



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No. S69 of 2020

BETWEEN: **WESTPAC SECURITIES ADMINISTRATION LTD ACN 000 049 472**
 First Appellant
BT FUNDS MANAGEMENT LTD ACN 002 916 458
 Second Appellant

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and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
 Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The Respondent (ASIC) considers these submissions may be published on the internet.

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Part II: Issues

2. The Full Court determined that the Appellants (**Westpac**) gave personal advice in telephone calls to each of the relevant customers within the meaning of s 766B(3)(b) of the *Corporations Act 2001* (Cth) (the **Act**) insofar as they provided "financial product advice" 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 situations and needs". The Full Court (and the Primary Judge) found, and Westpac does not challenge on the Appeal, that during the telephone calls Westpac:
 - a) gave "financial product advice" because it made a recommendation that was intended to influence the customer in making a decision in relation to a particular financial product;
 - b) asked the customer to identify objectives of the customer, which the customer duly did; and

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- c) made the recommendation after receipt of objectives of the person including by conveying that the financial product would meet those stated objectives of the customer:

(PJ [247] CAB 89, [252] CAB 90-91, [254]-[260] CAB 91-92; Allsop CJ: FFC [5] CAB 174, [64]-[67] CAB 195-197, [77] CAB 202-203, [84] CAB 204, [85] CAB 205, [88] CAB 205, [89] CAB 205, [94] CAB 205-206, [95] CAB 206, [98] CAB 206, [99] CAB 206, [103] CAB 206-207, [104] CAB 207, [108] CAB 207, [109] CAB 207, [112] CAB 207, [113] CAB 207, [116] CAB 208, [117] CAB 208, [122] CAB 208-209, [123] CAB 209, [126] CAB 209, [127] CAB 209, [131] CAB 210, [132] CAB 210, [136] CAB 210, [137] CAB 210, [141] CAB 211, [142] CAB 211; Jagot J: [219]-[235] CAB 258-263, [237] CAB 264; O'Bryan J: [341] CAB 296-297, [344]-[348] CAB 297-299).

- 10 3. The Primary Judge found, and the Full Court accepted, that the calls to the relevant customers reflected the nature and aims of procedures required to be employed by callers in an internal Westpac document (the QM Framework) insofar as the callers were “uncovering the personal motivations of the customers and then linking those motivations to influence the customer to roll over their external superannuation accounts into the customer’s BT account”: PJ [65](4) CAB 33, FFC [37] CAB 189 (Allsop CJ), [235] CAB 263, [284] CAB 279 (Jagot J) [347] CAB 298 (O'Bryan J). That finding is not challenged on the Appeal.
- 20 4. The Full Court found that a reasonable person might expect Westpac to have considered the objectives identified by the customer in the telephone calls in making the recommendation that it did. That finding is only challenged on the Appeal on the basis that the Full Court made three errors of interpretation. If the errors as alleged were not made, or were not errors, there is no residual issue inviting this Court to revisit the Full Court’s conclusion, which is ultimately one of fact.
5. As to the three grounds of appeal:
- 30 a) the first is said to be whether s 766B(3)(b) requires that a reasonable person might expect the provider “to have considered” the recipient’s personal circumstances or might expect that the provider “should have considered” the recipient’s personal circumstances. ASIC submits that the former is clearly correct and the Full Court did not approach the matter otherwise;
- b) the second is whether “considered” is to be construed as “engaged with and evaluated”. ASIC submits there is no occasion to so constrain the ordinary meaning

of considered in the relevant section, particularly by words which themselves lack clarity;

- c) the third is somewhat obscure. It is unclear from Westpac's submissions as to the suggested scope of any debate.

Part III: Section 78B Notice

- 6. ASIC agrees that no notice is needed under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

- 10 7. The calls which are the subject of this Appeal formed part of "consolidation campaigns" by Westpac, whereby a team of Westpac employees (the "Super Activation" team), called existing Westpac customers to encourage them to rollover their "external" superannuation accounts into their BT account. The campaigns were admittedly self-interested campaigns to increase its superannuation funds under management: PJ [1]-[2], [4] CAB 19; [25] CAB 23-24; [434] CAB 129, [447] CAB 131.
- 8. Between 18 May 2013 and September 2016, the Super Activation team spoke with approximately 95,682 customers, more than 31,000 customers rolled over all external superannuation into their BT account or contributed additional funds to their account, and \$646,719,225.51 additional funds under management were generated: FFC [32] 20 CAB 184-185.
- 9. Members of the Super Activation team participated in internal Westpac training which included a PowerPoint presentation that provided guidance as to the difference between general and personal advice: FFC [33]-[34] CAB 185-186, which, if followed by the callers, ought to have avoided the provision of personal advice.
- 10. However, the Super Activation team were also assessed, rewarded and penalised depending on their compliance with a "quality monitoring" document prepared by Westpac known as the "QM Framework": FFC [35]-[37] CAB 186-189; FFC [347] CAB 298. The QM Framework set out a four-part structure to follow on a phone call, comprising: (1) an "open" phase where the callers initiated the calls with statements to 30 the effect that they were ringing to help the customer; (2) a "gather" phase where the callers asked the customer why the customer thought that consolidation may be beneficial to them; (3) a "presenting" phase where the callers used what the customer had told them to seek to persuasively present the Westpac product, including by using a

“social proofing” technique of a statement such as “I understand where you are coming from and that is what a lot of customers tell us”, which affirmed that customer’s expressed thoughts about the beneficial consequences of consolidation; and (4) an “objection handling / closing” phase where the callers sought to get the customer to a decision to rollover on the phone. The QM Framework required the Westpac callers to employ techniques of psychology and sophisticated marketing on calls with existing Westpac customers, so as to encourage those customers to rollover external superannuation into their BT accounts: FFC [39] CAB 189-190, FFC [274] CAB 274-275.

