

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND GORDON JJ

WESTPAC SECURITIES ADMINISTRATION LTD
& ANOR

APPELLANTS

AND

AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION

RESPONDENT

*Westpac Securities Administration Ltd v Australian Securities and
Investments Commission*

[2021] HCA 3

Date of Hearing: 7 & 8 October 2020

Date of Judgment: 3 February 2021

S69/2020

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

R G McHugh SC with J R Williams SC and E R Doyle-Markwick for the appellants (instructed by Allens)

A J L Bannon SC with J G Renwick SC, T J Kane and M S Kalyk for the respondent (instructed by Australian Securities and Investments Commission)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Westpac Securities Administration Ltd v Australian Securities and Investments Commission

Corporations – Financial services – Where appellants had contacted members of superannuation funds of which they are trustees, advising each to accept offer to roll over their external superannuation accounts into their account with appellants – Where s 766B(3)(b) of *Corporations Act 2001* (Cth) defines "personal advice" to include "financial product advice" given or directed to person in circumstances where a reasonable person might expect provider to have considered one or more of that person's objectives, financial situation and needs – Whether financial product advice given by appellants to members personal advice within meaning of s 766B(3)(b).

Words and phrases – "consideration", "considered", "financial adviser", "financial product advice", "general advice", "one or more of the person's objectives, financial situation and needs", "personal advice", "social proofing", "superannuation", "superannuation fund".

Corporations Act 2001 (Cth), ss 766B(3), 766B(4), 949A(2)(a).

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. We agree with Gordon J that
the appeal should be dismissed with costs. Gratefully accepting her Honour's
summary of the facts, issues and arguments in the case, we proceed to state our
reasons for concluding that the appeal should be dismissed¹.

2 Section 766B(3)(b) of the *Corporations Act 2001* (Cth) defines "personal
advice" so as to include "financial product advice" given or directed to a person in
circumstances where a reasonable person might expect the provider to have
considered one or more of the person's objectives, financial situation and needs.
Section 766B(4) defines "general advice" as financial product advice that is not
personal advice. The division of the universe of financial product advice into
"personal advice" and "general advice" serves to organise the obligations owed by
a financial product adviser to a retail client, with more onerous obligations being
imposed upon the adviser where the circumstances are apt to suggest to the client
that the financial product, the subject of the advice, is appropriate to the particular
circumstances of the individual client.

The phone calls: what a reasonable person might have expected

3 On the hearing of the appeal in this Court, it was common ground between
the parties that the question posed by s 766B(3)(b) was whether a reasonable
member might expect that Westpac had *in fact* considered one or more of the
member's objectives, financial situation and needs and not whether the member
might expect that Westpac *should have* considered those circumstances.

4 Westpac submitted that the Full Court erred in importing a normative
element into its understanding of the effect of s 766B(3)(b). ASIC urged that the
Full Court's reasoning did not involve a normative judgment as to whether Westpac
should have considered each member's particular financial circumstances before
recommending acceptance of its roll-over service. It may be accepted that, at some
points in the reasoning of members of the Full Court, there are suggestions that a
normative approach was being applied by reference to an expectation as to how a
service provider, such as Westpac, in an existing relationship with a member
should properly conduct itself in making investment recommendations of

1 These reasons adopt the abbreviations used by Gordon J and will repeat matters
stated in her Honour's reasons only to the extent necessary to understand our reasons.

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significance to the member². That said, ASIC did not seek to support such an approach in argument in this Court.

5 On the undisputed facts of the case, a reasonable person in the position of each of the members called by Westpac might expect Westpac, in recommending that the member accept Westpac's offer to procure the roll-over of the member's external superannuation accounts into the member's BT account, to have considered one or more of the member's objectives, financial situation and needs. Given that the appeal must fail on that basis, it is neither necessary nor appropriate to express a concluded opinion as to the correctness of the approach taken by the members of the Full Court.

6 Westpac accepted the findings of both the primary judge and the Full Court that in the personal phone calls made by Westpac to the members, the Westpac callers impliedly recommended that each member roll over his or her external superannuation funds into a BT account³. The primary judge found that Westpac made this recommendation in the course of personal phone calls to each of the members, with whom Westpac had a pre-existing relationship. Westpac's representatives framed the calls as helpful "courtesy calls", advising each member of the availability of the roll-over service. This service was presented as an obvious and uncontroversial course of action for each particular member in respect of his or her BT account, having regard to the member's objectives discussed during the call⁴.

7 The primary judge was dissuaded from reaching the conclusion that Westpac gave personal advice on the basis of three broad considerations. The first consideration was that the calls began with a disclaimer that "everything discussed today is general in nature, it won't take into account your personal financial

2 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 ("*ASIC v Westpac*") at 197 [77], 198 [80], 232 [266]-[271], 235 [278], 260-261 [388]-[392], 261-262 [396]-[397].

3 *Re Westpac Securities Administration Ltd* (2018) 133 ACSR 1 ("*Re Westpac*") at 65-66 [272]-[274], 66 [277]-[278], 78 [366], 79 [369]-[372]; *ASIC v Westpac* (2019) 272 FCR 170 at 196-198 [76]-[80], 232-233 [268]-[274], 260-261 [392].

4 *Re Westpac* (2018) 133 ACSR 1 at 84 [395].

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needs"⁵. Secondly, the advice was offered free of charge⁶. Thirdly, the callers revealed a lack of knowledge about the member's financial situation that was inconsistent with a capacity to consider one or more of the member's objectives and financial situation⁷. The primary judge erred in being swayed by these considerations. Each may be dealt with briefly.

8 As to the first consideration, each phone call was a personal communication to a member; it specifically related to the member's personal financial situation in relation to his or her superannuation. The disclaimer with which each phone call commenced was not apt to alter either the character of the recommendation in each case as advice specifically about the member's situation, or the expectation as to the quality of the advice that the phone call was apt to engender in the member. Immediately after the disclaimer, the Westpac callers set about, and succeeded in, eliciting from each member a statement of the member's objectives insofar as they were germane to the decision as to whether it was in each member's best interests to roll over external superannuation accounts into his or her BT account. Having elicited from each member an indication of his or her personal objectives of "saving on fees" and "improving the manageability" of superannuation by consolidating accounts⁸, the Westpac callers deployed the social proofing technique to confirm the validity of the expressed objectives. For example, Westpac's caller confirmed to member 1 that saving on fees and manageability are the "two main reasons our clients do like to bring their supers together" and that doing so "does make a lot more sense from a management point of view, for sure". The Westpac caller then proceeded to say to member 1⁹:

"Now, what we can do is we can go through your superannuation search results and we can actually help you bring them altogether over the phone now, the only thing we'll need from you today to do that is your tax file number."

