

MACQUARIE UNIVERSITY
DIVISION OF LAW
STUDY GUIDE

Year and Semester:	2008: Semester 1
Unit Code & Unit Name:	BUSL861 FINANCIAL SERVICES LAW
Credit points:	4
Unit convenor:	Mr John Bourke LLM (<i>Monash</i>)
Pre-requisites / Co-requisites:	NIL

Students in this unit should read this study guide carefully at the start of semester. It contains important information about the unit. If anything in it is unclear, please consult one of the teaching staff in the unit.

1. ABOUT THIS UNIT

Unit description

Examines the contractual, fiduciary and legislative obligations imposed upon financial service providers, such as financial advisers, stockbrokers and fund managers. Topics examined include Chapter 7 of the *Corporations Act* (Financial Services and Markets), and the consumer provisions in the *Australian Securities and Investments Commission Act*.

Unit rationale

The unit aims to develop an understanding of the legal and regulatory aspects of financial services law in Australia, and to put them in a broader commercial and regulatory context. It will explore the reach of regulation in this area and the underlying policy objectives ought to be served by the law and regulation.

2. TEACHING STAFF

Convenor:

Mr John Bourke
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3. CLASSES AND STUDY TIMES

The unit will be offered in two alternate modes:

Weekly mode – Wednesdays 6.00 – 9.00 pm

Intensive mode – Sunday, 9 March 10.00am – 5.00 pm, and
Saturday, 29 March 10.00 am – 5.00 pm

Please check the timetable prior to commencement of the semester in case there are any changes to these dates and times on www.law.mq.edu.au

4. REQUIRED AND RECOMMENDED TEXTS AND/OR MATERIALS

Prescribed text:

Corporations Act 2001 (Cth), and the *Australian Securities and Investments Commission Act 2001 (Cth)*, which are published by the major law publishers in a single volume – for example, CCH, *Australian Corporations and Securities Legislation* (current year)/

Recommended texts:

(later editions may be available in 2008)

Australian Financial Planning Handbook 2007-2008, Thomson, chap 20 (Compliance and Financial Planning) (reproduced in the BUSL861 Readings Volume)

Australian Master Financial Planning Guide, CCH, current edition, chap 8 (Compliance and FSR)

*Gillies, P, *Business Law*, 12th edn, Federation Press, 2004

Horgan, S, *Law of Financial Services*, Lawbook Co, 2003

Hanrahan, P, Ramsay, I, Stapledon, G, *Commercial Applications of Company Law*, 7th edn, CCH, 2006, chap 21 (Financial Services and Markets) (reproduced in the BUSL861 Readings Volume)

Hutley, P, Russell, P, *An Introduction to the Financial Services Reform Act*, 3rd edn, LexisNexis, 2005

McWilliams, J, and McLaren, J, *Law of Investments*, Lawbook, 2004 (chaps 1,2,3,4,5)

*Latimer, P, *Australian Business Law*, current edition, CCH

Tomasic, R, Bottomley, S, McQueen, R, *Corporations Law in Australia*, 2nd edn, Federation Press, 2002, chap 20 (Securities Regulation)

*Turner, C, *Australian Commercial Law*, current edition, Thomson/LBC

(*These are useful for an overview of the legal system and the law of contracts)

Australian Corporations and Securities Law Reports

Readings

A volume of reading material will be made available, containing documents relevant to the unit.

5. UNIT WEB PAGE

Study Guides and information on this unit can be found at:
<http://www.law.mq.edu.au/html.postgraduate/studyguides.htm>

6. LEARNING OBJECTIVES

The objectives of this unit are to develop or enhance an appreciation of (1) the legal and regulatory aspects of financial services law in Australia, and the underlying policy objectives and issues, and to put this regime in a broader commercial and regulatory context; and (2) the principles and techniques of case interpretation and statutory construction as aids in dealing with legal materials.

7. GENERIC SKILLS

As reflected above, the unit aims at developing or enhancing skills for interpreting the materials of their law, and their analysis and synthesis. In essence, the unit develops verbal reasoning and writing skills in the context of the discipline of law. The unit also aims to develop or enhance an understanding of the interrelationship between law, regulation and policy.

8. TEACHING AND LEARNING STRATEGY

The unit consists of seminar-based classes (both in intensive and weekly modes). Students are encouraged to attend classes and to prepare for class. The techniques of legal reasoning, legal knowledge and a capacity to apply the principles of law to hypothetical fact situations (or “cases”) will be developed through explanation,

discussion and essay writing. Students are encouraged to raise real life cases from their professional experience, relevant to the subject matter of the unit. Likewise, they are welcome to propose research project topics which are relevant to their work.

