



Litigation Liability
Floodgate is Open; is your
SMSF client checklist
robust or so so?

Peter Bobbin
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#MC2018 

Peter Bobbin

For nearly 30 years Peter has earned respect for his fine planning and strategy skills in the areas of superannuation, taxation, estates and business succession planning, commercial structuring, regulatory compliance, and general commercial issues. Whatever Peter undertakes, his focus is foremost on the outcome, not the process. As a former university lecturer, frequent commentator on the law and former accountant, Peter can't help but bring a practical and insightful approach to law. For this reason he courts as clients the financial services arms of every major financial institution in Australia, public companies, and associations. Peter advises both individuals and businesses, working with many corporate and high net wealth clients as well as accountants, financial advisers, and other lawyers.

Through his wide network, Peter is also active in lobbying government to support a good cause or achieve better outcomes in the law. He's successfully had laws amended and was the only individual (non-association) representative invited to the Federal Treasury initiative on the Ralph Report to tax trusts as companies.

Peter takes his role as charity trustee of the Future2 Foundation very seriously and is an active member of numerous professional associations in the financial services, superannuation, and planning industries. He's also a keen cyclist and has taken part in the Future2 Wheel Classic, riding each year for the past years from 2010 to 2016.

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**Peter's
Disclaimer?**

There
Is none
Trust me
I am
A lawyer

Client onboarding is exciting ... it's the start of your/their legal relationship!

#INC2019



Do you understand your

Conflicts of Interest

Confidentiality

Duty of Care

Privacy

Ethics

Risks

You can shape your legal relationship

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Clever client engagement

...can save you and

...can set the (your) rules

...and save them from not-knowns

One of you will be sued

Know & express who you are

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Understand who you are and who you might become and express this;

I am an accountant, I do accounting

I am a financial advisor, if advise investment strategies

I can be an attorney or executor, I charge for this

Know & express who you are

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- Highlight engagement terms & know what it says
- Tell them you act in their interest but must provide you with info to enable you to act, in their interest
- Set out service standards
- Say; you authorise me to charge for my services, however these arise and if you appoint me beyond my primary role, you release me from any conflict

Jones -v- Leahy & Partners Pty Ltd [2007] WASC 29

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Claim included; that the recommendation to set up the smsf caused a business cash shortfall.

An accountant generally owes a tortious duty of care to their client as well as a contractual duty

One of you will be sued

Jones -v- Leahy & Partners Pty Ltd [2007] WASC 29

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The duties of an accountant primarily depend upon the contract with their client. However, ... the duty may require positive steps beyond the retainer, where these are necessary to avoid a real and foreseeable risk of economic loss being sustained by the client

One of you will be sued

Jones -v- Leahy & Partners Pty Ltd [2007] WASC 29

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The employed accountant testimony was supported by file notes.

The positive steps of the duty that is beyond the retainer depend upon the nature of the particular professional task or function

One of you will be sued

Jones -v- Leahy & Partners Pty Ltd [2007] WASC 29

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The accountants advised of the advantages and disadvantages of smsf but did not advise the plaintiffs that they should establish one

There was no duty to give additional advice about the amount to be drawn from the Company's account to pay into their smsf

One of you will be sued

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Issue a well thought out letter
(contract) of services
engagement

don't get them to sign an acknowledgment, use systems

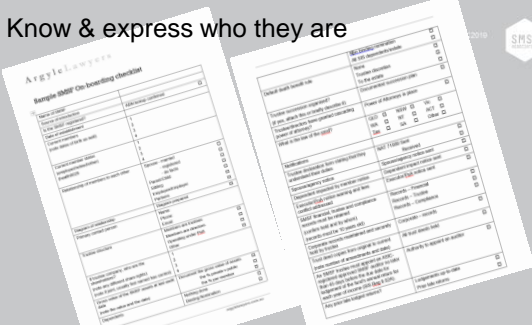
Shape your letter to limit...

