

BETWEEN: **WESTPAC SECURITIES ADMINISTRATION LTD ACN 000 049 472**
First Appellant
BT FUNDS MANAGEMENT LTD ACN 002 916 458
Second Appellant
and
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

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APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of Oral Argument

The scheme of Chapter 7

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2. An object of Chapter 7 of the *Corporations Act 2001* (Cth) (the Act) is to strike a balance between “informed decision making by consumers of financial products and services” and (inter alia) “efficiency” and “flexibility”: s 760A(a); AS [17]. The Chapter is predicated on consumer autonomy. It does not require that consumers receive any particular standard of advice — or any advice at all — before making financial decisions, including about superannuation: AS [37], [43].
3. A central concept of Chapter 7 is providing a “financial service” (s 766A; AS [18]), which is defined in part by reference to a “financial product”: ss 763A, 764A, 765A.
4. One type of financial service is providing “financial product advice”: AS [18]. The definition in s 766B(1) has been given a very wide construction: AS [9].
5. Subsections 766B(2), (3) and (4) distinguish “personal advice” from “general advice”: AS [19]-[21]. The distinction is fundamental to the statutory scheme: AS [22].
- 30 6. Where general advice is given, the Act’s sole requirement as to the content of the advice is that a licensee give the warning in s 949A(2): AS [26]. The form of warning, when given orally, was the subject of a class order issued by ASIC: AS [26], fn 40. There is no issue in this case about compliance with s 949A: A Reply [16]. The only issue is

- whether the appellants gave personal advice — despite the contrary warning they gave.
7. By contrast, where personal advice is given, the Act is onerous: AS [9].
 8. First, the “provider” must act in the “client’s” best interests (ss 961, 761G, 961B): AS [23(a)]; must provide appropriate advice (s 961G): AS [22(a)]; must warn the client if the advice is based on incomplete information (s 961H); and must give priority to the client’s interests when giving the advice, in case of conflict (s 961J): AS [23(a)]. Each of those is a civil penalty provision: s 961K; AS [23(a)].
 9. Secondly, the licensee must give the client a Statement of Advice: ss 944A, 946A, 947B, 947D; AS [22(b)]; and, when recommending a product, a PDS: s 1012A(3); AS [22(c)].
 - 10 10. The s 912A(1)(a) duty of licensees to provide financial services “efficiently, honestly and fairly” applies to both personal and general advice: AS [26]. But the specific content of the duty is driven by the nature of “*the financial services ... provided*” — relevantly, whether the advice is personal or general. ASIC’s case for breach of s 912A was confined to an allegation predicated on personal advice: AS [15(c)]; A Reply [2].

The calls

11. The appellants’ dealings with Customer 1 illustrate the issues relevant to s 766B(3)(b): AS [6]-[9].
12. The prior correspondence provides context for the calls, including the two generic benefits of consolidating super accounts: potential saving of administration fees and improved manageability: AFM 34-36, 67-70; AS [8(a)-(c)], A Reply [17]. ASIC identified these same two benefits on its Moneysmart website: AFM 208, AS [6].
13. No reasonable person could sensibly expect the appellants to have considered the customers’ objectives, financial situation or needs in giving any advice, particularly given (a) the general advice warnings given on each call: eg AFM 116-131; AS [8(d), (e)], [13], [46(a)]; A Reply [16]; and (b) the callers’ evident lack of knowledge about the customers’ relevant details: eg AFM 82 (Customer 2); 103, 113-114 (Customer 8); 177 (Customer 15); 205 (Customer 7); AS [46(c), (d)]; A Reply [8], fn 5.

First Ground

14. As ASIC accepts, the s 766B(3)(b) inquiry is purely factual: AS [39]-[45]; RS [5(a)].
- 30 15. The Full Court erroneously introduced a normative element into that inquiry when it found that the implied recommendation to roll over was personal advice. The Court reasoned from normative premises not found in the Act (that the advice provider should act in the customer’s best interests when making such a recommendation, which required

consideration of the customer’s personal circumstances) to a factual conclusion (about what a reasonable person might expect the appellants to have considered) which was at odds with the facts known to the customer: AS [39]; A Reply [5], [6]; see per Jagot J FC [266], [269]-[271], [278]; AS [29]-[31]; per O’Bryan J FC [387]-[392], [396], [397]; AS [32]-[33]; per Allsop CJ FC [5], [150], [76], [77], [79], [80]; AS [34]-[38]. No personal advice was provided on any of the calls: AS [46].

Second Ground

10 16. Contrary to the Full Court’s construction, the word “considered” in s 766B(3) refers to an active process of evaluating or reflecting upon the subject matter of the consideration, appropriate to the provision of financial product advice: PJ [127]; AS [47]-[49]. So much is apparent from ss 961B(2) and 961G; see also former s 945A; AS [55].

17. The Full Court’s construction is undemanding: see per Allsop CJ FC [25]-[26], [77]; Jagot J FC [247]-[248]; O’Bryan J FC [375]; AS [47]. That construction, sourced from dictionary definitions, is inconsistent with the purpose of the provisions, which is to ensure that a person who reasonably expects that advice will be based on and tailored to their personal circumstances receives advice that actually is: AS [54]; (A Reply [9]).

20 18. Here, it was obvious the callers did not have the necessary information to evaluate the customer’s “objectives” in order to provide personal advice: AS [56]-[57]. It was only by adopting an excessively low threshold for “consideration” that, eg, Jagot J could reason as she did at FC [275], which does not identify in what way the callers could consider the customers’ objectives when they were not in a position to do so; see also per O’Bryan J FC [396].

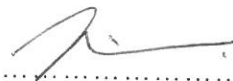
Third Ground

19. The words “one or more of the person’s objectives, financial situation and needs” refer to categories: AS [58]. In light of s 961B(2)(b)(ii) and (f), s 766B(3)(b) is engaged only where a reasonable person might expect that the advice provider has considered so much of each category as is relevant to the subject matter of the advice: AS [61]-[63].

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