9. ASSESSMENT

Assessment consists of an essay between 5,000 – 7,000 words, weighted at 100% of unit assessment. Possible topics will be proposed by the unit convener, but students may with the convener's approval, work on an alternate topic. This option would be especially relevant to those with prior legal training or professional exposure to the law, or industry experience.

Class participation is encouraged but is not mandatory.

The essay is due by Monday, 23 June 2008, 5.00 pm.

If circumstances preclude this please get the unit convener's approval for a later submission. Please ensure that the essay cover sheet is filled in.

Internal students must place a hard copy of the essay in the PG assignment box outside room 341 W3A.

External students must post a copy of their essay to COE in folder provided.

Due Date: Monday, 23 June 2008, 5.00 pm.

In addition all students are to email all assignments on the submission date to the Law PG box which will record date time and name of each email and will provide a backup copy to the Division:

Email to: postgrad@law.mq.edu.au

10. RELATIONSHIP BETWEEN ASSESSMENT AND LEARNING OBJECTIVES

Assessment is by way of an independent research project, which will foster the acquisition of knowledge specific to the subject matter of the unit, and the development of more general skills of law-focused data searching, analysis, synthesis and written expression.

11. PLAGIARISM

The University defines plagiarism in its rules: **“Plagiarism involves using the work of another person and presenting it as one's own.”** Plagiarism is a serious breach of the

University's rules and carries significant penalties. You must read the University's policies and procedures on plagiarism. These can be found in the *Handbook of Undergraduate Studies* or on the web at: <http://www.student.mq.edu.au/plagiarism/>

The policies and procedures explain what plagiarism is, how to avoid it, the procedures that will be taken in cases of suspected plagiarism, and the penalties if you are found guilty.

Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

YOU WILL BE GUILTY OF PLAGIARISM

If you take and use the work of another person without clearly stating or acknowledging your source, you are falsely claiming that material as your own work and committing an act of *PLAGIARISM*. This is a very serious violation of good practice and an offence for which you will be penalized. If you do any of the following in an assignment, or in any piece of work which is to be assessed, ***without clearly acknowledging your source(s) for each quotation or piece of borrowed material you are guilty of PLAGIARISM.***

- (a) Copy out part(s) of any document, including computer and web-based material;
- (b) Use or extract someone else's concepts or experimental results or conclusions, even if you put them in your own words;
- (c) Copy out or take ideas or summarise from the work of another student, even if you put the borrowed material in your own words;
- (d) Submit substantially the same final version of any material as a fellow student. On occasions, you may be encouraged to prepare your work with someone else, but the final form of the assignment you hand in must be your own independent endeavour.

There is nothing wrong in using the work of others as a basis for your own work, nor is it evidence of inadequacy on your part, ***provided you do not attempt to pass off someone else's work as your own.***

12. LIBRARY SUPPORT SERVICES

Macquarie University Library offers a wide range of services and resources to postgraduate students. Go to the Library website. <http://www.lib.mq.edu.au>

Services

Include information on borrowing periods, services to distance students, links to IT Help (the Library's IT support service), and links to training information and training course notes.

Postgraduate students are eligible for a number of additional services. Information about these is available from the **Postgraduates** link, listed under **Additional Services** on the Library homepage.

Additional services for Macquarie postgraduate students include the Academic Outreach Librarians (AOLs). The Academic Outreach Librarians are the first point of contact for Postgraduate students. There is an Academic Outreach Librarian appointed to each Division of the University.

13. UNIVERSITY POLICY ON GRADING

The University requires all Divisions to adhere to a policy relating to the distribution of grades across high distinction, distinction, credit and pass grades. This means that on occasion a student's raw mark for a unit (ie, the total of their marks for each assessment item) may not be the same as that which they receive on their transcript. This is because the total raw mark may be scaled up or down so that the grades of all students in each unit sit within the distribution bands set down by the University. The policy does not require that any number of students are to be failed in any unit.

14. SCHEDULE OF TOPICS

FINANCIAL SERVICES AND MARKETS

This unit examines the legal and regulatory framework governing **financial products**, **financial service providers** in Australia (ie financial intermediaries), and the **financial markets** in which they operate. The focus will be on Chapter 7 of the *Corporations Act* (Cth) (Financial Services and Markets), and the unconscionable conduct and consumer protection provisions applicable to financial service providers in Part 2 Division 2 (sections 12AA-12GW) of the *Australian Securities and Investments Commission Act* (Cth). These consumer provisions mirror those found in the *Trade Practices Act* (Cth).

Reference will also be made to Chapter 5C of the CA, which deals with managed investment schemes.