9 As to the second consideration, the circumstance that the superannuation roll-over service was offered "free of charge" was at best neutral in relation to the reasonable expectations of a member approached in this way by his or her financial

5 *Re Westpac* (2018) 133 ACSR 1 at 36-37 [148], 38 [158], 83 [394].

6 *Re Westpac* (2018) 133 ACSR 1 at 83 [394].

7 *Re Westpac* (2018) 133 ACSR 1 at 83 [394].

8 *Re Westpac* (2018) 133 ACSR 1 at 80-81 [380]-[382].

9 *Re Westpac* (2018) 133 ACSR 1 at 38 [158].

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service provider, to whom he or she already paid fees for financial services related to superannuation. Westpac's interest in bringing more funds under its management to obtain fees was also both real and obvious: it was the *raison d'être* of Westpac's phone calls to the members. In these circumstances, a reasonable person in a member's position might well have seen the benefit to Westpac of provision of the roll-over service as attributable either to fees already paid by the member or to Westpac's business development.

10 As to the third consideration, the circumstance that the Westpac callers at times revealed a lack of comprehensive knowledge of the members' financial affairs was not inconsistent with an expectation that the members' objectives were taken into account by Westpac in recommending acceptance of its roll-over service. Nothing in the text or context of s 766B(3) conveys any suggestion that advice is personal advice for the purposes of the regulatory scheme of the Act only if it is comprehensive of the totality of the objectives, financial situation and needs of the client. Indeed, to the contrary, s 766B(3) expressly provides that personal advice has been given where "the provider of the advice has considered *one or more* of the person's objectives, financial situation and needs"; it does not provide that the provider must have considered *all* of those matters (emphasis added). In addition, as a matter of fact, the social proofing technique used by the Westpac callers confirmed to each member that Westpac was familiar with objectives identified by each member as a matter of conventional wisdom. In this factual context, each member might reasonably think that Westpac considered that acceptance of the roll-over service was apt to realise the objectives the member had stated, and that this justified acceptance of the offer of the roll-over service regardless of what more comprehensive consideration of his or her financial situation might reveal.

11 Westpac argued in this Court that the members' objectives identified and discussed in the phone calls were "highly generic and ... obviously correct" and that, for that reason, financial product advice that took those objectives into account was not apt to give rise to an expectation that the advice was based on one or more of the personal objectives, financial situation and needs of any of the members. But this argument seeks impermissibly to gloss the language of the statute. Objectives do not cease to be personal objectives merely because those objectives are such as to be generally applicable to all or most persons in the position of the client as well as to the particular client. It follows that advice which is personal advice within s 766B(3)(b) does not cease to be so because the content of that advice is such as to be generally applicable to all or most persons in the position of the client as well as to the particular client.

12 The social proofing technique deployed by Westpac served to confirm, by reference to the common experience of like-placed others, that consolidation of

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each particular member's external superannuation accounts was appropriate to achieve that member's personal objectives of reducing fees and improving manageability. Those very objectives had been identified by the discussion which the Westpac caller elicited in the phone call itself as matters of concern pertaining to that particular member. By segueing into an offer to effect the roll-over, Westpac's callers implicitly recommended that each member accept the offer there and then on the evident footing that his or her interests were being served without any need for further consideration of his or her other objectives, financial situation or needs. It is well recognised that "many persons will only absorb the general thrust" of such marketing ploys¹⁰. Westpac knew its business and had reason to be confident that its marketing techniques were likely to be effective¹¹.

13 Each member might reasonably have expected that, given the nature of Westpac's business and its experience and expertise in relation to financial matters like superannuation, Westpac had taken the objectives it had elicited from the member into account in recommending the roll-over service. That is consistent with the recommendation of the service being presented to each member as a "no brainer" having regard to the manifest benefits to each member to be expected from rolling over into a single Westpac account. Given that Westpac's marketing was apt to create precisely that impression, it can hardly complain that it succeeded. Nor can it sensibly be suggested that the impression so created did not reasonably include an expectation on the part of the member that the recommendation was appropriate for him or her as an individual.

"Considered"

14 Westpac argued that "considered" in s 766B(3) refers to an active process of evaluation and reflection, and that the Full Court erred in adopting an "undemanding" understanding of "considered". That argument should be rejected. Westpac's argument once again glosses the statutory language, and does so in a way that renders its application less certain, while, at the same time, blurring its protective operation.

10 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 654-655 [47]-[48].

11 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 657 [55]-[56]; *Gould v Vaggelas* (1984) 157 CLR 215 at 219, 237-238, 250-252, 262.

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15 In the context of the consumer protection provisions of Ch 7 of the Act, "considered" in s 766B(3) should be understood as meaning "took account of"¹². So much is confirmed by its broader statutory context. Section 949A, which appears in Div 4 of Pt 7.7 of the Act, is concerned with the regulation of the provision of general advice. Section 949A(2)(a) states:

"The providing entity must, in accordance with subsection (3), warn the client that:

(a) the advice has been prepared without taking account of the client's objectives, financial situation or needs".

16 It is significant that s 949A was introduced into the Act by the *Financial Services Reform Act 2001* (Cth) at the same time as s 766B was enacted. The terms of s 949A(2)(a) can be seen as a deliberate counterpoint to what is described in s 766B(3), with the antonym of "considered" being "without taking account of".

17 There is therefore no basis in the text of s 766B(3), or the context in which it appears, to read the word "considered" as importing a requirement of an active and comprehensive process of evaluation. Such a gloss upon "considered" would impermissibly narrow the scope of a provision intended to protect consumers while at the same time adding a layer of uncertainty to its operation.

