

Marina Nehme, University of Western Sydney, 5/09/2011

Clause Number	Clause heading	Submission
		<p>Australian context regarding similar provisions to clause 16 see: <i>Concrete Constructions (NSW) Pty Ltd v Nelson</i> (1990) 92 ALR 193, 197; <i>lackmagic Design Pty Ltd v Overliese</i> [2010] FCA 13, [100]; <i>Blackmagic Design Pty Ltd v Overliese</i> (2011) 276 ALR 646, 652; Skead N, 'Casting the First Stone: Lawyers' Liability Under Section 52' (2008) 16 <i>Trade Practices Law Journal</i> 6, 8-15; McCabe B, 'Section 52 and the Regulation of Non-Commercial Speech' (2010) 18 <i>Trade Practices Law Journal</i> 21, 21-23.</p> <p>A provision similar to clause 16 may be found under s 1041H of the <i>Corporations Act 2001</i> (Cth) (Australia):</p> <p style="padding-left: 40px;">A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.</p> <p>However, unlike clause 16, there is no limitation regarding 'in trade' which means that the Australian provision may cover situations that are not covered by clause 16.</p>
Clause 17	Misleading conduct in relation to financial products	I question the need for such a clause. This clause and the scenarios it covers are already covered in clause 16. The provision seems to create duplication in the system.
Clause 18	Misleading conduct in relation to financial services	I question the need of such a clause. This clause and the scenarios it covers are already covered in clause 16. The provision seems to create duplication in the system.
Clause 20	Certain conduct does not contravene this part	I support such a clause as it is crucial to stop duplication.
Clause 22	Other Exceptions	I suggest that clause 22 should be added in clause 20 as the aim of both provisions is the same: stop duplication.
Part 3 and schedules 1 and 2	Disclosure offers of financial products	
Clause 24 Clause 25	Issue offers that need disclosure Sale offers that need disclosure	<p>I support the introduction of both these provisions. However I suggest that another clause should be introduced stating:</p> <p style="padding-left: 40px;">A recommendation to acquire a financial product requires disclosure to investors under this Part unless an exclusion applies.</p> <p>This will ensure that recommendations are accompanied by disclosure documents before the issue or sale of the product takes place. It is further a confirmation of the point made in clause 34 of the Bill.</p> <p>See for example: s 1012A of the <i>Corporations Act 2001</i> (Cth) (Australia).</p>
Clause 33	Purpose of PDS	I support the introduction of this clause even through the provision is vague and does not provide enough guidance to issuers of financial products. However later provisions in the Bill provide clarification regarding the content of product disclosure statements.

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		The introduction of a clause similar to s 1013C of the <i>Corporations Act 2001</i> (Cth) (Australia) may be desired.
Clause 37	Offence to knowingly or recklessly contravene section 34	<p>While I support this provision, it only deals with scenarios where there is knowledge or recklessness.</p> <p>I believe the provision should also deal with other scenarios: The mere fact that a contravention of clause 34 has occurred should be in itself an offence. Maybe the person could be committing a tier 1 offence.</p>
Clause 40	Meaning of material information in this Part	I support Option B regarding this matter. While Option A is good for consistency purposes, Option B provides clearer guidelines and remove any unnecessary confusion that may arise from Option A.
Clause 44	Supply of prescribed information and document	<p>I support this provision. However, in its current state, the clause only imposes tier 1 offences to issuers who do not comply with the provision.</p> <p>What if the breach of the provision was done knowingly? In such instances imposing tier 1 offences may not be appropriate. I suggest that a new provision should be added to this clause:</p> <p>(3) An issuer who knowingly contravenes this section commits a tier 3 offence.</p>
Part 4 and schedule 3	Governance of financial products	
Clause 109	Need to register managed investment scheme for regulated offer of managed investment product	I support the minister's conclusion that all registered MIS should be required to publicly file audited financial statements under the Financial Reporting Act. This will be a step toward protecting investors and raising confidence in the market.
Clause 125	General duties applying in exercise of manager's functions	The duty referred to in this clause protects investors. There is no need to add more duties as this may lead to over-regulation.
Clause 126A	Duties of directors and senior managers of manager	I support the introduction of provisions similar to s 601FD of the <i>Corporations Act 2001</i> (Cth) (Australia). Officers of managers should also have duties imposed on them to ensure protection of the investors.
Part 5	Dealing in financial products on markets	
Clause 211	Meaning of material information	<p>There is no justifiable reason to have a distinction between the treatment of information in relation to listed issuer and information in relation to quoted derivatives. Any such distinct treatment may lead to confusion.</p> <p>I suggest the term 'price or value' should be introduced in both (1) and (2). This inclusion will cover scenarios where a market may be illiquid.</p>
Clause 218	Prohibition of insider conduct	<p>I suggest that the prohibition should apply to securities, derivatives, managed investment schemes and any other financial product traded on the financial market.</p> <p>This means that non-quoted financial products, such as unlisted securities and derivatives, will also be included in the prohibition. This ensures the protection of investors which falls</p>

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		in line with the main purpose of this Act. Excluding non-quoted financial products, such as unlisted securities and unquoted derivatives, from this prohibition may leave a number of investors vulnerable.
Clause 220	Information insider must not disclose inside information	<p>I have two comments regarding this provision:</p> <ul style="list-style-type: none"> - I support the removal of tipping from this provision - I question whether the 'information insider' has to be linked to listed issuers only. The provision should state: listed and unlisted issuers. Such an inclusion will broaden the scope of this provision.
Clause 225	Exception for disclosure in connection with preparing PDS or disclosure document	I support the introduction of this provision. Such an exception is necessary for practical reasons: Without it, preparing a PDS may be very difficult.
Clause 235	Inside information obtained by independent research and analysis	<p>I question the need for this provision. Part of this scenario is covered in clause 212. Regardless of clause 235, information collected from research is not deemed as inside information if it is derived from public information. Consequently, people are not committing insider trading if they are relying on information derived from research based on public information.</p> <p>Other scenarios should not be protected as they will contradict the insider trading prohibition. I do not believe that the scope of the insider trading prohibition should be reduced in such a manner. This will send a negative message to investors and may impact on confidence in the market.</p> <p>Further, it is important to remember that successful prosecution of insider trading is very hard. These prosecutions will be even harder if clause 235 is introduced in the system.</p>
Clause 291	Need for financial product market licence	<p>I support the introduction of such a provision.</p> <p>But I recommend that the exemptions should be specified by regulation. Further I recommend that the Financial Market Authority be provided with the power to grant exemptions from the licence requirement. This will ensure the flexibility of the legislation.</p>
Part 6	Licensing and other regulation of market services	
Clause 474-477	Infringement offences	<p>I suggest that the process of issuing an infringement notice should be more transparent.</p> <p>To achieve this, the Bill may require the Financial Market Authority to give the alleged offender a written statement stating that the regulator believes that a breach of the law has occurred. This will provide the alleged offender with an opportunity to be heard before the infringement notice is issued.</p> <p>Further, for transparency purposes, I suggest that the infringement notices should be available to the public via the Financial Market Authority website.</p> <p>Lastly, clause 474 specifies that the infringement notice should not exceed \$50,000. I wonder if more information should be included to provide guidance to the Financial Market Authority on the manner in which the regulator will decide on the amount</p>

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		imposed on the alleged offender.
Part 7	Enforcement and liability	No comments
Part 8	Regulations and exemptions	No comments
Part 9 and schedule 4	Miscellaneous provisions	No comments