The *Corporations Act* will be abbreviated as 'CA'; and the *Australian Securities and Investments Commission Act* as the 'ASIC Act'.

Texts will be abbreviated thus:

Gillies, *Business Law* G

Horgan's *Law of Financial Services* H

Hutley and Russell, *An Introduction to the Financial Services Reform Act* HR

Williams and McLaren, *Law of Investments* WM

OVERVIEW – THE REGULATORY SYSTEM

[H chaps 1-3 HR chaps 1-2 WM chaps 1-2, 4]

The regulatory system, and the sources of law (general law and legislation) will be surveyed. The statutes of principal relevance are the *Corporations Act* (Cth) (Chapter 7 “Financial Services and Markets”), and the *Australian Securities and Investments Commission Act* (Cth) (see Part 2 Division 2 (sections 12A A-12GW) containing the unconscionable conduct and consumer protection provisions applicable to financial service providers – these provisions mirror the consumer protection provisions found in the *Trade Practices Act* (Cth)).

The principal regulator is the federal Australian Securities and Investments Commission (‘ASIC’). Reference will be made to the structure, role and powers of the ASIC, which are provided for in the ASIC Act.

See the general definitions section – s761A. Note also the following definitions, including the definitions of –

financial product (CA s762Aff). Broadly, a financial product is a facility through which, or through the acquisition of which, a person does one or more of: (a) makes a financial investment; (b) manages a financial risk; (c) makes a non-cash payment. Examples of financial investment include buying shares in a company or units in a managed fund (known technically as a managed investment scheme/registered scheme). Buying real estate is not within the definition. Examples of managing financial risk are taking out insurance; and hedging a liability by acquiring a futures contract or entering into a currency swap. Examples of a non-cash payment are: making payments by means of a facility for direct debit of a deposit account; making payments by a facility for the use of cheques; or making payments by means of a purchased payment facility within the meaning of the *Payment System (Regulation) Act* 1998, such as a smart card; or making payments by means of traveller’s cheques (whether denominated in Australian or foreign currency). Certain things are specified not to be financial products, including reinsurance, and any credit facility within the meaning of the regulations, and an interest in a superannuation fund of a kind prescribed by regulations.

provision of a financial service (CA s766Aff). A person does this when, for example: they provide financial product advice; or deal in a financial product; or make a market for a financial product; or manage a registered scheme (managed fund).

financial product advice (s766B). A person offers this when they make a recommendation or a statement of opinion, that is intended to influence a person to make a decision in relation to a product, or which could reasonably be expected to have such an influence. The legislation distinguishes between personal advice (ie where the recipient’s personal circumstances are taken into account) and general advice. Certain forms of advice are excluded, such advice by a lawyer in the course of giving legal advice.

financial market (s767A). This is a facility through which offers to buy or sell financial products are regularly made or accepted, etc. An example is a stock exchange.

The concept of licensing as a mechanism for regulating financial products and intermediaries will be introduced in this module, but developed in more detail in **Part 2** below.

It will also be useful in this overview to note the general law (technically, common law and equitable) sources of rights and liabilities of parties involved in services transactions, including:

- The **law of contract**
- The **law of negligence** (virtually defunct given the introduction of the statutory provisions relating to misleading or deceptive conduct)
- **Unconscionable conduct**
- **Undue influence**

It must be stressed, however, that the statutory regime applying to the provision of financial products and services, which includes prohibitions on certain harmful forms of conduct by providers and associated remedies, will often preclude the need for resort to the general law causes of action and remedies (which, if they are raised, will be pursued concurrently with the statutory causes of action).

PART 2

WEEKS 3 – 4

THE LICENSING SYSTEM

[H chaps 4-9 HR chaps 3,9 WM chap 2]

The Corporations Act makes provision for the licensing of financial markets and financial service providers. The licensing regime has the usual objectives – ensuring that a licensed person has the skills and capacity to carry out the licensed activity; regulating them in this activity; and applying sanctions for breach of requirement (and in turn sanctions for unlicensed personnel engaging in conduct which requires a licence).

The *Corporations Act*, Part 7.2 (ss790Aff) deals with the **licensing of financial markets**. Section 719A provides in effect that a person may only operate, or hold out that a person operates a financial market, if the person has an Australian market licence, or the market is exempt from this requirement. The following provisions deal with such matters as **the regulation of market licences**, including the licensee's obligations, the obligation to notify ASIC of certain matters, the content of the market's operating rules and procedures, the enforcement of the operating rules, and ASIC's powers in relation to licensees. Provision is made for the **Australian market licence**, including how to get a licence, when a licence may be granted, the conditions on the licence, and licence suspension.