#MC2019



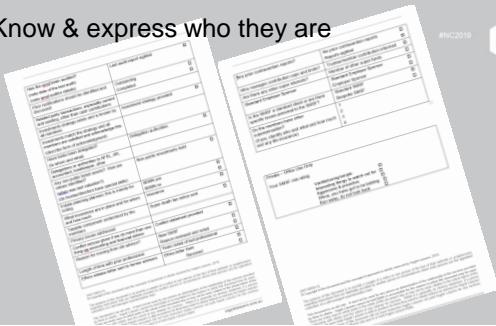
Know & express who they are

2019



Know & express who they are

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Clever Client Engagement



- State that advice is time bound
- Put the onus on clients to raise any concerns
- Risk, don't disclaim it, explain it
- Seek an ethical engagement 'authority'

Clever Client Engagement



[APES 110 Code of Ethics for Professional Accountants](#)

210.7 When a Member in Public Practice intends to rely on the advice or work of an expert, the Member shall determine whether such reliance is warranted.

210.8 A Member in Public Practice who is asked to replace another Member in Public Practice ... shall determine whether there are any reasons, professional or otherwise, for not accepting the engagement

Clever Client Engagement



[APES 110 Code of Ethics for Professional Accountants](#)

210.12 An Existing or predecessor accountant is bound by confidentiality.

210.13 A Member in Public Practice will generally need to obtain the client's permission, preferably in writing, to initiate discussion with an Existing or predecessor accountant

210.14 In the case of an audit of Financial Statements, a Member in Public Practice shall request the predecessor accountant to provide known information that, in the predecessor accountant's opinion, the proposed successor accountant needs to be aware of

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APES 110 & 210

These create a standard that applies to you..... If you are an accountant, this is because it stands for Accounting Professional & Ethics Standards.

And ASIC says the SMSF Auditor *must comply*, see also ASIC Class Order [\[CO 12/1687\]](#) *Competency standards for approved SMSF auditors*.

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Issue an ethics letter to the former advisor(s)

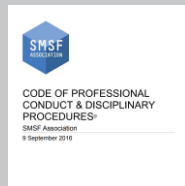
...and when they reply send it to the trustee, but if they do not, tell the trustee you have nothing to rely upon.

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Our SMSF Association code of conduct is an ability that leads to *sueability*



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Schemes allow limits to be placed on the civil liability of professionals who are members of an association covered by a scheme, including with respect to the Competition and Consumer Act 2010, the Corporations Act 2001, and the Australian Securities and Investments Commission Act 2001.

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Read your scheme? Do you do what is needed to have liability limitation?

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Financial responsibility for occupational liability is limited to the level that applies in respect of the scheme that relates to the profession to which it relates. Commonly this is \$2,000,000 which is the insured amount.

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Issue a Professional Standards Limitation statement

...in your retainer, on your letterhead, within your website, as part of your billing system, and everywhere else.

Deal with him but invest for her ...

#INC2019



Issue a Spouse/Agency Statement



Deal with him but invest for her ...

#INC2019



Whilst it is your circumstances that I am bound to consider, I understand that I am to gain this from your husband/wife/partner. I understand that they are to be my primary contact point for our services relationship. In effect you have nominated or appointed them to act on their *and your* behalf in dealing with me.

To the extent that our services may involve or impact upon you, it is important that you understand that your role as a co-controller/trustee/director raises special responsibility issues for you, often of a nature that can impact on another such as a family member. You cannot abdicate your responsibility to another in such circumstances; this has been made clear in many court decisions. The ATO is of this view as well

As you may appreciate I cannot determine if the information provided to me by another factually represents you, unless I deal personally with you.....

**The truth is that this is a disclaimer
Done well it is actually an empowerment**

Liability shift to the trustee/directors

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Liability shifting to the client is a great idea, just do it neatly

Oldham v Hume & Ors [2011] NSWCTTT 99

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Client smsf no longer viable, so claimed accounting costs refund.

Tribunal concluded that a contract of service existed therefore no refund. Also accountant cannot be held responsible for fund no longer being viable.

One of you will be sued

Start with their end in mind

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Issue a death statement that warns them and protects you

Hill v Van Erp (1997) 188 CLR 159

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".... the claim can be made only by an intended but disappointed beneficiary in respect of an intended (superannuation) gift and the duty of care owed by the advisor to the intended but disappointed beneficiary is in the performance of the work in which it owes a corresponding duty – albeit contractually – to the (member). It is immaterial of course, that the negligent act or omission which causes the loss occurs during the lifetime of the member and the plaintiff's loss is suffered on or after the member's death."

