FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited [2021] FCA 1008

File number:	NSD 2204 of 2016
Judgment of:	**O'BRYAN J**
Date of judgment:	23 August 2021
Publication of reasons:	9 September 2021
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS** – enforcement and remedies – pecuniary penalties for contraventions of s 961K of the *Corporations Act 2001* (Cth) – penalties sought by plaintiff not opposed by defendants – whether quantum of penalty appropriate
Legislation:	*Corporations Act 2001* (Cth) ss 961B, 961K, 1317G(1E)
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 *Australian Securities and Investments Commission v BT Funds Management Limited* [2021] FCA 844 *Australian Securities and Investments Commission v Dover* [2021] FCA 170; 150 ACSR 185 *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266

	Australian Securities and Investments Commission v Westpac Banking Corp [2019] FCA 2147 *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 *Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2018] FCA 2078; 133 ACSR 1 *Chief Executive Officer of Australian Transaction Reports and Analysis Centre v Westpac Banking Corp* [2020] FCA 1538; 148 ACSR 247 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 *Markarian v The Queen* (2005) 228 CLR 357 *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 *Trade Practices Commission v CSR Limited* [1990] FCA 762; ATPR 41-076 *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; 387 ALR 1
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	98
Date of hearing:	23 August 2021
Counsel for the Plaintiff:	J Renwick SC, T Kane and M Kalyk
Counsel for the Defendants:	J Williams SC and Z Heger
Solicitors for the Defendants:	Allens

ORDERS

NSD 2204 of 2016

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION** Plaintiff
AND:	**WESTPAC SECURITIES ADMINISTRATION LIMITED (ACN 000 049 472)** First Defendant
	BT FUNDS MANAGEMENT LTD (ACN 002 916 458) Second Defendant

ORDER MADE BY: **O'BRYAN J**

DATE OF ORDER: **23 AUGUST 2021**

THE COURT NOTES THAT:

A. Due to the procedures implemented by the Federal Court of Australia in response to the COVID-19 pandemic which include restricting the parties, their legal representatives and members of the public from attending hearings at the Commonwealth Law Courts, Melbourne in person, this hearing is being conducted by video link.

B. Instructions to enable members of the public to attend the hearing by video link are published on the Federal Court website.

THE COURT ORDERS THAT:

1. Pursuant to s 47B of the *Federal Court of Australia Act 1976* (Cth), the parties be permitted to appear before the Court and to make submissions to the Court, whether in person or through a legal representative, by way of video link.

2. Unless the Court otherwise orders, no person, being a member of the public, who is observing the hearing by accessing any video link, audio link or other means may:

   (a) make any video or audio recording or photography of the hearing or any part of it; or

   (b) participate in or interrupt the hearing,

   provided that nothing in this order shall prevent any person, based on what they have heard during the hearing:

(c) making their own notes or record of the proceeding; or

(d) publishing a fair report of the proceeding.

3. Pursuant to s 1317G(1E) of the *Corporations Act 2001* (Cth) (the **Act**), the first defendant pay to the Commonwealth an aggregate pecuniary penalty of $7,500,000 in respect of the first defendant's contraventions of s 961K of the Act referred to in declarations 3, 4, and 7 to 14 made by the Full Court on 12 November 2019.

4. Pursuant to s 1317G(1E) of the Act, the second defendant pay to the Commonwealth an aggregate pecuniary penalty of $3,000,000 in respect of the second defendant's contraventions of s 961K of the Act referred to in declarations 1, 2, 5 and 6 made by the Full Court on 12 November 2019.

5. The defendants are to pay the plaintiff's costs of and incidental to the hearing as to penalty and other relief as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

O'BRYAN J:

Introduction

1 In 2016, the plaintiff (**ASIC**) brought a proceeding against the defendants, Westpac Securities Administration Limited and BT Funds Management Limited, for alleged contraventions of Ch 7 of the *Corporations Act 2001* (Cth) (**the Act**).

2 Each of the defendants is and was at all relevant times a wholly owned subsidiary of Westpac Banking Corporation and part of the BT Financial Group which is the wealth management division of the Westpac group of companies. Each is and was at all relevant times the trustee of a superannuation fund which was a regulated superannuation fund under the *Superannuation Industry (Supervision) Act 1993* (Cth) (which I will refer to collectively as the **BT funds**). Each is and was at all relevant times the holder of an Australian financial services licence granted under s 913B of the Act. Under their respective licences, each of the defendants was authorised to provide financial product advice, including in relation to superannuation products, which was general advice (within the meaning of s 766B(4) of the Act) but was not personal advice (within the meaning of s 766B(3) of the Act).

3 The alleged contraventions related to a campaign that the defendants (to which I will refer collectively as **Westpac**) engaged in during the period May 2013 to September 2016 to encourage members of the BT funds to roll over (or consolidate) superannuation held by the member with one or more other funds into their account in the relevant BT fund. The campaign was conducted through a team of employees referred to as the "Super Activation Team". The campaign included written communications by which Westpac offered those members (also referred to as "customers" and "clients" in previous judgments on liability) a service comprising a free search for external superannuation accounts the member might hold and telephone calls during which the member, who may or may not have accepted the free search offer, was offered a further service of arranging a rollover of their external superannuation accounts into their BT account. During the period of the campaign, the Super Activation Team contacted and spoke with approximately 95,682 BT fund members. Over the course of the campaign, Westpac substantially increased its funds under management in the BT funds.

4 While Westpac's superannuation consolidation campaign involved making contact with a large number of members of the BT funds, ASIC's proceeding against Westpac was limited to 15

such members. In respect of each of those 15 members, ASIC alleged that Westpac's conduct involved:

(a) a contravention of s 912A(1)(a) of the Act by failing to do all things necessary to ensure that financial services were provided efficiently, honestly and fairly; and

(b) the provision of personal advice within the meaning of s 766B(3) of the Act and:

  (i) a contravention of s 912A(1)(b) of the Act by providing personal advice in breach of conditions of Westpac's Australian financial services licences;

  (ii) a contravention of s 946A of the Act by failing to give the member a statement of advice;

  (iii) a contravention of s 961K(2) of the Act by reason of a failure by relevant staff to act in the best interests of members in the provision of personal advice in contravention of s 961B(1) of the Act; and

  (iv) a failure to comply with financial services laws in contravention of s 912A(1)(c) of the Act.

5 In addition to declaratory relief, ASIC sought orders under s 1317G(1E) of the Act that Westpac pay a pecuniary penalty in respect of the contraventions of s 961K(2) of the Act.

6 The conduct engaged in by Westpac is the subject of detailed findings of fact made by the primary judge in *Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2018] FCA 2078; 133 ACSR 1 (which I will refer to as the **Primary Judgment**). The primary judge concluded that Westpac's conduct involved a failure to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Act and made declarations to that effect. However, her Honour found that Westpac's conduct did not involve the provision of personal advice within the meaning of s 766B(3) of the Act and, as a result, Westpac had not contravened ss 912A(1)(b), 912A(1)(c), 946A, 961B(1) and 961K(2) of the Act.