The CA Part 7.3 (ss820Aff) deals with the **licensing of clearing and settlement facilities**, and their regulation, and the powers of the Minister, ASIC and the Reserve Bank in relation to licensees.

CA Part 7.4 (ss850ff) deals with **limits on involvement with licensees**, including the disqualification of licensees.

CA Part 7.5 deals with **compensation regimes for financial markets**. In general a licensed market through which participants provide services must have a compensation regime (s881A). One such regime is the National Guarantee Fund or NGF (ss887Aff). This fund would cover, for example, defalcations by a stockbroker which result in a client vendor not receiving settlement monies.

CA Part 7.6 (ss910Aff) deals with the **licensing of providers of financial services**. A person who carries on a financial services business (such as a stockbroker or financial planner) must hold an Australian financial services licence (subject to certain exceptions) (s911A). Obligations are imposed on licence holders (such as that they do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (s912A). The licensing regime is administered by ASIC.

Sections 913Aff deal with applying for a **financial services licence**, the imposing of conditions on licences, and the suspension, variation and cancellation of licences.

A licence holder may give an **authorised representative** (such as an employee or agent (see s910A) written notice authorising the person to provide a specified financial service or services on behalf of the licensee (ss916Aff).

Sections 917Aff deal with the **liability of financial services licensees for representatives**.

Pursuant to s920Aff, ASIC has **the power to ban, and the court the power to disqualify, a person from providing financial services**.

Sections 924Aff deal with **agreements with unlicensed persons relating to the provision of financial services**.

FINANCIAL SERVICES DISCLOSURE – FINANCIAL SERVICES GUIDES; PRODUCT DISCLOSURE STATEMENTS (PDS)

[H chaps 10-11 HR chap 4 WM chap 3]

The *Corporations Act* Part 7.7 (ss940Aff), and Part 7.9 (ss1010A ff) provides for a **financial services and products disclosure regime**. This regime aims to inform prospective investors so that they can make an informed decision regarding investment.

Part 7.7 is headed **Financial services disclosure**. The objective of these provisions is to compel the provider of a financial service (such as units in a managed fund) to provide the prospective retail client (ie, small investor) with a **financial services guide**, as a means for helping to ensure that the client makes informed decisions. The procedures to be followed, and the content of the guide, are closely regulated. In certain cases a **statement of advice** must be given to a retail client (ss944Aff).

Criminal civil liabilities are imposed upon persons for stipulated acts of non-compliance with the disclosure regime (ss952Aff).

Part 7.9 is headed **Financial product disclosure and other provisions relating to issue, sale and purchase of financial products**. It provides in substance that the regulated person, such as an issuer of a financial product, must give the prospective customer a **Product Disclosure Statement (PDS)** for a financial product, in stipulated cases such as where the regulated person provides financial product advice to a person that consists of or includes a recommendation that the person acquire the financial product (s1012A(3)).

A classic example would be a fund manager marketing units in a managed investment scheme (such as an equity fund or property fund) to a prospective purchaser. Secondary trades (involving the transfer rather than the issue of financial product) – for example, sale of shares on the stock exchange – are not in general covered by the PDS regime.

The concept of **financial product** upon which the PDS regime pivots, is defined for the general purposes of Part 7 as including “securities”(most obviously, shares and debentures in corporations) and “interests in registered investment schemes” (ie managed investment schemes, also known as managed funds): see s764A. The concept of financial product is, however, narrowed for the purpose of the PDS regime – the PDS regime is not applicable to securities, in the sense of shares or debentures in corporations: see s1010A which specifically excludes “securities”.

The net result is that the PDS regime applies to products such as units in managed funds (this is its main role in practice), but not shares and debentures in corporations. The sale of shares and debentures in corporations on the primary market (ie, newly issued securities) is regulated by the fundraising provisions in the *Corporations Act* (Chapter 6D) – at the core of this parallel regime is the prospectus which parallels the PDS in relation to managed funds.

Relevant products include managed investment products, certain superannuation products, RSA (retirement savings account) products, investment life insurance products, and certain deposit products.

The PDS regime does not apply to financial products not issued in the course of a business (s1010B). Other exclusions apply also – small purchases of units (such as by way of reinvestment of distributions in a managed fund) do not require a PDS (s1012E).

The PDS regime specifies the content of the PDS – in substance matters relevant to the making of an informed choice as to whether to invest in units in the managed fund or other financial product must be set out (see ss1013Bff).

Periodic account statements must be supplied to investors in units in managed funds and like products (s1017D).