- 10 11. The calls to customers were preceded by various written correspondence sent by Westpac: FFC [41]-[54] CAB 190-193. Westpac now places emphasis on this written correspondence: AS [6]-[8]. But as the Primary Judge found, and as Westpac has never challenged, the calls should not be construed in the context of this earlier correspondence or on an assumption that the customers understood it, given it is far from obvious that any particular message within the correspondence would have been absorbed or remembered at the time of an unsolicited phone call made some time later, while the customer was almost certainly doing something that did not involve thinking about their superannuation or Westpac’s marketing material: PJ [243]-[245] CAB 88, FFC [61]-[62] CAB 194-195.
- 20 12. While some (but not all) of the customers who received the phone calls had taken up an offer by Westpac contained in the written correspondence to search for other superannuation which the customer might hold, at the time the calls were initiated, none of the customers had indicated to Westpac any intention to rollover external superannuation *into their BT accounts*, despite Westpac’s invitation to do so: cf AS [6]. Further, while it is true that the written correspondence stated benefits in rolling over superannuation which were also referred to on ASIC’s “Moneysmart” website (AS [7]), that website also emphasised matters which customers should consider in carefully choosing the best fund for them, such as termination fees and the impact of a rollover on their insurance position. These additional “important cautionary points”, as described
- 30 by Gleeson J, did not generally feature in Westpac’s calls to its customers: PJ [10]-[12] CAB 21.
13. The calls which are the subject of these proceedings are relevantly extracted at FFC [Annexure A] CAB 231-256. They involved a member of the Super Activation team

making an unsolicited call to each of the Westpac customers. Westpac does not challenge that they followed the pattern of the QM Framework (FFC [281] CAB 278), thus:

- a) the calls were framed by the Westpac representative as calls to “help” the customer in relation to their superannuation;
 - b) a formulaic “general advice warning” was given at the beginning of the call, but one which fell short of the prescribed short form warning in cl 4(b)(ii) of ASIC Class Order CO 05/1195 because callers did not inform customers that “the advice may not be appropriate” for them (which would have cut across social proofing);
 - 10 c) the customer was asked what *their* objectives were;
 - d) those objectives were then applied to the BT product, in an implicit recommendation that the customer should consolidate their superannuation *into their BT account*, because that was an *obvious and uncontroversial course of action* for that particular customer: PJ [247] CAB 89, [252] CAB 90-91, [254]-[260] CAB 91-92, [395(4)] CAB 119, [446] CAB 131; Allsop CJ: FFC [5] CAB 174, [67] CAB 196-197, [84] CAB 204, [85] CAB 205, [88] CAB 205, [89] CAB 205, [94] CAB 205-206, [95] CAB 206, [98] CAB 206, [99] CAB 206, [103] CAB 206-207, [104] CAB 207, [108] CAB 207, [109] CAB 207, [112] CAB 207, [113] CAB 207, [116] CAB 208, [117] CAB 208, [122] CAB 208-209, [123] CAB 209, [126] CAB 209, 20 [127] CAB 209, [131] CAB 210, [132] CAB 210, [136] CAB 210, [137] CAB 210, [141] CAB 211, [142] CAB 211, [150] CAB 213-214; Jagot J: [219]-[235] CAB 258-263, [278] CAB 277-278; O’Bryan J: [344]-[348] CAB 297-299; and
 - e) the caller then sought to take the customer to the “close”, i.e. the point of sale, and to overcome any objections raised by the customer to that course.
14. The particular “objectives” elicited were differently expressed by each customer but generally fell into one or more categories of maximising the performance in terms of financial return of the customer’s overall superannuation, minimising the fees payable in respect of the customer’s overall superannuation, organising the customer’s overall superannuation in a manner that was appropriate to the customer’s retirement, and 30 consolidating into one account for better manageability: PJ [380] CAB 114-115, [382] CAB 115-116, FFC [70]-[143] CAB 197-211, [220]-[233] CAB 258-262, [381]-[382] CAB 307-308 (cf AS [9], [11]-[12]). Westpac does not challenge that such matters constitute “objectives” for the purposes of s 766B(3).