7 On appeal by ASIC, the Full Federal Court found that, in respect of 14 of the 15 members, Westpac's conduct did involve the provision of personal advice within the meaning of s 766B(3) of the Act and that Westpac had contravened ss 912A(1)(b), 912A(1)(c), 946A, 961B(1) and 961K(2) of the Act, and made declarations to that effect: *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170

(**Full Court Judgment**). The Full Court found that Westpac's conduct involved the provision of personal financial product advice because, during the telephone calls to the 14 members, Westpac's representatives expressed opinions or made implied recommendations which were intended to influence the member to roll over the member's external superannuation account into their BT account, and that was done 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 contravened s 961B(1) and thereby 961K(2) of the Act because, in giving personal advice, Westpac failed to act in the best interests of the members.

8 On further appeal by Westpac, the High Court affirmed the decision of the Full Court: *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; 387 ALR 1 (**High Court Judgment**).

9 ASIC now seeks pecuniary penalties to be imposed against Westpac in respect of the 14 contraventions of s 961K(2), pursuant to s 1317G(1E) of the Act.

10 ASIC seeks a total penalty of $10.5 million, being $750,000 for each of the 14 contraventions, comprising $7.5 million for the first defendant (which engaged in contravening conduct in respect of 10 members) and $3 million for the second defendant (which engaged in contravening conduct in respect of 4 members). Westpac does not oppose the imposition of those penalties.

11 At the hearing on 23 August 2021, I informed the parties that I was satisfied that the penalty sought by ASIC, and ultimately not opposed by Westpac, was appropriate in all the circumstances and I made orders accordingly. These are my reasons for making those orders.

Relevant statutory and legal principles

12 Section 961K(2) of the Act relevantly provides as follows:

> A financial services licensee contravenes this section if:
>
> (a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and
>
> (b) the licensee is the, or a, responsible licensee in relation to that contravention.

13 Section 961K(2) falls within Division 2 of Part 7.7A of the Act, introduced as part of the "Future of Financial Advice" (**FOFA**) reforms by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth). The FOFA provisions became law on 1

July 2012. Compliance with Division 2 of Part 7.7A was voluntary for the first year of operation, and compulsory from 1 July 2013: s 1527 of the Act.

14 Here, relevantly, the Court has found that Westpac contravened s 961B(1) of the Act, because it failed to act in the best interests of the retail clients to whom it was providing personal financial product advice.

15 At the time of Westpac's contravening conduct, s 1317G(1E) provided that a Court may order a person to pay to the Commonwealth a pecuniary penalty if:

(a) a declaration of contravention has been made under s 1317E; and

(b) the contravention is of one of the provisions listed in s 1317G(1E)(b)(i)-(xiv) (which included s 961K of the Act).

16 Under section 1317G(1F)(b) the maximum pecuniary penalty that could be imposed on a corporation for a contravention of s 961K at the time of Westpac's contravening conduct was $1 million.

17 The applicable legal principles are uncontroversial. The principal object of imposing pecuniary penalties in civil proceedings is deterrence, both to deter repetition of the contravening conduct by the contravener (specific deterrence) and to deter others who might be tempted to engage in similar contraventions (general deterrence): *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***ACCC v TPG***) at [65] per French CJ, Crennan, Bell and Keane JJ; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***FWBII***) at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ and [110] per Keane J. In *FWBII*, the plurality (at [55]) stated that the purpose of civil penalties "is primarily if not wholly protective in promoting the public interest in compliance", endorsing the view of French J (as his Honour then was) in *Trade Practices Commission v CSR Limited* [1990] FCA 762; ATPR 41-076 (***CSR***) at [40]:

> The principal, and I think probably the only, object of the penalties … is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.

18 The penalty should therefore be fixed with a view to ensuring that the amount is not such as to be regarded by the contravener or others as an acceptable cost of doing business: *ACCC v TPG* at [66] (per French CJ, Crennan, Bell and Keane JJ); *Singtel Optus v Australian Competition*

and Consumer Commission [2012] FCAFC 20; 287 ALR 249 at [62]-[63] (per Keane CJ, Finn and Gilmour JJ).

19 In fixing the amount of a civil penalty, reference is often made to the list of factors identified by French J in *CSR* (which have become known as the "French Factors") and also to a similar list identified by Santow J in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80.

20 Those factors and considerations may be broadly grouped into two categories: those relating to the objective nature and seriousness of the offending conduct, and those relating to the particular circumstances of the contravenor: *Australian Securities and Investments Commission v Westpac Banking Corp* [2019] FCA 2147 (***Westpac BIO case***) at [256]-[260] (per Wigney J).

21 The factors relating to the objective seriousness of the offence include:

(a) the nature of the conduct, including the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness;

(b) whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time;

(c) the seniority of the officers responsible for the contravention;

(d) the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation;

(e) the impact or consequences of the contravention on the market or innocent third parties; and

(f) the extent of any profit or benefit derived from the contravention.

22 The factors that concern the particular circumstances of a corporate contravenor generally include:

(a) the size and financial position of the contravening company;

(b) whether the company has been found to have engaged in similar conduct in the past;

(c) whether the company has since improved or modified its compliance systems;

(d) whether the company has demonstrated (through its senior officers) contrition and remorse;

(e) whether the company has disgorged any profit or benefit received or made reparation;

(f) whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and

(g) whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

23 These factors are neither exhaustive of potentially relevant matters to be considered nor "a rigid catalogue or checklist of matters to be applied in each case": *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [101]. The process of fixing an appropriate civil penalty may, to an extent, be likened to the "instinctive synthesis" method involved in the criminal sentencing process: *Westpac BIO case* at [261]; *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***) at [44]. This involves addressing each relevant matter and, without expressly giving a weighting to those matters, instinctively synthesising them to apply a value judgment and arrive at an ultimate penalty that is proportionate to the contraventions at issue.

24 In considering the sufficiency of a proposed civil penalty, regard should be had to the maximum penalty. This is because it is an expression of Parliament's policy concerning the seriousness of the proscribed conduct, it permits comparison between the worst possible case and the case that the Court is being asked to address, and it provides a "yardstick" which should be taken and balanced with all of the other relevant factors: *Markarian v The Queen* (2005) 228 CLR 357 at [31] (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

25 In determining the appropriate penalty for a multiplicity of civil penalty contraventions, the Court may have regard to two common law principles that originate in criminal sentencing: the "course of conduct" principle and the "totality" principle: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (***Yazaki Corporation***) at [226]. Under the "course of conduct" principle, the Court considers whether the contravening acts or omissions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a "concurrent" or single penalty should be imposed for the contraventions: *Yazaki Corporation* at [234]. The principle guards against the risk that the respondent is punished twice in respect of multiple contravening acts or omissions that should be evaluated, for the purposes of assessing an appropriate penalty, as a lesser number of acts of wrongdoing: *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 at [39], per Middleton and Gordon JJ. However, as noted by the Full Court in

Yazaki Corporation (at [227]), it is not appropriate or permissible to treat multiple contravening acts or omissions as just one contravention for the purposes of determining the maximum limit dictated by the relevant legislation. Accordingly, the maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for each contravening act or omission: *Reckitt Benckiser* at [141]; *Yazaki Corporation* at [229]-[235]. The "totality" principle operates as a "final check" to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate and that the total penalty for related offences does not exceed what is proper for the entire contravening conduct in question: *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [132].