18 The recommendation by the Westpac caller to proceed to roll over each member's external accounts without further ado was put forward in a manner productive of an expectation that each member's objectives of saving fees and improving manageability were taken into account or, in the words of s 766B(3)(b), "considered". The social proofing technique deployed by Westpac was calculated to create that impression. That there was no mention of contraindicative factors such as fee penalties or loss of insurance is not inconsistent with the proposition that each member's personal objectives which were articulated were taken into account by Westpac.

"One or more of the person's objectives, financial situation and needs"

19 Westpac argued that the words "one or more of the person's objectives, financial situation and needs" refer to categories, so that s 766B(3)(b) is engaged only where a reasonable person might expect that the provider of advice has

12 See *ASIC v Westpac* (2019) 272 FCR 170 at 179-180 [25], 227 [247], 256-257 [373]-[375].

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considered so much of each category as is relevant to the subject matter of the advice. That contention should be rejected. Once again, Westpac seeks to gloss the language of the legislation so as to reduce its protective scope.

20 The primary judge and the Full Court rightly held that s 766B(3)(b) contemplates consideration of at least one aspect of the client's objectives, financial situation or needs¹³. The ordinary and natural meaning of the terms of s 766B(3) is readily applicable to a situation in which the issue for decision by the client is focused upon one aspect of his or her financial affairs. The scope of advice reasonably germane to the resolution of that issue may be expected by both adviser and client to encompass only so much of the client's objectives, financial situation or needs as is relevant to its satisfactory resolution.

21 The application of the ordinary and natural meaning of the text of s 766B(3)(b) is confirmed by the Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth), which included the following statement in relation to the provision that became s 766B(3)¹⁴:

"As subsection 766B(3) is currently drafted, a financial services provider could recommend a financial product or class of financial product as being appropriate to a retail client's individual needs and objectives, but avoid the requirements of proposed Divisions 3 or 5 of Part 7.7 because they had not considered the client's financial situation."

Conclusion

22 For these reasons, we agree with the orders proposed by Gordon J.

13 *Re Westpac* (2018) 133 ACSR 1 at 30-32 [111]-[119]; *ASIC v Westpac* (2019) 272 FCR 170 at 180-181 [27]-[29], 227-230 [249]-[257], 254-256 [365]-[372].

14 Australia, Senate, *Financial Services Reform Bill 2001*, Supplementary Explanatory Memorandum at 5 [3.23].

23 GORDON J. Each of Westpac Securities Administration Ltd ("WSAL") and BT Funds Management Ltd ("BTFM") (collectively, "Westpac") held an Australian Financial Services Licence ("AFSL") granted under the *Corporations Act 2001* (Cth)¹⁵ authorising them, as persons carrying on a financial services business in Australia¹⁶, to provide financial services including some financial product advice¹⁷.

24 WSAL issued a superannuation product, the BT Business Super Account, part of the Westpac MasterTrust – Superannuation Division ("BT Business Account Fund"), of which WSAL is trustee. BTFM issued a superannuation product, the BT Lifetime Super – Employer Plan Account, part of the Retirement Wrap ("BT Lifetime Account Fund")¹⁸, of which BTFM is trustee. Membership in either Fund is a "financial product"¹⁹.

25 Westpac contacted existing members²⁰ of the Funds to encourage them to roll over external superannuation accounts into their pre-existing Westpac superannuation accounts (collectively, the "BT accounts"). There was no dispute, in this Court, that when Westpac made a telephone call or calls to each member,

15 *Corporations Act*, s 913B.

16 *Corporations Act*, s 911D.

17 *Corporations Act*, ss 766A and 766B.

18 Each Fund is a "superannuation entity" within the meaning of s 10(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) ("the SIS Act"), namely, a "regulated superannuation fund" for the purposes of ss 10(1) and 19 of the SIS Act.

19 Within the meaning of Div 3 of Pt 7.1 of Ch 7 of the *Corporations Act*, by reason of s 764A(1)(g) (namely, a "superannuation interest" within the meaning of s 10(1) of the SIS Act). Section 10(1) of the SIS Act relevantly provides that "**beneficiary**, in relation to a fund, scheme or trust, means a person (whether described in the governing rules as a member, a depositor or otherwise) who has a beneficial interest in the fund, scheme or trust and includes, in relation to a superannuation fund, a member of the fund despite the express references in this Act to members of such funds".

20 The members were referred to in the decisions below variously as "clients", "customers" and "members".

it provided financial product advice²¹ to that member in relation to a financial product (namely, membership in one of the Funds), that the advice was intended to influence that member in making a decision in relation to the Fund, and that the advice comprised an implied recommendation that that member "should roll over their external accounts into their BT account or, in other words, they should accept the rollover service".

26 In relation to superannuation products, including membership in either Fund, neither WSAL nor BTFM was authorised, under its AFSL, to provide "financial product advice" which was personal advice²² within the meaning of s 766B of the *Corporations Act*. The term "personal advice", relevantly, is defined in s 766B(3) of the *Corporations Act* as:

"financial product advice that is *given or directed to a person* (including by electronic means) *in circumstances where*:

- (a) the provider of the advice has considered one or more of the *person's objectives, financial situation and needs ...*; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters." (emphasis added)

27 The issue in this appeal is whether the financial product advice Westpac gave members was personal advice within the meaning of s 766B(3)(b). Was the advice given or directed to the member in circumstances where a reasonable person *might expect* that Westpac had considered one or more of the member's objectives, financial situation and needs? The resolution of that issue necessitates first construing s 766B(3) of the *Corporations Act* and then, as s 766B(3) directs, considering the circumstances in which the financial product advice was "given or directed" to the person, in this case, the member. As the Full Court of the Federal Court of Australia unanimously held, the answer to the issue is "yes". The appeal should be dismissed with costs.

Statutory framework

28 Chapter 7 of the *Corporations Act*, headed "Financial services and markets", was introduced in 2001²³. It was designed, in part, to introduce a single

21 In the course of doing so, Westpac was providing a "financial service" within the meaning of s 766A(1)(a) of the *Corporations Act*.

22 *Corporations Act*, s 766B(3).