15. In recommending that a rollover was obvious and uncontroversial for a particular customer, Westpac did not actually know whether the customer would end up in a better or worse position, or whether the rollover suited the customer's elicited objectives. For example, a customer who indicated that an objective was to pay less fees, may pay less fees by remaining in multiple funds or consolidating into an external fund, rather than consolidating into a BT fund. That will depend, in significant part, upon the amount and basis of charging fees in the funds in question: FFC [150] CAB 213-214.
16. The Primary Judge and Full Court ultimately found that Westpac did not provide personal advice within the subjective limb at s 766B(3)(a), because the Westpac callers themselves were simply making a scripted call in accordance with the QM Framework, and would have acted in the same way irrespective of what the customer said: PJ [387] CAB 117, FFC [75] CAB 201, [81] CAB 204, [265] CAB 272-273, [384] CAB 308-309. That finding is not now challenged by ASIC.
17. However, overruling the Primary Judge, each member of the Full Court considered Westpac provided personal advice within the objective limb at s766B(3)(b) because, shortly stated:
- a) Westpac was offering a service to a customer with whom it had a pre-existing relationship, about a matter of importance to them, namely, the customer's superannuation: FFC [77] CAB 202-203, [80] CAB 203-204, [269]-[270] CAB 273-274; [388]-[390] CAB 309-310;
 - b) that the tenor of the call was a repeated emphasis by Westpac on the call's purpose being to *help* the existing customer, and that Westpac was acting in the customer's interest: FFC [55] CAB 193, [77] CAB 202-203, [80] CAB 203-204, [146] CAB 211, [219] CAB 258, [234]-[236] CAB 262-263 [271] CAB 274; [391] CAB 310;
 - c) that the formulaic general advice warning was immediately followed by substantive questioning to elicit what that particular customer's objectives were, before the use of those stated objectives to influence the customer to rollover into their BT account by conveying that the product met the objectives and was an obvious and uncontroversial course of action for that particular customer: FFC [5] CAB 174, [55] CAB 193, [77] CAB 202-203, [80] CAB 203-204, [266] CAB 273, [272] CAB 274, [275] CAB 275, [277](6) and (7) CAB 277 [391] CAB 310; and
 - d) the calls conveyed a recommendation for the customer to act (and to do so on the call), and a reasonable customer might expect the advice provider to have

considered their personal circumstances when it urges a particular course of action after being told of the customer's personal circumstances: *Ibid.*

- 10 18. The matters now emphasised by Westpac at AS [13]-[14] as relevant to the Primary Judge were all fully considered and addressed in an assessment of the expectations of the reasonable person: FFC [277]-[278] CAB 276-278; [393]-[395] CAB 311. Contrary to AS [12]-[13] the members of the Full Court did not impose some additional, "normative" requirement as to what a reasonable person should have considered, different to the approach adopted by the Primary Judge. Rather, in finding that the advice was personal advice, the Full Court conducted an assessment of what a reasonable person might expect having regard to what was *actually* said on the calls, including that Westpac actually said it was helping the customer and indicated it was acting in their interests, and actually elicited those objectives which were important to that particular customer and used those elicited objectives to recommend Westpac's product.
- 20 19. As to s 912A(1)(a), ASIC does not challenge the findings of the Full Court that its case at first instance was predicated on personal advice being given. But the Full Court did not find a breach of the "efficiently, honestly and fairly" standard merely because personal advice was given when it may well not have been in the customers' interests: *cf* AS [15(a)]. Their findings were based on accepting ASIC's case that personal advice was given in circumstances where Westpac failed to exhibit the ethical standards expected of it and engaged in "systemic sharp practice", including through the carefully structured QM Framework designed, unfairly, to make the customer feel that the rollover was a straightforward and obvious decision when it may well not have been, nor was otherwise in their interests: FFC [159]-[176] CAB 216-220, [286]-[291] CAB 280-282, [421] CAB 318, [421]-[428] CAB 318-320. Those aspects of the s 912A(1)(a) findings of the Full Court are not challenged by Westpac on appeal – if the financial product advice which it provided was "personal advice", Westpac does not challenge that it breached the "efficiently, honestly and fairly" standard in the manner found by the Full Court.
- 30 20. As to s 961B, although AS [25] states that s 961B assumes that personal advice will be "sought" from the advice provider, Westpac does not submit that that is a pre-condition of personal advice and expressly disclaimed such a submission at trial (see RFM), with the consequence that it has not been considered in the Courts below and there are no findings of fact as to whether it was sought, expressly or impliedly.

Part V: Argument

Section 766B of the Corporations Act

21. The objects of Chapter 7 of the Act include the promotion of (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: s 760A of the Act.
22. The Act seeks to achieve those objects in relation to “financial product advice”, which is broadly defined to include wherever there is a recommendation or statement of opinion that is intended to influence, or could reasonably be regarded as intended to influence, a person to make a decision in relation to a financial product: s 766B(a) of the Act. Such advice is not limited to the type traditionally provided by a financial planner or financial adviser – it can be given through all manner of interactions with retail clients regarding financial products, such as a recommendation by a bank teller, or a seminar, or a pamphlet or television advertisement commending a particular product, so long as the advice provider is appropriately licensed.
23. Section 766B distinguishes between “financial product advice” which is “general”, and that which is “personal”, and sets out different protections for a retail client from an adviser’s sales imperatives, depending on which type of advice is given.
24. *Where general advice is provided*, the adviser leaves to the retail client the question of whether or not the financial product is suitable to their personal circumstances, and the client is afforded less protections. The primary obligations on the advice provider include: (a) those which apply to all holders of financial services licences under Part 7.6, Division 3, of the Act (e.g. s 912A(1)(a), (b), (c)); (b) those which apply to all “financial product advice” under Part 7.7, Division 2 of the Act (e.g. s 941A); and (c) the requirement to provide a “general advice warning” under s 949A of the Act.
25. *Where personal advice is provided*, the adviser considers (or the retail client thinks that the adviser had considered) whether the financial product is suitable to the client’s personal circumstances. The client is more reliant on and vulnerable to the adviser, and is accordingly afforded stronger protections. For example, the advice provider is required: (a) to provide a statement of advice under s 946A of the Act; (b) act in the best interests of the client under s 961B(1) of the Act; (c) provide advice that is appropriate

to the client under s 961G of the Act; and (d) prioritise the client's interests under s 961J of the Act.