Evidence relied upon

26 At the hearing on penalty, the parties relied on the evidence adduced at the liability hearing. In addition, ASIC tendered a number of documents and Westpac read the following affidavits (the deponents of which were not cross-examined).

27 John Lawrence James David Cannons affirmed two affidavits on 28 May 2021 and 9 July 2021. Mr Cannons is currently employed by Westpac with the role Senior Manager – Engagement. At the time of the contravening conduct, Mr Cannons was employed within Westpac in the roles of:

(a) Sales Coach from October 2013 to October 2015, during which time he coached consultants across the Super Activation Team (and the Super Retention Team); and

(b) Manager of the Super Activation Team from October 2015 to February 2017.

28 In his affidavit dated 28 May 2021, Mr Cannons gave evidence concerning the review and approval process for the "QM Framework" which was the principal legal compliance document governing the activities of the Super Activation Team in respect of the superannuation consolidation campaign (see Primary Judgment at [52]ff). Mr Cannon's evidence was stated at a high level of generality, based on his recollection. It is not clear from his affidavit whether and to what extent he examined Westpac's business records in preparing the affidavit. Mr Cannon deposed that, as Sales Coach, he prepared draft amendments to the QM Framework, typically every six months, and the amendments would be reviewed by the Manager of the

Super Activation Team. Feedback would also be sought "as required" with risk and compliance personnel. A final version of a proposed amended QM Framework was then provided to the Senior Manager – Sales Operations or Head of Sales and Operations and then to the Senior Manager – Superannuation or National Manager – Superannuation for their review and final sign-off. As discussed further below, Mr Cannon's evidence reinforces a conclusion that Westpac's legal compliance framework in respect of the superannuation consolidation campaign was inadequate.

29 In his affidavit dated 9 July 2021, Mr Cannons gave evidence concerning the steps taken by Westpac in 2016 and 2017 in response to concerns raised by ASIC about the superannuation consolidation telephone calls. Mr Cannons deposed that, on or around 13 April 2016, Westpac received ASIC's draft Outline of Suspected Offending, which related to the conduct the subject of these proceedings. Upon receiving this document, all outbound superannuation consolidation calls and campaigns were stopped. Since that time, Westpac has not conducted outbound superannuation consolidation calls of the kind at issue in this proceeding. I note for completeness that, at the hearing, I ruled paragraphs 5, 6 and 15 of the affidavit inadmissible.

30 Hannah Oakhill affirmed an affidavit on 9 July 2021. Ms Oakhill is an employee of BT Financial Group holding the role of Head of Customer Experience & Growth. Ms Oakhill deposed that, on 9 July 2021, Westpac sent to ASIC a letter that set out Westpac's proposal to remediate the 14 members the subject of the proceeding that were found to have been given personal advice and other affected members who potentially received personal advice. Ms Oakhill said that Westpac undertakes to carry out the remediation according to its 9 July 2021 letter, subject to any modifications that may be made following the receipt of any comments from ASIC on the proposal. The remediation proposal is considered further below.

31 Emma Chand affirmed two affidavits on 9 July 2021 and 20 August 2021. Ms Chand is an employee of BT Financial Group holding the role of Acting Head of Product. Ms Chand deposed that she undertook quantitative analysis in respect of the 14 BT fund members the subject of this proceeding to determine the amount payable by way of remediation in accordance with Westpac's remediation proposal. The quantitative analysis comprised two steps:

(a) first, calculating the amount of the administration fees and investment fees collected from the member in respect of the amounts that were rolled over into their BT fund; and

(b) second, validating that a proposed remediation payment in the amount of such fees would at least cover any estimated difference in the performance of the BT fund compared with the relevant external fund or funds from which an amount was rolled over (including an allowance for any dollar based fees in the external fund).

32 For each of the 14 members, the validation was positive; ie the calculations showed that a proposed remediation payment to each member in the amount of the administration fees and investment fees collected from the member in respect of the amounts that were rolled over into their BT fund would exceed any estimated difference in the performance of the BT fund compared with the relevant external fund. The quantum of the amounts involved in each of the calculations was modest (the largest proposed remediation payment was approximately $2,200). The calculations undertaken by Ms Chand were premised on a number of assumptions that could be the subject of debate or disagreement. In her affidavit, Ms Chand explained the assumptions made and the calculations performed. In the context of this proceeding, I consider it unnecessary to express any concluded views about the assumptions made, save to say that the approach adopted by Westpac toward remediation is not plainly incorrect or unreasonable.

Findings with respect to relevant factors

33 In the following section, I set out my findings with respect to the factors that are relevant to the assessment of penalty in the circumstances of this case. In doing so, I rely primarily on the factual findings made in the Primary Judgment, aspects of which were restated in the Full Court and High Court judgments, and the further evidence adduced by ASIC and Westpac in the penalty hearing.

34 As a preliminary observation, the matter to be determined is the penalty to be imposed on Westpac for the contraventions of s 961K(2) in relation to each of the 14 BT fund members the subject of findings made in the proceeding. While the circumstances in which those contraventions occurred, particularly the superannuation consolidation campaign undertaken by Westpac, is relevant to the assessment of the penalty to be imposed, the Court is not imposing a penalty in respect of Westpac's superannuation consolidation campaign generally. The Court is only imposing a penalty in respect of the contraventions of s 961K(2) relating to the 14 BT fund members.

Nature of the contravening conduct

35 ASIC submitted that the contravening conduct occurred in the context of a pre-existing trustee and beneficiary relationship between Westpac and BT fund members, the conduct was deliberate in nature, as opposed to merely careless or negligent, and the conduct occurred in relation to a product of particular importance to Westpac's members, being their superannuation.

36 Westpac submitted that its contravention of s 961K was not deliberate. It argued that ASIC's characterisation of the conduct as deliberate pays insufficient regard to the complexity of the underlying questions relating to the interpretation and application of the law and whether Westpac's conduct, properly characterised, constituted the giving of personal advice. In that respect, Westpac referred to the fact that different conclusions were reached at first instance and on appeal; that three separate judgments were written in the Full Federal Court; and that the High Court considered it appropriate to grant special leave to appeal. Westpac further submitted that to characterise its conduct as "deliberate" does not give due regard to Westpac's extensive (albeit ultimately inadequate) attempts to train its consultants with respect to the difference between "general" and "personal" advice, and to review their calls to ensure that they were not providing the latter.

37 In the course of the hearing, ASIC made clear that it did not contend that Westpac deliberately contravened the law in the sense of knowing that the conduct involved a contravention (or being recklessly indifferent to whether it involved a contravention). ASIC's submission was that the conduct engaged in by Westpac was deliberate conduct, not the result of inadvertence or unauthorised behaviour.

38 I accept ASIC's characterisation of the contravening conduct. The following matters should be highlighted.

39 First, the contravening conduct was in relation to a product of particular importance to Westpac's members, being their superannuation. The "superannuation context" is a relevant matter for the Court to consider in assessing an appropriate penalty: *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306; 147 ACSR 266 at [199] (Yates J). The potential significance of the rollover decision to a member should not be understated even if the particular amounts do not appear to be large. As Gordon J observed, the consolidation of multiple superannuation accounts is "a significant financial decision" (at [73] of the High Court Judgment). A decision by a member as to the entity to entrust with their

superannuation can have a significant impact on their quality of life in retirement. Further, the inherent nature of superannuation as a complex investment for the long term is such that, what may seem a reasonably minor matter at the time of a decision, may have a very significant effect on a person's financial welfare in the long term. As Gordon J identified (at [34] and [82] of the High Court Judgment), superannuation products are given a distinct and special treatment under Chapter 7 of the Act, which provides that where the relevant financial product is a superannuation product, a person will *always* be a retail client. The reason for this is as described in the Revised Explanatory Memorandum for the *Financial Services Reform Bill 2001* (Cth) at 9 [2.27]:

> 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.