23 *Financial Services Reform Act 2001* (Cth), Sch 1, item 1.

licensing regime applicable to all persons providing financial services to ease the administrative burden on financial service providers, who previously were required to obtain multiple licences²⁴. But it was also intended to benefit consumers, who previously could not "be certain that the conduct of the financial service provider [met] minimum standards"²⁵.

29 Thus, the object of Ch 7 includes to promote²⁶:

- "(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services ..."

30 Part 7.1 (like much else in the *Corporations Act*) proceeds by defining key concepts – here "financial service", "financial product advice", "personal advice", "general advice" and "retail client". These defined terms are then used in ways that build one on the other and it is, therefore, necessary to set out several definitions. Division 4 of Pt 7.1, headed "When does a person provide a financial service?", contains s 766A(1), which relevantly provides:

"For the purposes of this Chapter ... a person provides a *financial service* if they:

- (a) provide financial product advice (see section 766B); or
- (b) deal in a financial product (see section 766C); or
- (c) make a market for a financial product (see section 766D); or
- (d) operate a registered scheme; or
- (e) provide a custodial or depository service (see section 766E); or
- (f) engage in conduct of a kind prescribed by regulations made for the purposes of this paragraph."

24 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 1 [1.4]-[1.5], 11 [2.39].

25 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 11 [2.40]; see also 1 [1.5].

26 *Corporations Act*, s 760A.

31 This appeal is concerned with s 766A(1)(a) – "financial product advice" – defined in s 766B(1), for the purposes of Ch 7, to mean:

"a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence."

32 Section 766B(2) records that there are "2 types of financial product advice: personal advice and general advice". The term "personal advice" is defined in s 766B(3), which has been set out earlier²⁷. General advice is defined as "financial product advice that is not personal advice"²⁸.

33 One aspect of the drafting history of s 766B(3) is to be observed. As initially drafted, s 766B(3) referred only to the "objectives, financial situation and needs" of a person²⁹. The phrase "one or more of" was inserted prior to its enactment³⁰:

"to ensure that a financial services provider will be subject to the requirements of proposed Division[] 3 ... of Part 7.7 (including the requirement to provide a [Statement of Advice]) when advising a retail client that a particular financial product (o[r] class of financial products) is appropriate to them as an individual.

As subsection 766B(3) is currently drafted, a financial services provider could recommend a financial product or class of financial product as being appropriate to a retail client's individual needs and objectives, but avoid the

27 See [26] above.

28 *Corporations Act*, s 766B(4).

29 Australia, Senate, *Financial Services Reform Bill 2001*, Supplementary Explanatory Memorandum at 5 [3.20].

30 Australia, Senate, *Financial Services Reform Bill 2001*, Supplementary Explanatory Memorandum at 5 [3.22]-[3.23].

requirements of proposed Division[] 3 ... of Part 7.7 because they had not considered the client's financial situation."

34 It is also to be observed that Ch 7 draws a distinction between retail and other clients³¹. The consumer protection provisions³² apply only to retail clients; this recognises that other clients "do not require the same level of protection, as they are better informed and better able to assess the risks involved in financial transactions"³³. Where, however, the relevant financial product is a superannuation product (as it was here), Ch 7 provides that the person will always be a retail client³⁴. The Revised Explanatory Memorandum explained that legislative decision in these terms³⁵:

"This will ensure that disclosure is given to all persons in relation to superannuation ... products. This is consistent with the long term nature and complexity of such products and will ensure the integrity of the regime in a choice of superannuation fund environment."

Financial services licences

35 Part 7.6 of Ch 7 governs the licensing of providers of financial services. Section 911A(1), within Div 2 of Pt 7.6, relevantly provides that "a person who carries on a financial services business ... must hold an [AFSL] covering the provision of the financial services". As stated earlier, each of WSAL and BTFM was a holder of an AFSL granted under s 913B of the *Corporations Act* authorising them, as persons carrying on a financial services business in Australia within the meaning of s 911D, to provide financial services. Under their respective AFSLs, they were authorised to provide financial product advice but they were *not* authorised to provide personal advice within the meaning of s 766B(3).

36 The obligations of financial services licensees are addressed in Div 3. Section 912A(1) relevantly provides that a financial services licensee must:

31 Described in s 761G(4) as "wholesale clients" and in s 761GA as "sophisticated investors". See also Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 8-9 [2.26]-[2.28].

32 See, eg, *Corporations Act*, ss 941A, 941B, 946A, 949A, 961B, 961G, 961J.

33 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 8 [2.25].

34 *Corporations Act*, ss 761G(1), 761G(6)(a), 761GA(b).

35 Australia, Senate, *Financial Services Reform Bill 2001*, Revised Explanatory Memorandum at 9 [2.27].

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- "(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
- (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and
- (b) comply with the conditions on the licence; and
- (c) comply with the financial services laws ..."

Westpac accepted that if the advice it provided was personal advice, Westpac not only breached the conditions of the AFSLs and the financial services laws, but also failed to do all things necessary to ensure that the financial services covered by the AFSLs were provided efficiently, honestly and fairly within the meaning of s 912A(1).

Financial services obligations

37 Part 7.7 of Ch 7 imposes on financial services licensees disclosure obligations which differ depending on whether general advice or personal advice is being provided.

38 Divisions 3 and 4 of Pt 7.7, respectively, provide for different financial services obligations to apply when a licensee is providing personal advice and general advice. The main additional requirement applicable to the provision of personal advice is for a written Statement of Advice ("SOA") to be given³⁶. The content of a SOA is prescribed³⁷ and, subject to exceptions not presently relevant, must include, among other things: a statement setting out the advice; information about the basis on which the advice is or was given; and a statement setting out the name and contact details of the providing entity³⁸. It was found by the Full Court, and was not contested in this Court, that if Westpac provided financial product advice that was personal advice, it breached s 946A because it failed to give the members a SOA.

36 *Corporations Act*, s 946A.

37 *Corporations Act*, Pt 7.7, Div 3, Subdiv D.

38 *Corporations Act*, s 947B(2).

39 For general advice, the requirements are understandably less onerous. The main "[o]ther disclosure" requirement³⁹, which applies any time general advice is provided to a retail client⁴⁰, is that the client is provided with a general advice warning by the providing entity at the same time as the advice is provided and by the same means⁴¹. Under s 949A(2), that general advice warning must relevantly state that:

- "(a) the advice has been prepared without taking account of the client's objectives, financial situation or needs; and
- (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs ..."

