative Design* (n 12) 285 [D], 286 [Footnote 39].

[61] Deloitte, *Culture, Customer, Purpose: Key Recommendations and Impacts of the Hayne Royal Commission* (6 February 2019) 4.

[62] *FLS5* (n 1) 24[84-85], 26[90, 92]; **Best interest duty (BID)** requires financial services providers prioritise clients' interests in the event of a conflict, supplemented by safe harbour steps: *Corporations Act* 2001 Part 7.7A; **Ban on conflicted remuneration** prohibits financial services providers receiving commission-based remuneration, volume sales incentives and asset-based fees – as these were capable of influencing the advice given and products recommended to clients: *Corporations Act* 2001 s 963F. **Professional standards** for financial advisers prescribed educational and training requirements and a **Code of Ethics** was mandated to extend existing obligations in the Corporations Act: *Corporations Amendment (Professional Standards of Financial Advisers)* Act 2017. See also *Corporations Act 2001* Part 7.6 Div 8A.

[63] *Proposals for Reform* (n 48) 16 [2.6], 18 [2.8], 22 [2.12]

[64] *Grant Thornton UK* (n 19).

[65] *Consultation Paper CP21/36* (n 59) 37 [6.15]; *FG22/5* (n 16) 25 [4.13]-[4.18]: In this context, **reasonableness** is an objective test having appropriate regard to the nature of products and services offered (complexity and risk of harm), and the characteristics of consumers (resources, financial capability and vulnerability in the target market).

[66] *Grant Thornton UK* (n 19); *FG22/5* (n 16) 4 [1.9], 5 [1.14], 6 [1.21].

[67] *Grant Thornton UK* (n 19); *PS22/9* (n 2) 5 [1.15], 9 [1.40]

remunerate the sale of inappropriate products.[68] A firm would act in bad faith if it were to delay paying redress.[69] Acting in "good faith" is more intuitive than assessing what is in a "client's best interest".[70]

C. Product Governance

Financial products involve risk.[71] To manage information asymmetries in Australian financial services, clients are buried in a mountain of (disclosure) paperwork to enable them to make informed decisions.[72] Disclosure is necessary, but overly complex tick-a-box compliance doesn't enable informed decisions. The vast majority of disclosure-related law remains unchanged since the Financial Services Reform Act 2001. The basis to the disclosure requirements was that if retail clients were armed with all relevant information, they could make well informed choices.[73] Long after behavioural economists dispelled consumers as rational and the best guardians of their interests[74], advisers must still provide clients lengthy, complex, templated disclosure documents that are rarely read.[75] Over-disclosure shifts risk onto consumers.[76] It has not benefited consumers, but added significantly to administration, making financial advice unaffordable.[77]

Design and distribution obligations (DDO), Product Intervention Powers (PIP), Annual Advice Fee Renewal and Responsible Lending have been recent attempts to address product risk in Australia.[78]

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[68] *FG22/5* (n 16) 30 [5.10], 48 [6.58].
[69] Ibid 31 [5.17].
[70] *Consumer Duty Instrument* 2022 [FCA 2022/31] s 2A.2.4
[71] *FG22/5* (n 16) 34[5.36].
[72] *Kohler* (n 52); *Financial Services Compliance* (n 50) 11[19]; Australian Government the Treasury, *Quality of Advice Review: Issues paper* (Report, March 2022) ('*Issues Paper'*) 25[4.5].
[73] *Report A: Summary* (n 3) 33[51]; *FLS5* (n 1) 2[8], 17[57]; *Proposals for Reform* (n 48) 6.
[74] Developments since the Wallis Inquiry (1997) and CLERP 6 in behavioural economics / behavioural biases dispelled underlying assumptions that consumers were rational and best placed to assess inherent risks for themselves, due to inadequate appreciation of risks, levels of financial literacy and complex disclosure documents - calling for more interventionist consumer protections: Australian Government the Treasury, *Financial System Inquiry Final Report* (Report, November 2014) 9
[75] *Proposals for Reform* (n 48) 6, 32; Lengthy templated disclosure documentation includes Product Disclosure Statements, Financial Services Guides, Statements or Records of Advice, General Advice Warnings designed as information disclosure to assist consumers assess a product's risk/return trade-off: *Report A: Summary* (n 3) 32 [45].
[76] *FLS5* (n 1) 6 [22]; See also William Isdale and Nicholas Simoes da Silva, 'Shifting sands in the regulation of financial risk: the ALRC's new Background Paper on Risk and Reform in Australian Financial Services Law', *ALRC News* (online, 21 March 2022) < https://www.alrc.gov.au/news/shifting-sands-in-regulation-of-financial-risk/>.
[77] *Proposals for Reform* (n 48) 16, 29; Aleks Vickovich, 'Financial advice reviews paves way for return to 'bad old days', *Financial Review* (online, 29 August 2022) < https://www.afr.com/companies/financial-services/review-paves-the-way-for-banks-to-return-to-wealth-20220829-p5bdlq#:~:text=Treasury's%20review%20of%20financial%20advice,advisers%20and%20angered%20consumer%20groups>.
[78] *FLS5* (n 1) 24 [84]-[85], 26 [90], [92]; **Design and Distribution Obligations** (**DDO)** introduced in October 2021, require product issuers to identify target markets for financial products and take reasonable steps to ensure the product is distributed only to those within the target market: *Corporations Act* 2001: Part 7.8A; **Product Intervention Powers (PIP)** allow ASIC to make orders to impose conditions on or ban the sale of financial products: *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument* 2022/647: **Annual Advice Fee renewa**l notices including Ongoing fee disclosures, fee

Industry are agreeable to expanding consumer protections, but want to rethink unnecessary disclosures to make advice more affordable and accessible.[79] An outcomes-based standard, as proposed by the ALRC can provide flexibility in disclosure design making advice less costly and better reflect policy.[80] But ALRC proposals aren't seen to be drastic enough.[81] By contrast, UK firms in financial products and services distribution chains must "enable and support customers to pursue their financial objectives". Significantly, this places the onus on firms to equip clients to make sensible decisions.[82]

D. Cross-cutting rules as a ballast

Principles enable firms to focus on the purpose behind the rule and offer greater flexibility for the regulator and regulated firms to decipher how the rule should be complied with.[83] The UK Duty includes three cross-cutting rules which firms will be required to comply with when delivering good outcomes for retail customers.[84] Firms must "act in good faith towards retail customers; avoid causing foreseeable harm to retail customers and enable and support retail customers to pursue their financial objectives".[85] These rules articulate the standard of conduct expected of firms to comply with the Principle 12.[86] They are also intended to inform and assist firms to interpret the four outcomes.[87] The FCA has indicated that they expect the rules to work together as a 'package' and that poor conduct will often be a breach of more than one

disclosure statements are given to clients annually to manage the risk of disengaged clients paying ongoing advice fees for little or no service: Revised Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) [1.5]. See also *Corporations Act 2001* Part 7.7A Div 3; **Responsible Lending** requires lenders to refuse credit to consumers who are unable to meet their financial obligations or where it would not meet their financial objectives: *National Consumer Credit Protection Act* 2009 (National Credit Act) Chapter 3.

[79] *QAR Webinar* (n 52).

[80] *Report A: Summary* (n 3) 33 [51]

[81] Michael Pelly, 'Financial regulation inquiry 'unlikely to fix' problems: Law Council', *Australian Financial Review* (online 3 April 2022) https://www.afr.com/companies/financial-services/financial-regulation-inquiry-unlikely-to-fix-problems-law-council-20220330-p5a9ak

[82] *FG22/5* (n 16) 9 [2.12]-[2.13]; *Grant Thornton UK* (n 19); *PS22/9* (n 2).

[83] *ALRC Report No 108* (n 33) [4.7].

[84] *FG22/5* (n 16) 28 [5.1].

[85] Ibid [5.2].

[86] Ibid [5.3].