40 Second, the superannuation consolidation campaign was a deliberate and carefully planned campaign. Westpac submitted that the QM Framework, being the compliance framework that governed the campaign, showed that Westpac sought to ensure that its representatives only gave general advice and not personal advice. It can be accepted that the QM Framework defined both general advice and personal advice and instructed Westpac's representatives not to give personal advice. However, the QM Framework then outlined an approach to the campaign (a marketing and sales technique referred to as "social proofing") which, in my view, was inherently likely to result in representatives giving personal advice and which the Court has found did result in giving personal advice to 14 of the 15 fund members who were the subject of the proceeding. In engaging in the contravening conduct in respect of those 14 fund members, the Westpac representatives were doing precisely as they had been instructed in the QM Framework. The primary judge described the marketing and sales approach under the QM Framework in the following terms (at [65] of the Primary Judgment):

> The calls to the 15 customers reflected the terms of the QM Framework to varying extents, including through opening by saying that they were calling about the relevant customer's superannuation, as a "courtesy call" or to "help them potentially save on fees", uncovering the personal motivations of the customer and then linking those motivations to influence the customer to roll over their external superannuation accounts into the customer's BT account. The callers were encouraged to, and typically did, seek information about the customer's personal circumstances.

41 In the Full Court, Allsop CJ observed of these findings (at [38]-[39] of the Full Court Judgment) that:

> There can be no doubt that Westpac's intention was to influence the customers in

> making a decision in relation to a particular financial product.
>
> Further, there can be no doubt that the process and techniques involved in the QM Framework and the calls involved techniques of psychology in bringing the customer to a decision favourable to the interests of Westpac. …

42 Justice Jagot observed (at [289] of the Full Court Judgment):

> It is apparent from the evidence of Mr Cannons in particular that through the campaign by its callers, Westpac was trying to do indirectly what it (rightly) thought it could not do directly without risking giving personal advice when Westpac held no licence to do so. …

43 I place little weight on Westpac's submission that the question whether its campaign constituted the giving of personal advice involved complexity relating to the interpretation and application of the law. It can be accepted that the primary judge formed the view that Westpac's conduct did not involve the giving of personal advice. However, the Full Court and the High Court were unanimously of the view that the conduct did involve the giving of personal advice. Neither the law nor its application are as complex as Westpac suggests. Westpac's failure was to consider properly the meaning and effect of the law in the context of its "social proofing" marketing and sales technique. The definition of "personal advice" in s 766B(3) of the Act has two limbs. The second limb is important. It refers to financial product advice that is given or directed to a person in circumstances where a reasonable person (the recipient) might expect the provider of the advice to have considered one or more of the recipient's objectives, financial situation and needs. Effectively, Westpac's "social proofing" marketing and sales technique activated that limb of the definition. The technique, when applied in telephone calls made by Westpac representatives to persons with whom Westpac had an existing relationship (as trustee of a superannuation fund of which the person was a member), created the circumstances in which a reasonable member might expect Westpac to have considered one or more of the member's objectives, financial situation and needs. As the High Court plurality found (at [12]-[13] of the High Court Judgment):

> The social proofing technique deployed by Westpac served to confirm, by reference to the common experience of like-placed others, that consolidation of 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 ploys. Westpac knew its business and had reason to be confident that its marketing techniques were

likely to be effective.

> 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.

44 Similar, Gordon J concluded (at [81] of the High Court Judgment):

> 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.

45 The third matter to highlight is that Westpac's conduct favoured its own interests over the interests of the members of the superannuation funds in respect of which Westpac was trustee. That makes the conduct particularly egregious. In the Full Court, Allsop CJ observed (at [174]-[175] of the Full Court Judgment in the context of considering s 912A(1)(a) of the Act, but which observations apply to the overall effect of Westpac's contravening conduct):

> … There was a degree of calculated sharpness about the practice adopted in the QM Framework. At best, the aim was to get a customer to make a decision after only general advice, being a decision that could only prudently be made by a consideration of the personal circumstances of the customer and his or her funds and their characteristics.
>
> … The customers were, through the carefully structured QM Framework, made to feel that this straightforward and obvious decision should be taken when, subject to their personal circumstances and the features of their other funds, it may well not have been in their interests. In the context, the calls and the callers gave the impression (as it was intended by Westpac from the QM Framework) that BT (through the callers) was there to help, when in fact it was there only to help itself.

46 Similarly, Jagot J observed (at [218] of the Full Court Judgment):

> …The rub in the present case is that while Westpac may have perceived what it was doing as a marketing campaign in the interests of Westpac, its campaign consisted of making calls to existing Westpac customers on the basis that the purpose of the call was to help the customer in respect of the customer's superannuation. The reasonable customer would not expect that in such a serious context, the customer's superannuation, and given the existing relationship between them, Westpac would present itself as helping the customer if, in reality, it was doing nothing more than helping itself.

and (at [301] of the Full Court Judgment):

> … it is apparent that Westpac was not acting in the best interests of the customers. It was acting in its own interests in circumstances where it would be merely fortuitous if the rollover would also be in the customer's best interests.

47 My own conclusion as a member of the Full Court was the same. Again in the context of considering s 912A(1)(a) of the Act, but in observations that were generally applicable to describe the nature and character of Westpac's contravening conduct, I said (at [427] of the Full Court Judgment):

> …There was an asymmetry in the knowledge held by Westpac and that held by the customer in relation to the subject of the advice, and Westpac took unfair advantage of that asymmetry. The asymmetry of knowledge arose from the facts that: Westpac knew that the decision by a customer whether to consolidate the customer's other superannuation funds into a Westpac fund was an important decision for the customer, with potentially significant implications for the customer's future financial position; Westpac also knew that the decision involved a range of considerations, including particularly the relative performance of the superannuation funds and the relative structure of the fees charged in the funds; and Westpac knew that a prudent customer would weigh up those matters. Westpac took unfair advantage of that asymmetry by implementing a carefully crafted telephone campaign, reinforcing in the minds of its customers an erroneous assumption that the decision to consolidate their superannuation into a Westpac fund was straightforward and was likely to generate benefits for the customer by saving fees and by reducing the burden of managing superannuation. The telephone campaign was directed to persons with whom Westpac had an existing relationship and in a real sense occupied a position of trust with respect to the customer's superannuation fund. Despite knowing that the decision was not straightforward, Westpac did not advise its customers about the matters that they should consider before deciding to consolidate their superannuation. Nor did Westpac even suggest to its customers that they reflect on the decision or seek advice about the decision. Through the campaign, Westpac pursued its own self-interest and disregarded the best interests of its customers…

48 The fourth matter is that it is apparent from what has been said above that Westpac's conduct was not isolated or unauthorised misconduct by employees or representatives, but rather the conduct of employees implementing a marketing and sales system designed by Westpac and that was in place over an extended period of time.

