

RECONCEIVING REGULATION: FINANCIAL LITERACY

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Many of us if asked to take simple tests to establish our financial literacy would pass on some and fail on others. Our pass rate will depend on the extent of our numeracy. We may know the numbers of our income and savings. If we are good budgeters we may know the component figures of recurrent outgoings on such things as groceries, insurance or mobile phone bills. Unlike over half of a sample of high school children we may know the meaning of the word 'debit'.¹ Few of us are likely to know about bank interchange fees on credit card transactions. Some of us may know about superannuation and the difference between a defined benefit fund and a contributions fund. Those approaching retirement may be aware of the total amount that employees can contribute in pre-tax dollars to superannuation. If we have a housing loan, we are unlikely to readily recall how many lenders the mortgage broker disclosed before recommending a loan, the commission paid to the broker, or whether the housing loan has a clause regarding early repayment. Fewer of us will know which platform our managed funds are linked to and only those who have been following the collapse of Westpoint may have an intimate appreciation of differences between a promissory note and a debenture and whether they meet the statutory definition of a financial product.²

There are two purposes to financial literacy. The first is to re-educate individuals about credit and debt. Following the expansion of easy credit and developments in card and electronic payment systems, many people forgot how to stay out of debt, to pay off debt to avoid excessive interest, and how to budget to keep expenses

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¹ ANZ Banking Group, *ANZ Survey of Adult Financial Literacy in Australia* (2005) (survey by AC Nielsen) <<http://www.anz.com/aus/aboutanz/Community/Programs/FinSurvey2005.asp>> at 17 November 2008.

² See *Financial Industry Complaints Service Ltd v Deakin Financial Services Pty Ltd* [2006] FCA 1805.

within income. This is linked to the debate on financial exclusion.³ It also underpins the national cooperation in developing schools curricula for financial literacy.⁴

The second purpose is to educate people about the financial market and the nature of risk. This is particularly linked to the changing role of the state in the provision of welfare and retirement income security. Following privatizations and demutualisations that resulted in the extension of share ownership to many more sections of the population, widespread education for investment and to understand financial products became necessary. The availability of new products, such as margin loans for investment purposes, also heightened the need for greater consumer financial education. The advent of choice in the selection of superannuation fund and the provision of lump sum retirement payouts means that individuals have to take some responsibility for the accumulation of funds for retirement and for the investment of funds once the age of retirement is reached.

TRACKING REGULATORY SUPPORT OF FINANCIAL LITERACY

The financial literacy project illustrates the complexity of the financial services regulatory system that involves the enrolment of diverse actors including various government agencies, industry and in particular banks, public minded wealthy individuals, consumer advocates, and financial counsellors. Unlike many regulatory objectives, where there are tensions between actors and not all share the overall regulatory goal, there is a high degree of consensus around financial literacy. For all, it is perceived as a 'good thing'. Some are sceptical of the ability of enhanced financial literacy to protect vulnerable consumers and others query the motives of large financial services conglomerates in promoting financial literacy, yet none reject it. The very term financial literacy shows the globalization of approaches to regulation; in this instance Australia was a 'term-taker'⁵ adopting the phrase from two United Kingdom (UK) surveys of financial literacy.⁶

Like the overall regulatory framework for financial services, the Australian financial literacy project stems from the *Financial System Inquiry*⁷ and subsequent reforms. The Australian Securities and Investments Commission (ASIC) was formed in 1998 as a result of the Wallis Report and has the statutory obligation to

³ Nicola Howell and Therese Wilson, 'Access to Consumer Credit: The Problem of Financial Exclusion in Australia and the Current Regulatory Framework' (2005) 5 *Macquarie Law Journal*.

⁴ Interview with Graham Crough (Manager, Education and Training, Financial Literacy Foundation, 7 October 2007).

⁵ John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 556. I have adapted term-taker from rule-taker.

⁶ Michael Noctor, Sheila Stoney and Robert Stradling, 'Financial Literacy' (1992) (Report prepared for the National Westminster Bank, National Foundation for Educational Research); Sandie Schagen and Anne Lines, 'Financial Literacy in Adult Life' (1996) (Report to the NatWest Group Charitable Trust, National Foundation for Educational Research).

⁷ The Treasury, Commonwealth, *Financial System Inquiry: Final Report* (1997), <<http://fsi.treasury.gov.au/content/FinalReport.asp>> at 17 November 2008.