[87] Ibid 29 [5.5].

rule.[88] They will underpin how firms should act, proactively and reactively, to deliver good outcomes for retail customers.[89]

In different aspects, the cross-cutting rules address the six fundamental norms of behaviour identified by Commissioner Hayne. The norms identified were: "obey the law; do not mislead or deceive; act fairly; provide services that are fit for purpose; deliver services with reasonable care and skill; and when acting for another, act in the best interests of that other".[90] Yet, these norms are not unique to the current legislative framework in Australia. Australian Financial Service Licence (AFSL licensees) holders and Australian Credit Licence (ACL) holders are required to do "all things necessary to ensure" that the financial services or credit activities authorised by the licence are provided "efficiently, honestly and fairly".[91] This obligation seemingly addresses all six norms, but as Commissioner Hayne revealed, there is no direct penalty for a breach.[92] Other examples include the best interests covenant in the *Superannuation Industry (Supervision) Act 1993* (Cth) and the duty to act in the utmost good faith imposed on each party under the *Insurance Contracts Act 1984* (Cth). Yet, their reflection in the existing regulation is 'piecemeal'.[93] The cross-cutting rules provide a simple and efficient solution to this problem by stating the obligations imposed on all firms, whilst allowing them to find the most efficient way of achieving the outcomes under the UK Duty.[94]

An important aspect of the cross-cutting rules is that they are subject to an objective test of reasonableness.[95] Therefore, each rule will apply to the standard that could reasonably "be expected of a prudent firm carrying on the same activity in relation to the same product and services, taking appropriate account of the needs and characteristics of customers in the relevant target market".[96] This is an outcomes-

[88] For example, "acting in good faith is a key part of creating an environment in which customers can make decisions in their own interest and pursue their financial objectives. It is also a key part of acting to avoid causing foreseeable harm. If a firm continues to sell a product it knows to be causing harm, it is also likely to be acting in bad faith", see ibid [5.4].
[89] Ibid [5.3].
[90] See *FSRC Final Report* (n 5) vol 1, 8-9.
[91] Ibid 9. See *Corporations Act* s 912A(1)(a); *NCCP Act* s 47(1)(a)
[92] *FSRC Final Report* (n 5) vol 1, 10.
[93] *Legislative Design* (n 12) 280, 286, citing Australian Government Treasury, *Submission to the Financial Services Royal Commission Interim Report*, 6.
[94] Ibid.
[95] *FG22/5* (n 16) 25 [4.13].
[96] Ibid.

focused approach. It allows for "greater flexibility to cast a wider net based on risk rather than structure".[97] Moreover, this has been described as a revolutionary approach to regulation, which would permit "stricter rules and self-insurance for high-risk products and lighter treatment for standard banking".[98] For example, certain products or services may be of higher risk, therefore, firms would be required to take additional care to meet customers' needs to comply with the cross-cutting rules.[99] The FCA turned to the example of introducing 'positive friction' to slow down how quickly transactions are made, by providing additional information for high-risk products or services.[100] The cross-cutting rules are flexible in this regard and would remedy the 'piecemeal' of the Australian legislation. The fundamental norms could be incorporated into the Australian regime in a similar way to reduce the ongoing need to draft even more prescriptive rules.

E. Which way positive outcomes?

Commissioner Hayne recommended the regime in Australia move towards a more principles-based regulatory approach and provide greater clarity about outcomes.[101] As mentioned, the UK are forging ahead with four outcomes addressing products and services governance, pricing, consumer understanding and support, which will be underpinned by the cross-cutting rules ensuring good faith, avoiding foreseeable harm and enabling financial objectives. Even though firms must exercise independent judgement with each outcome, FCA guidance provides numerous examples of measures and actions that will be consistent and inconsistent with the UK Duty. The **Products and services** outcome requires firms to hone products and services to target markets[102] (similar to DDO), while the three other outcomes represent substantively higher standards of product governance than current Australian obligations. The **Price and value** outcome concerns pricing reform – firms must be transparent and justify why the price of products or services (over its lifetime), is fair in value – and not be hidden in lengthy documents or websites.[103] **Consumer understanding** requires clients are properly informed, with firms tailoring communications to the target

[97] Alice Klettner, 'Challenges for Regulatory Reform in the Finance Sector: Learnings from the Last Decade' (2019) 30(3) *Journal of Banking and Finance Law and Practice* 151, 163.
[98] Ibid.
[99] *FG22/5* (n 16) 26 [4.17].
[100] Ibid.
[101] *Legislative Design* (n 12) 280, 293.
[102] Honing products and services to a target market requires a sufficient level of granularity, that considers the characteristics, complexity, risk profile and nature of the service or product: *FG22/5* (n 16) 40 [6.19].
[103] *FG22/5* (n 16) 20 [3.12], 57 [7.9], 74 [8.12].

market's information needs, in a way they will understand and to "monitor, test and adapt" communications are effective.[104] **Consumer support** prevents "sludge practices" by removing unnecessary barriers and friction to access support, claim, complain or switch providers and involves paying greater attention to consumer vulnerabilities.[105]

i. Consumer understanding with behaviourally informed disclosure

In his assessment of financial advice practices, Commissioner Hayne stated that the "idea of 'disclosure' underpins the now teetering edifice of product disclosure statements".[106] Disclosure is information that the law requires firms to give to consumers and is relevant to most financial products.[107] Its role is to inform consumers and help them make good financial decisions.[108] However, studies have shown that the disclosure of the relevant information to consumers of financial products or services, does not translate to good decision-making.[109] Most financial products are inherently complex. From a psychological perspective, when individuals face a complex decision, "they respond automatically and unconsciously to try to simplify the decision-making process."[110] Firms can use strategies to profit from this behaviour. The FSRC uncovered that the Commonwealth Bank of Australia ('CBA'), were doing this with CCP insurance.[111] CBA customer, Irene Savidis, gave evidence that she was sold CCP insurance, despite being ineligible for the product because she was unemployed at the time of purchasing the insurance.[112] She was also told that it was "good for [her]', it would 'benefit' her, and it would 'help [her] in the long run if anything happened to [her]'.[113] The CBA then relied on the fact that their customers were provided with a copy of the product

[104] Ibid 25 [4.11], 74 [8.13], 80 [8.30]-[8.37].
[105] Ibid 20 [3.12], 93 [9.9]; *Grant Thornton UK* (n 19).
[106] *FSRC Final Report* (n 5) vol 1. 172.
[107] Australian Securities and Investment Commission, *Disclosure: Why it Shouldn't be the Default* (Report No 632, 14 October 2019) 3. ('*Disclosure: Why it Shouldn't be the Default'*).
[108] Ibid 4.
[109] Phoebe Tapley and Andrew Godwin, 'Disclosure (Dis)content: Regulating Disclosure in Prospectuses and Product Disclosure Statements' (2021) 38(5) *Companies and Securities Law Journal* 315, 315.
[110] Australian Securities and Investment Commission, *Regulating Complex Products* (Report No 384, January 2014) 19. (*'Regulating Complex Products'*).
[111] *FSRC Interim Report* (n 8) vol 2. 51.
[112] Ibid.
[113] Ibid 54.

disclosure.[114] Furthermore, a study conducted by ASIC into consumer engagement with long disclosure documents, revealed that only 20 per cent of consumers actually read the disclosure.[115] Such examples show "how comprehensive disclosure can exacerbate the problem by triggering the automatic and unconscious response described".[116] Similar problems have been identified in the UK's financial sector, producing negative outcomes for retail consumers.[117] The UK finance industry raised concerns "that overcommunication can result in communication fatigue, which produces poorer outcomes" with regulation mandating rigid disclosures that consumers never read. The industry urged the FCA to balance informing consumers and overcommunicating, requesting more flexibility with trialing communications that will work for consumers including digital methods, which vulnerable consumers depend.[118]

The complexity of disclosure in Australia is heightened by the interplay between the general tests, standards and requirements for disclosure.[119] This is compounded by the fact that there are often modifications to the primary legislation and delegated legislation.[120] This overly prescriptive approach makes it difficult for firms to comply. It also risks becoming a "tick the box" exercise for firms.[121]

Disclosure is among the most frequent areas that AFCA disputes are lodged. ALRC analysis suggests disclosure is one of the most unnecessarily complex areas of the *Corporations Act*, including in terms of prescriptiveness, use of legislative instruments, definitions, and exceptions and exemptions.[122] Disclosures that do not consider how consumers process information and behavioural biases will be

[114] Ibid 51-52: "In April 2015, as a result of an internal audit, CBA determined that approximately 64,000 customers who had purchased CCP insurance may not have been eligible to claim benefits under their policy in the event that they suffered temporary or permanent disability or involuntary unemployment".

[115] The study was based on "six separate quantitative who read or used research studies of consumers who read or used mandated disclosure and/or information. Research findings included products and services from various sectors delivered by a range of channels, see *Disclosure: Why it Shouldn't be the Default* (n 107) 20.

[116] *Regulating Complex Products* (n 110) 19.

[117] See, eg, House of Commons, *Changing Banking for Good; Report of the Parliamentary Commission on Banking Standards* (Fifth Report, 12 June 2013) vol 2, 98: "To open an HSBC packaged account, the consumer is expected to read 165 pages of information. No one is going to do that. As long as banks [...] provide so much gobbledegook that the real things you need to know are hidden, we will continue to have these problems".