Pursuant to s 951B(1)(a) and (c), the Australian Securities and Investments Commission ("ASIC") published an exemption⁴² in relation to oral advice, which required the provider to orally warn any client provided with oral advice only that the advice is general and that the advice may not be appropriate for the client. ASIC did not contend that Westpac failed to comply with s 949A(2) or the exemption.

40 In 2012, substantial changes were made to the regulation of personal financial advice by the Future of Financial Advice or "FoFA" reforms⁴³. Their objective was to "improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest"⁴⁴.

39 *Corporations Act*, Pt 7.7, Div 4.

40 *Corporations Act*, s 949A(1). It applies subject to regulations made for the purposes of the paragraph: *Corporations Act*, s 949A(1)(c).

41 *Corporations Act*, s 949A(2) and (3).

42 ASIC Class Order [CO 05/1195] at [4(b)].

43 *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

44 Australia, Senate, *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012*, Revised Explanatory Memorandum at 3. See also Australia, Senate, *Corporations Amendment (Future of Financial Advice) Bill 2012*, Revised Explanatory Memorandum at 3.

One reform was to insert Pt 7.7A into Ch 7 of the *Corporations Act*⁴⁵. Part 7.7A requires providers of *personal advice* to retail clients⁴⁶ to "act in the best interests of the client in relation to the advice"⁴⁷ and to give priority to the interests of the client⁴⁸.

41 It was found below, and was not contested in this Court, that if Westpac provided personal advice to the members it breached s 961B(1) because it failed to act in the best interests of those members in providing that financial product advice, and thereby contravened s 961K(2), a civil penalty provision.

Facts and background

42 The circumstances in which Westpac provided the advice may be stated briefly. Westpac conducted a campaign to encourage existing members to roll over superannuation accounts held with other entities into their BT account. The objective of the campaign was to increase Westpac's funds under management. As a result of the campaign, Westpac increased its funds under management by almost \$650 million between 1 January 2013 and 16 September 2016.

43 The campaign was carried out by Westpac's Super Activation Team, comprised of employees of Westpac (or a company within the Westpac group of companies). At all relevant times, these employees were acting as agents of WSAL or BTFM for the purposes of s 769B of the *Corporations Act* within the scope of their actual or apparent authority, and were acting as representatives of WSAL or BTFM within the meaning of ss 910A and 960 of the *Corporations Act*. This appeal concerns the interactions between those employees and 14 existing members of the BT Business Account Fund or the BT Lifetime Account Fund.

44 Each member was sent written communications by which Westpac offered to search for any external superannuation accounts they had, offered to roll over such accounts into their BT account, and sought to influence the member to take

45 *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth), Sch 1, item 10.

46 *Corporations Act*, s 961(1).

47 *Corporations Act*, s 961B(1). Section 961G requires that the advice provided be appropriate to the client.

48 *Corporations Act*, s 961J. For the purposes of Pt 7.7A, "advice" refers to personal advice, "client" refers to a retail client, and "provider" refers to the individual who is to provide the advice to the client: *Corporations Act*, s 961(1) and (2). See also Australia, Senate, *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012*, Revised Explanatory Memorandum at 5 [1.1].

up those offers. For example, one type of letter, which was sent to each member, included: statements to the effect that "if you combine your super into one account, you could save on administration fees and enjoy the convenience of having all your super in one place"; a link to Westpac's website to enable the member to ask Westpac to undertake a search to locate amounts held in external accounts; a rollover form that the member could complete and return to take up Westpac's rollover service; and a statement that, if the member had a financial adviser, Westpac recommended that the member speak to that adviser for personal advice tailored to their specific objectives, financial situation and needs. In most, but not all, cases, the members accessed Westpac's website and requested that a search be conducted to locate amounts held in external accounts. In some cases, the members were then sent a further letter which set out the results of the requested superannuation search.

45 Each member then received at least one telephone call from an adviser in the Super Activation Team. Although the calls varied, the appeal was conducted primarily by reference to the transcript of two calls conducted on one day with member 1⁴⁹. The primary features of the calls were as follows. The member was given a warning that everything discussed on the call would be general in nature and would not take into account their personal financial needs. The adviser then said that they were calling in order to help the member and this was reinforced by the adviser asking what the member saw as the main benefits of consolidating their superannuation funds, the adviser affirming the member's reasons to consolidate their superannuation through the use of "social proofing" language, by which the member was told that their objectives, beliefs or reasons were commonly held, and the adviser ultimately offering to help effect the consolidation of the member's external superannuation accounts into their BT account.

46 Westpac accepted, for the first time in this Court, that when it called the 14 members, it gave advice to those members and that the advice was "financial product advice" within the meaning of s 766B(1), the gateway to s 766B(3). The financial product advice, as found by the primary judge, was that each of the 14 members "received a 'recommendation' that they should roll over their external accounts into their BT account or, in other words, they should accept the rollover service" ("the recommendation").

47 The primary judge also found that "statements of opinion" were made during the calls which fell into the following categories:

49 A transcript of relevant parts of each call was annexed to the reasons of the Full Court: *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 at 269-289.

17.

- "(1) Statements to the effect that, by rolling over external accounts into the [member's] BT account, the [member] could or may (but not would, except in the case of [one member]) save on fees.
- (2) Statements to the effect that, by rolling over external accounts into the [member's] BT account, the [member] would improve the 'manageability' of their superannuation.
- (3) Statements to the effect that a rollover into the [member's] BT account would be beneficial to the [member] because, for example, it would be beneficial to pay only one set of fees or because there would be unspecified benefits.
- (4) Statements to the effect that, by rolling over external accounts into the [member's] BT account, the [member] could get a better return on their superannuation or could improve the performance of their superannuation."

48 Her Honour observed that "[s]ummarised in this way, it is obvious that the 'statements of opinion' each support the implied recommendation to accept the rollover service and, therefore, the [advisers'] intentions in making the recommendations and the statements of opinions were relevantly similar". After addressing the balance of s 766B(1), the primary judge concluded that "each of the 'recommendations' and 'statements of opinion' that ... were made constituted 'financial product advice' within the meaning of s 766B(1) of the Act".