‘promote the confident and informed participation of investors and consumers in the financial system.’⁸ Thus promoting financial literacy can be viewed as a statutory obligation and part and parcel of regulation to support consumers and retail clients in making financial decisions.

One of the first initiatives taken by ASIC in consumer education was to commission a report by the Financial Services Consumer Policy Centre. This was at the instigation of the Consumer Advisory Panel set up by ASIC in 1998.⁹ At this point there was no coherent account of the programs or resources available for teaching consumers about investment.¹⁰ The 1999 *Stocktake of Consumer Education in Financial Services: Final Report* found more material than it expected, mostly on credit and debt and consumer rights, some material on insurance, investments, banking, home lending and scams, but a deficit in material on superannuation, taxation, internet transactions and direct investment.¹¹ A wide range of groups provided the material, including community organizations, financial services industry complaints schemes, regulatory bodies, industry associations, investment advisors and banks, and insurance companies.

In March 2000 ASIC established <http://www.fido.asic.gov.au>, a website devoted to consumers. While not directly concerned with financial literacy, it serves as a clearing house for a wide range of consumer information and is an enormously valuable resource. In 1999 ASIC had formed a partnership with the Securities Institute of Australia (a private industry-based educational body later called FINSIA) to set up an on-line directory of consumer education materials about financial products and services. This financial information directory was located on ‘fido’ for about four years until it became out of date.¹²

At the same time as ASIC was systematizing the availability of existing information for consumer education, it set about devising a strategy for further consumer education. This was done in two steps. The first involved a Discussion Paper: ‘Educating Financial Services Consumers’ put out in July 2000. The second was a four-year education strategy: *Consumer Education Strategy 2001–2004* promulgated in October 2001.

There is a disjunction between the approaches to consumer education and financial literacy as revealed in the two documents. In the first the consumer is conceived of

⁸ *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(b); *Corporations Act 2001* (Cth) s 760A(a).

⁹ Australian Securities and Investments Commission (ASIC), ‘Minister Launches New ASIC Key Advisory Body’ (Press Release, 20 November 1998).

¹⁰ Australian Securities and Investments Commission (ASIC), ‘Research Project looks for Consumer Education Gaps’ (Press Release, 15 January 1999).

¹¹ Australian Securities and Investments Commission (ASIC), *Stocktake of Consumer Education in Financial Services: Final Report* (1999); Reports by the Financial Services Consumer Policy Centre, July 1999.

¹² Australian Securities and Investments Commission (ASIC), ‘Australia’s First Online Financial Information Directory’ (Press Release, 6 December 2000).

as a responsible market participant who needs education for better informed participation. Such informed participation would reduce market imperfections and market failure.¹³ In the second, the consumer is not cast as a person who is being empowered as a market participant but as someone requiring the regulator to improve and encourage them.¹⁴ Financial literacy is treated as strategy to overcome financial exclusion, a synonym for being poor, rather than an aid to effective market participation.¹⁵ This reflects a regulatory dilemma and an inherent tension in the role of the regulator as a market facilitator and protector. The Australian Securities and Investments Commission viewed itself as having a coordinating role for financial education initiatives and as setting directions to fill lacunae in education or literacy needs.¹⁶ In addition to the financially excluded, two further priority groups for financial education emerged. These were school children¹⁷ and retirees or those approaching retirement.¹⁸ All three required regulation via financial literacy.

When the financial literacy project commenced it was driven by consumer advocates and representatives along with the regulator. The next phase took place with close involvement from high level government and business. In 2003 the ANZ Banking Group issued a major survey of adult financial literacy in Australia, finding that most Australians had difficulties with their finances.¹⁹ In 2004 the Minister for Revenue and Assistant Treasurer announced a Consumer and Literacy Taskforce to assess existing financial literacy programs and make recommendations to improve these. The members of the Taskforce included senior people from financial services firms, industry bodies, such as the Financial Planning Association, banking industry lobby groups, non-government organizations, educators, and regulators from the Australian Securities and Investments Commission. It was led by a prominent media commentator and financial planner.²⁰ The Taskforce reported in June 2004 in a paper: 'Australian Consumers and Money'. This was accompanied by another paper: 'Consumer and Financial Education in Australian Schools'.²¹ The major recommendation of the Taskforce

¹³ Australian Securities and Investments Commission (ASIC), 'Educating Financial Services Consumers', Discussion Paper (July 2000) 7, 9.

¹⁴ See Australian Securities and Investments Commission (ASIC), *Consumer Education Strategy 2001–2004* (2001).

