

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187

Appeal from: *Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2018] FCA 2078

File number: NSD 204 of 2019

Judges: **ALLSOP CJ, JAGOT AND O'BRYAN JJ**

Date of judgment: 28 October 2019

Catchwords: **CORPORATIONS** – where Westpac conducted campaign to encourage customers to roll over funds held in external superannuation accounts into their existing Westpac accounts – whether Westpac’s campaign involved the provision of a “recommendation” or “statement of opinion” amounting to “financial product advice” – whether Westpac’s campaign involved the provision of “personal advice” or “general advice” within the meaning of s 766B of the *Corporations Act 2001* (Cth) (**the Act**) – where primary judge found that Westpac provided general financial product advice – “personal advice” was given because a reasonable person might expect the callers to have considered the objectives of the customers in making the recommendation to accept the rollover service – consequent contraventions of ss 912A(1)(b) and (c), 946A, 961B(1) and 961K(1) of the Act – appeal allowed

CORPORATIONS – whether Westpac failed to do all things necessary to ensure financial services provided “efficiently, honestly and fairly” – where primary judge found contraventions of s 912A(1)(a) of the Act – Westpac did not act efficiently, honestly, or fairly in conducting a campaign with the aim of getting its customers to make a decision after the provision of only “general advice” where that decision could only prudently be made having regard to information personal to the customers and the superannuation accounts – whether, if Westpac had been found to have given only “general advice”, an alternative case on s 912A(1)(a) was run before the primary judge – no alternative case articulated because the case before the primary judge was predicated on the likelihood or fact of “personal advice” – cross-appeal dismissed

Legislation:

Corporations Act 2001 (Cth), ss 760A, 766A(1), 766B(1), 766B(3), 766B(3)(a) 766B(3)(b), 766B(4), 912A(1)(a), 912A(1)(b), 912A(1)(c), 946A, 947B, 947B(2)(b), 949A, 949A(2), 961B(1), 961(B)(2), 961B(2)(b)(ii), 961C, 961D, 961E, 961G, 961J, 961K, 961K(2)

Financial Services Reform Act 2001 (Cth)

Financial Services Reform Bill 2001 (Cth)

Replacement Explanatory Memorandum *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth)

Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2011* (Cth)

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27

Attorney-General (NSW) v The Perpetual Trustee Co (Ltd) [1940] HCA 12; 63 CLR 209

Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liq) [2017] FCA 497; 348 ALR 525

Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) [2012] FCA 414; 88 ACSR 206

Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023; 336 ALR 209

Australian Securities and Investments Commission v Financial Circle Pty Ltd [2018] FCA 1644; (2018) 131 ACSR 484

Australian Securities and Investments Commission v NSG Services Pty Ltd [2017] FCA 345; 122 ACSR 47

Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3) [2015] NSWSC 1527

Cody v JH Nelson Pty Ltd [1947] HCA 17; 74 CLR 629

Commissioner of Taxation (Cth) v Consolidated Media Holdings Limited [2012] HCA 55; 250 CLR 503

ConnectEast Management Limited v Commissioner of Taxation (Cth) [2009] FCAFC 22; 175 FCR 110

Commonwealth v Baume [1905] HCA 11; 2 CLR 405

Daly v Sydney Stock Exchange Ltd [1986] HCA 25; 160 CLR 371

Esso Australia Resources Limited v Commissioner of Taxation (Cth) [1998] FCA 1655; 83 FCR 511

Esso Australia Resources Pty Ltd v Commissioner of Taxation [2011] FCAFC 154; 199 FCR 226
Independent Commission Against Corruption v Cunneen [2015] HCA 14; 256 CLR 1
Legal Services Board v Gillespie-Jones [2013] HCA 35; 249 CLR 493
Mersey Docks and Harbour Board v Henderson Bros (1888) 13 App Cas 595
Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50; 236 FCR 199
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd [1975] HCA 28; 132 CLR 336
R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA) [1989] SASC 1941; 1 ACSR 93
Rennie Golledge Pty Ltd v Ballard [2012] NSWCA 376; 82 NSWLR 231
Story v National Companies and Securities Commission (1988) 13 NSWLR 661
The Owners of The Ship “Shin Kobe Maru” v Empire Shipping Co Inc [1994] HCA 54; 181 CLR 404

Date of hearing: 26–27 August 2019

Registry: New South Wales

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Category: Catchwords

Number of paragraphs: 429

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Solicitor for the Respondents and Cross-Appellants: Allens

ORDERS

NSD 204 of 2019

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Appellant

AND: **WESTPAC SECURITIES ADMINISTRATION LTD ACN 000
049 472**
First Respondent

BT FUNDS MANAGEMENT LTD ACN 002 916 458
Second Respondent

AND BETWEEN: **WESTPAC SECURITIES ADMINISTRATION LTD ACN 000
049 472**
First Cross-Appellant

BT FUNDS MANAGEMENT LTD ACN 002 916 458
Second Cross-Appellant

AND: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Cross-Respondent

JUDGES: **ALLSOP CJ, JAGOT AND O'BRYAN JJ**

DATE OF ORDER: **28 OCTOBER 2019**

THE COURT ORDERS THAT:

1. The appeal be allowed with costs.
2. The cross-appeal be dismissed with costs.
3. Order 1 made by the Court on 7 February 2019 be set aside.
4. The appellant provide to the respondents, within 7 days, draft short minutes providing for declarations and orders to be made in addition to those made by the Court on 21 December 2018.

5. The parties file, within 14 days, draft short minutes containing any agreed declarations and orders proposed by the parties or, in the absence of agreement, the appellant and respondents file competing draft short minutes containing the declarations and orders proposed by each party and accompanying submissions in support of no more than 2 pages in length.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

Introduction

- 1 This is an appeal by the Australian Securities and Investments Commission (**ASIC**) and cross-appeal against a declaration made by a judge of this Court in relation to campaigns implemented in 2014 and 2015 by the respondents/cross-appellants to encourage their customers to roll over external superannuation accounts into existing accounts (collectively, the **BT accounts**) that they held with the first respondent/cross-appellant, Westpac Securities Administration Limited, and the second respondent/cross-appellant, BT Funds Management Limited (to which companies I will refer in the singular as **Westpac** or **BT** depending upon the context). The campaign comprised sending letters to customers and making telephone calls to the customers. The complaints of ASIC are directed principally to the telephone calling and the system adopted in relation thereto.
- 2 During the course of its campaign, Westpac routinely identified and emphasised particular benefits of the rollover service it was offering to customers without suggesting that they, before agreeing to the rollover, consider the particular issues which may have indicated that consolidation into their BT account was or was not the best course of action for them.
- 3 The heart of the appeal concerns whether Westpac's campaign involved the provision of financial product advice and, if so, whether that financial product advice should properly be characterised as personal advice or general advice, in the relevant statutory sense. The primary judge concluded that the advice was general, not personal.
- 4 On the appeal, ASIC submitted that the primary judge should have found that Westpac impermissibly provided personal financial product advice to its customers during its campaign. On the cross-appeal, Westpac submits that the primary judge erred both in finding that it provided a "recommendation" or "statement of opinion" amounting to "financial product advice" (even if general) and in finding that it failed to do all things necessary to ensure that the financial services covered by its licenses were provided efficiently, honestly and fairly. In argument on the cross-appeal, senior counsel for Westpac argued that the primary judge's conclusions went beyond the case pleaded and agitated below.

Summary of conclusions

5 For the reasons that follow the appeal should be allowed and the cross-appeal dismissed. In summary, Westpac's attempts to have customers transfer funds from their external accounts with other superannuation funds into their BT accounts were carefully calculated to bring about this desired result by giving no more than general advice. It was marketing by telephone selling. The difficulty is that the decision to consolidate superannuation funds into one chosen fund is not a decision suitable for marketing or general advice. It is a decision that requires attention to the personal circumstances of a customer and the features of the multiple funds held by the customer. Westpac attempted, assiduously, to get the customer to make a decision to move funds to BT without giving personal financial product advice as defined in the legislation. It failed. It gave personal advice, because when the telephone exchanges are considered as a whole and in their context, including importantly the "closing" on the telephone by getting the decision made during the call, there was an implied recommendation in each call that the customer should accept the service to move accounts funds into his or her BT account carrying with it an implied statement of opinion that this step would meet and fulfil the concerns and objectives the customer had enunciated on the call in answer to deliberate questions by the callers about paying too much in fees and enhancing manageability. This was personal advice, for the reasons discussed later. Perhaps Westpac could have avoided this conclusion and result by the callers ensuring that the customers had the opportunity to consider their own positions and, having done so, later communicate an acceptance, if they wished. This was, however, not the intended model of the engagement. "Closing" was to take place, if at all possible, on the call over the phone.