[118] UK Finance Limited, 'A new Consumer Duty: UK Finance response' (30 July 2021) <https://www.ukfinance.org.uk/system/files/210730%20UK%20Finance%20response%20to%20FCA%20Consumer%20Duty%20consultation.pdf> 26 [95] ('*UK Finance Response'*)

[119] *Tapley and Godwin* (n 109) 324.

[120] Ibid.

[121] *The HIH Royal Commission* (Report, April 2003) 106.

[122] *FLS2* (n 4) 29 [129].

counterproductive and ineffective, affecting how consumers understand, assimilate and act on information they are given, resulting in poor choices. Consumers are prone to biases (deviations from rationality), mistakenly trusting their intuitions. These biases affect how they make choices, particularly in relation to financial products. Financial products are complex, requiring decisions to be made on risks, present/future tradeoffs, uncertainty and financial decisions are often emotional. Cognitive limitations with literacy and numeracy make product concepts and descriptions hard to evaluate. Behaviourally, consumers are susceptible to biases such as loss aversion (where losses are psychologically felt twice as much as gains), emotion and regret (buying products for peace of mind, such as insurance, when it is unlikely needed), over-extrapolation (making predictions on only a few observations), framing (overestimating value when information is presented in way that underemphasize cons), rules of thumb (oversimplifying decisions with heuristics), persuasion (being easily influenced by and trusting of likeable salespeople). These biases can be easily triggered and manipulated with sales processes, marketing and advertising. Product design and sales processes can accentuate the effects of consumer biases.[123]

The FCA's predecessor acknowledged the importance of incorporating insights from cognitive psychology and behavioural biases, and that it is indispensable for regulating financial markets and designing effective remedies. In this way, the UK Duty recognises how consumers are fallible and that in order to protect consumers, interventions will not be successful unless information is presented in the right way. Regulatory interventions must involve ameliorating the effects of biases ('bounded rationality'[124]) and question whether consumer choices are reasonable to be respected or reflect errors to be corrected. Interventions should address biases by adjusting how products are presented, prohibiting specific marketing practices and materials, allowing products to be sold only to certain types of consumers and banning certain product features that are designed to exploit.[125]

[123] Kristine Erta et al, 'Applying Behavioural Economics at the Financial Conduct Authority' (Occasional Paper No.1, Financial Conduct Authority, April 2013) 8-9, 15-20, 24-25 ('*Occasional paper'*).

[124] '**Bounded rationality**' was a concept proposed by Herbert Simon, a Nobel prize winning political scientist, in which people make partly irrational decisions due to cognitive, information and time limitations: Brendan Tully, 'The resilience of advice', *Professional Planner* (online, 16 November 2022) <https://www.professionalplanner.com.au/2022/11/the-resilience-of-advice/>.

[125] *Occasional paper* (n 123) 12, 16, 21.

Market forces cannot be left to reduce biases/consumer errors – regulation is needed. Intervening in financial markets in behaviourally informed ways doesn't just protect consumers but ensures market integrity and promotes effective competition.[126] Regulating to address consumer biases poses significant challenges for financial firms. The UK Duty is informative as it seeks to apply the right interventions in financial product and services design, marketing, sales processes, implementation and remedies. This will have implications on many of a firm's functions – its policies, business model, pricing, culture, shaping its communications, products and services delivery, guidance and ongoing support. There is no mechanical routine or "one size fits" approach to disclosure to be prescribed or followed, as each firm and its client are unique.[127] Nor is it effective to oversimplify.[128] Essentially, firms are on hook to provide good information, at the right time, that enables their clients to make sensible decisions.

Back in 2014, the Murray Inquiry identified the need for greater focus on consumer outcomes, underlining consumer education.[129] Consumer education and understanding in particular, necessitates a human interface to effectively enliven the outcome. In the UK and US, "financial coaching" is a familiar concept. Financial coaches are trusted educators and mentors who maintain long term client relationships aligning financial strategies throughout a client's life stages. It is a newer concept in Australia, but is viewed as a right step towards the adviser of the future and a way to build trust – cultivating relationships that are more values-based, than transactional.[130]

The FCA's mantra is "comprehension is key". Consumer understanding is considered the most onerous of outcomes, but offers particularly relevant learnings for Australia. Fundamentally, this outcome seeks to ensure the overall communications approach is clear, fair, not misleading and in a way the consumer will understand, so that advisers can equip consumers make "effective, timely and properly informed decisions". This approach applies broadly to all communications, including financial promotions, advertisements, conversations with clients, not just to specific disclosure documents. This outcome is

[126] Ibid 4, 52.
[127] *Disclosure: Why it Shouldn't be the Default* (n 107) 5.
[128] Ibid.
[129] *FLS5* (n 1) 17 [58]-[59]
[130] Christopher Mather, 'Silver linings playbook for the advice industry' *Professional Planner* (online, 21 November 2022) <https://www.professionalplanner.com.au/2022/11/silver-linings-playbook-for-the-advice-industry/>.

particularly onerous for it requires financial firms to tailor, monitor, test and adapt communications so that they remain suitable. Firms must satisfy a required threshold to "draft communications that are reasonably likely to be understood by the target market" and demonstrate it to the regulator's satisfaction.[131] The UK Duty rebalances the current situation, by placing more of an onus on firms to ensure customers understand the products or services they are purchasing. Firms must take an approach to disclosure that considers the characteristics of the clients in the target market, their financial capabilities, limited experience, vulnerabilities, and biases at each stage of the customer journey.[132] Firms that adopt a 'test and learn' approach to adapt communications with the aim of enhancing client understanding is considered consistent with the UK Duty and highly likely to achieve good outcomes.[133]

ii. **Price and value: Repricing with Pricing Principles and AI**

The ban on conflicted remuneration and cessation of grandfathered commissions finally forced a shift from sales-based to fee-based advisory and revenue models.[134] Fallout from the FSRC, combined with sharp rises in professional indemnity insurance, regulatory, technology and compliance costs, has led to the provision of financial advice becoming unviable for many financial firms. Financial advice operating models won't survive the cost pressures atop of the cash-flow consequences from the cessation of grandfathered commissions, without a strategic re-evaluation and substantial changes to pricing, delivery models and cost efficiencies in operations. If financial advice is to survive not least become profitable, firms must address new expectations and adapt with authentic service models focusing on client relationships and understanding consumer biases.[135]

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[131] Fox Williams, 'The FCA Consumer Duty A guide to the Consumer Duty' (YouTube, 7 February 2022) 00:25:00-00:27:00. <https://www.google.com/search?q=fox+williams+the+FCA+consumer+duty+you+tube&rlz=1C1YBXH_en-GBAU939AU940&oq=fox+williams+the+FCA+consumer+duty+you+tube&aqs=chrome..69i57j33i10i160l2.15681j0j7&sourceid=chrome&ie=UTF-8#fpstate=ive&vld=cid:a33173fd,vid:-LssZdWh48A>; FG22/5 (n 16) 71 [8.4], 76 [8.18], 81 [8.37].

[132] *FG22/5* (n 16) 80 [8.30]; *PS22/9* (n 2) 39. It also "applies to all communications provided to consumers. This includes verbally, such as during conversations with advisers, online, in letters or product terms and conditions", see ibid 51.

[133] *FG22/5* (n 16) 91 [8.73]

[134] *FSRC Final report* (n 5) vol 1. 132

[135] Mohammed Abu-Taleb, Afzalur Rashid and Syed Shams, 'The Hayne Royal Commission and financial planning advice: A review of the impact on the operating model of financial advice firms' (2021) 6(1) *Financial Planning Research Journal* 75-76, 80 *('A review of the impact')*.

Indeed, regulation greatly affects the cost to serve and shapes the way financial firms run their businesses.[136] The compliance burden is a significant challenge, with 25 per cent of advisers expected to leave the industry in the next 5 years. "[T]he move to self-licensing has slowed over the past year as advisers begin to weigh up the benefits with the additional costs and compliance challenges …"[137]. The industry has perennially struggled to provide financial services to greater than 20 per cent of the Australian adult population.[138] Most Australian consumers are not willing to pay what it costs to prepare advice which is in excess of $5,000. Research suggests they are not prepared to pay more than one-tenth of this price (between $340-500), whereas the price typically charged by financial firms is between $1,500 and $2,900 – thereby not charging the full cost as an upfront fee. [139] Yet firms will slowly exit the market if profits cannot be made. In turn, fewer firms in the market serves to make financial advice less accessible and affordable for the average Australian. There is a growing "advice gap" (mismatch between demand and supply). While the demand for advice grows, there are less advisers to supply advice, as many advisers are also exiting the industry due to factors relating to the educational, training and ethical standards introduced in 2017.[140]

Market interventions such as price controls in the form of price caps that keep prices artificially low seem well-intentioned but do not work, creating shortages by interfering with the rationing function of price in competitive markets.[141] Market forces should be left to promote effective competition on quality and price. Firms must be able to pursue their legitimate commercial interests, so must find better economic models to provide advice.