The seniority of the officers responsible for the contravention

49 ASIC submitted that Westpac's superannuation consolidation campaign was occurring at the direction of, and with sign-off from, senior managers. Westpac submitted that Mr Cannons' evidence shows that this was not a campaign approved or organised at the Board or senior management level.

50 There is an absence of evidence about the origination and design of Westpac's superannuation consolidation campaign and the sales and marketing techniques that came to be included in the QM Framework. As ASIC submitted, no person in a senior manager role at Westpac, including any of those who signed off on the QM Framework over time, gave evidence addressing those matters. The only substantive evidence before the Court is that given by Mr Cannons, as set out earlier. The evidence was given at a high level of generality, based on Mr Cannons' recollection. Mr Cannons did not appear to undertake any review of Westpac's business records. The evidence was limited to the "periodic revision" (typically every 6 months) of the QM Framework. Mr Cannons said that, based on his recollection, revised versions of the QM Framework were provided to the Senior Manager of Superannuation for review and sign off. Mr Cannons also said that, as far as he was aware, the QM Framework was not reviewed by, approved by, or signed off by the Head of Scaled Advice, the Head of Wealth Connect or the CEO of BT Financial Group. I place little weight on that evidence given its generality and limited scope. However, the end result is that the Court is unable to make any findings about the seniority of the officers of Westpac who were responsible for the contravening conduct. Thus, it neither counts in Westpac's favour that the conduct involved more junior officers, nor counts against Westpac that the conduct involved more senior officers.

Existence of compliance systems and culture of compliance

51 ASIC submitted that the calls, and the QM Framework which led to those calls, were the product of a culture which prioritised sales and profit, which had a less than rigorous approach to compliance, and where those entrusted with compliance were ill-equipped for that role.

52 Westpac disagreed with ASIC's characterisation of its culture, submitting that it made extensive attempts to train its consultants and to regularly review their conduct to ensure that they were not giving "personal advice". In Westpac's submission, the fact that those attempts were inadequate, and did not accord with the conclusions reached by the Full Court and the High Court, does not demonstrate that Westpac's culture prioritised sales over compliance. In support of that submission, Westpac relied on its evidence of its training programs regarding

the difference between "general" and "personal" advice, the distinction drawn between these two types of advice within the QM Framework, the regular review of consultants' calls by a "sales coach" to monitor compliance with the QM Framework, and the consequences that it imposed for staff who breached compliance obligations.

53 I accept that, at the relevant time, Westpac had in place training programs for its representatives which appropriately described the difference between general and personal advice for the purposes of the law. However, the contraventions arose because the QM Framework, which provided the marketing and compliance framework for the superannuation consolidation campaign, failed to implement Westpac's broader compliance training. Although the QM Framework commenced with a brief statement that Westpac's representative may only give general advice and must not give personal advice, the document then instructed the representatives to engage in the very conduct that constituted the giving of personal advice and the failure to consider the best interests of the member. The QM Framework directed the representatives to ask the member about their needs and objectives in the context of consolidating their superannuation accounts. Although purportedly a compliance framework, the document explained the purpose of the questions to be asked of the member as: "To find out what's important to the customer and draw the need and want to help you develop urgency toward the close". In truth, the QM Framework focussed far more on marketing and "closing the sale" rather than legal compliance. As Jagot J observed (at [290]-[291] of the Full Court Judgment, in the context of Westpac's breach of s 912A of the Act):

> … The fact that Westpac provided training to its staff to avoid giving personal advice does not alter this conclusion. Indeed, the content of the training exposes the problem with Westpac's campaign to obtain increased funds under management by the targeting of their existing superannuation customers in the manner described. The primary judge at [14] referred to a BT PowerPoint presentation dated January 2014 concerning the distinction between personal and general advice which included a case study of an appropriate response to the question whether the consultant recommended a rollover of superannuation into their BT account. The recommended response was:
>
> > As I am only qualified to provide general advice, I am unable to advise you as to whether you should consolidate all these funds into BT Super. This would require personal advice from a qualified financial advisor who would consider information such as:
> >
> > - whether you will have to pay any termination fees moving from existing funds
> > - whether you will lose any insurance benefits
> > - whether the fund you want to consolidate into has all the services you want

> - whether employer can contribute to your chosen fund
>
> Would you like me to refer you to one of our financial advisors? If not, I can provide you with general advice regards the features and benefits of the BT Super Fund for you to consider.

> It will be apparent that of the topics noted only one, loss of insurance benefits, appears in the calls in the present case. None of the customers, for example, were warned about the risk of termination fees or told they should consider whether the BT fund had all the services the customer wanted or whether their employer could contribute into the fund.

54 Similarly, Allsop CJ observed (at [159] of the Full Court Judgment):

> The whole structure of the QM Framework, though assiduously trying to bring about the decision of the customer by general advice, was apt to lead to the implied recommendation that the customer should roll over their other superannuation accounts into their BT account and the conclusion that this could be seen by a reasonable person in the customer's position as being done as a way of meeting and fulfilling their concerns and objectives in respect of consolidation. The QM Framework was fraught with the risk of the giving of personal advice, as attention to the PowerPoint presentation would have told anyone.

55 It is appropriate to ask: why was Westpac's superannuation consolidation campaign poorly governed from a compliance perspective? As submitted by ASIC, the evidence indicates that Mr Cannons, who appears to have been given principal responsibility for compliance oversight of the campaign, was not qualified to have that responsibility. Mr Cannons commenced his employment with BT in the customer relations contact centre and progressed through various roles in the areas of customer sales and retention before taking up his position as Sales Coach. Mr Cannons explained that, as a sales coach, his role was to provide coaching support and assistance to sales consultants (including, relevantly, the Super Activation Team). In respect of risk and compliance management, Mr Cannons gave evidence that Westpac adopts a "three lines of defence" approach. The first line of defence is staff within the relevant business unit, including Mr Cannons as sales coach. The sales coaches had primary responsibility for checking telephone calls and identifying and monitoring risks. The second line of defence was a separate team called Risk and Compliance that could be consulted on compliance issues. Mr Cannons said that he would interact with that team at least once a month. The third line of defence was "internal group assurance" which audited business units every year or so, including by listening to telephone calls that had been "marked" by a sales coach.

56 As stated above, the only evidence given about the QM Framework was given by Mr Cannons and was given at a high level of generality. It is not clear whether the QM Framework was originally prepared by Mr Cannons or by someone else. No evidence was given by anyone

from the Risk and Compliance team or the internal group assurance about their involvement in the preparation of the QM Framework or ongoing compliance supervision of the superannuation consolidation campaign. The impression I have formed from the evidence, such as it was, is that Westpac's so-called three lines of defence approach to risk and compliance management was inoperative in respect of the superannuation consolidation campaign. Only the first line of defence, involving Mr Cannons as sales coach, was in operation.

