

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 13/02/2019 9:33:08 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	NSD204/2019
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v WESTPAC SECURITIES ADMINISTRATION LTD ACN 000 049 472 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 15/02/2019 2:10:20 PM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Notice of appeal

No.

Federal Court of Australia  
District Registry: NSW  
Division: General

On appeal from the Federal Court of Australia

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Appellant

**WESTPAC SECURITIES ADMINISTRATION LIMITED (ACN 000 049 472)** and another named  
in the Schedule

Respondents

To the Respondents

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:** Level 17, Law Courts Building, Queens Square, Sydney, NSW

Date:

Signed by an officer acting with the authority  
of the District Registrar

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, Appellant

Prepared by (name of person/lawyer) Nick Kelton, Lawyer

Law firm (if applicable) Australian Securities and Investments Commission

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**Address for service** Level 7, 120 Collins Street, Melbourne, Victoria 3000  
(include state and postcode)



The Appellant appeals from Order 1 made on 7 February 2019 in the Federal Court in Proceeding Number NSD 2204 of 2016 at Sydney, and from so much of the decision of the Federal Court given on 21 December 2018 in *Australian Securities and Investments Commission v Westpac Securities Administration Limited & Anor* [2018] FCA 2078 (the **Decision**) as supports Order 1.

### Grounds of appeal

1. The primary judge erred in applying an incorrect test in relation to the term “*considered*” in s 766B(3) of the *Corporations Act 2001* (Cth) (the **Act**).

#### Particulars

The primary judge erred in finding that the term “*considered*” in s 766B(3) of the Act requires the provider of the advice to engage in (or that a reasonable person might expect the provider of advice to have engaged in) “*an active process of evaluating or reflecting upon*” and “*an active intellectual engagement with*” the subject matter of the consideration “*appropriate to the provision of financial product advice*”.

2. The primary judge erred in finding that, within the meaning of s 766B(3)(a) of the Act, the callers did not “*consider*” one or more of the objectives and financial situation of the customers to whom advice was given (except for Customer 3).

#### Particulars

- (a) The primary judge erred in finding that on the proper characterisation of the calls with the 14 customers, which adopted the approach encapsulated in the QM Framework, the Respondents’ representatives had not “*considered*” one or more of the objectives and/or financial situation of each customer.
  - (b) The primary judge ought to have found that on the proper characterisation of the calls with the 14 customers, the Respondents’ representatives did “*consider*” one or more of the objectives and/or financial situation of each customer.
  - (c) This appeal ground is further or in the alternative to appeal grounds 1 and 3.
3. The primary judge erred in finding that, within the meaning of s 766B(3)(b) of the Act, a reasonable person might not expect the callers to have “*considered*” one or more of the



objectives and financial situation of the customers to whom advice was given (except for Customer 3).

### Particulars

- (a) The primary judge erred in finding that on the proper characterisation of the calls with the 14 customers, a reasonable person might not expect the Respondents' representatives to have "*considered*" one or more of the objectives and financial situation of each customer.
- (b) The primary judge ought to have found that on the proper characterisation of the calls with the 14 customers, a reasonable person might expect the Respondents' representatives to have "*considered*" one or more of the objectives and financial situation of each customer.
- (c) This appeal ground is further or in the alternative to appeal grounds 1 and 2.

### **Orders sought**

1. The appeal be allowed.
2. Order 1 made on 7 February 2019 be set aside.
3. The declarations of contravention sought by paragraphs 1-2 and 7-12 inclusive of the Amended Originating Process dated 6 February 2017 be made, subject to amending the definition of Relevant Customers to exclude Customer 3.
4. The proceeding be remitted to the primary judge on the question of penalty and any other orders arising upon the declarations made.
5. The Respondents pay the Appellant's costs of the proceeding below and on appeal, to be assessed or agreed.

### **Appellant's address**

The Appellant's address for service is:

Place: Level 7, 120 Collins Street, Melbourne, Victoria 3000

Email: [nicholas.kelton@asic.gov.au](mailto:nicholas.kelton@asic.gov.au)



**Service on the Respondent**

It is intended to serve this application on all Respondents.

Date: 13 February 2019

*Nick Kelton*

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Signed by Nick Kelton  
Solicitor for the Appellant



**Schedule**

No. of 2019

Federal Court of Australia  
District Registry: NSW  
Division: General

**Respondents**

Second Respondent:

**BT FUNDS MANAGEMENT LIMITED (ACN 002 916 458)**

Date: 13 February 2019