The statutory framework

6 Chapter 7 of the *Corporations Act 2001* (Cth) concerns financial services and markets. The main object of the chapter is set out in s 760A:

The main object of this Chapter is 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; and
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

7 In Pt 7.1, dealing with preliminary matters, Div 4 concerns when a person provides a financial service. Section 766A(1) sets out various ways in which a person may do so. One way (s 766A(1)(a)) is to provide financial product advice as provided for in s 766B. Relevantly, s 766B is in the following terms:

- (1) For the purposes of this Chapter, **financial product advice** means a recommendation or a statement of opinion, or a report of either of those things, that:
 - (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
 - (b) could reasonably be regarded as being intended to have such an influence....
- (2) There are 2 types of financial product advice: personal advice and general advice.
- (3) For the purposes of this Chapter, **personal advice** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:
 - (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or
 - (b) a reasonable person might expect the provider to have considered one or more of those matters.
- (4) For the purposes of this Chapter, **general advice** is financial product advice that is not personal advice.

8 The consequences of the distinction between personal and general advice is important. If general advice only is given, the primary obligations on the provider of the advice are fewer. First, there are those applying to all holders of financial services licences under Pt 7.6 Div 3 and in particular relevantly here, s 912A(1)(a):

- (1) A financial services licensee must:
 - (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly[.]

9 Secondly, there are various obligations which apply to all financial product advice given to retail clients under Pt 7.7 Div 2 and some which apply to general advice under Div 4, including, in Div 4, the obligation in s 949A to provide a general advice warning that the advice does not take account of the client's objectives, financial situation or needs (being the words in s 766B(3)(a)).

10 Where personal advice is given, there are a number of obligations which are designed to provide protection to the client. Pt 7.7 Div 3 sets out additional requirements for personal advice. For instance, there is an obligation to give a client a Statement of Advice which accords with (the detailed requirements of) the Division: s 946A; and the provider must act in the best interests of the client: s 961B. The latter provision is contained in Pt 7.7A Div 2 entitled “Best interests obligations”, which contains a detailed attempt to define what is, in effect, an obligation of good faith and unqualified faithfulness to the interests of the client. The primary obligation is simply expressed in s 961B(1) as a requirement to “act in the best interests of the client in relation to the advice”. Section 961B(2) contains seven more detailed requirements, proof of all of which will satisfy the general obligation in s 961B(1). The requirements of s 961B(2), that may be varied or added to by the regulations (s 961B(5)), are as follows:

The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

- (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
- (b) identified:
 - (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
 - (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the *client’s relevant circumstances*);
- (c) where it was reasonably apparent that information relating to the client’s relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;
- (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
- (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
 - (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
 - (ii) assessed the information gathered in the investigation;
- (f) based all judgements in advising the client on the client’s relevant circumstances;
- (g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

- 11 Section 961B(2)(b), s 961C (as to when something is reasonably apparent), s 961D (as to what is a reasonable investigation), s 961E (as to what would reasonably be regarded as in the best interests of the client), and s 961J (as to conflicts of interest of the client and the provider) contain references to the advice that has been sought by the client as an express assumption of the operation of the provision.
- 12 The distinction between general and personal advice in ss 766B(1) and (3) is assisted by the expectations and requirements consequent upon the distinction. Notwithstanding the detailed particularisation of the expectations and requirements, the distinction should, however, conform with notions readily apparent to the people involved – the provider of advice and the client. What is advice, and whether it is personal or general, are questions most readily answered by a consideration of the communication or exchange in its whole relational context. They are questions not to be answered by picking over individual and decontextualised parts of a whole communication or exchange.

The questions of statutory construction

- 13 The primary judge surveyed the relevant statutory provisions at [68]–[79] of the reasons. After a summary of principles of statutory interpretation and some general observations, her Honour dealt with the meaning of “recommendation or a statement of opinion” in s 766(1) at [83]–[105]; of “intended to influence a person in making a decision in relation to a particular financial product” in s 766B(1) at [106]–[110]; and of the elements of s 766B(3) at [111]–[135].
- 14 The aspects of the construction of these provisions that relate to the appeal and cross-appeal concern ss 766B and 912A(1)(a). The first ground of appeal by ASIC is that her Honour erred in finding that the term “considered” in s 766B(3) required an engagement in an active intellectual process of evaluating or reflecting upon the subject matter of the advice. Secondly, as part of its notice of contention on the appeal, Westpac complains about the primary judge's view that it sufficed for there to be a consideration of one component or aspect of the person's “objectives, financial situation and needs.” Thirdly, again as part of the notice of contention on the appeal, Westpac complains about the primary judge's view that the words “in the

circumstances” at the end of the chapeau in s 766B(3) did not import what was referred to as a causal element in relation to the matters to be considered. Fourthly, also as part of the notice of contention on the appeal, Westpac complains about the primary judge’s construction of the objective limb of s 766B(3)(b). Fifthly, the cross-appeal and notice of contention complain that the primary judge erred in concluding that, in the communications concerned, there was a recommendation or statement of opinion amounting to advice. It was Westpac’s contention that no advice at all was given. Though this question is one of the application of the words of the statute to the facts, considerations of construction arise. Sixthly, the cross-appeal complains that the primary judge applied an incorrect test to the operation of s 912A(1)(a).

15 Care must be taken not to over-complicate these questions, in particular by breaking up the questions of meaning into parts of a section or sub-section to be treated separately. They are all interconnected as part of the distinction between the notions of personal advice and general advice seen through the definition of the term “personal advice”.

s 766B(1) – “recommendation or a statement of opinion”

16 The primary judge, correctly in my view, at [83]–[93] of the reasons, considered it appropriate to give a broad interpretation to “recommendation” and “statement of opinion”, as words used in a provision intended to be, to a significant degree, protective. In particular, I agree with the approach of Sackville AJA in *ASIC v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [365]–[366], referred to by the primary judge at [85]:

365 The construction of s 766B(1) must take into account that the language encompasses a recommendation or statement of opinion that is intended to influence a person in making a decision relating to a financial product or could reasonably be regarded as having such an influence. A person wishing to influence another person (the client) to make a decision relating to a financial product ... may do so in ways other than by express recommendations or explicit statements of opinion. Information or other material may be presented to the client in a form implying that the presenter favours or commends a particular course of action without saying so explicitly. Similarly information or other material may be presented in a form that implies that the presenter’s view is that the contemplated course of action is likely to be beneficial to the client.

366 The authorities have accepted that the statutory language should be given a broad interpretation. Specifically, they support the proposition that a person may provide information or present material in a way that implicitly makes a recommendation or states an opinion in relation to a financial product.

17 The protection of people from potentially selfishly motivated advice is not advanced by making fine logical distinctions based on overly precise linguistic choices about words of a general kind employed by Parliament in furtherance of the protective purpose. Protection from

assiduous, clever and subtle advancement of another's personal interest may require a generous breadth of meaning of words that are taken from, and are intended to relate to, human relational experience, and a giving of practical flexibility in the application of those words to the reality of human experience.

18 The question is one of the practical application of the statute to the context in question to see whether an express or implied "recommendation" (that is, a commending something by favourable representation or presentation as worthy of confidence or acceptance or as advisable or expedient) or "statement of opinion" (that is, a judgment or belief or view or estimation) was made. The two concepts are, of course, related. The opinion may be the basis of the recommendation; and the recommendation may carry with it an implied opinion.

19 That said, the distinction made by the primary judge at [94]–[97] of the reasons between "opinion" and "fact" or "statement of opinion" and "statement of fact", by reference to principles of evidence, is likely to complicate the enquiry without warrant. One could well imagine a communication that was in overall terms an implied recommendation or opinion being made up of statements of interconnected facts, designed by its and their structure, to appear as a recommendation for some conduct or view. The unnecessary complexity, with respect, can be seen in [98] and [99] of the reasons.

20 The task is to look at the communication or exchange, in its whole context, and assess whether some express or implied recommendation or statement of opinion is made. This is unlikely to be assisted by minute examination of parts of the text of a flowing, whole, engaged human conversation with all its implicit, as well as explicit, content. One can well understand that in some contexts mere statements of fact will not qualify as recommendations or statements of opinion. That is not, however, a conclusion that is to be drawn by an abstracted distinction between statements of fact and inference or by the deconstruction of text, but rather by looking at, or listening to, the whole of the communication or exchange, in its context.

