

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

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Clause Number	Clause heading	Submission
Part 3 and schedules 1 and 2	Disclosure offers of financial products	
Clause 33	Purpose of the PDS	<p>Clause 33 of the draft Bill currently provides that the purpose of the product disclosure statement is to "... provide certain information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial products."</p> <p>The words "prudent but non-expert person" should be replaced with the words "retail investor" to clarify the target audience of the PDS.</p> <p>The Cabinet Paper released in February 2011 specified that the PDS is intended to cater for the needs of retail investors.¹ The draft Bill provides a specific definition for retail investors, and excludes the provision of the PDS for wholesale investors. It is therefore clear that the purpose of the PDS is to provide information to assist retail investors to "decide whether or not to acquire the financial products." This should be reflected in the wording of the purpose section.</p> <p>Clarifying retail investors as the target audience avoids any uncertainty and inconsistency surrounding the information required by "a prudent by non-expert person." The level of expertise to be expected of a retail investor can be guided by the "eligible investors" provision stipulated in sch 1 cl 37. In other words, retail investors would be unlikely to have the expertise to assess the "merits and risks of the transaction" and their own "information needs in relation to the transaction."²</p> <p>Eliminating any uncertainty as to the target audience of the PDS would also discourage lengthy documents, one of the main reasons for introducing this new disclosure regime.³</p>
Clause 40	Meaning of material information	<p>The explanatory note provides for several alternatives as to the meaning of material information.⁴ Once it is made clear that the PDS should cater for the information needs of retail investors, the sensible option for the definition of "material information" would be the alternative that is synonymous with provisions in the Corporations Act 2001 (Cth); that is, "information that investors and professional advisers would reasonably require to make an informed assessment of the matters"⁵ regarding the financial products on offer.⁶ This would allow the PDS to be concise while allowing issuers to disclose further information on the register of offers, and avoid the "potential pitfall of allowing the issuer to omit information that is important to the risks and returns of the product on the basis that an unsophisticated</p>

¹ Office of the Minister of Commerce *Cabinet Paper to the Chair of the Cabinet Economic Growth and Infrastructure Committee: Securities Law Reform* (February 2011) at [99].

² Financial Markets Conduct Bill sch 1, cl 35(2).

³ Office of the Minister of Commerce *Cabinet Paper to the Chair of the Cabinet Economic Growth and Infrastructure Committee: Securities Law Reform* (February 2011) at [93].

⁴ Financial Markets Conduct Bill Exposure Draft (request for submissions and commentary, August 2011) at [81]–[86].

⁵ Corporations Act 2001 (Cth), s 1013E.

⁶ Financial Markets Conduct Bill Exposure Draft (request for submissions and commentary, August 2011) at [86].

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		retail investor is unlikely to understand it or be influenced by it.” ⁷
Schedule 1, Part 1, Clause 3	Disclosure exclusions for offers of financial products for issue or sale – exclusion in relation to wholesale investors	<p>This clause may disadvantage some investors who could be classified as wholesale investors due to the size of their investment or assets but lack the level of sophistication to assess the merits and risks of the transaction without a disclosure statement.</p> <p>Commentators have already highlighted problems with the current definition “wholesale investor”, as taken from the Financial Advisers Act 2008.⁸ For example, the definition of “wholesale” investors in the Financial Markets Conduct Bill 2011 and the Financial Advisers Act 2008 includes entities with net assets over a million dollars.⁹ Persons making investments in excess of \$500,000 will soon be deemed as “wholesale investors”.¹⁰ This could be a farmer who has just sold the farm, or a retiring small business owner who places money in a trust or partnership entity; these people may not have the type of detailed financial knowledge expected of a typical wholesale client.¹¹ The risk here is that these investors, who are the target audience of the PDS, are not entitled to a PDS as a right, and may lack the knowledge to request one.</p> <p>Offers for investments to wholesale investors should require a disclosure statement alerting them to the implications of being deemed as a wholesale investor, and encouraging them to obtain a PDS if they are unsure in any way about the investment.</p>
Schedule 1, Part 1, Clauses 6 and 7	Disclosure exclusions for offers of financial products for issue or sale – exclusion for offers through licensed intermediaries and DIMS licensees.	<p>The draft Bill excludes offers of financial products through licensed intermediaries and DIMS licensees from the requirement to prepare a PDS and making disclosures on the Register, and provides for an alternative disclosure document under sch 1, cl 24.</p> <p>The explanatory note provides for an alternative to this approach; that is, to apply PDS disclosure requirements to more products.¹² This alternative should be favoured to achieve comparability across investment offers, which was one of the objectives for the PDS.¹³ Further, as retail investors should be encouraged to seek advice from licensed advisers and intermediaries, excluding the provision of a PDS to those who invest through licensed intermediaries would be counter-intuitive.</p> <p>It should also be noted that disclosure documents designed to cater for the needs of retail investors in other jurisdictions are <i>only</i> provided for offers through licensed dealers or intermediaries. The provision of a product disclosure statement</p>