57 With no disrespect to Mr Cannons intended, there is no evidence that Mr Cannons was appropriately trained in legal compliance issues to undertake that role on his own. The evidence shows that Mr Cannons had a limited understanding of the law relating to the difference between general and personal advice. That can be illustrated by an email sent by Mr Cannons to the Super Activation Team on 15 October 2013 which was as follows:

> Hi Guys & Gals
>
> Another friendly reminder ;)
>
> When presenting consolidation benefits remember that we cannot tell a customer that they WILL save on fees or anything definite like that if they are rolling from external funds into BT.
>
> We do not know the customers situation, they may end up paying more by moving across. It is considered advice telling a customer that they WILL save on fees
>
> Best way to say this benefit is something like "You MAY save on fees, you could POTENTIALLY save on fees, you could POTENTIALLY reduce your total fees paid, right now you have 3 super accounts and you are paying 3 sets of fees, by consolidating you will be only paying one set etc etc. Saying it like this leaves it up to the customer to make up their own mind about saving on fees
>
> Easy to add into your conversation. It's an easy trap to fall into and it's easy to get a compliance breach because of it – By changing your approach just a little you won't have to worry about that.

58 The obligations imposed on financial services licensees under Parts 7.6, 7.7 and 7.7A of the Act are important obligations directed to the protection of consumers of financial services. As stipulated in s 760A, two of the main objects of the provisions of Chapter 7 of the Act are to promote:

(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.

59 Mr Cannons' email, set out above, reflects an approach to compliance that is focussed on technical avoidance of legal obligations. The obligations in Chapter 7 of the Act are not so easily avoided, and nor should they be. I reiterate that this is not a personal criticism of Mr Cannons. It is a criticism of a corporate compliance framework that gives primary responsibility for monitoring compliance to a person who is not qualified to perform the task.

60 If and to the extent Westpac's Risk and Compliance team or the internal group assurance played an oversight role in respect of the superannuation consolidation campaign, it appears to have been from a giddy height and wholly ineffective. My conclusion in that respect is reinforced by the fact that no representative of those bodies gave evidence as to any close involvement in the campaign.

Whether the company has since improved or modified its compliance systems

61 ASIC submitted that there is no evidence that Westpac has undertaken any review to ascertain how the contravening conduct could have occurred having regard to Westpac's existing compliance systems, and that failure should be considered by the Court in its assessment of an appropriate penalty. Westpac submitted that, when it received ASIC's draft Outline of Suspected Offending in April 2016, it stopped all outbound superannuation consolidation calls and campaigns, and since that time has not conducted outbound superannuation consolidation calls of the kind at issue in this proceeding.

62 On the existing findings and evidence before me, it appears that no review has been undertaken by Westpac to ascertain how the contravening conduct could have occurred, having regard to Westpac's existing compliance systems. I accept ASIC's submission that this is relevant to the question of penalty, given the observations above as to the failures of those compliance systems in this matter. This is not a case where Westpac points to any steps taken to improve or modify any relevant compliance systems since the contraventions: cf *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 (***ASIC v AMP***) at [188].

63 The evidence shows that, when ASIC raised concerns with Westpac's conduct in about April 2016, Westpac temporarily ceased "outbound superannuation consolidation calls", recommenced them in July 2016 with some changes such as the deletion of the "social proof", and then ceased making outbound superannuation calls in 2018. I accept that this is a mitigating factor.

Any loss suffered by consumers

64 ASIC submitted that Westpac's conduct exposed its members to risk of harm, and that exposure to risk is itself a detriment (whether or not it can be shown that an individual member suffered financial loss as a result of the contravening conduct).

65 Westpac submitted that the relevant inquiry is what harm the members suffered as a result of Westpac giving personal advice in breach of s 961B(1) (since the penalty sought is for breach of s 961K(2) only). In that regard, Westpac submitted that harm should be assessed having regard to two possible counterfactual scenarios: the first is that Westpac gave advice to the members which complied with s 961B(1), while the second is that Westpac did not give any personal advice at all. Westpac submitted that the fair and reasonable assumption to adopt in each counterfactual is that the member would have "maintained their status quo"; that is, not rolled over their superannuation from the external fund.

66 Westpac's conduct involved providing advice to BT fund members, encouraging them to roll over superannuation from external funds, where that course of action had financial benefits for Westpac and where Westpac did not know whether or not the consumer would financially benefit or suffer financial harm as a result. I accept ASIC's submission that that conduct exposed members to the risk of financial harm, and that in itself is a harm or detriment which should be taken into account on penalty: see e.g. *ASIC v AMP* at [179]; *Australian Securities and Investments Commission v Dover* [2021] FCA 170; 150 ACSR 185 at [57]-[58].

67 The assessment of financial loss and damage suffered by fund members in a case such as the present can often be contested. There is often no clear answer to the question whether, but for the contravening conduct, the affected member would have acted differently. In the absence of evidence from affected members, it would be inappropriate for the Court to reach any concluded view about the fact of financial loss or the appropriate method to assess any such loss. Further, I do not consider that it is necessary to form a concluded view in assessing an appropriate penalty. Nevertheless, some consideration should be given to the evidence adduced by Westpac on this issue.

68 As outlined earlier, Ms Chand gave evidence of calculations carried out with respect to the 14 members in issue in this proceeding, based on the assumption that, if Westpac had not engaged in the contravening conduct, those members would not have rolled over superannuation amounts in external accounts into their BT fund but maintained both their external superannuation and the BT fund. ASIC criticised that assumption on the basis that members, if

given proper advice, may have chosen to roll over the superannuation in their BT fund account into their external fund. That is a possibility but, as I have recorded earlier, Westpac's approach to the likely counterfactuals is not plainly unreasonable.

69 Two consequences flow from the assumption that, on the counterfactuals, the 14 members would have retained two funds (the BT fund and their external fund). First, the members would have continued to incur any fixed fees charged in connection with both accounts (being fund administration and investment fees that are charged by reason of being a member of a fund and that do not vary by reference to the value of the superannuation account). Second, loss would be confined to the difference between the financial performance (net of administration and investment fees that are calculated as a percentage of funds invested) of the amount rolled over into the BT fund compared with the performance of the amount if it had not been rolled over.

70 Ms Chand gave evidence of the latter calculations undertaken by Westpac with respect to the 14 members (that is, the difference between the net financial performance of the amount rolled over into the BT fund compared with the performance of the amount if it had not been rolled over). On Ms Chand's calculations, one half of those members (that is, 7 members) enjoyed a better financial performance in the BT fund compared with the external fund, while 7 members suffered a worse financial performance. The amounts rolled over ranged from a little more than $1,000 up to approximately $41,000. The roll overs occurred between June 2014 and November 2014 and the period of investment in the BT fund varied from one month to the date of Ms Chand's affidavit. The greatest financial performance loss for an individual member, on Ms Chand's calculations, was approximately $1,200.

71 It should be noted that Ms Chand's calculation of the net financial performance of the roll over amount if it had continued to be invested in the external fund was based on certain assumptions. Ms Chand explained in her evidence that Westpac was not in every case able to identify the investment option held by the member in their external fund (that is, prior to rolling over to the BT fund) on the basis of the information available to Westpac. In those cases, Westpac's calculations applied an assumption that, within the external fund, customers held the default or balanced investment option just before the roll over. Ms Chand said that Westpac considered this assumption to be a realistic one in circumstances where the customers joined Westpac as members of an employer fund and, in most cases, went into the default investment option.