21 Westpac also argued before the primary judge that the words "recommendation" and "statement of opinion" were to be understood by reference to "advice". Thus, it was submitted that the word being defined may properly influence the interpretation of the definition: *Rennie Gollidge Pty Ltd v Ballard* [2012] NSWCA 376; 82 NSWLR 231 at 260–261 [129] and the cases there cited. So, the recommendation or statement of opinion was to be seen as one which contained some element of estimation or judgment as opposed to a mere advertisement or "sales pitch". This was reinforced, it was submitted, by the reference in s 766B(1) to a

“report” of the advice. The complaint on the cross-appeal by Westpac is that the primary judge’s meaning would encompass all advertising and marketing, and such are not, and could not be, advice. Thus, it was submitted the meaning given by her Honour was too wide.

22 None of these provisions can be seen to be directed to what might be described or characterised as mere advertising. That, however, does not lead to the need for, or the appropriateness of, abstracted definition of categories of human behaviour or communication, outside the context of that actual behaviour or whole communication. The provisions are directed at the giving of advice that is contained in an express or implied recommendation or statement of opinion. That it may have some marketing or sales purpose is not the point. It is sterile to seek to draw a line between “advice” and “marketing” or “advertising”, or to engage in abstracted defining of those things. It is a question of characterisation in all the circumstances. Bearing in mind the view of the High Court as to the circularity that must be recognised in construing a definition by reference to the meaning of the term defined (*The Owners of The Ship “Shin Kobe Maru” v Empire Shipping Co Inc* [1994] HCA 54; 181 CLR 404 at 419 and however that case may now stand with the approach to construction laid down in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381–382 [69]–[71]) this submission of Westpac cannot be accepted in its terms: *Eso Australia Resources Pty Ltd v Commissioner of Taxation* [2011] FCAFC 154; 199 FCR 226 at 256–258 [100]–[107]. The question is whether, on its proper characterisation, the communication or exchange was a recommendation or statement of opinion given by someone to another for that other’s consideration in connection with making the decision in s 766B(1). I would accept that in some circumstances what might otherwise be seen to be a recommendation might only meaningfully and rationally be described or characterised as part of mere puffery in an advertisement and could not meaningfully and rationally be described or characterised as advice. That conclusion is likely, however, to be reached by an examination of the applicability of the Chapter as a whole. The proper process is to examine the communication and exchange in its whole context to ascertain whether it is a recommendation or statement of opinion to the person. One does not add to this process by considering some further limitation of advice and imbuing that limiting characteristic with some element of evaluation or degree of consideration, as Westpac’s submissions sought to do. There is certainly no bright line distinction to be made between “sales” and “advice”. The communication or exchange may have a heavy “sales” purpose. That will not mean that it does not contain a recommendation or opinion that was intended, or could reasonably be regarded as intended, to influence a person in making a relevant decision.

How broad the definition may reach may be better tested in other circumstances. Here, the relational exchanges and the engagement in conversation designed to influence customers to make a financial decision constitute the very kind of context and circumstance to which the Chapter and the Division were intended to be directed.

- 23 One of the features of the operation of s 766B that assists in the process of relevant characterisation is the relational character of the exchange. Section 766B(3)(a) is directed to the circumstance where the provider has considered one or more subjects. Section 766B(3)(b) is directed to where a reasonable person might expect that consideration to have taken place. That is not to require any particular temporal requirement for the relational exchange; but it may help to distinguish “advice” from advertising in particular circumstances.

s 766B(3) – “considered”

- 24 The primary complaint by ASIC on the appeal was that [127] of the reasons contained an error of requiring too high a level of abstracted thought by the provider. Her Honour said at [127]:

In my view, the word “considered” refers to an active process of evaluating or reflecting upon the subject matter of the consideration, appropriate to the provision of “financial product advice”. It does not require a process that is “detailed, extensive or careful”, however, it does involve an intellectual engagement with the subject matter of the consideration. If it were suggested, I do not accept that such an interpretation will permit unscrupulous advisers to evade the scheme by failing to give the client’s personal circumstances due consideration: in my view, s 766B(3)(b) is intended to capture those cases.

- 25 The complaint of ASIC was bound up with the primary judge’s application of the provision to the facts, especially at [386], [389] and [394] of the reasons, to which I will come. However, there is force in the criticism of ASIC on appeal that the primary judge impermissibly restricted the word “considered” to something more than its ordinary meaning used in the context of a protective provision. The word “consider” in its context is ample to include elements of what is a usual or ordinary meaning: to pay attention or regard to; to view or think about with attention or scrutiny. Once again, its meaning is assisted by the structure of paras (a) and (b) of sub-s (3). Paragraph (a) is directed to circumstances where the provider has considered certain things; and para (b) is directed to the reasonable person’s expectation that the provider has considered certain things. Again, that does not necessarily require any particular temporal framework; but it having occurred, or some expectation that it has occurred, will assist the application of the words to the facts of the communication or exchange to assess whether consideration has occurred or could be expected to have occurred. I do not think that any

assistance is given to understanding the meaning of the word by borrowing from its meaning and usage in another universe of discourse such as public or administrative law.

26 Thus, as a matter of general approach, I broadly agree with ASIC's submission that a provider of advice may "consider" the relevant matters by making allowance for, paying attention to, or having regard to the relevant personal circumstances. But the word "considered" needs also to be understood in the context of personal advice and in the context of the whole section. The matters that one considered in the making of a recommendation or of a statement of opinion are ones to which the provider had regard or took into account in making such, and so in the giving of advice. I will return to this point below. It is important to the proper understanding of the definition in s 766B(3).

s 766B(3) – "one or more of the person's objectives, financial situation and needs"

27 The difference between the parties as to this phrase was whether the phrase "one or more of the person's" referred to the three subjects contained in the phrase – "objectives", "financial situation", and "needs" – or whether the phrase also referred to any aspect of one of those subjects.

28 A consideration of the secondary material, in particular the Senate Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth), and the text of the singular phrase "financial situation" makes it tolerably clear that "one or more" was one or more of the person's objectives, the person's financial situation, and the person's needs. It is the distributive consideration of these three matters for consideration which was important. This is plain from [3.20], [3.22] and [3.23] of the Senate Supplementary Explanatory Memorandum:

[3.20] As currently drafted, proposed subsection 766B(3) defines personal advice as financial product advice that is given or directed to a person in circumstances where the provider has considered the 'objectives, financial situation and needs' of the person (or where a reasonable person might expect the provider to have considered these matters).

...

[3.22] The purpose of this proposed amendment is to ensure that a financial services provider will be subject to the requirements of proposed Divisions 3 or 5 of Part 7.7 (including the requirement to provide a SOA) when advising a retail client that a particular financial product (o[r] class of financial products) is appropriate to them as an individual.

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

considered the client's financial situation.

(Emphasis added.)

29 That does not mean, however, that there can be no personal advice unless every aspect of each matter is considered. The surrounding circumstances, including the nature, content and context of the communication or exchange, will provide the answer to the question whether the provider has considered, or whether a reasonable person might expect the provider to have considered, any one or more of those subjects. It is the consideration of sufficient aspects of the objectives, the financial situation or needs of the person so as to make the conclusion that there has been a consideration of that subject appropriate (and so the advice being seen as personal to the individual).

s 766B(3)(b) – “a reasonable person might expect”

30 The context or frame of reference of paras 3(a) and (b) is a communication or exchange involving the giving or directing of advice (a recommendation or statement of opinion) to a person. It is therefore by reference to that communication or exchange that one assesses whether the advice is given or directed in circumstances where the provider has considered one or more of the relevant matters or a reasonable person might expect the provider to have considered one or more of the matters. Sections 766B(3)(a) and (b) are co-relatives of each other. It is personal advice if a provider has considered the relevant personal circumstances of the person in the giving of the advice; or if a reasonable person might expect the provider to have considered the relevant personal circumstances in the giving of the advice. The provision is not framed by reference to what a provider should consider if the advice is to be given reasonably or responsibly. Rather, s 766B(3)(b) 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. In these circumstances, it is difficult to understand how s 766B(3)(b) would operate, as found by the primary judge at [135] of the reasons, by reference to circumstances that could not have been known to a reasonable person. At the trial ASIC submitted that the question was to be assessed as I have set out. That is the preferable construction. Thus, I do not think that one can imbue a reasonable person in the customer's position with knowledge of the QM Framework. It is to a real world communication or exchange in context to which the factual questions in ss 766B(3)(a) and (b) are addressed.