⁷ Financial Markets Conduct Bill Exposure Draft (request for submissions and commentary, August 2011) at [87].

⁸ Compare Financial Advisers Act 2008, s 5C. See Financial Markets Authority “Warning: Think Before Signing Away ‘Mum and Dad’ Investor Rights” (press release, 5 May 2011).

⁹ Financial Markets Conduct Bill 2011 (consultation draft), sch 1 cls 3, 35; Financial Advisers Act 2008 s 5C.

¹⁰ Financial Markets Conduct Bill 2011 (consultation draft), sch 1 cls 3(3).

¹¹ Financial Markets Authority “Warning: Think Before Signing Away ‘Mum and Dad’ Investor Rights” (press release, 5 May 2011).

¹² Financial Markets Conduct Bill Exposure Draft (request for submissions and commentary, August 2011) at [132].

¹³ Capital Markets Development Taskforce *Progress Report* (prepared for the Ministry of Economic Development 2009) at 25.

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		in Australia is limited to financial products offered by licensed financial services. ¹⁴ The Corporations Act 2001 (Cth) imposes strict conduct and disclosure obligations on licensed financial product dealers, in addition to financial requirements and adequate risk management systems, ¹⁵ providing a degree of protection for investors. Use of the key investor information document, a document analogous to the PDS, in the European Union, currently limited to investments in UCITS funds, ¹⁶ which are specially constituted for collective investment portfolios and are heavily regulated for the protection of investors. ¹⁷ Suggestions to extend the KIID model for products outside of the UCITS regime have been received with scepticism by the financial industry and academics. ¹⁸ The fundamental criticism is that financial investments outside of the UCITS regime require much more disclosure, as, unlike those under the UCITS regime, the issuer would not been vetted by the authorities. ¹⁹

¹⁴ Corporations Act 2001 (Cth) ss 1012A–1012C.

¹⁵ Ibid, ss , 824B, 912, 945A, 945B, 946A, 949A.

¹⁶ Lachlan Burn “KISS, But Tell All: Short-Form Disclosure For Retail Investors” (2010) 5(2) CMLJ 141 at 154.

¹⁷ Niamh Moloney *How to Protect Investors* (Cambridge University Press, Cambridge, 2010) at 152. Maloney outlines three dimensions of the UCITS regime that protects investors: structure and investment policy; authorization and supervision of the scheme manger and depositary; and a public marketing restriction.

¹⁸ Lachlan Burn “KISS, But Tell All: Short-Form Disclosure For Retail Investors” (2010) 5(2) CMLJ 141 at 154; Eusipa Legal Committee “Comments on the Commission Consultation on Packaged Retail Investment Products” (submission to the European Commission 30 January 2011) <www.eusipa.org>.

¹⁹ Lachlan Burn “KISS, But Tell All: Short-Form Disclosure For Retail Investors” (2010) 5(2) CMLJ 141 at 155.