

**FINANCIAL MARKETS CONDUCT BILL  
SUBMISSION ON EXPOSURE DRAFT  
Commerce Commission**

<b>Clause Number</b>	<b>Clause heading</b>	<b>Submission</b>
<b>Part 1</b>	<b>Preliminary provisions</b>	
<b>Part 2</b>	<b>Misleading or deceptive conduct or false or misleading representations</b>	
<b>Clause 16(b)</b>	<b>Misleading or deceptive conduct generally</b>	
<b>Part 3 and schedules 1 and 2</b>	<b>Disclosure offers of financial products</b>	
<b>Part 4 and schedule 3</b>	<b>Governance of financial products</b>	
<b>Part 5</b>	<b>Dealing in financial products on markets</b>	
<b>Part 6</b>	<b>Licensing and other regulation of market services</b>	
<b>Part 7</b>	<b>Enforcement and liability</b>	
<b>Part 8</b>	<b>Regulations and exemptions</b>	

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<b>Part 9 and subpart 4</b>	<b>Miscellaneous provisions Amendments to the FTA 1986</b>	
Clause 553	New section 5A substituted	<p>1. Clause 553 is unclear in its operation and does not remedy the uncertainties that exist with the current s5A of the Fair Trading Act 1986 (FTA).</p> <p>2. There are a number of possible interpretations of clause 553 including:-</p> <p style="margin-left: 40px;">a. That misleading and deceptive conduct in relation to financial products and services is excluded from the coverage of sections 9 to 13 of the FTA, resulting in an effective “carve out” of the application of key provisions of the FTA; or</p> <p style="margin-left: 40px;">b. That it is a prohibition against double jeopardy – i.e. a party is not liable under the FTA if their conduct has been found to contravene the Bill; or</p> <p style="margin-left: 40px;">c. That it is intended to give the FMA priority, or “precedence”, in the enforcement of misleading and deceptive conduct in relation to financial products and services. It is not clear as to how this priority would operate in practice.</p> <p>3. The May 2011 Cabinet Paper (at paragraph 73) appears to set out the four reasons for the current wording of clause 553, and we respond to each:</p> <ul style="list-style-type: none"> <li>▪ <i>“it encourages the FMA rather than the Commerce Commission to take proceedings, by giving securities law precedence where there is a direct overlap with the FTA.”</i></li> </ul> <p style="margin-left: 40px;">Clause 553 does not say this, and given the numerous possible interpretations, may not be applied by the Courts in a way that is</p>

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		<p>consistent with this objective.</p> <ul style="list-style-type: none"> <li>▪ <i>“it provides assurance to stakeholders that in areas of overlap, securities law takes precedence”</i></li> </ul> <p>We agree that where there is any overlap legislation must provide clarity as to how the overlapping legislation will interact. However, the Commission is concerned that the current wording of clause 553 does not achieve this objective.</p> <ul style="list-style-type: none"> <li>▪ <i>“it avoids the need for a carve out from the FTA as a law of general application”</i></li> </ul> <p>On our reading of the proposed provisions, one readily available interpretation of clause 553 is that there is indeed a carve out from the FTA. On that interpretation, the FTA will no longer be a law of general application – sections 9 to 13 will not apply to financial services or products. But as noted above, the Cabinet Paper disavowed the intention of carving out the FTA – noting in particular that this may leave enforcement gaps. If a carve out is not MED’s intention then the Commission is of the view that clause 553 needs redrafting to make the Ministry’s intention clear.</p> <ul style="list-style-type: none"> <li>▪ <i>“it avoids the current uncertainty under section 5A of the FTA about what conduct is regulated under the Securities Act and the Securities Markets Act”</i></li> </ul> <p>As noted above, clause 553 is unclear and confusing and as such does not remedy the uncertainties that currently exist with s5A of</p>

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		<p style="text-align: center;">the FTA.</p> <ol style="list-style-type: none"> <li>4. The Commission would invite the Ministry to clarify clause 553 to clearly address the overlap issue that the Ministry has identified.</li> <li>5. If the Ministry does wish to adopt a carve out, then we prefer that unambiguous wording be crafted to record that outcome (such as: <i>“Nothing in sections 9-13 of the FTA shall apply to financial products and services as defined in the FMCB.”</i>)</li> <li>6. The Commission’s preference is to then comment further on the Bill once the Ministry has adopted a clause 553 with clear effect.</li> </ol> <p><i>Additional uncertainty</i></p> <ol style="list-style-type: none"> <li>7. In addition to that concern about clause 553, the Commission is troubled by the perhaps unintended interplay between that provision, the FTA and the Credit Contracts and Consumer Finance Act 2003.</li> <li>8. The Commission currently routinely investigates credit contracts – and misrepresentations relating thereto – under both the industry-specific CCCFA and the more adaptive FTA. The Commission is active in this credit contracts area, under both Acts.</li> <li>9. But as drafted the definition of “financial services” encompasses credit contracts (see clause 6 and the referenced Regulations).</li> <li>10. The effect of clause 553 would be to: <ul style="list-style-type: none"> <li>• Prevent the Commission alleging FTA breaches in respect of credit contracts, as it does currently; and</li> <li>• To retain (see above points) a dual agency enforcement over credit contracts, as there is no proposal in the Bill to remove CCCFA responsibility to the FMA.</li> </ul> </li> </ol>

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		<p>11. The Commission invites MED to consider these difficulties. We do not anticipate that this complication was intended by the draft Bill.</p> <p>12. The Commission would be most reluctant to relinquish its ability to include FTA pleadings within an existing CCCFA enforcement action where that is appropriate.</p> <p><i>Commission suggestions</i></p> <p>13. The Commission suggests that MED consider two other alternatives to the proposed clause 553.</p> <p>14. First alternative: - Delete clause 553 from the Bill and retain FTA jurisdiction over financial services and products. This would make the Bill consistent with the Financial Advisors Act which contains no equivalent to clause 553. This alternative means that the Bill and FTA will both apply to misleading or deceptive conduct in relation to financial services and products. Any duplication of enforcement action by the Commission and the FMA can be resolved through a formal Memorandum of Understanding between the two agencies.</p> <p>15. Second alternative: – Insert an FTA carve-out, but, with an amendment to the Bill and FTA to enable the Commission to bring proceedings under this Bill for contraventions of Part 2.</p> <p>16. If the Ministry is minded to adopt a clause 553 that removes Commission jurisdiction in respect of financial product or service misrepresentations, the Commission asks that the Ministry consider deferring that significant amendment in the short-term (say, 2+ years) until the Financial Markets Authority is fully equipped, fully staffed and is experienced in taking enforcement actions large and small.</p> <p>17. The Commission recognises the perceived advantages in consolidating financial product and services regulation within a single authority. But we note also that the spectrum of Commission enforcement</p>

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		<p>activity is wide, covering not just products offered widely through nationwide institutions, but small payday lenders, finance offered ancillary to retail purchasers and the like. The Commission considers that there would be necessary lead-in time and planning required to develop within another agency the expertise that the Commission has in regulating these broad product &amp; service areas.</p>