See here, understand?

If you think the indecipherable legal verbiage, written in microscopic type and buried in obscurity on your customer documentation, will cover your liabilities, think again, PETER BOBBIN writes.

DEAR READER, please do not start reading this article here. First view the disclaimer at the bottom.

What's the matter … do you hate disclaimers? I don't. I love the inventiveness and language in them.

The PowerPoint delivery of disclaimers has become a dark art. The disclaimer statement usually comes as the second slide in a presentation, commonly takes up a whole page, has an illegible font size and is screened for only three seconds. If a presenter tried to give it justice, then 90 per cent of the presentation would be about the disclaimer and 10 per cent of the talk would be about the actual topic at hand.

Behind every such disclaimer lies a proud lawyer who, from the comfort of an office, never sees just how ineffectual the work has become. Nobody has been brave enough to tell disclaiming lawyers about their self-defeating impotence. So let's do it now.

There is no such thing as a one-size-fits-all disclaimer. Context is critical, so never create one unless you know the context in which it is needed. And make one for each context. Courts always interpret the disclaimer against the person seeking to hide behind it and will also look to the surrounding circumstances.

Do disclaimers work? Yes, the courts see a limited role for disclaimers. In the 1986 INXS case, Murray Wilcox, the judge in the matter, said: "There are occasions upon which the effect of otherwise misleading or deceptive conduct may be neutralised by an appropriate disclaimer … but such cases are likely to be comparatively rare and to be confined to situations in which the court is able to reach satisfaction – the onus resting on the party relying upon the disclaimer – that the disclaimer is likely to be seen and understood by all those – leaving aside isolated exceptions – who would otherwise be misled before they act in relation to the relevant transaction."

What is Wilcox's key checklist for disclaimers? It must be likely to be "seen" and "understood" before the intended person acts.

Keep it simple

So it should be upfront, a person should not have to hunt for it: a commonsense, prominent position is needed. A PowerPoint disclaimer should be the second slide in a presentation because people leave early. Most presenters get this right, but they suffer a timing failure; their disclaimer is screened for a time that is in inverse proportion to the number of words used.

I am sure that Wilcox does not view "seen" as simply viewed; the disclaimer needs to be readable to all, use a large, clear font and, in the case of a PowerPoint talk, it needs to be displayed for as long as it takes to read it. In fact, the presenter should read it aloud. In this way the presenter can know that there is a chance of the message being understood.

In website terms, a good example of how to bury a disclaimer to the point where it's ineffectual is the new-look Australian Securities and Investments Commission site. How long does it take you to find its conditions of use? You should make the effort, because once you get there, you will be rewarded.

The wording is simple, clear and only deals with its own context. It could have worked if only it was, in Wilcox's words, "likely to be seen". But unlike the rest of us, ASIC need not worry. It enjoys a range of statutory protections that we do not.

ASIC has a view on disclaimers that should not be ignored. In 2003, it banned Kevin Trezona for a long list of reasons, one of which included that he "sought to contract out of his responsibilities, obligations and liabilities to his clients". This was not a major reason, but it was one of the reasons for the banning order.

All-encompassing mistake

In essence, ASIC says, and rightly so, that you should not go overboard with liability limitation statements. Certainly, the most common mistake is the all-encom-

> A professional cannot disclaim the very basis of what it is that they are doing, in particular the advice given to a client.

passing disclaimer. What is not understood is that a professional cannot disclaim the very basis of what they are doing. A financial planner can not generally disclaim a client from relying on their advice.

In the 1990 decision of Benlist versus Olivetti Australia, the federal court dramatically limited the effectiveness of a general disclaimer that did not single out the particular representation complained of, because to do otherwise would make it permissible to avoid the operation of the Trade Practices Act (for the financial services industry read consumer protection provisions within the ASIC Act).

"By such a clause," James Burchett, the judge in the case, said, "it would be all too easy to make representations in the confidence that they would be acted upon, and then withdraw in the confidence … that the withdrawal would not be acted upon."

Fine print frailties

If your disclaiming lawyer is not listening yet, suggest that they consider the words of Michael Kirby, a judge in the 2004 High Court judgement on Butcher v Lachlan Elder Realty. "The qualification must make any exemption very obvious to those unfamiliar with it," he said. "The more harsh the exemption, the stricter has been the approach of the courts to the duty of the party that seeks to rely upon it to draw it to specific notice.

"The finer the 'fine print', the more readily will a court draw a conclusion that insufficient notice has been given, so as to take the provision outside the operation of an effective exemption."

Kirby also said with approval that "the presence of such a clause may in fact exacerbate the misleading nature of the impugned conduct".

It is likely that he would have also agreed with the 2004 Ontario Superior Court of Justice decision on Andersen versus Fortune Financial Corporation.

In that case, the court concluded that the disclaimers in the document were ineffective. It contained the warnings regarding the speculative nature of the investment, but the complexity of it made these warnings of no use.

Discreditable disclaimers

It is time to get serious about disclaimers. I would love to receive your top five discreditable disclaimers.

To help you find these, look for anything headed "Disclaimer" that does not use plain English or has a font size smaller than the rest of the presentation. It will not be too easy to find.

And it will exclude all liability except for liability which cannot legally be excluded.

But before you race off to redraft all of your communications, remember this: pay no attention to what I say. This article is not an offer of advice for you to rely upon.

I accept no responsibility for anyone relying upon the content of this article, except for liability that cannot legally be excluded. ✪

DISCLAIMER

Warning, warning, warning, pay no attention to what I say. This article is not an offer of advice for you to rely upon. Except for liability that cannot legally be excluded, all liability (including liability for negligence and other naughtiness) arising from use of this material, even if the font size sends you blind, is excluded. Liability, which cannot legally be excluded, is limited to the maximum extent possible, in whatever way possible. Even if it is not possible, you agree for it to be possible to the maximum extent that you can agree, which by reading this you are deemed to have done. Even if you have not read this disclaimer you are deemed to be aware of it and to understand its application to you, especially the fact that I do not waive any rights within it and that your rights are legally tied when reading this (even if you may not have read it), which is why you cannot waive any rights at all. You agree that you will not assess whether the content of this material is right or wrong, or of good or bad quality and you will not use it as a substitute for professional advice. You agree to pay for professional advice and to be willing to pay a lot for it, but not to know what to do with it.