Ancillary provisions deal with a number of matters, such as advertising financial products (s1018A); and cooling-off periods (s1019A).

Criminal sanctions are provided for specified acts of non-compliance with the disclosure regime (ss1021Aff), and a parallel civil liability regime is provided for (ss1022Aff).

PART 4

WEEKS 7 – 8

MISCELLANEOUS: MARKET MISCONDUCT AND OTHER REQUIREMENTS – REGULATING CONDUCT ASSOCIATED WITH FINANCIAL PRODUCTS AND FINANCIAL SERVICES – DEALING WITH CLIENT’S MONEY, UNCONSCIONABLE CONDUCT – PROHIBITIONS ON HAWKING – MARKET MISCONDUCT SUCH AS MARKET MANIPULATION, MISLEADING OR DECEPTIVE CONDUCT, AND INSIDER TRADING

[H chaps 12-13 HR chaps 5, 7, 8]

The *Corporations Act* Part 7.8 (ss980Aff) and Part 7.10 (ss1040Aff) make provision for conduct connected with financial products and services, other than disclosure.

Part 7.8 is headed **Other provisions relating to conduct, etc, connected with financial products and financial services, other than financial product disclosure.**

It provides for rules governing dealings with client’s money (s981Aff) (installing a traditional trust account regime); financial records and audit (ss987Aff); audit (ss990Aff).

Unconscionable conduct by financial services licensees is prohibited (s991A).

Financial services licensees must give priority to clients’ orders (s991B).

The hawking of certain financial products is prohibited, although unsolicited contacts in which products are offered for sale are permitted in certain circumstances. A PDS must be given to the prospective purchaser before a binding contract to acquire a product can be formed (ss992Aff).

Provision is made for the enforcement of obligations in Part 7.8.

Part 7.10 is headed **Market misconduct and other prohibited conduct relating to financial products and financial services**.

Part 7.10 prohibits certain forms of financial market conduct and attaches criminal and civil liability to their commission, including market manipulation (s1041A), false trading and market rigging (s1041B), false or misleading statements (s1041E), misleading or deceptive conduct (civil liability only) (s1041H), and insider trading ((ss1042Aff). The objective of these provisions is to ensure an orderly and informed market for financial products (including shares and debentures) and services. A *financial market* for these purposes is one where financial products are regularly traded; it does not include one-to-one private transactions such as where a person offers to buy from another specified person (see s767A).

Certain defences are enacted (ss1044Aff).

PART 5

WEEK 9

UNCONSCIONABLE CONDUCT AND CONSUMER PROTECTION IN RELATION TO FINANCIAL SERVICES

[G chap 33 on parallel provisions in the Trade Practices Act]

The *Australian Investments and Securities Commission Act 2001* (Cth) makes provision for **unconscionable conduct and consumer protection in relation to financial services** (Part 2 Division 2 ss12AAff). These provisions set out a range of prohibited forms of conduct which attract civil (and in some cases criminal) liability. (They parallel the unconscionable conduct and consumer protection provisions in the *Trade Practices Act 1974* (Cth), except that they are confined to conduct in relation to financial services.)

They include unconscionable conduct in relation to financial services (ss12CA, 12CB and 12CC) (corresponding to ss51AA, 51AB and 51AC of the *Trade Practices Act*); and misleading or deceptive conduct in relation to financial services (s12DA), (corresponding to s51 of the *Trade Practices Act*).

Note will be made of the other provisions, and of the enforcement and remedies provisions (ss12GAff).

MANAGED INVESTMENT SCHEMES

[WM chap 5]

Provision is made for **Managed investment schemes** in Chapter 5C (ss601EAff) of the *Corporations Act*. The concept of managed investment scheme – known colloquially as managed funds or (in earlier times) unit trusts – includes such entities as unlisted equity funds, cash management funds, property trusts, hedge funds and agricultural schemes such as unit trusts formed to sell interests in pine tree plantations. A common feature is the pooling of money from investors, who are given “units” in the underlying business, such as units in a trust owning a portfolio of shares (ie, in effect investors become part-owners of interests in this pool of shares). They have historically been structured as trusts, and they can still be, but the trust must under current law be managed by a corporation.

The Chapter 5C regime provides for the registration of a managed investment scheme by ASIC; and for the management of the scheme by a public company (‘the responsible entity’) holding an Australian financial services licence. Statutory duties are imposed upon the management company and its officers and employees. Provision is made for changing the manager.

Provision is made for the constitution of the registered scheme, and for other matters of governance; for members; rights to withdraw from a scheme, and for related party transactions, for winding up and deregistration.

As noted in Part 3, units or other interests in a managed fund must be marketed via a PDS.