26. Where a reasonable person in a retail client's shoes might expect that the adviser has considered whether the financial product is an appropriate course having regard to their own circumstances (or whether the adviser actually considers those personal circumstances), the additional protections are engaged. That does not mean that any conversation that proceeds by way of offering assistance, or involves the retail client raising their personal circumstances, must be personal advice. Whether the line from general to personal advice has been crossed will depend on all of the circumstances, but the provision of personal advice will likely be avoided by:
- 10 a) not asking questions to uncover the particular objectives of an individual customer, and not then using those elicited objectives to try to make a sale by seeking to persuade the customer that the product is a straightforward and obvious one for them having regard to their objectives;
- b) reiterating the full effect of the general advice warning if the retail client has raised their personal circumstances;
- c) referring the customer to a qualified adviser when personal circumstances are raised, or simply declining to continue the call if the customer seeks advice about what is appropriate to their personal circumstances.
- 20 27. Indeed, on the facts as found, Westpac's own training guidelines for the callers in question recognise that "a general warning at the outset" will not protect against "instances where you have provided personal advice (implied or actual)", for example by providing general advice "in such a way as to drive a particular outcome" and suggesting that "the client need has been taken into consideration in recommending the preferred outcome", with the consequence that, despite the earlier general warning "you need to reinforce the nature of the engagement": FFC [34] CAB 185-186.
28. Significantly, not all products sold by financial institutions are subject to the full suite of personal advice protections provided by the Act. Taking some examples:
- 30 a) *some products are not "financial products" for the purposes of Chapter 7 of the Act and therefore not subject to the personal advice protections* – for example, credit cards, charge cards, mortgages, personal loans, hire purchase agreements, granting or taking a lease over real or personal property, letters of credit, promissory

notes, overdrafts, funeral benefits and health insurance: see s 765A of the Act, and Regulation 7.1.06 (which defines “credit facility”);

- 10 b) *some products are financial products which do not require a statement of advice and are subject to a modified “best interests” duty*: for example, bank accounts, term deposits with terms up to 5 years (where funds can be withdrawn from the term deposit upon notice), travel money cards – see ss 761A, 941C(6), 946B(5), 961B(3), 961F; travellers' cheques – see ss 961B(3), 961F, 946B(5)(c), Reg 7.7.10, 941C, Reg 7.7.02(1); car insurance, home building insurance, home contents insurance, travel insurance, personal and domestic property insurance, medical indemnity insurance and cash management trust interests – see ss 946B(5)(c), 961B(3), Reg 7.7.10, Reg 7.1.17A; and
- c) *some products, including superannuation, are subject to the full range of protections under Chapter 7 where personal advice is provided*: for example life insurance, TPD insurance, income and mortgage protection insurance, credit card repayment protection insurance, personal loan protection insurance, shares, securities, derivatives and margin loans: see s 764A. It is unsurprising that superannuation is so treated given the complexity of the products and its fundamental importance to Australians in their retirement.

20 29. Further, even where personal advice is provided, the Act does not provide an “all or nothing” regime whereby an adviser must provide free advice on the customer’s tax position, their investment profile, superannuation accounts, insurance position and retirement objectives: cf AS [64]. The adviser can provide limited or “scaled” advice on a specific issue (if the adviser is properly qualified and trained to do so) pursuant to s 961B(2)(b)(ii) of the Act, by which the provider may satisfy the duty to act in the best interests of the client by identifying, relevantly, the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that specific issue: PJ [115], [118]-[119] CAB 46-47; Replacement Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) at [1.34].

30 ***Ground 1: Full Court’s application of the s 766B(3)(b) test***

30. Westpac’s first ground asserts that the Full Court introduced a “normative” element to the enquiry under s 766B(3)(b), based on assumptions as to what a reasonable person might expect the advice provider *should* have considered if acting in the recipient’s best

interests, not what a reasonable person might expect Westpac *actually* to have considered.