¹⁵ Ibid 10–2.

¹⁶ ASIC 'Educating Financial Services Consumers', above n 14, 24; ASIC *Consumer Education Strategy 2001–2004*, above n 15, 2, 5, 7.

¹⁷ Australian Securities and Investments Commission (ASIC), 'Financial Literacy in Schools', Discussion Paper (June 2003).

¹⁸ Senate Select Committee on Superannuation, Commonwealth, *Planning for Retirement* (2003); Investment and Financial Services Association (IFSA), *Retirement Incomes and Long-Term Savings: Living Well in an Ageing Society*, Policy Paper, (2003).

¹⁹ ANZ Banking Group, *ANZ Survey of Adult Financial Literacy in Australia: Final Report* (2003) (survey by Roy Morgan Research) <<http://www.anz.com/aus/aboutanz/Community/Programs/Survey2003.asp>> 17 Nov 2008.

²⁰ Consumer and Financial Literacy Taskforce, 'Australian Consumers and Money – Full Version', Discussion Paper (2004) Appendix 1, 89. The chair is Mr Paul Clitheroe.

²¹ Consumer and Financial Literacy Taskforce, 'Consumer and Financial Education in Australian Schools' (2004) (prepared by Curriculum Corporation).

was to establish a Financial Literacy Foundation, duly established in June 2005.²² Towards the end of 2005 the ANZ Banking Group issued another two reports on financial literacy, supported by the Parliamentary Secretary to the Treasurer and the Chair of the Australian Securities and Investments Commission.²³ In the middle of 2006 the Australian Government launched an Understanding Money campaign with a website <http://www.understandingmoney.gov.au> and booklet *Understanding Money: How to Make it Work for You*.²⁴ This was supported by an extensive media campaign.²⁵

Australia is a global leader in compulsory financial literacy as part of the education of all school children. The Financial Literacy Taskforce, situated in Treasury, commenced work in earnest on a National Financial Literacy Framework.²⁶ The Foundation took a leadership role among jurisdictions in commissioning and developing the National Consumer and Financial Literacy Framework (Framework), directed by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), for the compulsory years of schooling.²⁷ The Framework concept is to embed financial literacy as a permanent feature of a nationally consistent and cohesive school curriculum. The Framework was drafted in the latter part of 2005 and endorsed at a meeting of Chief Executives of all educational jurisdictions through the Australian Education Systems Officials Committee on 4 November 2005. There is Ministerial direction for the inclusion of financial literacy in core curriculum, such as Mathematics. From 2008 onwards, all Australian school children will progressively receive financial literacy education in their compulsory years at school. Part of this task to provide financial literacy education for all school children is providing direction in the market for schools resources and professional development for schoolteachers. From the beginning of 2008, the aim is to reach 1000 teachers across Australia. This work is not confined to school children and there are programs in technical training institutions, workplaces and for indigenous Australians.

²² By this time the Minister for Revenue and Assistant Treasurer was Mal Brough. See Mal Brough, Minister for Revenue and Assistant Treasurer, 'Understanding Money – Financial Literacy Foundation Launched to Help All Australians' (Press Release No 048, 6 June 2005).

²³ ANZ Corporate Communications 'ANZ Releases First Comprehensive Study into Issues causing Financial Difficulty' (Press Release 25 November 2005); *ANZ Survey of Adult Financial Literacy in Australia* (2005), above n 1; ANZ Banking Group, *Understanding Personal Debt and Financial Difficulty in Australia* (2005) (survey by AC Nielsen).

²⁴ Australian Securities and Investments Commission (ASIC) 'ASIC Welcomes Launch of Understanding Money Campaign' (Press Release 06-252, 27 July 2006).

²⁵ According to Australian Netguide the website <http://www.understandingmoney.gov.au/documents/media/fs002website.pdf> (at 17 November 2008) is the second most popular website and over 900 000 copies of the booklet *Understanding Money: How to Make it Work for You* have been distributed.

²⁶ wish to thank Mr Graham Crough, Financial Literacy Taskforce, Treasury, for information on the work of the Financial Literacy Taskforce and the National Consumer and Financial Literacy Framework.

²⁷ Financial Literacy Foundation 'Financial Literacy to become part of the School Curriculum' (Press Release, 14 December 2005).