49 There may have been some division of opinion in the Full Court about whether what was said by the advisers included statements of opinion which could be regarded as personal advice. For the purposes of this appeal, however, it is sufficient to observe that financial product advice is a recommendation *or* a statement of opinion⁵⁰. And in this Court, as explained, there was no dispute that when Westpac called each member, it provided financial product advice⁵¹ to that member in relation to a financial product (namely, membership in one of the Funds), that the advice was intended to influence that member in making a decision in relation to the Fund, and that the advice comprised an implied recommendation that that member "should roll over their external accounts into their BT account or, in other words, they should accept the rollover service".

50 The issue is whether, contrary to the terms of the AFSLs, that financial product advice was personal advice within the meaning of s 766B(3)(b) because

50 *Corporations Act*, s 766B(1).

51 In the course of doing so, Westpac was providing a "financial service" within the meaning of s 766A(1)(a) of the *Corporations Act*.

the advice was given or directed to the member in circumstances where a reasonable person *might expect* Westpac to have considered one or more of the member's objectives, financial situation and needs.

Westpac's submissions

51 Westpac submitted that the Full Court erred in its construction of the reasonable person test in s 766B(3)(b) by asking whether a reasonable person might expect that the adviser should have considered one or more of the recipient's objectives, financial situation and needs, rather than asking whether a reasonable person might expect that the adviser had in fact considered such matters. Westpac contended that the Full Court introduced a "normative element" into the inquiry under s 766B(3)(b) by assuming what a reasonable person might expect the adviser *should* have considered if acting in the recipient's best interests, instead of asking what a reasonable person might expect the adviser *actually* to have considered. Put in different terms, Westpac argued that the Full Court erred by proceeding on a two-stage assumption: that an adviser in Westpac's position should act in its members' best interests, and that a member's best interests can only be served through the provision of personal advice.

52 Westpac further submitted that the Full Court should have held that, properly construed, the reasonable person test in s 766B(3)(b) was not satisfied where a reasonable person would know that Westpac was not in a position to have considered the members' stated objectives of "saving on fees" and "manageability" because Westpac did not have knowledge of the members' personal circumstances that would be needed to give consideration to those objectives.

53 Finally, Westpac submitted that the Full Court erred in finding that, on the proper construction of s 766B(3), the words "one or more of the person's objectives, financial situation and needs" refer to something less than what Westpac described as the minimum irreducible objectives, financial situation or needs of the recipient that would reasonably be considered relevant to the subject matter of the advice in question⁵².

Construction of s 766B(3)(b)

54 Section 766B(3) is to be read as a whole and given its ordinary meaning, in light of its context and purpose⁵³. It is not to be dissected into separate words or

52 *Corporations Act*, s 961B(2)(b)(ii).

53 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4], 46-47 [47]; *Federal Commissioner of Taxation v*

phrases, the meanings of which are then amalgamated into some composite meaning⁵⁴.

55 As has been observed, the gateway to s 766B(3) is "financial product advice", relevantly defined in s 766B(1) as a recommendation or statement of opinion that is intended to influence a person in making a decision in relation to a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence. Here, the particular financial product was membership in one of the Funds. The advice was given in telephone calls. The substance of the advice included a "recommendation" that each member "should roll over their external accounts into their BT account or, in other words, they should accept the rollover service". And, it is common ground that the provider, Westpac, gave that financial product advice – the recommendation – with the intention to influence the member to accept the rollover service offered by Westpac and to roll over their external accounts into their BT account. It is also common ground that the advisers, the callers, had not in fact considered one or more of the person's objectives, financial situation and needs within s 766B(3)(a).

56 The question then is whether, for the purposes of s 766B(3)(b), the financial product advice (comprising the recommendation) was given or directed to the member in circumstances where a reasonable person *might expect* Westpac to have considered one or more of the person's objectives, financial situation and needs.

57 In answering that question, several features of s 766B(3)(b) are significant. First, it poses an objective test, assessed at the time the financial product advice was given and having regard to the circumstances in which that advice was given. It refers to a reasonable person's expectation, being a reasonable person standing in the shoes of the person receiving the advice. It falls for consideration where financial product advice, intended (or reasonably regarded as being intended) to influence a person in making a decision about a particular financial product or class of financial products, has been given or directed to a person and it is to be assessed having regard to the circumstances in which that advice was given or directed.

Consolidated Media Holdings Ltd (2012) 250 CLR 503 at 519 [39]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14].

54 See *Project Blue Sky* (1998) 194 CLR 355 at 381 [69], 382 [71]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 391 [29].

58 Second, s 766B(3)(b) refers to things which a reasonable person *might expect*, which has a wider meaning than things which a reasonable person *would expect*. The standard is one of reasonable possibility, not reasonable probability⁵⁵.

59 Third, the phrase "to have considered" bears its ordinary meaning. Section 766B(3)(b) picks up the meaning of "the person's objectives, financial situation and needs" in s 766B(3)(a) by referring to "those matters". Section 766B(3)(b) therefore captures circumstances where a reasonable person might expect the provider to have taken into account, had regard to, or given attention to, one or more of the person's objectives, financial situation and needs.

60 It follows that Westpac's submission that the word "considered" refers to the adviser *actually* taking the recipient's personal circumstances into account – by evaluating them for the purpose of providing the advice in question so that there is a nexus (in fact or by reasonable apprehension) between the adviser's consideration of the personal circumstances and the advice provided – must be rejected. Read in context, "considered" cannot be given the meaning Westpac submitted.

61 Fourth, the words "one or more of", when used in s 766B(3)(a) and (b), convey that s 766B(3) applies where an adviser has considered (or might be expected to have considered) one or more (but not necessarily all) of a person's objectives, financial situation and needs. As has been explained, the words "one or more of" were added during the drafting process⁵⁶. The inclusion of "one or more of" in s 766B(3) conveys that advisers cannot avoid the disclosure and conduct obligations⁵⁷ which attach to the provision of personal advice simply by failing to consider one or more of the matters referred to in the provision. The contrary conclusion – that s 766B(3)(a) and (b) do not apply unless an adviser considers all or the whole of a person's objectives, financial situation and needs – would be unworkable legally and practically. A person may fail to provide complete information to an adviser, whether by way of oversight or otherwise. That is why s 961B(2)(c) recognises that an adviser will meet the duty to act in a client's best interests when providing personal advice⁵⁸ where, among other things, the adviser makes *reasonable inquiries* to obtain complete and accurate information.