Reducing the compliance burden, as the industry urges, is not a cure-all for making advice affordable, nor would such a solution necessitate advisers passing on savings in lower cost advice. Evidently, there are numerous variables behind the rising costs of advice – the cost pressures are not simply down to the

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[136] Australian Government the Treasury, *Quality of Advice Review* (Issues Paper, March 2022) 10 [3.2] ('*Issues Paper'*).

[137] Chris Dastoor, 'Quarter of advisers plan to leave industry within five years', *Professional Planner* (online, 5 September 2022) <https://www.professionalplanner.com.au/2022/09/quarter-of-advisers-plan-to-leave-industry-within-five-years/>:

[138] Simon Hoyle, 'Affordability and accessibility of advice unlikely to improve: CoreData research'*, Professional Planner* (online, 29 July 2022) <https://www.professionalplanner.com.au/2022/07/affordability-and-accessibility-of-advice-unlikely-to-improve-coredata-research/>.

[139] *Issues Paper* (n 136) 9 [3.2]

[140] *A review of the impact* (n 135) 83, 85

[141] Jacqeline Murray Brux, *Economic Issues and Policy* (Cengage Learning, 6th ed, 2016) 71, 178

compliance burden. Financial firms will need to focus on a number of areas beyond compliance, such as technology, research and education to enhance their client value propositions.[142] Importantly, alternative business models and advice delivery mechanisms such as digital advice, can be both welfare-enhancing and provide a more meaningful option for lowering the cost of advice. [143] Analysts at KPMG and the Financial Planning Association CEO, Dante De Gori, agree that to reduce the cost of advice, improve profitability and better outcomes for consumers, there is an overwhelming need for firms to create efficient cost-to-serve models with scaled advice to clients (instead of providing traditional comprehensive advice), through direct distribution, simple and transparent advice platforms and technology solutions. Digital advice is expected to increase by 43 per cent each year over the next five years and may be the only low margin model for the mass market to survive the long run.[144]

In the EU, firms sought to reduce regulatory costs by moving outside of regulation with financial innovations in technology, but technology can be fallible. Thus, regulators must ensure consumer protections are in place, with an expectation that innovations achieve better consumer outcomes.[145] Despite cost advantages, the Australian financial industry is cautious about providing digital advice solutions, purporting consumer demand and preferences, associated compliance concerns were key impediments. Digital advice is understood in Australia as "automated financial advice delivered through technology without the direct involvement of an individual adviser". However, consumer demand and preferences might improve if only the advice construction component was generated digitally, with advice delivery provided by human advisers – thereby, humans dealing with humans.[146]

The advice construction process can be handled by artificial intelligence (AI), with advice process stages such as initial engagement, information gathering, advice formulation and documentation driven by AI. AI is already used for data collection required for Know Your Client (KYC), Design and Distribution

[142] *A review of the impact* (n 135) 84
[143] Australian Law Reform Commission, *Legislative Framework for Corporations and Financial Services Regulation – New Business Models, Technologies, and Practices* (Background Paper FSL7, October 2022) 16 [71], 17 [74] ('*FSL7*')
[144] *A review of the impact* (n 135) 81-83
[145] *FLS7* (n 143) 17 [74], 19 [82], 20 [88]
[146] *Issues Paper* (n 136) 9[3.3]

obligations (DDO) and National Consumer Credit (NCC) obligations.[147] Furthermore, design principles can be governed by code (algorithms) to address issues such as conflicts, or indeed achieve similar principles as the UK Duty's cross cutting rules – good faith, avoiding foreseeable harm, enabling and support financial objectives.[148] Rules that govern technology are encoded in programs that are referred to as "smart contracts". Smart contracts, along with block chain and distributed ledger technology (DLT) can be used to remove the need for trusting advisers – as the advice construction process is managed by computer algorithm (not humans where there is always a risk of conflicts of interests). [149] Options such as these are especially important in areas where prior consumer outcomes have been sub-optimal.

Additionally, auto-generation of advice documentation is a massive time saver as this leaves advice delivery, implementation and service to the financial adviser. As such, it is important that regulatory frameworks are drafted in a technologically neutral manner. The regulatory principle of "technology neutrality", endorsed by the Wallis and Murray inquiries, seeks to encourage financial innovations by ensuring that old ways of conducting business are not entrenched in law.[150] Murray explained that adaptive regulation should be principles-based, focusing on outcomes and functional in design, as technology-specific regulation impedes innovation. This approach to regulation not only allows regulators improve the longevity of regulation and manage risks, but also reduces compliance costs for financial providers and allows for greater flexibility to adapt to changing consumer expectations.[151]

One cannot overlook that as the world becomes digitalised, there is increasing concern that financial services may use online choice architecture ('OCA') to exploit behavioural biases.[152] People's behavioural biases are said to be "exacerbated in the online world".[153] Significantly, when people are online, they tend to act quicker, have short attention spans, scan and skim, instead of reading.[154] Therefore, firms can use

[147] Hong-Viet Nguyen, 'More Data, Less Risk - How Australian Banks and their Customers Ended Up With a Greater Duty of Care" *Lexology Law Business Research, Ashurst* (Web Page, 16 October 2022) <https://www.lexology.com/library/detail.aspx?g=6eeb3733-114f-4bce-8115-9eda08d75c35>
[148] *FLS7* (n 143) 9 [35]
[149] Ibid 11 [49, 51]
[150] Ibid 14 [60, 62], 15 [64, 66]
[151] Ibid 16 [68]
[152] Competition and Markets Authority, 'Online Choice Architecture: How Digital Design Can Harm Competition and Consumers' (Discussion Paper CMA155, April 2022) vi.
[153] Ibid 4.
[154] See Ibid.

tactics that encourage consumers not to act in their best interests.[155] In particular, vulnerable customers may be targeted by OCA.[156] Evidence from Australia indicates that short-term lending services are targeted at vulnerable consumers.[157] The online world makes it easier for firms to exploit these behavioural biases, prompting consumers to make decisions that are not in their best interests. Taking the short-term credit example, it is evident that firms have taken advantage of gaps in the current regulatory structure.[158] ASIC responded by imposing conditions on short-term lenders.[159] What this truly highlights is the reduced flexibility of the current rules-based architecture. [160] Under the UK Duty, there would be no such requirement of ASIC to amend the law. This is because under the principles-based approach there is more flexibility, and the law can be applied to different situations.[161] Therefore, the UK Duty provides a solution for not only the immediate concerns in the industry, but also the future.

It also highlights the need for a disciplined approach to AI, underpinned by design principles that protect consumers from harm. With digital advice to drive down costs, design principles are crucial to guide firms towards positive outcomes – by building in rules to address conflicts and prevent exploitation of behavioural biases. The UK Duty is informative, with repricing principles based on "fair value". Offering fair value requires determining inherent value of financial products and services. Manufacturers and distributors must not distribute products unless they are satisfied they are providing fair value. This means ensuring there is a relationship between the total price charged over the life of the product and service, overall benefits received such as quality, customer service, how well it meets the client's needs, what they find valuable, potential returns and pay-outs. It does not mean offering low prices when it is at the expense of other factors such as quality. If the product or service is transparently sold, designed to meet the target market's needs, clients are properly supported and can easily choose to switch or exit if it no longer meets

[155] Ibid 33: "The three most prominent concepts are dark patterns, a set of (deliberately) manipulative practices identified by user experience (UX) designers; sludge, which makes it hard for consumers to act in their interests (such as adding friction to cancellation processes); and dark nudges, which make it easy for consumers to take action that is not in their interests (such as one-click purchases)".
[156] Ibid 44.
[157] Australian Financial Complaints Authority, Submission No 5 to ASIC, *Consultation Paper 316: Using the Product Intervention Power: Short Term Credit* (August 2019) 3.
[158] Ibid 1.
[159] Australian Securities and Investments Commission, '22-182MR ASIC makes product intervention orders for short term credit and continuing credit contracts' (Media Release, 14 July 2022).
[160] *Legislative Design* (n 12) 286.
[161] Ibid 285.