31. In fact, no member of the Full Court took the approach now suggested by Westpac. Each member of the Full Court focused on the calls in their context and applied the statutory test, being what a reasonable person might *expect* that Westpac considered. So much is clear from the totality of what was said: FFC [30] CAB 183-184, [57] CAB 193-194, [67] CAB 196-197, [77]-[80] CAB 202-204 (Allsop CJ); [217] CAB 257, [219] CAB 258, [266], [267]-[280] CAB 273-278 (Jagot J); FFC [387]-[396] CAB 309-312 (O’Bryan J) – see also the summary at paragraph 17 above.
- 10 32. Indeed, in his reasons, Allsop CJ expressly adverted to the difference between what Westpac now describes as a “normative” assessment and a factual one, finding that s 766B(3) is not framed by reference to what a provider *should* consider if the advice is to be given reasonably or responsibly, but rather that it calls for an enquiry as to whether, in the circumstances of the giving of the advice by the provider, a reasonable person might *expect* one or more of the subject matters to have been considered in the giving of that advice: FFC [30] CAB 183-184. His Honour was focused on how the whole exchange would be perceived from the perspective of the customer: FFC [77] CAB 202-203. Likewise, Jagot and O’Bryan JJ made clear that the enquiry was a factual one as to what the retail client might expect: e.g. FFC [266] CAB 273, [387] CAB 309.
- 20 33. The approach of the Full Court did not amount to the imposition of “default quasi-fiduciary duties” on Westpac to act in its customer’s best interests: cf AS [42]. That submission ignores that the Westpac callers conveyed a message to each customer that they were calling to help them, were providing a service that was in the customer’s interests to accept (FFC [235] CAB 263), and implied to the customer that having regard to their personal circumstances the rollover was obvious and straightforward.
- 30 34. As Jagot J held, no reasonable customer would have expected that when Westpac said it was calling to help the customer, in fact, it was doing nothing more than helping itself to the customer’s superannuation irrespective of the customer’s best interests: FFC [218] CAB 257-258, [235] CAB 263. As O’Bryan J held, the reasonable person receiving the call would think that the reason the caller sought information from the customer was because it was relevant to the matters discussed, and that the objectives the customer had identified were valid and reasonable: FFC [391] CAB 310. As Allsop CJ held, had Westpac approached the calls differently, including by following their training or

allowing customers an opportunity to consider their position, the recommendation to consolidate may have remained appropriately general: FFC [5] CAB 174, [79] CAB 203, [145] CAB 211, [159] CAB 216.¹ These are all conclusions as to the reasonable expectations of the customer, rather than some imposition of quasi-fiduciary duties.

- 10 35. Ultimately, on ground one, each of the matters relied upon by the Full Court in determining the factual question as to what a reasonable person might expect were matters which could legitimately be considered in answering that question. There is no reason, for instance, why a pre-existing relationship as a superannuation customer of Westpac and the importance of the product cannot be relevant to an assessment of expectation, particularly in a context where that adviser has expressly stated that their purpose was to provide assistance in the customer's interests. Westpac does not appear to contend that any of the matters identified were legally irrelevant or factually incorrect. Instead, Westpac contends that each member of the Full Court should have reached a different factual result for other reasons: AS [46].

Ground 2: Meaning of "considered" in s 766B(3)

- 20 36. Westpac's second ground is that the term "considered" in s 766B should be construed as it was by the Primary Judge, and the Full Court's construction was in error: AS [49]-[50]. The Primary Judge held that "consideration" requires "an active process of evaluating or reflecting upon" and an "intellectual engagement with" the subject matter of the consideration, introducing a qualitative and temporal criteria as to the type and duration of consideration that is necessary to be undertaken for the subsection to be enlivened: PJ [127] CAB 49, [386] CAB 116, [389] CAB 117, [394(5)] CAB 119.
37. In support of this position, Westpac relies upon discussion of the meaning of "considered" in authorities considering statutes which impose a mandatory requirement for an administrative decision maker to "consider" a particular matter which has been identified as relevant and important for a particularly statutory decision: AS [53]. These authorities have analysed the obligations that are conferred upon statutory and other decision-makers to ensure that they adhere to a normative standard of conduct as to the legality of their decision-making. That ensures that decision-makers are held to that

¹ Contrary to the assertion at AS [34], which relies on a sentence in what are stated to be a 'summary' of conclusions at [5] CAB 174, and parts of Allsop CJ's reasons relating to breaches of s 961B and 912A(1)(a).

standard of legality. Those authorities, however, do not have the effect of confining the scope of the word when looked at from the setting of a marker for regulatory behavior, protective of the consumer.

38. In ASIC's submission, there is no statutory warrant to limit "consideration" under s 766B(3) being a consumer protection provision which must apply to a wide variety of circumstances and financial products only to circumstances which involve a certain type, level or duration of consideration (e.g. where there is an opportunity for active, intellectual reflection over a period of time), and not other types of consideration (e.g. where an adviser gives a prompt or immediate response on the telephone, or on email, or in person, or where the product of what an adviser says on the telephone has been carefully predetermined as part of a deliberate and considered marketing process irrespective of the answer provided by the consumer). The ordinary meaning of "considered" is one which "a reasonable person" could comprehend and thus is the natural meaning to be adopted in the expression "a reasonable person might expect the provider to have considered".
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39. As a matter of construction, each member of the Full Court was plainly correct to reject the primary judge's approach; thus they:
- a) gave the word "consideration" its ordinary meaning – e.g. to "pay attention or regard to", "take into account" or "view attentively": FFC [25]-[26] CAB 181-182, FFC [247]-[248] CAB 266-267, FFC [373]-[375] CAB 305-306;
 - b) construed the term in its statutory context, noting that care must be taken not to break up the question of the proper interpretation of s 766B(3) by reference to the individual meaning or parts or sub-parts considered separately, as they all form part of an interconnected concept of personal advice in s 766B(3): FFC [15] CAB 178, [241] CAB 265, FFC [314] CAB 288, [332] CAB 293, [360] CAB 301;
 - c) held that there is no statutory warrant to read the word "consider" as having something more than its ordinary meaning used in the context of a protective provision, or, alternatively, to place a restrictive gloss on the word: FFC [25] CAB 181-182, [373]-[375] CAB 305-306;
 - d) held that the use of the term "consider" in administrative law, which typically concerns the construction of a statute requiring a decision-maker to consider a particular matter relevant for the exercise of a statutory power or function, is another universe compared to s 766B(3) of the Act, which uses the term as a threshold
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provision that, once crossed, enlivens other obligations on a provider of financial product advice: FFC [25] CAB 181-182, FFC [246]-[247] CAB 266-267; and