The facts

31 ASIC's case before the primary judge was principally based on sample calls to 15 customers (the **Relevant Customers**), one of which – the call to Customer 3 – is no longer relied upon on appeal.

The consolidation campaigns

32 The consolidation campaigns involved Westpac sending written communications to customers with an offer to conduct a free search for other superannuation accounts that those customers might hold. Follow-up telephone calls were then made to customers, who may or may not have accepted the free search offer, in which a further offer was made to arrange a rollover of any external accounts into their BT accounts. These telephone calls were conducted by a team of Westpac employees (referred to collectively as the **Super Activation Team**). The primary judge described the nature of the Super Activation Team and their involvement in the consolidation campaigns is at [36]–[38] of the reasons, as follows:

36 Westpac's campaign to encourage rollovers into the BT funds involved a team of employees operated by one or more entities within the Westpac group and referred to at various times as the "Super Activation" or "Investor Solutions – Outbound" or "Investor Solutions" telephone unit (collectively, the "Super Activation Team").

37 The parties agreed that, during the period 18 May 2013 to September 2016:

- members of the Super Activation Team contacted and actually spoke with approximately 95,682 Westpac group customers;
- approximately 31,506 customers were regarded by the Westpac group as having satisfied the following criteria:
 - (a) during the call from the Super Activation Team, the customer stated they intended to:
 - (i) roll over an external account into a superannuation account with the Westpac Group ("Westpac account"); or
 - (ii) contribute additional funds into their Westpac account; and
 - (b) funds were received into that customer's Westpac account within 12 months of the customer's statement of intention, noting that for "Corporate Superannuation customers", funds over \$1,000 were required to be received.

38 An amount of approximately \$646,719,225.51 in FUM was generated during the period from 1 January 2013 to 16 September 2016 in respect of the customers who satisfied the criteria set out above.

33 Members of the Super Activation Team participated in internal training, which included a PowerPoint presentation that provided guidance as to the difference between general and

personal advice and which sought to ensure that Super Activation Team members did not provide personal advice. The primary judge described the content of this training at [14] of the reasons in the following way:

14 ... The evidence included a BT PowerPoint presentation dated January 2014 concerning the distinction between personal and general advice. A case study in the presentation included a response to the customer's question whether the consultant would recommend a rollover of other funds into their BT account. The response given is:

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.

34 At [48] of the reasons, the primary judge set out the following statements contained in the PowerPoint presentation to guide the interaction between callers on the Super Activation Team and Westpac's customers:

- *'NOTE: If you provide/suggest or imply an opinion/recommendation in relation to the factual information you present to a client, then you are providing advice'* (page 1);
- *'The client needs to receive a general advice warning at the outset and at any time where you need to reinforce the nature of the engagement. **However, be aware that providing a warning does not cover instances where you have provided personal advice (Implied or actual) to the client'*** (page 2);
- *'General advice should **NEVER** be provided in such a way as to drive a particular outcome. Doing so is unlikely to provide a balanced view of the options available to the client and could in fact constitute personal advice i.e. the client need has been taken into consideration in recommending the preferred outcome'* (page 2);
- *'The client can volunteer personal information, yet the use of this information must be contained to what people generally consider. You should only use this information to*

provide more relevant general advice e.g. It is presented from what clients in a group or age bracket or life stage would generally consider’ (page 2);

- *‘When comparing products, you cannot state or imply that one of the products better meets the client’s objectives, financial situation or needs e.g. you cannot state or imply that specific product features will be suitable for the client’ (page 2); and*
- In ‘Case Study 6’, which involves a scenario wherein a staff member calls a customer about consolidation of their superannuation, there is a warning against making statements which involve *‘a recommendation to essentially rollover the clients [sic] existing superannuation funds’* and another warning against making statements which *‘attempted to influence the clients [sic] decision to invest further into the BT Super Fund’*.

35 During their internal training, members of the Super Activation Team were also introduced to a “quality monitoring” document (the **QM Framework**), which was said to set out risk compliance obligations for the Super Activation Team and was used to monitor the quality of calls and compliance. A four-part structure for calls made by the Super Activation Team to customers was set out in the QM Framework and was comprised of the following phases: (1) Open; (2) Gather; (3) Presenting; and (4) Objection Handling/Closing. The primary judge described the elements of each phase at [55]–[57] and [60] of the reasons:

55 The “Open” phase was designed to put the customer in a positive, receptive frame of mind and to gain permission from the customer to ask them questions. For example, a staff member might introduce themselves and ask a question such as “So I can focus on what’s important to you, do you mind if I ask you a few questions?”

56 The “Gather” phase involved asking the customer questions to “gather, uncover, clarify and develop” an understanding of the customer’s requirements. For example:

- (1) “What do you look for in a super fund? What’s important to you in a super fund? What do you care about in a super fund?” In the October 2013 version of the QM Framework, an equivalent question is framed: “A lot of customers that I speak to tell me that fees, investment options, online actions and insurance are important to them. Of these, which one of these is important to you?” According to the QM Framework, such questions were asked to “find out what’s important to the customer and draw the need and want to help you develop urgency to the close”. They were described as important to “help you present the features and benefits to the points of relevance to the customer. This will help you maintain rapport, ignite the thinking and emotions of the customer and uncover what will spur them to take action”.
- (2) “What do you see as the benefits of combining your super? Can you

tell me a little bit more about that? Is (what the customer thinks the benefit of combining is) important to you?" In the October 2013 version of the QM Framework, an equivalent question is framed "When you said that you liked ... can you tell me a little more about that?" According to the QM Framework, such questions were asked to "find out more about the customer's need and to build it through the use of questioning[[". Such questions were said to be important to "encourage the customer to continue to talk to help you with your presentation & need what you are offering".

- (3) "How much do you have in your super accounts?" How long have you been working for?" According to the QM Framework, this was important because the "information derived through this question is going to help you to prioritise your follow up according to value of consolidation, age and number of years the customer has been working".

57 In the "Presenting" phase, the aim was to "conduct a persuasive, interactive presentation to the customer based on what the customer told you in your questioning". This included:

- (1) "Social proofing" the customer with a statement such as "I understand where you are coming from & many customers are also in a similar situation". According to the QM Framework, such a statement created a "space of comfort, assurance and confidence that other customers have had the same concerns and agreed to the same benefits".
- (2) "Articulating the feature(s) as benefit(s)". In the October 2013 version of the QM Framework, the equivalent description was written as "related the motivation/benefit back to what was picked up during the Gathering Requirements". According to the QM Framework, this was done to "link the customer's motivation to the features of the product / service that was found during your questioning". It was said to be important "to create an emotional connection to how a service will benefit them rather than what the service provides".

...

60 Finally, the "Objection Handling/Closing" phase was aimed at overcoming any objections raised by the customer and seeking a "commitment for action that moves the customer closer to the sale". This phase included:

- (1) Using all relevant information to overcome any customer objection. This included trying to "find out any underlying reasons that could hold the customer back from following the next steps". The Super Activation staff member was to be scored "zero points" if they "accepted the customer's objection without questioning further or using a strategy to overcome it". In the October 2013 QM Framework, staff were to overcome the customer's objection using "the important points taken from the call to create the connection between their needs and wants and their objections".**
- (2) Providing "clearly articulated next steps" to "provide direction to the customer to ensure the end outcome is achieved".**
- (3) "Effectively end[ing] the call with a powerful benefit based on the**

customers motivation / interest”, by “link[ing] the customer’s motivation using a relevant benefit after you demonstrate your advance”. This was said to be important because it will “help you build urgency for the service. Providing this linking statement at the end of the call can help leave a lasting need in the customer’s mind”.

- (Emphasis added.)

36 Performance was regularly assessed against the QM Framework and members of the Super Activation Team would be rewarded and penalised depending on their extent of compliance with the QM Framework and the amount of funds under management (**FUM**) they generated for Westpac, as set out by the primary judge at [61]–[64] of the reasons:

61 As part of their ongoing training, the calls of the staff were reviewed by a “sales coach” and scored in accordance with a scoring system set out in the QM Framework. The staff attended one-on-one meetings with their “sales coach” approximately once per week to assess how closely they were following the QM Framework and how they might more closely follow its requirements.

62 ... [T]he QM Framework set out specific techniques for which staff were scored, including questioning techniques designed to “maintain rapport, to gather the right information, and to build desire in the customer”. For example, staff received points for:

- (1) Using “open questions” such as “what’s important to you?”. These were said to be important because they would:

“obtain uninfluenced responses to allow you to begin to understand what’s important to the customer and help you through the sales process. Open questions are the key to unlocking every customer’s unique requirements. Aim to uncover their problems or needs so when you present, they will pay more attention”.