In 2007 the Financial Literacy Foundation produced 'Financial Literacy: Australians Understanding Money',²⁸ a report on the attitude of Australians to money and an account of how they manage money. This was based on a survey of 7 500 Australians aged 12 to 75. Among the findings, it was reported that 69% of adults say they have the ability to invest money and yet 66% would not consider both risk and return when choosing an investment!²⁹ The Report revealed a discrepancy between what people regard as best practice and what people actually practice.

PRIVATE SECTOR PARTNERING WITHIN REGULATORY FRAMEWORKS

Financial literacy initiatives are not limited to government and government-supported activities. Over 100 organizations deliver over 700 financial literacy programs of various kinds. It is important to note the role of industry in financial literacy programs. A taste of these initiatives includes the Australian Bankers' Association 'Financial Literacy Info Centre'³⁰; the Commonwealth Bank's 'Financial Literacy for Life'³¹; and ING Direct's mtrek.³² This can be viewed as industry engaging in its own regulation through providing education for consumers or alternatively as sophisticated branding and marketing.

The involvement of this widespread group of interests around financial literacy illustrates theories of the pervasiveness of regulatory networks and the way in which different individuals and groups become enrolled in a regulatory activity. While a Taskforce driven by a Federal Government Minister may be viewed as top down regulation, the notion of financial literacy has been shaped by the full cast of actors at the Taskforce and Foundation tables. The role of a major bank in undertaking surveys of what Australians know about debt is important in producing empirical information and not just to the corporate social responsibility and reputation agenda of the bank. Similarly the role of government through the Financial Literacy Foundation is important in generating data on attitudes to money, information campaigns and educational policy changes.

Regulation is conceived of as 'the intentional activity of attempting to control, order or influence the behaviour of others'³³ Notions of regulation can be placed along a

²⁸ Financial Literacy Foundation 'Financial Literacy: Australians Understanding Money' Report (2007) <<http://www.understandingmoney.gov.au/documents/Australiansunderstandingmoneyweb.pdf>> at 17 November 2008.

²⁹ Ibid viii.

³⁰ <<http://www.bankers.asn.au/default.aspx?FolderID=191>> at 17 November 2008; <[http://www.westpac.com.au/manage/pdf.nsf/32B8CB37E0E22D47CA2572F100103BE4/\\$File/BroadeningFinUnderstandingDRM.pdf?OpenElement](http://www.westpac.com.au/manage/pdf.nsf/32B8CB37E0E22D47CA2572F100103BE4/$File/BroadeningFinUnderstandingDRM.pdf?OpenElement)> at 17 November 2008; <<http://www.bankers.asn.au/default.aspx?ArticleID=487>> at 17 November 2008.

³¹ <<http://www.commbank.com.au/foundation/>> at 17 November 2008.

³² <<http://www.mtrek.com.au/legal.htm>> at 17 November 2008.

³³ Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

continuum and might include the power of the state and enforcement mechanisms;³⁴ the role of the state and industry in seeking compliance with regulatory objectives;³⁵ and the enrolment and conversations among many actors engaged in the regulatory process.³⁶ These involve the interplay of coercion and persuasion.

Financial literacy as a form of regulation must be placed in the context of regulation of financial services. The overall goal of Australian financial services regulation is to enhance the competitive capability of Australia and to foster an efficient market for financial services. Regulation derives from the 'Financial System Inquiry' (Wallis Report) which adopted the classic notions of an efficient market economy.³⁷ The recommendations of the report and their adoption in legislation³⁸ aimed at a product neutral environment that would inhibit regulatory arbitrage, so that one financial product was regulated in a similar fashion to another product. The system, involving prudential regulation along with mandatory disclosure requirements, conduct standards and licensing, is concerned with the regulation of processes and risk. There is no or little regulation of products in the sense of prescribing what products must be offered, the design features of products, or quality and characteristic standards.

The regulatory system for financial services regulation involves a complex legislative framework and co-regulatory system. The centrepiece of the product neutral system is Chapter 7 of the *Corporations Act 2001* (Cth), which sets out the legal concepts of a financial product and a financial service as well as the licensing, disclosure and conduct rules and also makes provision for compensation for retail clients. This regime is supported by product specific regulation in such areas as managed investments, insurance and superannuation. Prudential regulation is also both product neutral and product specific. The rules in this system are a mixture of high level statements of principle and detailed prescription.

The regulatory system provides a framework for market activity. It is also designed to change market behaviour. This second concern involves both the industries and firms that provide financial products and services, and the persons who acquire them. Legal obligations and industry rules are designed to change the behaviour of financial services providers. The financial literacy project is aimed at altering the decisions and behaviour of retail clients.