62 Thus, Westpac's further submission that it was incapable of considering the personal objectives of each member in circumstances where, among others,

55 *Westpac* (2019) 272 FCR 170 at 232 [267].

56 See [33] above.

57 See [37]-[40] above.

58 *Corporations Act*, s 961B(1).

the member had not provided information about the fees charged on their external superannuation accounts, or any particular management issues with those external accounts, is also rejected. It is contrary to the text and purpose of s 766B(3)(b) and unworkable.

63 Fifth, the phrase "objectives, financial situation and needs" bears its ordinary meaning. As the primary judge held, and as has not been disputed, an objective is an end towards which efforts are directed, a situation is a state of affairs or combination of circumstances and a need is a case or instance in which some necessity or want exists. And the relevant objectives, financial situation and needs referred to must be "the person's". They must be personal. That follows linguistically from the words of the provision, including the fact that this kind of advice is described as "personal advice", and it is also implicit from the obligations that arise in connection with the giving of personal advice⁵⁹. Those obligations would be unnecessary and nonsensical if the only relevant matters to be considered were universal or generic, and not personal.

64 As to purpose, the purpose of Ch 7 of the *Corporations Act* is, relevantly, to promote "confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services"⁶⁰ and "fairness, honesty and professionalism by those who provide financial services"⁶¹. Consistent with, and reinforced by, that purpose and the wider statutory context, s 766B(3) is directed to the protection of the retail client, who is often without the skills, knowledge or information to make informed decisions.

65 The specific purpose of para (b) is clear. Section 766B(3)(b) focuses on what a reasonable person would expect "the provider" – not the retail client – to have done. It is a consumer protection provision in which the notion of "considered" includes not only circumstances involving a certain type, level or duration of consideration (as where there is an opportunity for active, mature, intellectual reflection over time) but also where an adviser provides a prompt or immediate response. It thus ensures that advisers cannot avoid the disclosure and conduct obligations⁶² which attach to the provision of personal advice simply by failing to consider one or more of the person's objectives, financial situation and needs.

59 See [37]-[40] above.

60 *Corporations Act*, s 760A(a).

61 *Corporations Act*, s 760A(b).

62 See, eg, *Corporations Act*, ss 946A, 961B, 961G, 961J.

66 These conclusions deny Westpac's contention that s 766B(3) does not apply unless an adviser (in fact or by reasonable apprehension) considers what is described as the minimum irreducible personal circumstances of the member relevant to the subject matter of the advice in question. It may be accepted that a member who has told a superannuation provider only that they want to save on fees and make their superannuation more manageable would not expect their tax position, the returns and investment profile of their other accounts, their insurance position and their retirement objectives to have been taken into account. However, advice can be personal advice within the meaning of s 766B(3) if, for example, a person's objectives of saving on fees and making superannuation more manageable are taken into account or might be expected to be taken into account. Whether or not other aspects of their financial situation and needs were considered would not alter that conclusion.

67 Section 766B(3) is engaged if an adviser (in fact or by reasonable apprehension) considers at least an aspect of one of the three categories – namely, a person's objectives, financial situation or needs – and whether that has occurred will be a fact specific inquiry. Here, Westpac elicited aspects of the members' objectives as part of the effort to persuade them to transfer their external superannuation accounts into their BT account.

68 It remains to deal with Westpac's further contentions that the Full Court disagreed on the touchstone for determining what aspects of, or to what degree, a person's objectives, financial situation or needs must be taken into account and that the Full Court erred in introducing what counsel described as a "normative element" into the inquiry under s 766B(3)(b).

69 As to the first of those contentions, as Allsop CJ rightly said, "[t]he surrounding circumstances, including the nature, content and context of the communication or exchange, will provide the answer to the question whether the provider has considered, or whether a reasonable person might expect the provider to have considered, any one or more of those subjects". The reasons of the other judges are not to any different effect. In short, there was no disagreement.

70 As to the second contention, Westpac submitted that the Full Court introduced a "normative element" into the inquiry under s 766B(3)(b) by proceeding on a two-stage assumption that an adviser in Westpac's position *should* act in its members' best interests, and that a member's best interests can *only* be served through the provision of personal advice. Westpac's submission is not correct. The submission elides two different ideas – what Westpac *should* have done, with what a reasonable person standing in the shoes of the member *might expect* Westpac to have done. What a reasonable person standing in the shoes of the member *might expect* must be found (as the section requires) by having regard to all the circumstances. But observing that regard must be had to all the circumstances does not add some additional normative element to the inquiry. And the Full Court did not proceed in that manner. To the contrary, each member

of the Full Court focused on the calls in their context and applied the statutory test, being what a reasonable person standing in the shoes of the member *might expect* that Westpac considered; and the matters relied on by their Honours in applying the statutory test were all matters which could legitimately be considered.

71 Certainly, the Full Court took into account factors such as the pre-existing relationship between Westpac and each member, that the calls were about superannuation, and that the purpose of the calls was to help the member. But the matters mentioned were not taken as "premises" or "assumptions". Nor were they added as some new elements ("normative" or otherwise) which were read into, or placed as a gloss on, the statute. Each was and remains simply a circumstance that arises from the application of s 766B to the facts of the case and informed the conclusion that the advice given was personal advice. That conclusion was correct.

Westpac gave personal advice within the meaning of s 766B(3)(b)

72 Westpac gave financial product advice to each member which was intended to influence them in making a decision in relation to a particular financial product, namely, membership in one of the Funds, in circumstances where a reasonable person might expect Westpac to have considered one or more of the member's objectives, financial situation and needs. The subject matter of the advice, the nature of the relationship between Westpac and its members, the purpose and tenor of the calls, and the members' objectives, together with the form, content and context of the financial product advice seen in light of a number of other considerations, compel the conclusion that the financial product advice was personal advice within the meaning of s 766B(3)(b).

73 The subject matter of the financial product advice concerned the consolidation of multiple superannuation accounts, a significant financial decision.