- (2) Using “leading” questions such as “What benefits do you see in combining your super?”. These were asked because “[o]nce you’ve gathered bits of information derived from the open questions, the use of leading questions will narrow down to your customer’s need”. These were said to be important because they were “[g]ood for leading the customer in the direction you want them to go and finding out more specific information about their requirements”.

63 ... [A] call would be classified as an “autofail” in circumstances which included where an operator:

- (1) did not expressly warn a customer at the start of the call that the information provided on the call was general in nature and did not take into account the customer’s needs or objectives;
- (2) failed the “personal advice” prohibitions;
- (3) did not refer a customer to appropriate advice channels if the customer asked certain questions; or
- (4) exerted undue pressure or influence on the customer.

64 When the relevant calls were made, members of the Super Activation Team were eligible for bonus payments. Approximately 15% of such payments were calculated by reference to scores that their calls were given under the QM Framework. Approximately 30% of any such bonus payment was calculated by reference to the FUM which the relevant staff member generated for Westpac on their calls. On the other hand, staff became ineligible for bonuses if they had a specified number of compliance “fails”.

37 The primary judge made various findings at [65] of the reasons concerned with the QM Framework and its relationship with the communications that were made, as follows:

- (1) Westpac had the QM Framework in place over an extended period and used it on campaigns that were aimed at encouraging customers to roll over their superannuation. The QM Framework was updated from time to time to take into account feedback from consultants, managers and coaching staff.
- (2) Staff in the Super Activation Team were trained and encouraged by coaches to follow the QM Framework.
- (3) Staff were marked and assessed based on the QM Framework and a substantial part of how their performance and any bonus was assessed was their ability to follow the QM Framework and their ability to generate FUM.
- (4) 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.
- (5) Based on the transcripts of the various calls, some callers attempted to personalise the calls, listen to the customers and encourage the belief that they were being listened to and that their reasons for rolling over funds into their BT account were valid and reasonable. The callers attempted to use the information provided by the customers to inform what they said subsequently.
- (6) Based on the transcript of the various calls, staff apparently considered that they could seek to influence customers to roll over funds into their BT account by saying words to the effect that they “would potentially save on fees”.
- (7) There is no reason to think that any of the callers knew whether it was in the best interests of the customers to roll over their external accounts into the customer’s BT account.

38 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.

39 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. Indeed, Westpac put below, and on appeal, that there was no advice, just marketing, and that this was plain to the customers.

The communications with the Relevant Customers

40 I now turn to the specific communications, written and oral, in which Westpac engaged with the Relevant Customers.

The written communications

41 Each of the Relevant Customers was sent various written communications, which sought to influence them into accepting an offer to search for, and roll over, any external accounts that they may have had into their BT accounts. There were six different types of written communication sent by Westpac to the Relevant Customers. The number and combinations of the communications sent by Westpac varied across the Relevant Customers.

42 First, all but one of the Relevant Customers (Customer 15) were sent an annual super statement letter for the year ending 30 June 2014 (**annual super statement letter**), which included the following text:

It's a great time of year to review your financial situation and make sure your super is working hard for you. On average, most Australians will receive three super statements around this time of year. By having multiple super accounts you're probably also paying multiple administrative fees. However, if you combine your super into one account, you could save on administrative fees and enjoy the convenience of having all your super in the one place. To help get you started, we've enclosed a Rollover form, simply complete the form and return it in the reply paid envelope and we'll do the rest.

43 The annual super statement letters contained a disclaimer which, relevantly:

- disclosed a possible fee of up to 1% for accepting rollovers;
- recommended that the customer check with their other fund(s) to determine whether any exit fees applied, or if other benefits, such as insurance cover, might be lost;
- stated that the letter only provided an overview or summary and that it should not be considered a comprehensive statement on any matter; and
- stated that the letter did not take into account the customer's personal objectives, financial situation or needs and that the customer should consider its appropriateness having regard to those factors before acting on it.

44 Most of the Relevant Customers responded to the offer by making an online request that a search be conducted to locate amounts held on their behalf in external accounts. Four of the Relevant Customers (Customers 1, 6, 11 and 13) then received a further letter that set out the

results of the requested superannuation search (**search results letter**), which, relevantly, contained the following text:

Having your super in multiple places may mean you're paying multiple sets of fees. By bringing it together in one account, you could potentially reduce fees and paperwork.

45 The search results letter contained a disclaimer similar to the disclaimer described at [43] above.

46 Secondly, four of the Relevant Customers (Customers 1, 4, 9 and 14) received correspondence with the heading "[Customer Name], let us do the legwork and you could WIN" ("**let us do the legwork**" letter). The "let us do the legwork" letter contained a green spot containing the words "WIN one of two \$10,000 travel vouchers", and the following text:

When your to-do list is ever growing, combining your super is left in the too hard basket. Yet in less than two minutes you can give BT your consent to search for all your other super and help sort it out for you.

Give us the OK to combine your super by 30 September and you'll have the chance to win one of two \$10,000 Flight Centre vouchers. Then you can relax knowing there's one less thing on your to-do list.

By combining all of your super into your BT super account, you'll pay just one set of fees, cut down on paperwork and make it easier to track your super's performance. So take the load off and let us do the hard work for you.

47 The "let us do the legwork" letter contained a disclaimer to the effect of the disclaimer described above at [43] under the heading "Things you should know", in very small pink font.

48 Thirdly, seven of the Relevant Customers (Customers 7, 8, 9, 11, 12, 14 and 15) received a letter picturing a person taking a selfie next to the words "There's only one [Customer Name]" ("**there's only one you**" letter), which contained the following statements:

- "If you've had more than one job, you probably have more than one super account. Yet multiple super accounts can be hard to keep track of and could be costing you in account keeping fees. We can help combine your other super into your BT Business Super account, leaving you with just one super account to manage. And what you could save on fees, could mean more money in your super."
- "Give us the OK and we'll help search for your other super accounts in order to roll them into your BT Business Super account."
- "Give your consent to do a super search and we can help track down your other super accounts – it's that easy!"

- “Win \$20,000 cash prize.”
- “Sort your super for your chance to win. There’s only one you and only you know how you’d spend \$20,000. We’re giving you the chance to do just that. Simply combine \$5,000 or more of your other super into your BT super account by 30 May 2014 to go into the draw to win.”

49 The “there’s only one you” letter contained a disclaimer under the heading “Things you should know” to the effect of that described at [43] above.

50 Fourthly, two of the Relevant Customers (Customers 2 and 11) received an email that included a prominent blue box containing the words “You still have time to WIN \$20,000 cash*” (“**win \$20,000**” email). The following text appeared underneath those words:

One super account means less hassle and paper work.

There’s only one [sic], so why have more than one super account? There may be no need to. By combining all your super[^] into your BT super account you could stop paying multiple account keeping fees, which is one way to help your super grow. Plus, having your money in one place can make it easier to manage.

51 The circumflex found after “super” is referable to text forming part of a larger disclaimer that is to the effect of the disclaimer described at [43] above.

52 Fifthly, four of the Relevant Customers (Customers 2, 5, 11 and 12) received an email that included a prominent blue box containing the words “Take your super out of the too hard basket” (“**too hard basket**” email). The “too hard basket” email contained the following statements:

- “Take your super out of the too hard basket”, which was accompanied by a checklist of items such as “Lodge tax return”, “Organise health insurance”, “Sort out super” and “Join the gym”.
- “When you’ve got a lot on your plate, your super is left in the too hard basket. We know we should combine our super, but it takes ages, right? Wrong. In just one click you can get BT to help take care of it for you.”
- “By combining[^] all your super into your BT super account, you could stop paying multiple fees and help your super grow. Plus, it’s easier to manage when it’s all in one place. So sit back and let us do the hard work for you.”
- “Get sorted to win.”

- “Why combine your super?
→Only pay one set of fees
→Cut down on paperwork
→It’s easy to track your super’s performance.”

53 The end of the “too hard basket” email contained a disclaimer in similar terms to the “Win \$20,000” email and the disclaimer described at [43] above.

54 Sixthly, three of the Relevant Customers (Customers 2, 5 and 12) received an email that was substantially identical to the “too hard basket” email but which contained the following additional statement: “It’s your last chance to combine your super for a chance to win one of two \$10,000 Flight Centre travel vouchers” (“**last chance**” email). The “last chance” email contained the same disclaimer as the “win \$20,000” and “too hard basket” emails; that is, the disclaimer at [43] above.