e) noted that Westpac's construction is apt to lead to unsatisfactory ambiguity, as it will be difficult to know what level of intellectual engagement is required before it may be said that the person has, objectively, "considered" one or more relevant matters: FFC [248] CAB 267, FFC [375] CAB 306.

10 40. Construing "consideration" in s 766B(3) in the manner sought by Westpac would substantially alter the balance struck by the legislative scheme and the scope of the Act to regulate the financial sector and protect consumers. This concern is exemplified in a case like the present, where Westpac was able to encourage thousands of people to take an important step regarding their retirement by suggesting that it was an uncontroversial and obvious step that met their personal objectives and was in their personal interests, despite it being a step that was in truth potentially adverse to their interests (as Westpac knew). Westpac's construction of the word "considered" would enable it to suggest that important financial products were appropriate to the personal objectives of its customers and that those customers did not need to seek any further advice, through careful and sophisticated marketing and psychological techniques, so long as it did not engage in, or appear to engage in, any active process of evaluating or reflecting on what the customer had told them about their objectives.

20 41. The Full Court's finding that there was consideration within the meaning of s 766B(3) in the present case demonstrates the correctness of its interpretation. There is no "conundrum": cf AS [56]. In making that submission, Westpac focuses on only some of the facts relied upon, to the exclusion of others: see AS [48] and [56]-[57]. For instance, the Full Court (and Westpac's own training material) state that the provision of a general advice warning at the outset of the call does not protect a provider where they have in fact as a matter of substance provided personal advice (actual or implied) to the client: FFC [34] CAB 185-186, [80] CAB 203-204, [234] CAB 262-263, [272] CAB 274. The warning here was "formulaic", was "immediately followed by a more substantive discussion" (FFC [272] CAB 274), did not include the terms or substance of the 'short form' warning ASIC prescribed, and was never repeated (FFC [393] CAB 311).

30 42. The unchallenged finding of the Primary Judge that the callers were "uncovering the personal motivations of the customers and then linking those motivations to influence the customer to roll over their external superannuation accounts into the customer's BT

account" consistently with the QM Framework (PJ [65 (4)]) is relevant. The unchallenged findings that the callers made the recommendation by conveying that the financial product would meet the stated objectives of the customer are also relevant. It is difficult to conclude otherwise than a reasonable person might expect that in making its recommendation Westpac had considered the very motivations which it was Westpac's object to deploy by conveying that those objectives were satisfied by the product with a view to influencing the decision of the customer.

- 10 43. The generality of the customer's objectives does not disqualify them as "objectives" within s 766B(3). Nor does the fact that the objectives might be shared by others. Indeed, the so called "social proofing" technique of informing the customer that Westpac was familiar with the customer's objectives as they were shared by others, is apt to reinforce to a reasonable customer the caller's capability to "consider" there and then those objectives in making the recommendation, because they were objectives with which the caller and Westpac were well familiar.
44. Finally, Westpac's so-called "three subsidiary errors" (AS [50]) are not errors.
- 20 45. As to the first alleged error, the Full Court's interpretation creates no inconsistency between s 766B(3)(a) and (b): *cf* AS [51]-[52]. The Full Court's finding that s 766B(3)(a) was not satisfied did not concern any different interpretation of "consideration", and was not because the callers "were following up on the offer made in the earlier correspondence". It was based upon findings that the callers were simply following the QM Framework 'script' in accordance with their training and were acting to recommend the product irrespective of what the customer said: FFC [75] CAB 201, [265] CAB 272-273, [384] CAB 308-309. The finding in fact shows that the Full Court's construction of "consideration" is not as undemanding and meaningless as Westpac would suggest.
- 30 46. As to the second alleged error, the Full Court's interpretation is consistent with the purpose of the scheme: *cf* AS [53]-[54]. Westpac's submission appears to presuppose that personal advice must be given by the traditional financial planner, ignoring the breadth of the language of the Act. Further, the Full Court *did find* that the relevant personal circumstances must be considered "in giving" the advice or the advice must be "on the basis of" the personal circumstances: FFC [75] CAB 201, [242]-[243] CAB 265-266, [362] CAB 301-302. That was satisfied in the present case because a reasonable person might expect that Westpac recommended the product after considering the

objectives that had been identified by the customer by affirming that those objectives were valid and reasonable.