The industry and the firm are key actors in the regulatory system. Regulation is underpinned by industry bodies, such as the Australian Bankers' Association, the Insurance Council of Australia, the Investment and Financial Services Association,

³⁴ Robert Kagan, 'Understanding Regulatory Enforcement' (1989) 11(2) *Law and Policy* 89.

³⁵ Christine Parker, *The Open Corporation: Self-Regulation and Democracy* (2002).

³⁶ Julia Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163; Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (2003) Spring *Public Law* 63.

³⁷ The Treasury, *Financial System Inquiry*, above n 7.

³⁸ See in particular *Corporations Act 2001* (Cth) ch 7.

and the Association of Superannuation Funds of Australia, which represent these particular industry segments, provide industry-based informal rules and standards, and mould the culture of the industry. The Financial Industry Council of Australia has an overarching role.

These bodies are associated with formal codes of practice and dispute resolution bodies and all together these form industry-based self- or co-regulatory systems. Self-regulation is ultimately justified in contributing to a more efficient market. Self-regulatory standards or rules should establish best or higher standards of practice than legal rules – at least if they require the imprimatur of the regulator the Australian Securities and Investments Commission.³⁹ Through devising their own complementary rules and administering these rules through dispute resolution bodies, it is argued that self-regulation should encourage industry to internalize the values and attitudes of the regulatory system overall, so that compliance with both industry and legal rules becomes a matter of course. It is also suggested that industry-based dispute resolution systems to which retail clients take their disputes as a first port of call should provide firsthand information to industry of potential market failures and allow industry to correct for this. Thus self-regulation should provide for an alignment of information about market issues and decision making. This in turn should result in better decision making by industry and thus a more efficient market.

BEHAVIOURAL CHANGE AND ITS ROLE IN UNDERPINNING FINANCIAL LITERACY

The licence obligations enshrined in legislation are clearly designed to change the behaviour of firms and industry. They concern both licensees and their representatives. Licensees must be competent and their representative must be adequately trained.⁴⁰ Licensees must have risk management systems and management of licensed financial services providers must be ‘fit and proper’.⁴¹

The financial literacy project is directed at changing the behaviour of consumers by equipping them with higher standards of knowledge. Just as financial product advisers require training, consumers also require training. This training as we have seen is designed to start at school. Financial literacy as a regulatory technique is

³⁹ See Australian Securities and Investments Commission (ASIC), *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (2005) 183.9; 183.28; 183.29.

⁴⁰ *Corporations Act 2001* (Cth) s 912A; Australian Securities and Investments Commission (ASIC), *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (2007) sets out the minimum training standards and requirements.

⁴¹ *Corporations Act 2001* (Cth) s 912A (d); For APRA regulated bodies see *Banking Act 1959* (Cth); *Insurance Act 1973* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); see also Prudential Standards APS 520 <<http://www.apra.gov.au/ADI/upload/APS-520-consolidated-Sept-06-1.pdf>> at 17 November 2008; GPS 520 <<http://www.apra.gov.au/General/General-Insurance-Prudential-Standards-and-Guidance-Notes.cfm>> at 17 November 2008; SGN110.1 <<http://www.apra.gov.au/Superannuation/upload/SGN-110-1-Fit-and-proper.pdf>> at 17 November 2008.

clearly a response to market failure and the fear of future failures. It is also a way to reconstitute the market with informed participants. It involves the enrolment of many actors in a decentred or polycentric regulatory system. When it was first initiated financial literacy did not involve the coercive power of the state. The earliest groups providing financial literacy tended to be voluntary and charitable organizations. Through sponsoring financial literacy and then incorporating financial literacy as a compulsory part of the national school curriculum the state has come to play a more prominent role. To a large extent financial literacy rests on persuasion, voluntary compliance, and permeation of values. In this there are similarities with industry-based self- or co-regulation. Just as industry is asked to assimilate and practice the values of the regulatory system, individuals are also asked to accept the knowledge and values of the market and become active and informed participants. This involves both the responsabilisation of the individual and the empowerment of the individual.

The financial services market is concerned with risk and choice. Market imperfections are said to derive from information asymmetry and it is this which underscores laws that require firms and market participants to disclose information to the market and which prohibit insider trading. Traditionally consumer or retail client protection in the market was based on disclosure to the consumer to overcome information asymmetry between the provider and the consumer.⁴² This extended a market model from investors to consumers. Financial literacy is a response to perceived shortcomings in disclosure as a regulatory technique. Like disclosure as a technique, it is linked to overcoming market imperfections by providing the basis for better choice and through knowledge and understanding reducing the potential for fraud.