55 For what it is worth, it can be accepted that those persons who received these letters would reasonably have appreciated that there was a degree of self-interest in Westpac in moving or consolidating funds held in accounts with other superannuation funds into their BT accounts. That said, the content of the calls, in conformity with the QM Framework, was to evoke the understanding or belief in the client that the caller was there to help the client or customer, not just to make a “sale”.

The telephone calls

56 The telephone calls to the Relevant Customers were made by six members of the Super Activation Team, anonymised as Callers AA, BB, CC, DD, EE and FF, all of whom were employed by a member of the Westpac group of companies and acting as agents for Westpac.

57 The primary judge described the various calls made by members of the Super Activation Team to the Relevant Customers and set out the relevant extracts from the transcripts of those calls at [149], [156]–[159], [160], [169], [176], [180], [181], [186], [187], [191], [192], [197], [198], [202], [203], [208], [209], [211], [212], [219], [220], [226], [227], [229], [230], [235], [236] and [238]–[239]. As the application of the statutory framework to the facts must occur with a full contextual appreciation of Westpac’s interaction with the Relevant Customers, the primary judge’s account of the calls is reproduced in full in an annexure to these reasons. In order to assess the calls and whether they involved giving advice (as defined) and whether they involved personal advice (as defined), it is of assistance to listen to the recording of the calls. The written

word in transcribed text may not always contain the nuance or implicit content of the communication.

58 As there are similarities in the approach that Westpac's callers adopted in their communications with the Relevant Customers, no doubt due, in large part, to the guidance provided by the QM Framework, I will address the appeal first by considering Westpac's communications with Customer 1, before turning to consider Westpac's communications with the other Relevant Customers. In many respects, the analysis with respect to Customer 1 applies generally to the other Relevant Customers; however, specific considerations that arose in Westpac's communications with particular Relevant Customers will also be discussed.

Did Westpac's communications with Customer 1 amount to the provision of financial product advice?

59 The threshold question is whether Westpac's communications involved the provision of any financial product advice at all. Were this question to be answered in the negative, there would be no need to consider the distinction between personal advice and general advice.

60 What must be established is that Westpac, through its Super Activation Team, made a recommendation or a statement of opinion that was intended, or could reasonably be regarded as having being intended, to influence the customer in making a decision in relation to her BT account.

61 A preliminary issue raised before the primary judge concerned the significance, if any, of the written correspondence summarised above as contextual material against which the individual calls to the Relevant Customers ought to be construed. On this point, the primary judge found at [243]–[245] that the individual oral conversations should be construed separately from any written communications that had been received:

243 However I do not agree that the individual conversations were to be construed in the context of the earlier correspondence, or on a broad assumption that the relevant customers had received, read and understood the contextual correspondence without evidence directed to those matters. As Westpac itself emphasised, those materials were marketing materials. Even assuming that they were received (and at least one must have been received to instigate the request for a super search), it is far from obvious that any particular message in the contextual correspondence would have been absorbed by any given customer or remembered at the time of receipt of an unsolicited telephone call, when the customer was almost certainly doing something that did not involve thinking about their superannuation or Westpac's marketing material.

244 In particular, there is no reason to assume that customers receiving an unsolicited telephone call would have recognised that the messaging of the call was the same as messaging they had received in prior written communications.

245 Similarly, I would not agree that the state of mind of an individual caller, which they may have expressed explicitly or impliedly, was affected by the contextual correspondence in the absence of evidence that the caller had read and understood that material.

62 No submission was put that this approach was in any way wrong.

63 Construing the conversations between Caller AA and Customer 1 in this way, the primary judge found that Westpac made one recommendation and two statements of opinion to Customer 1.

64 First, at [247] of the reasons, the primary judge found that Westpac made an implied recommendation that Customer 1 should roll over her external accounts into her BT account:

I accept that, in the calls to customer 1, caller AA (and Westpac) impliedly recommended that customer 1 should roll over her external accounts into her BT account. The main purpose of that call was to achieve that outcome, including by engaging in an exercise of marketing including “social proofing”. The calls were each expressed as an exercise in helping the customer to roll over their external accounts. For example, caller AA said: “...we’d like to help you bring them over to your account to potentially save you on fees” and, later, “we can actually help you bring them altogether over the phone now”. This language conveyed the message that the caller was offering to assist with an action that was likely to benefit the customer by improving the manageability of her superannuation and by creating the possibility that she would save on fees. By that language, the caller (and Westpac) implicitly recommended a rollover of the external accounts into customer 1’s BT account. The question “what did you see as the main benefits of bringing them altogether to the one place?” reinforced the idea that consolidation was beneficial, as did the social proofing statement that “they are the two main reasons our clients do like to bring their supers together, it does make a lot more sense from a management point of view, for sure.” The concluding language of the second call: “everything gets rolled over in two or three weeks, so it’s all in the one spot and nice and organised for you. How does that sound?” conveys the message that the rollover service has provided a benefit to the customer.

65 Secondly, at [272]–[274] of the reasons, the primary judge then found that Westpac made a statement of opinion to Customer 1 that by rolling over her external accounts into her BT account she would potentially save on fees:

272 This is a statement that the action of rolling over external accounts into the customer’s BT account would possibly (although not probably) produce a benefit for the customer...

273 Although Westpac argued that a statement to this effect is not a “statement of opinion”, it did not do so by reference to evidence about the underlying justification for the statement. Rather, it contended that the tone and context of the statements suggested a “self-interested promotional exercise”. Mr McHugh SC contended the statement does not involve any element of judgement and is nothing more than a logical possibility. However, Westpac did not suggest that I had given no consideration to the truth of the statement.

274 Although the message concerns a possibility rather than a probability, it was expressed by the various callers in positive terms, rather than as a question about

whether the customer would save on fees, or an observation that the customer might or might not save on fees, or a doubt as to whether or not the customer would save on fees, or as a caution that the customer should not assume that they would save on fees because that was a mere possibility. Taking those matters into account, in my view, a statement to this effect reflected an inference by Westpac from other facts and is a “statement of opinion” within the meaning of s 766B(1).

66 Further, at [277]–[278] of the reasons, the primary judge found that Westpac made a statement of opinion to Customer 1 that combining superannuation accounts made a lot more sense from a management point of view:

277 This statement was made by caller AA. It expresses a view as to the merit of combining superannuation accounts. The statement appears to reflect a message contained in Westpac’s correspondence that “if you combine your super into the one account, you could ... enjoy the convenience of having all your super in one place”. As a central message in Westpac’s correspondence, I infer that the message is not the product of mere speculation and it was not suggested that the message was not based on any underlying facts.

278 Accordingly, I find that this statement is a “statement of opinion” within the meaning of s 766B(1).

67 I do not see any error on the part of the primary judge in these findings as to recommendation or statement of opinion. Westpac argued that these conclusions were reached divorced from any question as to whether the communications could properly be understood as advice. Looking at the transcript and listening to the conversations in the context of calls plainly intended to be understood as of assistance, I do not doubt the correctness of the primary judge’s conclusion that there was an implied recommendation that customer 1 should roll over her external accounts into her BT account. An important aspect of the whole context is that the callers took the customers to the point of decision-making over the phone in the call. That consideration embeds the conclusion that the recommendation was made, and is the foundation for recognising a concomitant and interconnected implied statement of opinion that the decision will fulfil and meet the objectives and concerns of the customer about fees and manageability. Further, the partly explicit and partly implicit statements of opinion about potentially saving on fees and manageability were made. It can be accepted that there was a marketing element to the call, but that does not mean that the call was not also advisory as well. The caller was attempting to assist. There is no clear dichotomy between marketing and advising. The giving of “helpful” recommendations and statements of opinion (even of a general character) is one way of marketing. Indeed, this was the essence of the QM Framework. Certainly a service was being offered. It was accompanied by a “helpful” recommendation and proffered statements of opinion. One does not need to enter any analysis based on the difference between opinion and fact here. There were tolerably clear statements

or inferences that the caller had the opinion, expressed partly as confirmation of the view from the client, that the customer could potentially save on fees and that combining accounts made sense from a management point of view or would enhance manageability. The submissions of Westpac sought to distinguish a statement of opinion from a “logical possibility” or a “truism”. These are not helpful or relevant distinctions. There were statements of opinion made, together with the recommendation, in a context of assistance being given to help the client with a useful service. Though lacking formality, they can plainly be seen as a form of advice. They were part of an approach designed to influence. That is not irrelevant. The statements of opinion and recommendation formed part of a communication or exchange designed to promote or reinforce a view of advantage to the client and of an appropriate and sensible decision being made.