their needs, then it is more likely to reflect fair value and comply with the Duty. The UK Duty lays out guidance that firms must consider when assessing fair value – consumers must have information about benefits and limitations, the expected total price they will pay and ability to switch to another product or service if they prefer. To demonstrate fair value, firms must assess and substantiate the costs the firm incurs to produce and distribute the product or service, the price charged is reasonable with comparable products in the market, and if an outlier to check design features, risks, functional and support elements for reasonableness. Firms must regularly monitor and assess value throughout the life of the products or services. If it ceases to provide fair value then firms must take remedial actions to mitigate or prevent detriment, either by improving value or withdrawing the product or service from the market. The UK Duty does not permit unreasonable exit charges – such charges must be fair and reflective of the underlying costs of terminating the agreement.[162]

The UK regulator acknowledges that firms must take into account their costs and permits differential pricing for separate groups of consumers. However, a firm that charges lower prices for new consumers than for existing, will not comply with the UK Duty. Nor will a firm that charges different prices for different products and services, yet provides the same benefits. Firms must also consider the impact of remuneration subsequently added by each firm in the distribution chain in the context of the overall value of the product.[163]

The FCA does not place price caps or limits on profit margins, but if firms can achieve lower costs through economies of scale, it does expect savings to be passed onto consumers.[164] The UK finance industry felt the FCA were right to rule out pricing interventions, as firms compete hard with each other to win consumers. In a competitive market, higher prices aren't necessarily unfair - Consumers will consider various factors, not just price.[165] The industry expects the price and value outcome will be effective for targeting unfair pricing practices, particularly sludge practices that take advantage of behavioural biases as it is inherently inconsistent with acting in good faith, and as such proper for the FCA to intervene.[166]

A price and value outcome would represent substantive pricing reform for Australian financial services, which is more concerned with banning conflicted remuneration, where advice fees are based on

[162] *FG22/5* (n 16) 56 [7.3-7.4, 7.7], 57 [7.10], 58 [7.14, 7.17], 59 [7.24-7.25], 62 [7.30].
[163] Ibid 63 [7.33], 64 [7.38], 69 [7.56]
[164] *Fox Williams* (n 131) 00:22:00-00:25:00; *FG22/5* (n 16) 64 [7.38]
[165] *UK Finance response* (n 118) 33 [133-34]
[166] Ibid 33[135]

compliance and other costs, not offering fair value.[167] Commissioner Hayne made recommendations following the FSRC that included the annual renewal of ongoing fee arrangements, conflicted remuneration and the banning of grandfathered commissions. The shift from trail commissions paid by product issuers (that posed no service obligation on advisers), to ongoing fee arrangements under the Future of Financial Advice reforms (FoFA) were meant to impose obligations and expectations for service. Yet it failed, with "fees for no service" brought to light amid the FSRC. To achieve some level of price and value transparency (to give consumers better visibility of the ongoing fees paid to advisers and value received), Hayne recommended that annual advice arrangements be reviewed each year. In place of automatic fee deductions from investment funds, advisers had to engage clients to understand their needs better, with the annual renewal of ongoing fee arrangements.[168] Yet, the UK price and value outcome would clearly prohibit "fees for no service" since it lacks "fair value".[169] Additionally, disclosing fees isn't enough in the UK – firms must assess fair value and where it is not, price or benefits offered must be amended or redress provided.[170]

iii. **Consumer support**

A key focus of the UK Duty is to eliminate the use of "sludge practices". Such practices are defined by the FCA as, "an excessive friction that hinders consumers from making decisions in their interests, by taking advantage of their behavioural biases".[171] An example of this is firms making it more difficult for a customer to cancel or switch a service, than signing up for it. [172] As shown by the FSRC, such practices have been used in the Australian financial industry. Evidence before the FSRC revealed that Freedom Insurance had retention strategies in place to prevent customers from cancelling their policy.[173] Present bias was one behavioural bias Freedom exploited. It is understood that people seek immediate gratification, thus, they will overestimate the present value of something, without considering the long-term

[167] *Proposals for Reform* (n 48) 29 [5.1]
[168] *A review of the impact* (n 135) 82
[169] *FG22/5* (n 16) 56 [7.1], 57 [7.13].
[170] Ibid 56 [7.3], 67 [7.49].
[171] Financial Conduct Authority, *A New Consumer Duty* (Consultation Paper 21/13, May 2021) 9 ('*CP 21/13'*)
[172] *FG22/5* (n 16) 101.
[173] *FSRC Final Report* (n 5) vol 2, 311-312: "Information provided by Freedom to ASIC indicated that over a 12-month period, Freedom had received an average of 72 cancellation requests a day, and that policyholders had only succeeded in cancelling their policies in 28.5% of calls made to Freedom." (*'FSRC Interim Report'*)

consequences.[174] During the cross-examination of Freedom's former Chief Operating Officer, Craig Orton, it was put forth that Freedom offered customers a 12-month free period, knowing that customers would not go to the trouble of cancelling the product.[175] This is a pricing strategy, that exploits people's tendency to procrastinate.[176] Furthermore, Freedom manipulated emotions of regret to dissuade customers from cancelling their policy. The Freedom retention call guide required retention agents to ask questions such as; "what plans do you have in place once the cover is removed to cover the costs of the funeral should you pass away?".[177] Behavioural economics suggest that people will be willing to pay a premium for products in these situations to deal with their emotions.[178]

Whilst the case of Freedom demonstrates a level of gross misconduct, it shows the type of 'sludge practices' the FCA is trying to prevent in UK, must also be addressed in Australian financial services. Under the UK Duty, the practices of Freedom would be considered an unreasonable barrier under the consumer support outcome, as it would prevent customers from pursuing their financial objectives.[179] Firms must support consumers use and realise the benefits of the products and services they bought as reasonably anticipated, assist them to pursue their financial objectives and act in their own interests.[180] The regulation offers considerable guidance on the standard of consumer support expected from financial firms. It makes clear the outcome is not limited to after sales service – consumers must be supported when they make an enquiry, complaint, claim or switch providers. For instance, firms building in appropriate "friction points" to mitigate risk of consumer harms, such as giving consumers ample time to make important decisions, to fully assess and understand options and risks, or nudges to help prevent poor decisions. Monitoring and acting promptly to address any shortcomings in support they are offering, in particular, ensuring vulnerable consumers are not disadvantaged. It must be as easy for consumers to change or exit a product as it was

[174] *Occasional paper* (n 123) 53. See especially Paul Heidhues and Botond Kőszegi, 'Exploiting Naïvete about Self-Control in the Credit Market' (2010) 100(5) *The American Economic Review* 2279, 2279.
[175] Banking Royal Commission, 'The COO of Freedom Insurance Testifies at the Banking Royal Commission' (YouTube, 14 September 2018) 03:38:20 <https://www.youtube.com/watch?v=hxHA8ONtTuM>.
[176] *Occasional paper* (n 123) 54.
[177] Transcript of Proceedings, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Day 52, Commissioner Kenneth Hayne, 11 September 2018) 5510.
[178] *Occasional paper* (n 123) 56.
[179] *FG22/5* (n 16) 101.
[180] Ibid 92 [9.2], 93 [9.5]

to open the product. This also means that firms must also ensure that consumers do not face unreasonable barriers and additional costs, such as unreasonable exit fees.[181]

With cross-cutting rules as their ballast, firms must design effective processes and channels to enable efficient support consumers, regularly monitor levels and take action to address shortfalls in support. For instance, by ensuring well-resourced helplines that include real-time human interfaces, well-designed websites that are easy to navigate, proportionate focus paid to pre, during and after-sales support, staff capable of dealing with non-standard matters and responding with care and flexibly to vulnerable consumers.[182] Such measures are equally important in Australia. Furthermore, a consumer support outcome capable of guiding behaviour beyond the reach of existing False, Misleading, and Unconscionable Conduct, or Unfair Contract Terms provisions under the *Australian Securities and Investments Commission Act 2001* (Cth) and *Corporations Act 2001* (Cth), would be a significant advancement. For if sludge practices are not caught within the limits of these existing laws, there aren't effective consequences and avenue for redress.[183] Such an outcome is all the more important when one takes into account issues of how regulatory arbitrage can inhibit compliance – how sludge practices can *fall between two stools* by taking advantage of loop-holes of existing legislation or by arguing more favourable regulation over less.

iv. Products and services governance

Unlike the other three outcomes, the UK's product and services outcome is similar to Australian financial product governance. Australia would seem ahead of the game having already shifted to outcome-based product regulation. After a lengthy delay, principles-based Design and Distribution obligations (DDO) and Product Intervention Powers (PIP) were finally added to ASIC's consumer protection toolkit in October 2021, requiring Australian issuers and distributors of "financial and credit products" to have product governance arrangements in place. Similar to the UK products and services outcome, DDO requires a consumer centric approach to the design and distribution of products. This includes making a target market determination (TMD) for the distribution of each product and providing this to product distributers, taking