No person can offer financial services to a retail client unless they are licensed and licensees have extensive disclosure obligations. They must provide a Financial Services Guide⁴³ setting out who they are to those contemplating a transaction, and a Product Disclosure Statement⁴⁴ that describes the financial product. If the person is offered personal financial advice for their particular requirements, then they must also be given a Statement of Advice⁴⁵ that records the advice. Financial literacy is associated with disclosure as an important decentred regulatory technique.⁴⁶ As a complement to disclosure of information about the provider, the product, and the advice, financial literacy enabling individuals to knowledgeably assess that information should enhance party autonomy, thus regulating the self. Similarly,

⁴² This is seen most clearly in the 'truth in lending' basis for the Uniform Consumer Credit Code. See *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57 (Kirby J).

⁴³ *Corporations Act 2001* (Cth) ss 941A, 941B.

⁴⁴ *Corporations Act 2001* (Cth) ss 1012A, 1012B, 1012C.

⁴⁵ *Corporations Act 2001* (Cth) s 944A.

⁴⁶ Dimity Kingsford Smith, 'Decentred Regulation in Online Investment' 2001 19 *Company and Securities Law Journal* 532, 545, 540.

through enhanced choice and decision making the individual plays a role in regulating the firm and the industry.⁴⁷

The regulator, the Australian Securities and Investments Commission, perceives financial literacy as supplementing its role as a regulator. The ASIC *Consumer Education Strategy 2001-2004* stated that education ‘complements’ other regulatory strategies of enforcement, compliance and supervision and increases their effectiveness.⁴⁸ In this way the financially literate person becomes a de facto regulator, regulating their own transaction. Education of consumers is not unique to financial services. The regulation of dangerous products such as cigarettes has been accompanied by education campaigns. However, the financial literacy project is entrenched in the regulatory system in a way that makes it intrinsic to the system.

The possibilities of the enforceable undertaking illustrate the embedding of financial literacy linked to other ways of regulation. The undertaking is a regulatory device that allows the regulator to shift behaviour. It is at the fulcrum of coercion and persuasion. The Australian Securities and Investments Commission is particularly active in taking undertakings to move firms to comply with specific legislation and regulatory objectives. Undertakings often involve the parties implementing a compliance program. This contributes to the education of the firm. Undertakings can also involve making financial contribution to consumer education campaigns. Both were the case with an Undertaking given by Mortgage Point.⁴⁹ Mortgage Point was a finance broker. In contravention of Corporations Act sections 923A and 923A(5), which prohibits the use of words such as ‘independent’, ‘impartial’ and ‘unbiased’, Mortgage Point used these words in its brochures. This was an incorrect description as Mortgage Point had a panel of only 33 lenders, received commissions from them, did not receive commissions from any other lenders and did not refer borrowers to any other lenders. The Australian Securities and Investments Commission believed that the conduct was misleading. Mortgage Point gave an undertaking to ASIC in which it agreed to refrain from using such words, implement a compliance program, provide compensation to borrowers, and make a financial contribution to consumer education in relation to the finance and mortgage broking industry. Mortgage Point was not permitted to say anything about this contribution. Although the amount towards consumer education was only \$2500, this remains highly symbolic of the nexus between regulation through restricting marketing language, coercion and persuasion and financial literacy. Promoting consumer education in this way is clearly a regulatory strategy.

⁴⁷ Toni Williams, ‘Empowerment of Whom and for What?: Financial Literacy Education and the New Regulation of Consumer Financial Services’ (2007) 29(2) *Law & Policy* Part II.

⁴⁸ ASIC, *Consumer Education Strategy 2001-2004*, above n 15, 4.

⁴⁹ Australian Securities and Investments Commission (ASIC), ‘ASIC Acts Against Misleading and Deceptive Advertising’ (Press Release 05-36, 24 February 2005); Australian Securities and Investments Commission (ASIC), Enforceable Undertaking 014835083, 23 February 2005; Enforceable Undertaking 014835083, 23 February 2005; Annexure 1 Notice to Customers of Mortgage Point Pty Ltd.

