



## Mother of all standards

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There are some general rules that should be followed when determining whether something is clear, concise and effective

I hear that Greenpeace and the Australian Conservation Foundation are planning a protest against the Australian financial services industry. Apparently, they regard the Financial Services Reform (FSR)-induced changes to disclosure obligations as a threat to world forest resources.

Some say that size does count, but does the statement of advice (SOA) really need to be so big? Just who is to blame for the requirement for a statement of advice to carry a health warning: "Lift carefully; bend at the knees"?

Not only is the size of a SOA of current concern to some in the industry, others are also worried about the regularity of it. As we get older, being regular is important. But some financial advisers complain that they have clients where the concept of "regular" to them means a monthly or weekly telephone call to ask how the investments are going. They ask: does this mean that I have to issue a SOA every time?

Oops, there goes another tree.

Before the next reform to the financial services industry, what do you think of the idea of making it compulsory that the parents of Treasury and ASIC officers obtain a full and comprehensive financial plan that their Treasury and ASIC children are required to explain to them? This would force Treasury and ASIC to understand, in a practical sense, what the rest of Australia has to endure. They will learn what it is like to be a financial adviser and to explain the size of the SOA and its relevance to the personal circumstances of the client.

To be fair, Treasury law makers are not the ones to blame. When crafting the FSR they have insisted that all communication be clear, concise and effective. Treasury doesn't interpret the law, it just writes it.

Perhaps ASIC is to blame. Is it Pauline Vamos or Mark Adams? No, it is neither of them; they have presented a very commonsense and practical approach to the SOA.

So who is to blame?

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With some trepidation I must admit that it is me and my colleagues who are to blame, the lawyers and in-house techos who have never met a client or been involved in the financial planning process.

To be completely fair, there are some very specific requirements of the Corporations Law as to what should be included in an SOA. These are mostly found in Sections 947A through to 947D, but there are additional obligations that can be gleaned from other parts of the FSR. Importantly, there is an overarching requirement that the statements and information included in the statement of advice must be worded and presented in a clear, concise and effective manner.

In the financial services industry, it is really easy to be concise, especially for a client in receipt of an AP from the rollover of an ETP out of their SMSF. And surely, you cannot be any clearer when you say that the IAS and the PAYG from the AP is dependent on the applicable RBL as well as the amount of the pre- or post-July 1983 component and whether the post is a taxed or untaxed element.

This is clear to me, and I am sure that you will agree!

It may be concise, but for the average client, even if it were clear, the language used is unlikely to be effective.

The phrase "clear, concise and effective" must be read in the context in which it appears. This phrase is littered throughout the FSR-amended Corporations Act. Because of this, it must be read in the context in which it appears. What this means is that the relevant disclosing document must be presented in a clear, concise and effective manner having regard to the person to whom it is to be provided.

Where the phrase is used in relation to a SOA, it is in the context of personal advice to a retail client. Whether or not a SOA will satisfy this test is, to some degree, a matter of personal opinion. But there are some general rules that should be followed when determining whether something is clear, concise and effective.

When in doubt, leave it out. As a lawyer, my training says when in doubt, leave it in. This is why the documents get longer and longer over time. You need to reverse this philosophy.

That is not to say that the information should not be disclosed to the client. It is a question of how it is presented. Look carefully at what has been prepared. Will it add to the client's particular knowledge about the specific advice, or is it background information, material of the type that may help the client to put the advice into context? If it is the former, this should be in the SOA. If it is the latter, don't include it. Add it as an appendix. Create an attachment of all the educational material that is of value to enable a client to embark upon the education process to more clearly understand their own financial well being, but do not include it in the SOA.

From a practical legal risk management perspective, add a table of contents to the SOA that refers to the additional material, or better still, in the covering letter that encloses the SOA, refer to the additional educational material.

**Avoid industry jargon.** This is going to be hard for those of us who have sweated over many years of study to learn to speak fluent

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FSR-ese, but the discipline of looking for simple words to explain jargon will be well rewarded with a clear report to the client. We lawyers are sometimes accused of writing in a language that even Latin scholars have difficulty understanding. There is a simple rule when choosing the language to incorporate in the SOA: if it is industry jargon or does not add meaning, avoid it. Leave the industry jargon for your conferences and business lunches.

**Dumb it down.** Some phrases live long in Australian folklore. Everybody knows what negative gearing is. But the question you should be asking is: do they really understand it? Which of the following phrases do you think is more effective?

\*\* Negative gearing is a tax-effective way to enhance an investment portfolio with tax deductibility of excess interest expense against other assessable income.

\*\* Negative gearing is how to lose money tax-effectively.

The communication must be clear and concise, but it must also be effective. This requires you to put yourself into the mind of the reader and read your own advice. For it to have been effective, you need to understand what your purpose was. After reading it, if you believe that the client would embrace your purpose, it will have been effective.

**Public workshop the basic structure.** FSR imposes general consistent obligations on some aspects of the SOA. To see whether you have achieved a clear, concise and effective skeletal frame within which the body of the advice will be structured, get the document public workshopped. For larger licensees, this may involve a communication specialist; for smaller licensees and advisers, this may involve some obliging friends.

I often recommend you get your mother involved. I don't know about your mother, but my mother doesn't hold back - whether I want to know or not, she will tell me what is wrong. If, after explaining my purpose to her, my mother said that she understood it and my SOA was effective, I doubt that any judge in Australia would challenge her opinion - especially if they met my mother.

If you want some legal authority for what I am saying, look to the informed consent cases. In many areas of Australian law, an uninformed consent is no consent at all. Where there is uninformed consent, the agreement reached, the benefit granted or the indulgence sought is not achieved. Worst, where uninformed consent is found to exist in a position of unequal bargaining power, the nature of the uninformed consent may constitute a misrepresentation.

It is the informed consent purpose that is the real purpose of the requirement that the SOA must be clear, concise and effective. Treasury and ASIC will tell you that the whole purpose of the SOA is to enable the client to be able to make an informed decision about their financial future. This is the central purpose of the SOA. This is the context in which your approach to clear, concise and effective communication must be assessed.

There are many instances across the spectrum of Australian laws where one of the parties claims deceit by the other to justify the overturning of the legal relationship between them. Or the claim is to compensate for a loss that they have sustained. Where this happens, the defendant always argues: but they consented! To overturn that consent, all that the claiming party need show is that a duty was

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owed to them by the other to provide information, and the information was not provided in a manner that enabled them to make an informed opinion.

If a person cannot arrive at an informed opinion, they cannot give their informed consent.

Let me make this point clear. If you work in a financial services industry, you are a broker of information. This is a fundamental part of the services that you provide. And you provide it in the context of a fiduciary duty to the retail client.

The absence of the proper information in a clear, concise and effective manner can only lead to the inevitable conclusion that the client was not informed when they expressed the opinion to alter their approach to investments and instructed you to act accordingly. Any loss sustained by them can only be attributed to you since any decision that was made by them was flawed because of you.

So when we look at it closely, the concept of "clear, concise and effective", while newly introduced by the FSR, has been a standard that has existed in the financial services industry for quite a long time. Some of us just did not know this.

Let's recap: what is clear, concise and effective? I don't know - ask your client. After all, it is for them that it has been written. Better still, ask your mother. If she understands it, you have achieved the mother of all standards.