[181] *Fox Williams* (n 131) 00:27:00-00:29:00; *FG22/5* (n 16) 92 [9.3], 93 [9.9], 98 [9.19-9.24]
[182] *FG22/5* (n 16) 93 [9.10], 95 [9.12], 96 [9.18]
[183] For **Misleading and deceptive conduct**, see *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act 2001*') ss 12DA and 12DB, *Corporations Act 2001*, s 1041H; For **Unconscionable conduct**, see *ASIC Act 2001*, Subdivision C; For **Unfair Contract Terms**, see *ASIC Act 2001* s 12BF.

reasonable steps to monitor distribution according to the TMD, reviewing the TMD for appropriateness, collecting and keeping records and notifying ASIC about significant inconsistent dealings. The TMD must consider the nature of the product, customer circumstances and made at a granular level in order to correctly identify consumers. PIP gives ASIC the power to ban products where there is a risk of significant consumer harm, including civil and criminal penalties. However, unlike the UK Duty product and services outcome, DDO is limited to products regulated by ASIC with ever expanding exemptions, making the intent and application of the DDO regime uncertain.[184]

One year into the design and distribution obligations (DDO) regime, ASIC Deputy Chair, Karen Chester, warns the obligations are not "set-and-forget". The regulator's focus has now shifted to compliance mode, indicating that products subject to FSRC case studies would not pass the muster under the DDO regime. With an initial focus on products of most harm (crypto products, buy now pay later, credit cards, superannuation and managed investments), ASIC has already used stop order powers to prevent the sale of products of three financial firms. Not dissimilar to the UK outcome, firms must "take a consumer-centric approach to a financial product's lifecycle", requiring "products to be designed and distributed with clear and contemporary consideration of the objectives, financial situation and needs of the consumers being targeted". Firms must collect and analyse data to monitor and improve consumer outcomes – "It is critical that companies get their TMDs and product governance settings right and have robust and meaningful data to test and monitor settings" says Chester. ASIC will be looking at how firms respond to any poor outcomes identified with necessary changes to refine design and distribution of products.[185]

The UK outcome however, appears more onerous and has broader coverage than the equivalent Australian obligation (DDO) and therefore, will likely have a better effect on reducing consumer detriment.

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[184] Rosalyn Teskey, 'Design and Distribution Obligations (DDO) and Product Intervention Powers (PIP) - Implications of the new regime' *Deloitte* (Web Page) <https://www2.deloitte.com/au/en/pages/audit/articles/design-distribution-obligations-product-intervention-powers.html>; 'Target market determination: renewing the focus on customer outcomes' *Deloitte Touche Tohmatsu*, (Web Page) 1-3 <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/audit/deloitte-au-audit-target-market-determination-240419.pdf>; 'Update amendment to the design and distribution obligations' *Australian Government the Treasury* (Web Page) 1-2 <https://treasury.gov.au/sites/default/files/2021-09/c2019-t408904-206688.pdf>

[185] Karen Chester, 'Product design and distribution: The consumer is key' *Australian Securities and Investments Commission* (Web Page, 9 November 2022) <https://asic.gov.au/about-asic/news-centre/articles/product-design-and-distribution-the-consumer-is-key/>

The UK finance industry needed no convincing that products and services must be fit for purpose and only sold to clients within their target market.[186] The scope of the UK Duty is broader applying to services, as well as products, and places greater emphasis on the different requirements for firms that play a role in the distribution chain - Products and services manufacturers and distributors must work together to safeguard actual and potential consumers in the TMD. The UK Duty offers the Australian regime further guidance and greater protections on what is and isn't consistent with good product and services outcomes. Similar to the Australian regime, product manufacturers must identify the target market for their product and/or service at a granular level to ensure the needs, characteristics and objectives of the target market are compatible, but the UK outcome goes a step further in that firms must also consider any consumers with characteristics of vulnerability in the TMD and take into account their different needs. Firms must also test product and services to ensure they are meeting the needs of the target market, select appropriate channels for distribution, provide information to distributors to help them understand the target market, regularly review and take actions to mitigate harms that might arise. An extensive set of obligations are also imposed on distributors, who need to develop distribution arrangements based on the information received from manufacturers on the needs of the TMD, their identified distribution strategy, regularly review and adapt distribution arrangements to mitigate risks of harm. There is also the concept of proportionality in which obligations are less onerous for less complex products and services with less risk.[187] The UK finance industry called for this proportionality when applying the UK Duty based on the complexity and nature of products and services offered, the size and relative sophistication of their clients – it seems they were heard.[188]

[186] *UK Finance response* (n 118) 29 [111]
[187] *Fox Williams* (n 131) 00:17:50-00:22:00.
[188] *UK Finance response* (n 118) 11 [25]

F. Trust is the currency that matters most

Poor conduct is often the consequence of poor culture.[189] Prior to the FSRC, the Australian banks rejected the proposition that there were widespread cultural issues within their institutions.[190] In 2016, Former NAB CEO, Andrew Thorburn, stated that issues in relation to poor financial advice by NAB, were not a "systemic issue" and that the "vast majority" of the planners were doing "the right thing".[191] Firms had become reluctant to take responsibility for bad consumer outcomes, alternatively, blaming it on a "few bad apples".[192] However, Commissioner Hayne made no mistake in identifying that those who managed and controlled the entities were in fact responsible for the widespread misconduct in the financial services industry.[193] The industry had become driven by greed, with total disregard for the law and consumers.[194] In their search for their "share of the customers wallet", banks had initiated a sales culture that incentivised individuals and institutions in the name of short-term profit.[195] The root cause of these problems stemmed from "the systems, processes and culture cultivated by the entity".[196] These findings eroded consumer trust. It is suggested that markets need a "social licence to be allowed to operate, innovate and grow".[197] The misconduct uncovered by the FSRC has called this "social licence" into question.[198] In an industry where "trust is the currency that matters the most"[199], it must surely raise alarm

[189] Greg Medcraft, 'Corporate Culture and Corporate Regulation' (Speech, Law Council of Australia BLS AGM Seminar, 20 November 2015) <https://download.asic.gov.au/media/3461374/corporate-culture-and-corporate-regulation-speech-published-23-november-2015.pdf> 2.

[190] Alexandra Beech, 'Banking inquiry: NAB boss confirms no senior executives sacked over financial advice scandal', *ABC News* (online, 16 October 2016) <https://www.abc.net.au/news/2016-10-06/nab-apologises-for-dodgy-financial-advisors-during-bank-inquiry/7907840>.

[191] Ibid.

[192] Roman Tomasic, 'Exploring the Limits of Corporate Culture as a Regulatory Tool — The case of Financial Institutions' (2017) 32 *Australian Journal of Corporate Law* 211, quoting Michael Bennet and Richard Gluyas, 'Leading by example key to healthy corporate culture', *The Australian*, 23 March 2016.

[193] *FSRC Final Report* (n 5) vol 1, 333

[194] Vicky Comino, 'Corporate Culture is the 'New Black'- Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions' (2021) 44(1) *UNSW Law Journal* 295. See especially, *FSRC Interim Report* (n 8) vol 2, xix. See also *FSRC Final Report* (n 5) vol 1, 401.

[195] *FSRC Interim Report* (n 8) vol 2, xix.

[196] Ibid 87.

[197] Mark Carney, 'Three Truths for Finance' (Speech, Harvard Club UK Southwark Cathedral dinner, 21 September 2015) <https://www.bis.org/review/r150922a.htm> 5.

[198] *Comino* (n 194) 317.

[199] *Beech* (n 190)

bells that only 34 per centtof customers believe that the financial services industry can be trusted.[200] The Australian community has developed a perception that the industry does "not value their customers, but instead takes advantage of them".[201]

There have been many attempts since 2001 to reform the industry to enhance consumer protection, promote transparency and trust, raise the quality of advice and education standards.[202] From its sales-driven, commission-based past, the culture of life insurance agents endured as the banks, superannuation and insurance institutions expanded into wealth management decades later. A number of early design decisions taken with CLERP 6 contributed to poor culture. Financial advisers were not required to be independent from product manufacturers, nor were fiduciary duties or other general law obligations attached to their authorisation. This, along with the shortcomings of the "one-stop-shop" vision of vertical integration, limited competition, created a bias towards selling the manufacturer's products over other products that may have been better suited for the consumer.[203]

Poor culture and misconduct in the financial industry is not unique to Australia.[204] In the years prior, the 2007-2008 global financial crisis (GFC), uncovered similar truths in the UK banking sector.[205] When the Big Five banks became "universal banks" in 1986, they expanded beyond their normal course of business, from taking deposits and granting loans, to delivering a variety of financial services.[206] They began conducting investment banking, which was more profitable.[207] Investment banking techniques were

[200] Brad Milliken, Tom Alstein and Sharon Sun, 'Restoring trust in financial services in the digital era' (Research Report, Deloitte Digital and Salesforce, July 2018) <https://www2.deloitte.com/au/en/pages/financial-services/articles/restoring-trust-financial-services-digital-era.html> 8.