One of you will be sued

Make risk personal

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Issue the SMSF Trustees with a risk awareness statement that suits your role in their life

Can I sue my SMSF auditor when things go wrong? This case says yes

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FINANCIAL REVIEW

Menu Home Finance Business Markets Street Talk Real Estate Opinion Technology Personal Finance Leadership Lifestyle All

Can I sue my SMSF auditor when things go wrong? This case says yes

By James Mather

A doctor and his wife sued their accountant for losses incurred by their self-managed superannuation fund and won. In a landmark case that will speak auditors but reduce pressure for DIF superannuation.

Lance Bow and Jennifer Campbell headed the running of their SMSF's investments over to a close friend, who persuaded the fund to make investment loans to one of his related businesses.

The business went broke, but it was neither Anthony Mc Grathick who was found responsible for the entire cost of the SMSF's losses.

One of you will be sued

What, how and how to get out

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- Your engagement terms should outline ongoing services, the frequency and cost. What is not said is not provided.
- Make sure you can terminate and specify how. It is best to separately document.
- Monitor the provision of your ongoing services.
- Cannot meet ongoing service obligations because of the client? Put the issue back to them! Or consider termination.

What, how and how to get out

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Issue a client profile statement from time to time (say every 3/5 years) and invite an update. This is what we know about you.....

If it isn't in the file, your're fired

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- The Client Profile must be completed. Provide a copy so there can be no misunderstanding of what information was provided – this is where the fight is won or lost.

Dolevski v Hodpik Pty Ltd [2011] FCA 54 ²⁰¹⁹



In-house loan back attracts civil penalty provisions in s62, 84, 109 and 193.
Were defenses available?

One of you will be sued

Dolevski v Hodpik Pty Ltd [2011] FCA 54 ²⁰¹⁹



Accountant said; "Just borrow it from your Super and we will fix up the paperwork later ... Draw up a simple loan agreement and charge 8%".

Applicant's evidence was preferred to that of the Accountant who could not recall the meeting.

One of you will be sued

Dolevski v Hodpik Pty Ltd [2011] FCA 54 ²⁰¹⁹



ATO argued, 'should have read the trust deed' but Court said no evidence they did and reasonable for them to rely on the accountant, doing what the accountant told them proved they relied upon it
The defence (of blame the accountant) succeeded.

One of you will be sued

Disclaimers – YOU should have them

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The existence of a qualifying statement or disclaimer may or may not limit the potential for a successful claim for negligence. The Courts will consider the advisers conduct as a whole....to be effective such disclaimer must be as bold, precise and compelling as the trade description itself and must be as effectively brought to the notice of any person to whom the goods (and in an SMSF Professional's services sense, services) may be supplied" Norman v Burnett [1974] 3 All ER 351

bold

precise

compelling

brought to notice

Disclaimers – YOU should have them

#MC2019



Good disclaimers have both negative and positive components. They warn and are a call to action at the same time.

bold

precise

compelling

brought to notice

Disclaimers – I have them

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This lecture and document has been prepared by Argyle Lawyers. We think it is pretty good in dealing with its subject, but it is addressed to the hypothetical person who, of course, does not exist. It has not been designed for you or for your clients. Accordingly, Argyle Lawyers cannot take any responsibility for the use of, or amendments to, this information and makes no representation as to the legality, sufficiency, relevance or accuracy of it. Having said that, you are invited to learn from the content and design something that suits you and your circumstances for use with your clients. Argyle Lawyers can also do this for you, from which time we can and do stand behind what we create, of course we get paid for this.

bold

precise

compelling

brought to notice

And you can contract limit others

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Your engagement should warn the client to make up their own minds as to whether another is suitable

SMSF Risk Management

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Friend and family smsf's are the professional's greatest risk

Take positive steps?

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Do you deal with death risk issues?
Do you only mention account-pensions and not lifetime ones?
Have you dealt with the living too long risk or the dementia risk

With all that money, no wonder – Super Litigation is on the Rise



family law, criminal law, proceeds of crime, property, contract disputes, partnership break ups, partnership creations, estates, death forfeitures, financing laws, tenancy, Corporations Law, takeovers, banking, Constitutional, insurance, financial services, Social Security, pensions, taxation, double tax agreements, international law, contract and of course trust law.

One of you will be sued

Start with the end in mind

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Clever client onboarding is

- Telling them about you
- Finding out about them
- Telling them about them

Repeat at least every three years

Thank you

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