74 There was a pre-existing relationship between each member and Westpac. Westpac already held some of the member's superannuation and each member had entrusted those funds to Westpac. The pre-existing relationship was one of trustee and beneficiary⁶³. A reasonable person might expect that the adviser would be acting in the member's best interests, including by considering one or more of their objectives, financial situation or needs before giving financial product advice. Contrary to the findings of the primary judge, the fact that the specific adviser from the Super Activation Team who made the call had no previous relationship with the member, or was not provided with information by the member prior to the call, does not detract from that conclusion. In circumstances where the advisers were representatives of Westpac, a reasonable person would expect the adviser to be

63 Westpac was required under s 52(2)(c) of the SIS Act to perform its duties and exercise its powers in the best interests of the beneficiaries.

continuing the pre-existing relationship as a representative of Westpac, and to have access to all of the member's relevant information known to Westpac.

75 The tone and tenor of the calls had a repeated emphasis on helping and assisting the member in relation to their superannuation. The expressed purpose of the calls was to assist the members with their superannuation. For example, member 1's adviser said: "it was just a quick courtesy call regarding your BT Superannuation account, we've just had some superannuation search results ... [W]e've got some results here we'd like to help you bring them over to your account to potentially save you on fees ... Now, before we get started can I ask you a few quick questions so I can help you."

76 The members were then asked about their objectives. For example, member 1 was asked: "So what was the main reason you asked us to look for your superannuations ... and what did you see as the main benefits of bringing them altogether to the one place?". In response, the members conveyed their financial objectives, which included: to maximise the performance, in terms of financial return, of the member's overall superannuation; to minimise the fees payable in respect of the member's overall superannuation; and to assist with management of the member's superannuation. These were personal objectives within the meaning of s 766B(3).

77 Given the members were asked about their personal objectives, a reasonable person might expect that the objectives articulated were relevant to, and would be considered by Westpac in, the provision of any subsequent financial product advice. This expectation would not likely be undermined by the fact that the members' objectives were elicited during the course of the calls. Westpac's prior correspondence to members offering to search for and roll over their external superannuation accounts into their BT account⁶⁴ had set the scene for these calls. And the personal objectives that the advisers elicited from, and which were provided by, the members were said by the advisers to be ones which were common to most of Westpac's members. In other words, the members' objectives were familiar to the advisers. For example, after member 1 explained why they wanted Westpac to look for their superannuation accounts, the adviser responded that "manageability and also the saving on the fees ... are the two main reasons our clients do like to bring their supers together". In these circumstances, a reasonable person might expect that the adviser would be able to consider the member's objectives in a short time, and would have taken additional time, if necessary, before providing personal advice.

78 The members were given a general advice warning. By that warning, the advisers expressly stated that they would not take into account the members' personal circumstances. So, for example, member 1's adviser said: "I do need to

64 See [44] above.

let you know ... everything discussed today is general in nature, it won't take into account your personal financial needs". But the significance of the general advice warning must be assessed in light of *all* the circumstances. The general advice warning was given only once, at the beginning of the telephone conversation. Members were subsequently asked directly about their personal objectives. Members were not encouraged to seek personal advice before deciding whether to accept the rollover service.

79 The financial product advice was provided without charge. Where financial product advice is provided without charge, a reasonable person may be less likely to think that the advice would be given taking into account the member's objectives, financial situation and needs. Here, however, the position was qualified by two features of the calls. First, there was a pre-existing relationship between the members and Westpac under which the members paid annual fees to Westpac. While those fees were not said to be for services including the provision of personal advice, it is nonetheless the case that the members would likely have made payments over time to Westpac for financial services related to superannuation. Second, it might have been apparent to a reasonable person that the recommended rollover was in Westpac's interests, because it would increase Westpac's total funds under management. A reasonable person might expect that where Westpac is acting, in part, in its own interests, a fee for the provision of personal advice is less likely to be required.

80 In some cases, the adviser revealed a lack of knowledge about the member's financial situation. For example, questions asked by member 1's adviser revealed that the adviser did not know the amount of funds held in member 1's external accounts or the duration of member 1's employment with previous employers. This might suggest to a reasonable person that the adviser had not taken the whole or all aspects of the member's financial situation into account in providing the financial product advice. But that cannot detract from the fact that, on the calls, the adviser elicited the member's personal objectives, and, having been told what they were, the adviser then confirmed that the member's stated objectives were relevant and in common with other members. Personal advice only requires that the adviser has considered, or a reasonable person might expect them to have considered, "one or more of" a person's objectives, financial situation or needs and that is what occurred on these calls.

81 Section 766B(3)(b) is concerned with the circumstances of the retail client. Here, those circumstances included the form, content and context of the financial product advice given to the members that they should roll over their external superannuation accounts into their BT account. As O'Bryan J observed, where a provider of advice urges the recipient to follow a particular course of action, there is a greater likelihood that a reasonable person might expect the adviser to have considered the recipient's personal circumstances. This observation applies with particular force in the present case, where: the course of action concerns a subject matter of significance to most members (being the consolidation of

multiple superannuation accounts); there is a pre-existing relationship of dependence between the adviser and the member (that of trustee and beneficiary); the adviser elicited the member's objectives; and once having been told them, the adviser confirmed those personal objectives through the use of social proofing as being common and relevant objectives. As has been said, those circumstances would have conveyed to a reasonable person not only that those personal objectives were considered, but that no other matters needed to be taken into account and no other advice was required before the member made a decision to accept the recommendation and roll over their external superannuation accounts.

82 In the course of argument, Westpac referred to the advice that might be given in respect of other kinds of financial products, such as securities traded on a licensed market. Those references are not to the point for at least two reasons. First, advice about those products is subject to the specific provisions in Subdiv C of Div 3 of Pt 7.7 of Ch 7 including, in particular, ss 946A and 946B. Second, as has been observed⁶⁵, superannuation products are recognised as a distinct and different kind of product and treated separately.

Conclusion and orders

83 For these reasons, in all of the circumstances, the financial product advice Westpac gave to the members was personal advice within the meaning of s 766B(3)(b) of the *Corporations Act*. The appeal should be dismissed with costs.

⁶⁵ See [34] above.