Was the financial product advice given by Westpac to Customer 1 personal advice?

68 The primary judge dealt with the question of objectives, financial situation and needs at [375]–[382]. Her Honour found that none of the conversations contained any reference to the needs of the customer. This was not challenged on appeal.

69 As to financial position, there were three particular matters related to customers 2, 3 and 5 to which I will come. However, at [376], the primary judge accepted that each customer was “in the financial situation of having multiple superannuation accounts”, and such was the “financial situation” of the customer. Respectfully, I disagree. I would not characterise that one fact as sufficient to amount to that there had been consideration of the financial situation of the customer.

70 As to objectives, the primary judge said the following at [380]–[382] of the reasons:

380 In several cases, the customers expressed a desire to “save on fees” by rolling over their superannuation or to consolidate their superannuation into the one account “for better manageability”. I accept that these are “objectives” of those customers within the meaning of s 766B(3) because they are ends to which the customers were directing their efforts, by requesting the super searches and participating in the customer calls made to them by Westpac.

381 In several cases, ASIC alleged that the customer has an objective “to ensure that [the customer] adopted an efficient and efficacious setup of [their] superannuation to ensure [they are] receiving the greatest possible returns” On the evidence, I do not accept that any customer expressed such an objective, or could be taken to have had such an objective.

382 ASIC alleged that the customers had numerous other objectives, as evidenced by their statements during the customer calls. Applying the reasoning above, I accept that the following are “objectives” of the relevant customers:

- (1) To not lose money because her superannuation was in different places (customer 1).
- (2) To organise his superannuation in a manner that was most appropriate to the fact that he was retiring (customer 2).
- (3) To ensure that his level of insurance with BT was at the same level as it was with MLC (customer 3).
- (4) To appropriately consider any exit fees that would be payable for leaving any external accounts (customer 3).
- (5) To ensure that his insurance coverage was appropriate for his particular circumstances, including that he did not have time to complete the relevant forms to increase his insurance and that he had been a type 2 diabetic for nine years but that that did not stop him from playing golf, engaging in normal activities or affect his work (customer 3).
- (6) To remedy or ameliorate any issues with his superannuation fund that would mean that he was not achieving the returns that he should or could achieve (customer 5).
- (7) To earn a greater return by creating one bigger pool of funds in his account (customer 7).
- (8) To not lose money from his superannuation account (customer 8).
- (9) To ensure that he was in the best performing fund or the best performing fund in respect of which he was a member (customer 10).
- (10) To have all his superannuation in the one spot to ensure that he was not losing money in finance and fees (customer 11).
- (11) To ensure that he was maximising the amount of interest he was receiving (customer 12).
- (12) To achieve better performance on his superannuation (customer 12).
- (13) To ensure that he was maximising the principal sum in his superannuation account and thereby obtain a better return (customer 13).
- (14) To achieve a greater level of performance on his superannuation (customer 14).
- (15) To ensure that he was not losing superannuation by having multiple superannuation accounts (customers 14 and 15).
- (16) To ensure that he was not losing superannuation by having multiple superannuation accounts (customer 15).
- (17) To increase his superannuation funds overall (customer 15).

71 Dealing first with customer 1, it can be accepted that she had objectives in this exercise of not losing money through fees because her superannuation was in different places, and of improving its manageability. For her, these were the relevant objectives concerned with the subject under discussion. Customer 1 no doubt had many more objectives about her superannuation. But the call concerned consolidation of multiple accounts. **All** her objectives

relevant to the subject of discussion were saving on fees and better manageability of superannuation.

72 The question is whether these objectives were considered in the relevant sense by the caller or whether a reasonable person in customer 1's position might expect the caller to have considered them in the giving of the advice, that is in the giving of the recommendation or statements of opinion that were made. The primary judge dealt with the question of the caller's "consideration" at [383]–[393] of the reasons, and with what a reasonable person might expect at [394]–[395] of the reasons.

73 As to the caller's consideration, [384]–[386] and [389] encapsulate the primary judge's views:

384 The first basis for that conclusion was said to be that the caller knew that each customer had more than one superannuation account at the time that the call was made; in all but two cases, the caller knew that the customer had requested a superannuation search and, consequently, knew information about other funds held by the customer. ASIC argued that the calls were clearly considering each of those matters in seeking to influence the customers to accept the rollover service.

385 ASIC also contended that the evidence that callers engaged with the customers in accordance with the QM Framework "whether they listened very carefully or not", demonstrated their consideration of the customers' various statements about their objectives, financial situation and needs.

386 I do not accept either of these propositions. Mere knowledge of facts about customers, particularly that they held multiple superannuation accounts, and an intention to persuade the customer to accept the rollover service does not support an inference that the caller engaged in any reflection upon the customer's position that amounted to "consideration". Active listening does not evidence an intellectual engagement with the information provided by a customer, such as would permit a finding that the caller had "considered" that information: it simply demonstrates that the information has been heard. The use of facts, apparently identified as matters that might be used to influence the customer in the course of the call does not, without more, indicate the caller "considered" those facts.

...

389 In the case of each of the 15 customers, ASIC relied on the fact that the caller called to speak to the customer personally about the consolidation of the customer's superannuation accounts to prove that the relevant caller had "considered" one or more of the customer's objectives, financial situation and needs. In the context of the campaigns pursuant to which the calls were made, I do not accept that this fact evidences that there was any relevant consideration. To the contrary, the context suggests that the callers were not engaging in a process of consideration, but instead were engaged in a highly structured marketing activity requiring them to call customers directly to seek consolidation of their superannuation account.

74 The primary judge's consideration of the possible application of s 766B(3)(b) is found in [394]–[395], as follows:

394 In order to determine what a reasonable person might expect in particular circumstances, it is necessary to consider those circumstances. In my view, the following circumstances would suggest to a reasonable person that the caller who provided the “financial product advice” did not consider any of the customer’s objectives and financial situation that I have identified above:

- (1) The call containing the “financial product advice” was not preceded by the provision of information from the customer to Westpac about their objectives, financial situation and needs.
- (2) The “financial product advice” was offered proactively by members of the Super Activation Team, who had no previous relationship to the customer, and was not known or understood by the customer as their adviser so that they were not obviously in a position to consider one or more of the customer’s objectives and financial situation.
- (3) The callers did not present themselves as making statements on the basis of their consideration of the customer’s objectives or financial situation. To the contrary, they presented themselves as offering the rollover service on the basis that the calls would not take into account the customer’s individual situation. In my view, this would strongly suggest to the reasonable person that, regardless of whether the callers should consider the customer’s objectives and financial situation, they were not doing so.
- (4) The “financial product advice” was provided free of charge. This fact would raise a doubt in the mind of the reasonable person as to whether the advice provider had considered one or more of the customer’s objectives and financial situation.
- (5) To the extent that the customers identified “objectives”, it occurred during the course of the calls so that the callers did not have an opportunity to consider those objectives prior to making the calls.
- (6) In some cases, the callers revealed a lack of knowledge about the customer’s situation that was inconsistent with a capacity to consider or have considered one or more of the customer’s objectives and financial situation.
- (7) The “social proofing” technique emphasises a comparison between the customer’s reasons and the reasons of others, which is not a comparison involving a consideration of the customer’s particular circumstances.

395 There are matters which, in my view, might lead a reasonable person to think that the “financial product advice” should have been given in circumstances where one or more of the customer’s objectives and financial situation was considered. Examples are:

- (1) The fact that, in Westpac’s view, a customer’s request for advice as to whether to accept the rollover service was a request for personal advice, requiring consideration of matters personal to the customer.
- (2) Westpac’s knowledge that acceptance of the “financial product advice”, particularly by accepting the recommendation to rollover external accounts into a BT account, would be in its interests, because it would increase its FUM, and its further knowledge that it did not know all matters relevant to whether it was in the customers’ best interests to accept the recommendation. As a corollary, it did not know whether its recommendation was in the customers’ best interests.

- (3) Westpac did not know whether the customers that it called had considered all significant issues relevant to whether it was in their best interests to roll over external accounts into their BT account, or even whether they were cognisant of those issues.
- (4) By making the recommendation in an unsolicited call, using an informal style and a structure likely to be perceived as generic, and where consolidation of super accounts had obvious benefits, and by offering to effect a rollover on the telephone, Westpac conveyed the impression to the customers that the recommendation was an obvious and uncontroversial course of action for the particular customer. That impression was arguably reinforced by the “social proofing” content of the calls.
- (6) [sic] The callers’ attitude of helpfulness to be genuine, which reinforced the impression that the recommendation was appropriate for the particular customer.