72 On Ms Chand's evidence, and making all of the assumptions that underpin her calculations, any losses suffered by the 14 members the subject of the proceeding were very modest. As

stated above, though, it would not be appropriate for me to express any concluded views about the calculation of financial loss in circumstances where none of the 14 members had an opportunity to present evidence to the Court. Nevertheless, I place some weight on Ms Chand's evidence and calculations.

The extent of any profit or benefit derived by Westpac

73 ASIC submitted that the profit and benefits derived by Westpac from the contravening conduct should be a relevant consideration in the assessment of penalties, though it does not know the full extent of any such profit and benefits. In response, Westpac submitted that it is only to be penalised for its conduct contravening s 961B(1) (the giving of personal advice during the calls), and repeated the uncertainties as to the applicable counterfactual scenarios in determining the benefit that it derived from the contravening conduct.

74 As is the case with estimating consumer loss from the contravening conduct, estimating profits or benefits derived by Westpac depends on the counterfactual to be applied. Nevertheless, applying Westpac's assumption that the relevant counterfactual is that the 14 members would not have rolled over their external superannuation into the BT funds, the incremental revenue earned by Westpac from the contravening conduct is the value of the percentage based investment and administration fees generated on the rollover amounts. Ms Chand's evidence shows that those fees totalled $13,591.12. It is possible that other revenue streams were generated by Westpac in relation to these members (such as fees on insurance held with the BT accounts), but there is no evidence before me in relation to such revenues.

75 ASIC also made submissions as to the financial benefits derived by Westpac from the superannuation consolidation campaign more generally. As noted earlier, over the course of the campaign Westpac substantially increased its funds under management in the BT funds. However, the task presently before me is to assess an appropriate penalty in respect of the 14 members the subject of the proceeding, not Westpac's superannuation consolidation campaign more generally. It is not known whether and to what extent telephone calls made to other BT fund members (beyond the 14 members the subject of this proceeding) involved the same contravention of the Act. Accordingly, the amount by which Westpac increased its funds under management in the BT funds as a result of the campaign overall is not a relevant consideration to the assessment of penalty.

Disgorgement of benefit / reparation

76 ASIC submitted that the Court should take into account that Westpac presently retains the benefits gained by its conduct, though it accepts that the remediation proposal, now foreshadowed by Westpac, is a mitigating factor.

77 As outline above, Ms Oakhill gave evidence about Westpac's remediation proposal which is set out in a letter Westpac sent to ASIC on 9 July 2021 which outlined the "key principles" to be applied by Westpac. Broadly, Westpac's remediation proposal involves refunding to members the percentage based investment and administration fees earned by Westpac on rollover amounts (after ensuring that the remediation amount would exceed any negative difference between the net financial performance of the amount rolled over into the BT fund compared with the performance of the amount if it had not been rolled over). The proposal is to apply to the 14 members the subject of the proceeding and other members "within the affected cohort who potentially received personal advice". The letter goes on to define that latter expression. Broadly, the "affected cohort" is defined as a member who received a call from the Super Activation Team as part of one of the relevant campaigns during the period 1 January 2013 to 30 September 2016 and undertook a rollover of funds from one or more external superannuation accounts into a superannuation account they held with Westpac within 12 months after the customer indicated that they wanted to consolidate their superannuation. Westpac will determine whether the member "potentially received personal advice" by undertaking a search and review process over the calls within the affected cohort using voice-analytic technology that will search for certain phrases or combinations of phrases to identify calls that contained similar elements to those that were the subject of the proceedings. The letter stated that Westpac is continuing to work on the detail of its search and review methodology and would provide further details to ASIC in due course.

78 It is appropriate that Westpac's remediation proposal be taken into account in the assessment of penalty. Nevertheless, I accept ASIC's criticisms with respect to the pace of Westpac's efforts to remediate members, noting that the High Court decision was handed down on 3 February 2021 and Westpac has not yet contacted any members or embarked on any remediation (for the 14 members or for members in the wider cohort). Presently, ASIC does not know how many members will be remediated, how much will be paid to them, and when. ASIC accepted that the "key principles" identified by Westpac in its letter of 9 July 2021 would have the effect of remediating the members at least to an extent once implemented, however it

also indicated that it had raised with Westpac that the approach may not fully remediate members, where, taking the example of the 14 members:

(a) fees incurred on any amount other than the roll over amount are excluded from the remediation (e.g. fees charged by Westpac on employer contributions, any other contributions, and funds in the Westpac account pre-rollover, are excluded);

(b) fixed dollar-based fees paid by the member to Westpac are excluded from the remediation;

(c) the remediation proposal does not address any loss a member may have suffered in connection with their insurance; and

(d) many of the members now have their funds in a BT fund following the provision of the personal advice, which may not be suitable to their objectives and may continue to adversely affect them into the future.

79 Westpac indicated that it will send a written communication to all members in the affected cohort, in a form to be agreed with ASIC, informing them of the outcome of the litigation, remediation to be provided (where relevant) and inviting them to contact Westpac if they have any complaints.

Size and resources of defendants

80 ASIC submitted that the size and resources of the Westpac corporate group is a particularly important consideration in assessing penalty. It submitted that the defendants form part of one of Australia's largest corporate entities which plays a particularly significant role in Australia's financial services industry, and that this should be considered a highly relevant issue in determining a penalty that meets the principal objective of deterrence. Westpac did not submit to the contrary.

81 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 (***ASIC v Westpac (No 3)***) (regarding manipulation of the bank bill market), Beach J observed (at [121]) that:

> In considering the extent to which the penalty achieves deterrence, it is also important to have regard to a company's size and profitability. Modest penalties are unlikely to deter very large corporations from engaging in contravening conduct from which they may derive significant benefits. As Goldberg J observed in *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at [39], "[o]bviously the sum required to achieve this object [of deterrence] will be larger where the Court is setting a penalty for a company with vast resources". And plainly,

> the size of the enterprise affects the significance of the burden of the civil penalty, and thus its deterrent effect. Keane, Nettle and Gordon JJ have explained it in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* at [116] in the following terms:
>
> > …specific deterrence inheres in the sting or burden which the penalty imposes on the contravener. Other things being equal, it is assumed that the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or burden that a penalty imposes on a contravener, the less likely it will be that the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

82 In the *Westpac BIO case*, Wigney J described the relevant principles as follows (at [260]):

> The size of the contravening corporation does not of itself justify a higher penalty than might otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 at [89]–[92]. The size of the corporation may, however, be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve this object will be larger where the company has vast resources: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265; 215 ALR 301 at [39]; *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646 at [38].

83 In assessing penalty, Wigney J had regard to Westpac's substantial size and financial position, noting (at [286]):

> Westpac is undoubtedly a very large company. Its profits in the years preceding the contravening conduct exceeded $6 billion. Westpac's size and financial position suggests that the objective of deterrence may require the imposition of higher penalties than would be required for smaller and less well-resourced companies.

84 I accept that the size and resources of the Westpac Group is a highly relevant factor in achieving effective deterrence in this case. ASIC relied on publicly available extracts of the annual reports of the Westpac group, as well as the defendants individually. They identify that the Westpac group has a market capitalisation of about $100 billion, and total assets of $697 billion (as at 2013) and $907 billion (as at 2019), and net annual profit fluctuating between about $6 billion and $8 billion. The second defendant, from 2017 to 2020, has had net profit in the region of $38 million, $51 million, $61 million and $19 million respectively. The first defendant has lower net profit recorded on its balance sheet – e.g. $28,745 for 2020, with $7,978,683 in total current assets, and total shareholder equity of $6,525,225, although I accept ASIC's submission

that these figures should be viewed in the context of its interconnectedness with the Westpac group.