47. As to the third alleged error, Westpac conflates the word “considered” in s 766B(3) – which operates as a threshold or gateway provision – with the obligations imposed on a provider *once that threshold is engaged*: AS [55]. The obligations imposed on a provider of personal advice once the threshold is crossed do not determine when that obligation arises. Nor has Westpac identified how the Full Court’s approach to “consideration” would undermine the application of s 961B(2), which sets out a “safe harbour” provision for a provider to avoid breaching the obligation at s 961B(1). In any event, the Full Court did not find that “consideration” should be given an undemanding content – it found that it should be given its ordinary meaning.

Ground 3: Interpretation of “one or more of the person’s objectives, financial situation and needs” in s 766B(3)

48. By its third ground, Westpac complains of the approach adopted by the Full Court to the expression “one or more of the person’s objectives, financial situation or needs” in s 766B(3). In doing so, there is a lack of clarity as to what Westpac contends should be the correct construction.

49. Before the Primary Judge and the Full Court, Westpac contended that each of “objectives”, “financial situation” and “needs” are a separate category, and a provider of personal advice is required to consider a category *as a whole* to the extent it is relevant to the advice provided for personal advice protections to be engaged: PJ [116] CAB 46-47; FFC [27] CAB 182.

50. In this court, its submissions appear to combine the three categories, to contend that personal advice cannot be provided until the “relevant personal circumstances” or the “minimum irreducible personal circumstances” of the customer necessary to give appropriate advice have been considered: AS [62]. How such circumstances might be determined in a particular situation, how an adviser would know when he or she has determined such circumstances, and how a customer would know when the adviser has determined such circumstances, has not been explained, but the submission seems to be that an adviser such as Westpac should not be subject to the personal advice regime until whatever those necessary (but elusive) personal circumstances are, have been elicited and then evaluated through a process of intellectual engagement.

51. The construction put by ASIC, and accepted by the Primary Judge and each member of the Full Court, should be preferred to both of Westpac's apparent positions: Allsop CJ at FFC [27]-[29] CAB 182-183, Jagot J at FFC [249]-[257] CAB 267-270, O'Bryan J at FFC [367]-[375] CAB 303-306, PJ at J [111]-[119] CAB 45-47. What is required is consideration of at least an aspect of one of the three categories, and whether that has occurred will be a fact specific inquiry. In this case, Westpac does not challenge that it elicited an aspect of these categories, being the objectives articulated by the customers on the relevant calls: see paragraph 14 above.
- 10 52. In accepting this construction, each of the judges started with the language of s 766B(3), read in light of the Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth) at [3.20]-[3.23] which described the reasons for the addition of the words "one or more" into the proposed s 766B(3), and considered that the customer's "objectives", "financial situation" or "needs" were categories: Allsop CJ at FFC [28] CAB 182-183, Jagot J at FFC [250] CAB 268, O'Bryan J at FFC [367] CAB 303, PJ [112]-[115] CAB 45-46, [118] CAB 47.
- 20 53. However, each considered that the phrase does not require that a person must consider one or more of the categories *as a whole* to the extent relevant to the advice, or to have considered *each and every aspect of* a person's relevant objectives, financial situation or needs. The rejected construction leaves uncertain the question of what matters will be relevant so as to engage the personal advice protections: FFC [255] CAB 269-270. It would also have the unsatisfactory result of permitting any adviser to avoid the personal advice protections by stopping short of considering all of a customer's objectives, financial situation, and only considering them in part: Allsop CJ at FFC [29] CAB 183, Jagot J at FFC [250]-[253] CAB 268-269, O'Bryan J at FFC [370]-[371] CAB 304-305, Gleeson J at J [112]-[115] CAB 45-46, [118] CAB 47. The construction now seemingly contended for by Westpac suffers from the same problems.
- 30 54. At AS [60], Westpac submits that undesirable consequences flow from the construction adopted by the Primary Judge and Full Court. That submission does not accurately capture the objectives of these Westpac customers as found, which are not challenged as objectives for the purposes of the provision (see paragraph 14 above).
55. Nor does it accurately reflect the reasons of the Full Court at FFC [150] CAB 213-214 and [412] CAB 315-316 as to why Westpac's conduct was a breach of the best interests duty in s 961B in the present case. Those reasons included that:

