



PETER BOBBIN

LEGAL BRIEF

If it looks like a duck ...

That impressive disclaimer may not be worth the paper it's written on.

By Lisa Chambers

Responsibility is a unique concept. It can only reside and inhere in a single individual. You may share it with others, but your portion is not diminished. You may delegate it, but it is still with you. You may disclaim it, but you cannot divest yourself of it.

— *United States Admiral Hyman G. Rickover*

Although the disclaimer has become the darling of the commercial world, its purpose and effect are generally poorly understood by those who purport to seek its protection and those against whose claims it is intended to protect. A useful rule of thumb to remember is that you cannot disclaim that which you actually do.

Despite the propensity of commercial parties to treat disclaimers as a cure-all for mistakes, misrepresentations and inadequate service, the courts have developed the view that responsible parties should be held properly responsible for their actions. For this reason, disclaimers have been, and will continue to be, given a narrow construction.

Much of the case law in relation to the use of disclaimers has arisen in the context of claimed breaches of the misleading and deceptive conduct provisions of the Trade Practices Act, and decisions in this area afford a particularly useful insight.

In the financial services context, the implications for claims pursuant to the mirror provisions of the Australian Securities & Investments Commission Act and the consumer protection provisions of the Corporations Act as they apply to the financial services industry are likely to be comparable.

In determining the effect of the existence of disclaimers or qualifying statements, the courts will consider the conduct of the parties as a whole. More recently, in recognition of the fact that intent is not an element in determining misleading and deceptive conduct, the courts have tended to take a harder line, finding that such clauses should not be allowed to defeat consumer claims.

However, the courts do recognise that, in certain circumstances, disclaimers can be effective. In *Benlist versus Olivetti Australia*, the court found that, although the perpetrator of misleading conduct could not, “by resorting to a disclaimer, evade the operation of the Trade Practices Act ... if the clause actually has the effect of erasing whatever is misleading in the conduct, the clause will be

effective, not by an independent clause of its own, but by actually modifying the conduct”.

Disclaimers, qualifications and limiting statements will form, more often than not, an important part of the financial services industry advisory process. They are the cornerstones by which many advisers will seek to limit their liability. In light of more recent legal reasoning, it is vital that industry participants remember that:

- The existence of qualifying statements must be embraced by, not buried in, the report or material to which they relate.
- Any disclaimer should be clearly brought to the attention of the prospective client and expressed in language that is clear and understandable by them.
- Disclaimers should help guide the reader as to how to approach the report and what opinions, views or conduct should arise from it. The qualifying statement can then be read in the context of the report. Remember, it is the entirety of the report and the effect of its contents as a whole that will be particularly relevant.

- If there is a specifically identifiable risk area, a qualifying statement will have effect only when it is drawn to the reader's particular attention and specifically deals with the area of risk that has been identified.

It is vital to recognise that disclaimers and limiting statements are only one part of an effective risk-management strategy and must be properly supported by the organisation's processes and risk-management framework. Even the most carefully worded and prominent of disclaimers may be entirely invalidated where an adviser or any other party involved in the provision of the service gives advice inconsistent with the disclaimer.

If it looks like a duck and quacks like a duck, you can call it a dog all you like, dress it up and name it Fido — it will still be a duck.

Asset

LISA CHAMBERS IS A SOLICITOR
AT THE ARGYLE PARTNERSHIP.
PETER BOBBIN WILL BE RETURNING
IN THE MARCH ISSUE OF *ASSET*.