[201] Wayne Byres, 'Is Self-Regulation Dead' (Speech, the 2019 Banking and Finance Oath Conference, 8 August 2019) <https://prod.apra.shared.skpr.live/self-regulation-dead>.

[202] *A review of the impact* (n 135) 76

[203] *FSRC Final Report* (n 5) vol 1, 119, 122, 124-126; **CLERP 6** is the Corporate Law Economic Reform Program Paper No. 6 released by Treasury in April 1997.

[204] *A review of the impact* (n 135) 79

[205] André Spicer et al, A *Report on the Culture of British Retail Banking (*Research Report, New City Agenda and Cass Business School, City University London, 2014) 24.

[206] Ibid 17, 20. See also, Francesco De Pascalis, 'Sales Culture and Misconduct in the Financial Services Industry: An Analysis of Cross-Selling Practices' (2018) *Business Law Review* 39(5) 151.

[207] Richard Samuel, 'Banks, Politics and the Financial Crisis: A Demand for Cultural Change (Part 2)', *Oxford University Press Blog* (Blog Post, 18 June 2016) <https://blog.oup.com/2016/06/banks-politics-finance-law-part-2/>.

engrained into retail banks, as such, the previous "relationship culture" was replaced by a "sales culture."[208] A former employee from HSBC told the UK Future of Banking Commission:

> *"You had to sell, whether it was for the customer or not. You'd like to think that if you knew the customer you could sell them the right product, but some people didn't do that because they were trying to reach a target and they sold whatever they could."*[209]

Inevitably, customers were exploited. Two scandals that stood out were the mis-selling of Personal Protection Insurance (PPI) and the manipulation of the London Interbank Offered Rate (LIBOR).[210] Much of this was attributed to profit seeking greed.[211] All too similar to what was uncovered in Australia years later.[212] All of which was at the ultimate expense of the consumer.

In the most part, regulation is created to serve public interests.[213] The goal is to strike the correct balance between the "safety and fairness of the financial system and encouraging the development of financial markets."[214] Therefore, where the financial industry proves they are unable to self-regulate in accordance with public policy goals, they must expect regulatory interference.[215] If the 'tone' or corporate culture of an entity is "set at the top", as alluded to by Commissioner Hayne, then it is 'the top' (senior managers and executives) that should be held accountable.[216] In Australia, the Banking Executive Accountability Regime (BEAR) was introduced in 2018, which was modelled on the Senior Managers and Certification Regime (SM&CR) from the UK.[217] The SM&CR was implemented in response to the

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[208] 'Valued transaction volumes and margins over relationships – i.e., numbers over people. Profit was accordingly measured over shorter time-cycles', see Ibid. See also, *Spicer* (n 205) 20-21.
[209] *Spicer* (n 205) 20.
[210] Ibid 25.
[211] Georgette Fernandez Laris, 'Scandal or Repetitive Misconduct: Payment Protection Insurance (PPI) and the not so Little "Skin in Lending Games"' (2020) 9(1) *Seven Pillars Institute: Moral Cents* 4, 13.
[212] For example, the CBA mis-sold marginal loans to retail customers to invest in financial products recommended by Storm Financial (2008); the CBA used unethical tactics to avoid paying out legitimate insurance claims; Westpac contravened AML/CTF on over 23 million occasions (2019), see, eg, *Comino* (n 194) 296, 300.
[213] *Klettner* (n 97) 168
[214] Ibid 168.
[215] Ibid.
[216] *FSRC Final Report* (n 5) vol 1, 335.
[217] Justice Ashley Black, 'Misconduct in Banking and Financial Services: Some aspects of the Hayne Royal Commission' (Speech, 2020) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Speeches/Black_2020.pdfpg> 17.

Parliamentary Commission for Banking Standards (PCBS), which recommended a new framework for senior management accountability.[218] Similarly, the BEAR set out to establish "clear and heightened expectations of accountability for authorised deposit-taking institutions (ADIs), their directors and senior executives, and to ensure there are clear consequences of a material failure to meet those expectations."[219] Whilst the two regimes are similar, they have key differences. The BEAR only applies to conduct that is systemic and prudential in nature, and "does not tie accountability measures to poor consumer outcomes".[220] In the UK, the Prudential Regulation Authority (PRA) and the FCA oversee the SM&CR, therefore, covering prudential and consumer matters.[221] The SM&CR applies to dual-regulated insurers (those regulated by PRA and FCA) and solo-regulated firms (those regulated by FCA only).[222] Whereas the BEAR is restricted to banks.[223] The BEAR is limited in scope in terms of who it can regulate, and what it can regulate. This led to the Consumer Action Law Centre (CALC) stating, "... this legislation creates a baby BEAR, but consumers of financial services needs a grizzly".[224] Commissioner Hayne recommended that the BEAR should be jointly administered by ASIC and APRA and should eventually extend to all APRA regulated entities.[225] This echoes the approach in the UK. In September 2022, the Albanese government re-introduced the new Financial Accountability Regime (FAR) to parliament.[226] The FAR is set to take the Commissioner's recommendations into account by extending the scope of the BEAR to all APRA regulated entities and provide for the joint administration between APRA and ASIC.[227] The SM&CR, BEAR and if implemented, the FAR, have a significant role to play in holding executives accountable.[228] Arguably, their

[218] 'Senior Managers and Certification Regime', *Financial Conduct Authority* (Web Page, 22 September 2022) <https://www.fca.org.uk/firms/senior-managers-certification-regime> ('*SM&CR'*)
[219] Australian Prudential Regulation Authority, 'Implementing the Banking Executive Accountability Regime' (Information Paper, 17 October 2018) 4.
[220] Senate Economics Legislation Committee, Parliament of Australia, *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 [Provisions]* (Final Report, November 2017) 22.
[221] *SM&CR* (n 218)
[222] Ibid.
[223] Evidence to Economics Legislation Committee, Parliament of Australia, Canberra, 11 August 2017), 30 (Greg Medcraft, Chairman, Australian Securities and Investments Commission).
[224] Evidence to Economics Legislation Committee, Parliament of Australia, Canberra, 17 November 2017, 1 (Katherine Temple, Senior Policy Officer, Consumer Action Law Centre). (*'Economics Legislation Committee'*)
[225] See recommendations 4.12, 6.6 and 6.8, *FSRC Final Report* (n 5) vol 1, 34, 39.
[226] Stephen Jones MP, 'Hayne Royal Commission Recommendations Advanced' (Media Release, 8 September 2022).
[227] Ibid.
[228] *Black* (n 217) 18.

design provides an incentive for senior executives to involve themselves in improving conduct within the firm.[229]

In the UK, the Duty is set to operate in tandem with the SM&CR, to effect cultural and behavioural change in the financial industry.[230] On one hand, the SM&CR sets the standard of conduct for individuals working in financial services and increases "individual accountability for senior staff".[231] On the other hand, the UK Duty raises this standard of conduct expected of individuals and senior managers.[232] In line with the Duty, a new individual conduct rule has been introduced. The new rule 6, in the Code of Conduct Sourcebook (COCON), will require all conduct rules staff to "act to deliver good outcomes for retail customers", where the activities of the firm fall within the scope of the Duty.[233] Previous COCON rule 4, which required senior managers to "pay due regard to the interests of customers and treat them fairly", will be disapplied where the new rule 6 applies.[234] This is a more onerous responsibility for senior executives in terms of producing positive outcomes for retail consumers. In contrast, such a standard is non-existent under the BEAR. [235] Whilst the FAR will enable co-operation between ASIC and APRA, as recommended by Commissioner Hayne, there still would not be a rule that directly addresses consumer outcomes. If the "accountability obligations go to the heart of ensuring that the community can have trust in authorised deposit-taking institutions and the way they conduct their business",[236] as expressed in the second-reading speech for the BEAR, then senior executives must be held accountable for conduct resulting in bad outcomes for consumers.