SYNERGIES FOR PARTICIPANTS PROMOTING FINANCIAL LITERACY

As with all regulatory strategies, promoting financial literacy is not a panacea to protect or support consumers or to ensure a perfect market. Promoting better choice of products and services through a better educated community still rests on notions of rational choice and does not take account of cognitive and emotional biases. This is partially recognized, as the report of the Financial Literacy Taskforce referred to the work of Daniel Kahneman and planned to build a Consumer Behaviour Model.⁵⁰ This again begs a question enveloping the financial literacy project, the close involvement of industry and potential conflict between social responsibility and better marketing. It is clear that education alone does not overcome inadequate perceptions of risk by individuals.⁵¹ An editorial in the *Australian Financial Review* sums up the conundrum. It asks and then states: ‘Is transparency enough?’ Further investor education on asset allocation, the risk return trade off, and spreading risk is vital.’ And concludes: ‘No amount of regulation can stop people putting their money into unsecured schemes on the promise of higher returns.’⁵² Yet a report into comparison rates in credit found that there was a correlation between financial literacy and effective use of the comparison rates.⁵³

There are various critiques of the financial literacy project. The Consumer Credit Legal Centre, a community-based legal centre that represents consumer clients, pointed to the irony of an industry that thrives on people making poor decisions providing financial literacy information for consumers.⁵⁴ It expressed the view that financial literacy will not address the problems of the disadvantaged or excluded.⁵⁵ Studies in the United States have shown that those who have been through financial

⁵⁰ Consumer and Financial Literacy Taskforce, Commonwealth, *Australian Consumers and Money*, Discussion Paper, (June 2004) 26, 67, <<http://www.cfltaskforce.treasury.gov.au>> at 17 November 2008.

⁵¹ Jean Braucher, ‘Theories of Overindebtedness: Interaction of Structure and Culture’ (2006) 7(2) *Theoretical Inquiries in Law* 323; Lauren Willis, ‘Against Consumer Financial Education’ (Paper presented at International Association of Consumer Law 11th International Conference on Consumer Law, Cape Town, 11–13 April 2007) states that a survey of high school seniors found that those who did a personal finance course did a little worse and a study by the National Association of Securities Dealers (NASD) found that, on average, investment fraud victims had a higher level of financial literacy than non-victims. See Lauren Willis, ‘Against Financial Literacy Education’ (2008) 94 *Iowa Law Review*. On the importance of psychological attributes rather than information to financial capability see David de Meza, Bernd Irlenbusch and Diane Reyniers, *Financial Capability: A Behavioural Economics Perspective* (Consumer Research 69, Financial Services Authority, July 2008) <<http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>> at 17 November 2008

⁵² *Australian Financial Review*, 31 March 2007.

⁵³ Scott Ewing, ‘The Effectiveness of Mandatory Comparison Rates: Information, Capacity and Choice’ (2006) Swinburne Institute of Technology Institute for Social Research, 59. <http://www.creditcode.gov.au/content/downloads/Mandatory_final.pdf> at 17 November 2008.

⁵⁴ Consumer Credit Legal Centre (NSW) Inc, ‘submission in response to Australian Consumers and Money – A Discussion Paper by the Consumer and Financial Literacy Taskforce’, (2004) 2, <<http://cfltaskforce.treasury.gov.au/content/submissions.asp?NavID=8>> at 17 November 2008.

⁵⁵ *Ibid.*

re-education classes overestimate their own capacity and make poorer decisions.⁵⁶ There is a strongly stated view that the education model should not be a substitute for effective regulation:

[M]any financial products are complex in nature and are difficult for consumers to understand even if they have reasonable levels of financial literacy. This problem is compounded by the lack of clear guidelines for comparison between products.

It is meaningless for consumers to be 'better informed' or have better financial literacy skills if there is no equal, if not greater, effort to focus on the impact that industry practices in advertising and marketing have on consumer choices and decisions.⁵⁷

In a Submission to the Productivity Commission's recent enquiry into the Consumer Policy Framework, the Consumer Credit Legal Centre again expressed scepticism about the claims for financial literacy:

Generic materials produced to educate the public on fairly complex financial products such as credit, investments and insurance almost inevitably fall into the category of being too detailed and boring to be read or digested by consumers who are not currently considering a specific contract or opportunity, but of insufficient detail to be useful to those who are. Many low to middle income consumers cannot afford expert legal or financial advice, and yet increasingly they are being expected to make complex decisions with the potential to ruin their financial future.⁵⁸

In considering regulation of finance brokers, the NSW Office of Fair Trading canvassed the possibility of self-regulation of finance brokers accompanied by enhanced consumer education.⁵⁹ It rejected this option. In doing this it assessed whether a model that relies on education to deliver information and bargaining power to consumers can be effective. The 'Regulatory Impact Statement' made the following points: educational materials are unlikely to be received by consumers when they are most receptive to the information; those most in need of information are unlikely to receive it and unlikely to act on it; education materials must compete with the array of information provided by brokers,⁶⁰ to be effective education must

⁵⁶ Willis, 'Against Consumer Financial Education', above n 52.

