

Limits to responsibility

Is ASIC acting unfairly by disallowing contracting out of responsibilities. By Peter Bobbin

Kevin Trezona, of Applecross in Western Australia, has been permanently banned from acting as a representative of a dealer or an investment adviser because, in the words of the Australian Securities and Investments Commission (ASIC), he had not performed his duties as an authorised representative efficiently, honestly and fairly.

Most people don't even read ASIC's banning order press releases; banning orders always happen to somebody else. But I read them.

If you had read ASIC press release 03-029 *WA Adviser Permanently Banned*, you would nod in agreement. ASIC formed the banning order based on its belief that Trezona failed to have a reasonable basis for making recommendations to a significant number of clients, failed to disclose substantial benefits or advantages, made offers of securities that needed disclosure without a disclosure document having been lodged with ASIC and engaged in conduct that was misleading or deceptive or was likely to mislead or deceive.

With the current pressures on the industry, the banning of a planner based on a sound and reasoned approach helps to restore confidence in the industry and the system that must regulate it. But there was one extra reason for the order: ASIC alleged that Trezona "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.

This statement worries me. It potentially foretells of ASIC attempting to raise the standards bar well above that of the rest of the Australian business community.

We need a definitive statement from ASIC otherwise this simple two-line statement may see financial planners and dealer groups lose ordinary commercial

rights that other professions enjoy. Such an approach is a retrograde step for the consumer as well.

When issuing a banning order, ASIC is the detective, prosecutor, jury and judge. It is a role that it needs to possess and one that it must wield, having regard a person's rights to natural justice.

It is this natural justice concept that enables a person to appeal against an ASIC banning order. In the process, each of the points upon which a banning order has been made are the subject of review and comment. If this were to happen, we could better understand what motivated ASIC when it banned Trezona for reasons that included the fact that he sought to contract out of his responsibilities, obligations and liabilities to his clients. If Trezona is willing to appeal his banning order, we may get clarity on a potentially (commercially) dangerous issue. If, like many others, he has resigned himself to no longer work within the industry as a representative of a dealer or an investment adviser, we will be stuck with a statement by ASIC but have no understanding of it.

What is the problem? The rest of Australian business is entitled to limit their responsibility and liability to customers. Why can't the financial services industry do the same? To better understand the issue, let's examine some fundamental principles.

The law is relatively clear – you cannot disclaim the heart of your agreement with another. To do so means that there is either no contract, in which case you must give back all that you have earned under the contract, or the attempted disclaimer clause is of no legal effect – it is struck out of the agreement as though it never existed.

This is the basic law of what you can and cannot do when you seek to contract out of a liability to clients.

However, you can disclaim all ancillary responsibilities and liabilities, provided you have not made any of these central to your contract with the client.

Including a responsibility and liability limitation in a client services contract is a normal part of Australian business. Do they work? Yes, the courts see a limited role for disclaimers – they can be an effective legal risk management tool. But the courts have been careful not to allow them to grow too broadly.

To overcome the broad reaching effectiveness of responsibility disclaimers in contracts, governments have expanded the consumer protection measures in the ASIC act and provided additional protections for consumers of financial services under the FSR changes to the corporations act. These consumer protection provisions can apply notwithstanding that no one has been actually misled or suffered damage in reliance on the conduct of the adviser.

So if the courts and legislature can properly regulate the effectiveness of disclaimers, what has ASIC got to do with whether or not a financial planning business has pushed a disclaimer too far?

If ASIC's banning order was influenced by a dealer or representative excessively asserting that they have no liability to clients because of a disclaimer that is too broad, that is okay because to do so is itself engaging misleading and deceptive conduct. However, I am concerned the ASIC view is that the use of such disclaimers is not fair, in the context of what they perceive to be within the trilogy of efficiently, honestly and fairly.

This is a new standard. And ASIC is going too far if, in its view, an authorised representative is not acting efficiently, honestly and fairly because they (and through them their dealer) have sought to contract out of responsibilities, obligations and liabilities to clients. ★