- a) Westpac portrayed to customers that the decision to consolidate was an obvious or straightforward one for them when in fact it was not;
 - b) customers were not given a choice to go away and consider whether or not they wanted to consider the various issues further; and
 - c) the object of the calls was not to act in the best interests of the customers but to obtain funds under management for the benefit of Westpac.
56. There is nothing undesirable about a consequence where Westpac is sanctioned for succeeding in its attempts to make the customer think it was taking their personal circumstances into account and that the rollover was right for them, but not in fact giving the customer's personal circumstances any consideration.
57. At AS [61]-[62], Westpac does not correctly characterise the objects of the personal advice provisions, which are discussed at paragraphs 21 to 29 above. It also conflates the threshold provision at s 766B(3) which determines when the personal advice protections are enlivened, with s 961B which imposes a best interests obligation applicable to a provider who provides personal advice. The threshold provision should not be read down in this way.
58. In any event, while Westpac relies on s 961B(2) (AS [61]), that section in fact supports the Full Court's construction. Had Parliament wanted to narrow s 766B(3) in the way submitted by Westpac, it could have used the language in s 961B(2)(b)(ii) (i.e. "objectives financial situation and needs of the client *that would reasonably be considered as relevant to the advice sought on that subject matter*"). It did not do so. Further, as is explained by Jagot and O'Bryan JJ (FFC [251] CAB 268-269, [370] CAB 304-305), 961B(2)(c) states that a provider will satisfy the best interests obligation if, among other things, he or she made reasonable enquiries of the client to obtain complete and accurate information relating to the client's objectives, financial situation and needs where it was reasonably apparent that the information known to the provider was incomplete or inaccurate. On Westpac's construction, if the provider did not have complete information about one or more of the client's objectives, financial situation or needs, any advice given would not be personal advice and the obligation under s 961B would never arise. That would defeat the purpose of s 961B.
59. At AS [64]-[65], Westpac contends that the facts of this case support its construction of the phrase, by its circular assertion that no reasonable customer would think that the advice was personalised to them in the present circumstances. In doing so, Westpac

shifts the obligation onto the retail client to know that when Westpac says it is acting to help them, it is actually doing nothing of the sort. Westpac requires the customer to assess the point at which Westpac knows enough about their personal objectives, financial situation and needs, that it must actually be doing what it said it was – i.e. helping them and acting in their interests.

10 60. Here, each customer had a pre-existing customer relationship with Westpac, such that it had knowledge as to the personal circumstances of that customer through at least the pre-existing superannuation relationship (e.g. any insurance position as part of that superannuation). Most of these customers had requested that Westpac search for their external superannuation accounts. Each then received an unsolicited call, to discuss the results of the superannuation search to the extent it was requested (i.e. the customer knew that Westpac knew at least the identity of their identified other superannuation funds). On the call, Westpac was purporting to provide a service which, it at least implied, was in the customer's interests to accept, and was purporting to check what the customer's objectives were, before conveying to them that a rollover into a BT account was an obvious choice for them given their personal objectives, on a subject matter as serious as their superannuation.

20 61. A reasonable retail client might well expect that in such circumstances, Westpac had sufficient information to provide its recommendation. There is no obvious reason why such a retail client would think that an entity as sophisticated Westpac had not actually made any comparison between its product and the product of its competitors on matters such as comparative fee levels and rates of return (AS [65]) – being matters which Westpac might have determined with its knowledge of the customer's external superannuation – or undertaken any other analysis it considered necessary to suggest the rollover was an obvious and uncontroversial course of action for that particular customer. Nor is there any reason why such a client would necessarily think that there might be negative implications for, by way of example, their tax or insurance position, from a superannuation rollover, in the absence of those matters being raised with them: AS [64]. Ultimately, there is no obvious reason why such a customer would think
30 Westpac was not acting to help them with their elicited objectives, when it said that was what it was doing.

62. Further, the notion that the Full Court’s construction would impose on Westpac some requirement to provide extensive, free personalised advice, wherever a customer has provided reasonably commonly held objectives, ignores the many steps Westpac might have taken to avoid providing personal advice, including those identified in its own internal training (e.g. paragraphs 26 to 27 above). It also ignores the flexibility in the Act for providers (where licensed) to provide limited or scaled advice on a particular topic (paragraph 29 above).

Part VI: Notice of Contention

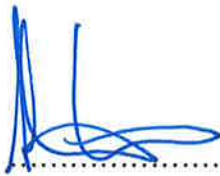
10 63. Not applicable.

Part VII: Time estimate

64. ASIC estimates that it will require up to 4 hours for oral argument.

Dated: 10 July 2020

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S69 of 2020

BETWEEN: **WESTPAC SECURITIES ADMINISTRATION LTD ACN 000 049 472**
First Appellant
BT FUNDS MANAGEMENT LTD ACN 002 916 458
Second Appellant

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and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

ANNEXURE
LEGISLATIVE PROVISIONS REFERRED TO IN SUBMISSIONS

Legislation	Version
<i>Corporations Act 2001</i> (Cth), ss 760A, 765A, 766B, 912A, 941A, 941C, 946A, 946B, 949A, 961B, 961F, 961G, 961J, 764A	19 July 2013 to 30 June 2014 (C2013C00568)
<i>Corporations Act 2001</i> (Cth) (as above)	1 July 2014 to 18 December 2014 (C2014C00519)
<i>Corporations Regulations 2001</i> (Cth), rr 7.1.06, 7.1.17A, 7.7.02, 7.7.10	7 August 2013 to 15 March 2014 (F2013C00813)
<i>Corporations Regulations 2001</i> (Cth) (as above)	15 March 2014 to 13 June 2014 (F2014C00242)
<i>Corporations Regulations 2001</i> (Cth) (as above)	14 June 2014 to 30 June 2014

	(FC2014C00822)
<i>Corporations Regulations 2001 (Cth) (as above)</i>	1 July 2014 to 18 November 2014 (F2014C00904)
<i>Corporations Regulations 2001 (Cth) (as above)</i>	19 November 2014 to 30 November 2014 (F2014C01274)