⁵⁷ Consumer Credit Legal Centre (NSW) Inc, above n 55, 3.

⁵⁸ Consumer Credit Legal Centre (NSW) Inc, 'submission to Productivity Commission Review of the Consumer Protection Framework' (2007) 36
<<http://www.pc.gov.au/projects/inquiry/consumer/submissions>> at 17 November 2008.

⁵⁹ NSW Office of Fair Trading, 'National Finance Broking Regulation: Regulatory Impact Statement', Discussion Paper (2004) 53, 6.3 <<http://www.fairtrading.nsw.gov.au>> at 1 September 2006 (no longer available, see reference at <http://www.fairtrading.nsw.gov.au/pdfs/About_us/nationalfinancebrokingscheme.pdf> at 17 November 2008.

⁶⁰ The Regulatory Impact Statement states: 'The information presented through websites and advertising is designed to promote the broker's activities and interest the consumer in using the broker. The extent to which this information may not be accurate is indicated by a recent action by ASIC. In September 2004 ASIC took action in relation to a website calculator which produced a comparison between the borrower's existing loan and an alternative loan. However,

be long-term and must rely on continuing government funding which might not always be available. It pointed out that reputable brokers would deal with the more financially literate, while fringe brokers would deal with the disadvantaged and time poor; financially literate consumers would have an improved bargaining position but others would be subject to fraudulent or misleading conduct, pay a premium for financial services and thus contribute to market inefficiencies. From the standpoint of government, the Impact Statement stated that while consumers would be less likely to need complaint and enforcement services due to their financially literate decision making, others would not benefit from government-funded education programs and government would continue to be criticized for failing to deal with market problems.⁶¹ Others have recognized the imbalance between intermediaries and consumers and argued that it is the financial services intermediary who requires re-education.⁶²

TAKING STOCK AND REFLECTING ON DIRECTIONS TO DATE

Whatever view is taken of the effectiveness of financial literacy as a tool of regulation or means of protecting or supporting consumers, financial literacy is becoming part of the three Rs and essential for citizens to negotiate their way in a landscape that requires informed decisions on borrowing, investing and options for an income in retirement. Just as in past eras citizens were encouraged to become literate for effective participation in the society and economy, today they are encouraged to become financially literate. Literacy in finances is becoming a necessary skill for the new citizen. The financial literacy project is about both responsabilisation and empowerment.⁶³ It is about embedding new skills and attributes in the citizenry to enable effective participation in the nation as consumers and as citizens. It seeks to include rather than exclude. Behavioural economics tells us that individuals may not always make the best choices. Just as industry and firms have been encouraged through self-regulation to participate responsibly in their own regulation, regulation that promotes efficiency, flexibility, and innovation in the market for financial services and products⁶⁴ has been extended by the financial literacy project to individuals who are required to comply and choose. Who bears the risk when regulation fails? If as suggested by Hood and others⁶⁵, education is about managing the gap between public attitudes and

the assumptions embedded in the calculator meant that additional repayments were attributed to the alternative loan, but not to the borrower's existing loan. This produced a distorted comparison which suggested that the consumer would always be better off financially by refinancing to the alternative loan. The calculator appeared on over 100 websites.' NSW Office of Fair Trading, 'National Finance Broking Regulation', above n 60, 54, 55

⁶¹ NSW Office of Fair Trading, 'National Finance Broking Regulation', above n 60, 55, 56.

⁶² Stephen Diacon, 'Investment Risk Perceptions: Do Consumers and Advisers Agree?' (2004) 22(3) *International Journal of Bank Marketing* 180, 191.

⁶³ Ian Ramsay, 'Consumer Law, Regulatory Capitalism and The 'New Learning' (2006) 28 *Sydney Law Review*, 9; Williams, above n 48.

⁶⁴ See *Corporations Act 2001* (Cth) s 760A(a).

⁶⁵ Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (2004) 106.

regulatory strategies, then financial literacy is about both coercing and persuading citizens to understand and accept the risk of their own choices and market risk.