Past contraventions

85 ASIC submitted that the nature and extent of past conduct of the defendants, as well as their parent entity, Westpac Banking Corporation, is a factor which ought to be taken into account in considering a penalty for the purpose of achieving deterrence in this matter. Westpac accepts that it is relevant to consider the past conduct of the defendants and Westpac Banking Corporation, however disagreed that all of the matters referred to by ASIC should be taken into account.

86 I accept ASIC's submission that, where there is a history of non-compliance with similar legal obligations across a corporate group, a higher penalty may be required for the purpose of achieving deterrence. However, the relevance of the past contraventions depends upon the degree of similarity with the instant contravention. Ultimately, the concern of the Court is to impose a penalty that deters repetition of the type of conduct that was found to have contravened the law. The fact that the defendant has previously engaged in other unlawful conduct which is of a different character to the instant contravention does not necessarily lead to a conclusion that a higher penalty is required to achieve deterrence.

87 ASIC placed reliance on the following recent proceedings against Westpac Banking Corporation or its subsidiaries:

(a) on 9 November 2018, Westpac Banking Corporation was ordered to pay a civil penalty of $3.3 million by reason of manipulative trading in the bank bill market amounting to unconscionable conduct contrary to s 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**): *ASIC v Westpac (No 3)*;

(b) on 19 December 2019, Westpac Banking Corporation was ordered to pay a civil penalty of $9.15 million for a failure by a representative to comply with the "best interests obligations" when providing personal advice concerning financial products to retail customers: *Westpac BIO case*;

(c) on 21 October 2020, Westpac Banking Corporation was ordered to pay $1.3 billion, for contraventions of various provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth): *Chief Executive Officer of Australian Transaction*

Reports and Analysis Centre v Westpac Banking Corp [2020] FCA 1538; 148 ACSR 247; and

(d) on 22 July 2021, the second defendant (BT Funds Management Limited) was ordered to pay a civil penalty of $1.5 million (out of a total $3 million in penalties for subsidiaries of Westpac Banking Corporation) for contraventions of s 12DB(1)(g) of the ASIC Act, for representing that no adviser fees were being charged to customers when in fact such fees were being charged: *Australian Securities and Investments Commission v BT Funds Management Limited* [2021] FCA 844 (***ASIC v BT Funds***).

88 In my view, the previous contraventions the subject of the *Westpac BIO case* and *ASIC v BT Funds* are relevant to the assessment of penalty in the present case. However, I do not consider that the other previous contraventions relied upon by ASIC have significance for present purposes as the contravening conduct in those proceedings lack sufficient similarity to the conduct in the present case.

Contrition or remorse of the defendants

89 ASIC submitted that as far as it is aware, there has been no expression of contrition or remorse by either of the defendants, through senior officers or otherwise, in respect of the contravening conduct. Westpac did not submit to the contrary.

90 The Court was informed that to date, Westpac has not sent any correspondence to the affected members, nor has correspondence containing any apology to those members been proposed, despite the passage of time. It is difficult to escape the inference that, to this day, the defendants do not truly accept that their conduct constituted a contravention of the law, or any failing on their part, despite the judgments of the Full Court and the High Court.

Cooperation with and assistance to ASIC

91 This is not a case where any admissions of wrongdoing were made in order to avoid or reduce the costs incurred in establishing liability, which would warrant a material reduction in penalties. Westpac did not submit to the contrary.

Extra-curial punishment or detriment

92 I have not been made aware of any extra-curial punishment or detriment which Westpac has suffered or will suffer which would warrant a reduction in penalties.

Course of conduct

93 ASIC submitted that the calls to the 14 members were distinct and separate acts involving different callers and members and amounting to multiple contraventions of the Act. While Westpac accepted that there were 14 separate contraventions of s 961K(2), it submitted that in being satisfied that $10.5 million is an appropriate total penalty, the Court should take into account that the contraventions all arose out of the same factual substratum: the drafting of the QM Framework and the training of consultants in accordance with that framework.

94 I accept that the contraventions arose out of a single marketing campaign designed to encourage members of the BT funds to roll over (or consolidate) into their account in the BT fund superannuation held by the member with one or more other funds, and to facilitate such roll overs. However, each telephone call involved a separate member interaction. Further, the calls occurred over time, and there was opportunity for Westpac to reconsider its marketing approach over that time. The fact that the contraventions were part of a single campaign is to be taken into account, but I consider that it would be incorrect to characterise the contraventions as a single course of conduct.

Consideration of appropriate penalty

95 The contravening conduct involves very serious contraventions of the financial services laws that are aimed at consumer protection. The conduct was engaged in by entities that are members of one of Australia's largest financial institutions, Westpac Banking group, and which occupied a position of trust in relation to the persons affected by the conduct. The conduct involved Westpac's representatives expressing opinions or making implied recommendations to members of the BT funds which were intended to influence the member to roll over the member's external superannuation account into their BT account, and that was done 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 contravened s 961B(1) and thereby s 961K(2) of the Act because, in giving personal advice, Westpac failed to act in the best interests of the members. Put bluntly, Westpac considered and acted in its own self-interest, rather than considering and acting in the member's best interest. The conduct was deliberate, in the sense that it was the result of a planned campaign, and was not the result of unexpected or rogue behaviour by Westpac's representatives. The compliance framework for the campaign was shown to be wholly inadequate and the individual seemingly charged with the "front line" compliance role was not qualified to perform that role. Subsequent to the

commencement of these proceedings, and even after their finalisation in the High Court, Westpac has not expressed regret for the conduct, does not appear to have taken steps to remedy the compliance deficiencies and has been tardy in progressing a remediation plan. This is the third instance, in recent years, of significant non-compliance with financial services law by Westpac Banking Corporation. All of those factors point to a penalty at the highest levels permitted by the Act.

96 There are relatively few factors that mitigate against the imposition of the maximum penalty. However, I take into account the facts that: Westpac ceased the contravening conduct shortly after being contacted by ASIC; the conduct did not involve dishonesty; the consumers losses occasioned by the conduct and the financial benefits derived by Westpac (in respect of the 14 members the subject of the proceeding) were relatively small amounts; and while tardy, Westpac has now taken steps towards implementing a remediation program.

97 Taking into account all of the matters referred to above, I consider that the penalty proposed by ASIC (and not opposed by Westpac) is appropriate, being $750,000 in respect of each of the affected members. While the penalty greatly exceeds the likely consumer loss or financial gain from the conduct, the amount of the penalty is warranted having regard to Westpac's role as a major financial institution in which a substantial number of Australian consumers place their trust for financial services, including superannuation services. It is critical that Westpac and similar Australian financial institutions do not see the penalty for conduct such as that which has occurred in the present case as an acceptable cost of doing business. I consider that this penalty can be expected to serve the purposes of specific and general deterrence.

98 I have also ordered that the defendants are to pay ASIC's costs of and incidental to the hearing as to penalty and other relief, as agreed or assessed.

I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: 

Dated: 9 September 2021