Australians expect corporate Australia to foster a culture of ethical behaviour, to promote good leadership and decision-making. Although some would argue that cultural concerns are best addressed by the judicature than legislatures, Hayne laid out soft-law guidelines with six principles to achieve appropriate

[229] Ibid.
[230] Sheldon Mills, 'What firms and customers can expect from the consumer duty and other regulatory reforms' (Speech, Consumer Protection in Financial Services Summit, 29 September 2022).
[231] Financial Conduct Authority, '*Consultation Papers: CP 17/25 and CP 17/26 Individual Accountability: Extending the Senior Managers and Certification Regime: Cost-Benefit Analysis*' (July 2017) 9.
[232] *FG22/5* (n 16) 113.
[233] Ibid.
[234] *FCA 2022/31* (n 16) 60-61 [1.1.7E].
[235] *Economics Legislation Committee* (n 224) 2 (Erin Turner, Director of Campaigns and Communications, CHOICE).
[236] Commonwealth, *Parliamentary Debates,* Senate, 7 February 2018, 342 (Mathias Corman, Senator).

culture and good governance, including 76 recommendations for deep changes for financial advice to be regarded as a profession. The recommendations concentrated on culture, conduct, management accountability, governance, remuneration and the regulators' performance – remarking that 'culture, governance and remuneration march together'.[237]

In 2017, measures designed to lift professionalism, ethical and education standards were legislated, with the Financial Adviser Standards and Ethics Authority (FASEA) established to develop a code of ethics, compulsory education, exam and professional year requirements.[238] Yet Hayne remarked that consumer confidence was misplaced in many cases heard at the FSRC, identifying three key issues with the provision of financial advice. Fees for no service, poor advice that left clients worse off and an ineffective disciplinary system. These would need to be addressed before financial advice could be regarded as a profession.[239]

It is well understood that a positive culture is one that promotes "doing the right thing" and supports "good outcomes for customers".[240] Yet, as Commissioner Hayne stated, "culture cannot be prescribed or legislated".[241] However, it can be assessed.[242] This idea is reflected by the culture, governance and accountability aspects of the UK Duty. Firms will be required to assess, test, understand and provide evidence that their customers are receiving good outcomes.[243] Under the UK Duty, a firm's board, or equivalent governing body will be required to assess whether the firm is delivering good outcomes for its customers in line with the Duty, at least annually.[244] This echoes Commissioner Hayne's recommendation that:

[237] *A review of the impact* (n 135) 76-79
[238] *FSRC Final Report* (n 5) vol 1, 133
[239] *FSRC Final Report* (n 5) vol 1, 120, 134-135
[240] Greg Tanzer, 'The Importance of Culture to Improving Conduct within the Financial Services Industry' (Speech, Thomson Reuters' Third Australian Regulatory Summit, 27 May 2015) 4.
[241] *FSRC Final Report* (n 5) vol 1, 376.
[242] Ibid.
[243] *FG22/5* (n 16) 114.
[244] Ibid 110.

> "All financial services entities should, as often as reasonably possible, take proper steps to: assess the entity's culture and its governance; identify any problems with that culture and governance; deal with those problems; and determine whether the changes it has made have been effective."[245]

In the UK, consumer organisations have challenged the requirement of firms to only report annually on the basis that it risks becoming a 'box-ticking exercise'.[246] In response, the FCA stated the report is not intended to be the only mechanism for accountability and governance. Moreover, firms' strategies, governance, leadership and people policies (including incentives) should reflect the Duty. This is intended to go beyond a box-ticking exercise. For example, firms must show how staff incentives and remuneration structures are designed in such a way to ensure good outcomes for retail customers.[247] In Australia, NAB have re-introduced sales targets and incentives for staff to maximise lending.[248] Under the Duty, NAB would be required to demonstrate through data and evidence how these incentives are designed to ensure good outcomes.[249] Furthermore, the idea of monitoring outcomes has been met with some resistance in the UK. Firms offering financial products and services wanted more clarity as to how they should monitor outcomes and what sort of data they should use.[250] They suggested that monitoring outcomes is complex, and that it would take a significant amount of time to integrate it into their processes.[251] In response, the FCA explained that they would not exhaustively prescribe how firms should monitor outcomes, as this will "vary depending on the type of firm, its role in the distribution chain, the nature of the product and the target market".[252] The data collected will be focused on consumer outcomes across the entire product life cycle.[253] This is where the Duty truly differs from TCF.

To further reflect the importance of change beginning at the top, the FCA expects firms to have a 'champion' at board level, who will be responsible for ensuring the Duty is being considered and discussed

[245] *FSRC Final Report* (n 5) vol 1, 392.
[246] *PS22/9* (n 2) 75.
[247] *FG22/5* (n 16) [10.7].
[248] Charlotte Grieve, ''All About Sales': NAB Sales Targets Risk Customer Welfare', *Sydney Morning Herald,* 15, March, 2022 <https://www.smh.com.au/business/banking-and-finance/all-about-sales-nab-sales-targets-risk-customer-welfare-20220310-p5a3jt.html>.
[249] *PS22/9* (n 2) 75 [13.13].
[250] Ibid 72.
[251] Ibid 73.
[252] Ibid 72.
[253] *Mills* (n 230).

regularly.[254] Whilst this expectation applies reasonably, the FCA have indicated that this should be an Independent Non-Executive Director (NED) where possible.[255] It is understood that changes to "culture, behaviour and processes" require strong oversight from above.[256] Having a 'champion' at board level ensures the UK Duty is being considered amongst senior executives. This allows change to "sound from above".[257] Poor leadership underpins a poor culture, which weakens the governance framework of an entity.[258] By having an individual responsible for discussing good outcomes, it ensures it is at the very least being spoken about at the top.

Poor culture in the Australian financial industry can be attributed to the norms of behaviour that have been entrenched into the industry over many years.[259] The new "whistleblowing type obligation"[260] proposed under the Duty provides somewhat of an opportunity to move away from the prior norms of behaviour. Rule 2A,9.17 states,

> "A firm in a distribution chain must notify the FCA if it becomes aware that any other firm in that distribution chain is not or may not be complying with Principle 12 or PRIN 2A".[261]

This runs parallel with the requirement of firms to inform another firm in the chain, if they identify or become aware, that they are not producing good outcomes.[262] In effect, this reduces any "first movers' disadvantage", as it will encourage firms to implement policies to achieve the designated outcomes.[263] Furthermore, one line of thinking suspects this may result in over-reporting, as "may not be complying" is a low-bar test.[264] However, the true intention of the rule seems to be to encourage firms to cooperate with each other to produce good outcomes, thereby reducing the chances of actual consumer harm.[265] For

[254] *FG22/5* (n 16) 111 [10.10].
[255] Ibid.
[256] *PS22/9* (n 2) 75.
[257] *FSRC Final Report* (n 5) vol 1, 335.
[258] Ibid.
[259] See generally, *Comino* (n 194) 310-311
[260] 'Episode 34: The New Consumer Duty – Raising Consumer Standards of Care', *Regulated Radio* (Deloitte LLP, 5 August 2022) 12:55. ('*Regulated Radio'*)
[261] *FCA 2022/31* (n 16) 47 [Rule 2A.9.17].
[262] Ibid 39 [Rule 2A.5.14].
[263] *CP 21/13* (n 171) 13.
[264] *Regulated Radio* (n 260) 14:40.
[265] Ibid 00:15:10.

organisations to comply with this rule, they must have policies in place to respond when they do suspect a firm is not complying. Therefore, this rule seeks to drive an industry wide cultural shift. Given the similarities between problems in the distribution chain in the UK and Australia, it is arguable that this rule has the potential to assist Australia's regulatory response in the financial industry.[266]

IV. CONCLUSION

Changes are always met with some criticism. Moving towards an outcomes-based regime would pose substantial challenges for Australian firms, as it requires independent analysis and judgement to ensure compliance. Yet, the financial industry is among the most economically important industries – it cannot have incoherent laws governing it.

The UK responded to their financial industry exploiting consumers' knowledge gaps and behavioural biases with outcomes-based legislative design. Should the ALRC turn to the UK Duty as an exemplar, it would not only have a better chance of achieving its task to simplify Australian financial services laws, promote meaningful compliance and lay "foundations for an efficient, adaptive and navigable regulatory framework", but will likely achieve greater consumer protections and building trust.

[266] Financial Conduct Authority, *Finalised Guidance 19/5: The GI Distribution Chain: Guidance for Insurance Product Manufacturers and Distributors* (November 2019) 9: In the UK, "a travel insurance product sold by a coach tour operator where the operator's remuneration made up approximately 73% of the end premium paid by its customers. The operator was given a net rate by the managing general agent who managed the product on behalf of the insurer. In situations of this type we would expect the manufacturer to take steps to ensure that the product provides value to the end customer". In Australia the CBA were found to be providing bonuses to Head Groups if they met certain sales objectives. See *FSRC Interim Report* (n 8) vol 2, 18.

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