75 I agree with the primary judge that the caller did not consider the objectives of customer 1 (nor indeed did any caller consider the objectives of any customer) for the purposes of s 766B(3)(a). The caller was following the QM Framework, not taking into account the customer’s objectives. But I do not agree with the primary judge’s conclusion that s 766B(3)(b) was not enlivened. As I have said earlier in dealing with the construction of s 766B(3), it is an error to inject some higher level of analysis or intellectual engagement into the word “considered” beyond that which a usual or ordinary meaning would permit in the context of the exchange or communication in question. That said, the consideration of the objectives of the person is to be taken into account in the giving of the advice.

76 The position from the perspective of the customer, or relevantly, the reasonable person for s 766B(3)(b) can be seen to be different in relation to, at least, the recommendation. It can perhaps be accepted that the reasonable person in the position of the customer would not expect the caller to have considered her objectives in giving the statements of opinion found by the primary judge. They were general statements of opinion that mirrored and reinforced her own view, which could not reasonably be seen to have been made after consideration of the personal objectives of the customer. They were advice of a kind, but general advice: that she could potentially save on fees by consolidation and that consolidation made sense from a management point of view. But such opinions could not reasonably be seen as personal to her, or as considering her personal objectives. I appreciate that the last sentence replaces the elements of the definition with the defined term. But the better view of the definition is that it is directed to a recommendation or opinion that is given, having considered, that is having paid attention or regard to, and taken into account the customer’s personal circumstances, being here her objectives, in formulating and giving the recommendation or the statements of opinion.

The objectives of the customer did not have that relationship with these two opinions, which were general in character, divorced from her characteristics and objectives.

77 The recommendation is, however, in a different position. In one sense, the recommendation might be seen to be based only on the two statements of (general) opinion that were made. Importantly, however, the recommendation can be seen in significant part to arise from the taking of the customer to the point of decision in the call – getting the tax file number and “closing” the consolidation decision. This implied recommendation to accept the service that arises from the whole of the engagement and exchange, including its closing, can be seen to carry with it a further statement of implied opinion that accepting the service will meet or fulfil the stated concerns and objectives of customer 1 – not to lose money by multiple fees and to enhance manageability. It is important not to break up or decontextualize the whole communication or exchange. The correspondence had set the scene for the discussion between financial institution and customer. The call was about consolidation. The call was expressed as one of assistance. The customer was asked to enunciate her concerns. Potential advantages were discussed. The customer’s concerns were explored. Statements of opinion (albeit expressed in terms of potentiality) were made about the advantages. The customer was taken to the point of decision, politely and helpfully, but with the focus and determination reflected in [60] of the primary judge’s reasons, set out at [35] above. The whole exchange, finishing or closing with the decision to take up the service, contained an implied recommendation to accept the service. A reasonable person might (indeed, would) expect the caller to have considered the customer’s objectives about fees and manageability in making the recommendation to go ahead with accepting the service. Another way of putting it, though it does not have to be put this way, is that the recommendation carried with it an implied statement of opinion that the customer’s concerns and objectives would thereby be met and fulfilled. The recommendation took account of, and paid regard to, the customer’s objectives by fulfilling them. That is how the whole exchange would reasonably be perceived from the perspective of the customer, in particular in circumstances where the parties had discussed, indeed the customer had been asked for, her concerns and objectives about the subject of consolidation and the customer is taken to the point of decision.

78 The level and degree of attention to (that is, the level and degree of intellectual engagement with) the personal circumstances of the customer will depend upon the content and context of the communication or exchange. What makes it **personal** advice is that the **customer’s** objectives, or financial situation, or needs have been considered or might be expected to have

been considered (that is, given, or might be expected to be given, relevant attention and taken into account) in making the recommendation or statement of opinion. This is not to ascribe some external notion of causality. Such a construct is unhelpful. What is required flows out of the text of s 766B(3), and the purpose of defining personal advice: that the relevant objectives, or financial situation or needs of the customer (that is the objectives, or financial situation or needs that are in that sense personal to them) be considered or might reasonably be expected to have been considered (that is, given relevant attention and taken into account) in making any recommendation or statements of opinion to the customer. In that way, personal advice is advice (as defined) given after consideration of the personal circumstances (as defined) of the customer.

79 One view of looking at the matter favourably to Westpac is that the whole circumstances should be characterised as if, after being told by the customer that she was concerned with fees eating away at her accounts and with having greater manageability, the caller said: “That is what many of our customers say. As a general proposition, consolidation can potentially save on fees and will generally enhance manageability. For those general reasons I recommend accepting our service”. If that is the correct characterisation of the exchange, it might be seen as a decision brought about by general advice without telling her that there are other important considerations that may bear on her prudent decision. On this view of the matter, the failure to say other things by way of caution (whilst perhaps being otherwise subject of criticism) would not transform the advice, being hitherto general in character, into personal advice.

80 The better and correct characterisation of what happened is, however, that, by making the implied recommendation in the whole exchange and taking the customer to the point of decision, a reasonable person might expect the person’s previously expressed concerns and objectives to have been taken into account and paid regard to, that is, to have been considered, in the making of the recommendation. It is not a question of an absence of a warning transforming general advice into personal advice. Rather, all the circumstances – what was said, what was not said, the tone in, and character of, the call – one of assistance, the call being a follow-up in some cases to an existing engagement by correspondence about consolidation, the existing relationship between financial institution and customer, and the taking of the customer to the point of decision meant that the recommendation could reasonably be seen to have taken up and considered the customer’s objectives and concerns, such that they would be fulfilled and met if the service were taken up.

The other customers

81 I reach the same conclusions about each of the other customers. In respect of each, the caller did not take the customer's objectives into account and so consider them. However, a reasonable person might (indeed would) expect the caller to have considered customer's objectives in making the implied recommendation to accept the service and the implied statement of opinion that accepting the service would fulfil and meet the objectives and concerns of the customer. With that overall conclusion, I will refer to each customer for completeness.

Customer 2

82 The primary judge accepted (at [377]) that the fact that customer 2 was retiring was a matter that constituted or fell within the "financial situation" of customer 2. Respectfully, I disagree. Such no doubt was a factor relevant to customer 2's financial situation, but it is inadequate in my opinion to answer the description of the customer's financial situation.

83 Once again the question is whether the objectives of the customer were considered. Once again this customer indicated that his concern was "to get them all put together", which was relevant to fees and manageability. At [382(2)], the primary judge accepted the following objective of customer 2:

To organise his superannuation in a manner that was most appropriate to the fact that he was retiring.

84 The primary judge considered the exchange with customer 2 at [249]–[252], [260] and [285]–[290], and concluded that a recommendation was made that the customer roll over his external accounts into his BT account and accept the rollover service and that two statements of opinion were made by the caller: that, by rolling over his external accounts into his BT account, he would potentially save on fees; and that it makes a lot more sense to pay one set of fees rather than multiple fees.

85 I agree with this analysis.

86 For the same reasons as concern customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 4

87 The primary judge found (implicitly) at [180], [380] and [382] that customer 4's objectives were to save on fees and to consolidate accounts for better manageability.

88 The primary judge considered the exchange with customer 4 at [254], [260] and [298]–[300] and concluded that a recommendation was made to accept the rollover service and that there were statements of opinion that rolling over the customer's external accounts could possibly save him on fees and may lead to a greater level of manageability by having all accounts in one place.

89 I agree with this analysis.

90 For the reasons that I gave in relation to customer 1, a reasonable person might (indeed would) expect that the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 5

91 The primary judge found at [378], correctly in my view, that the fact that customer 5 had been told by someone at BT that he had an unusually low amount of superannuation for a person of his age was not a matter that constituted customer 5's financial situation because it was merely a statement that amounted to the caller's assessment of customer 5, which may or may not be correct.

92 The primary judge found at [382(6)] that an objective of customer 5 was:

To remedy or ameliorate any issues with his superannuation fund that would mean that he was not achieving the returns that he should or could achieve.

93 The call, set out relevantly at [186], also contained a reference to better management and keeping track of superannuation.

94 The primary judge considered the exchange with customer 5 at [254]–[255], [260] and [301]–[304] and concluded that the caller made a recommendation to accept the rollover service and transfer his funds in external accounts into his BT account and statements of opinion that he may potentially save on fees and that he would increase the manageability of his superannuation.

95 I agree with this analysis.

96 For the reasons that I gave in relation to customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 6

97 The primary judge found (implicitly) at [191], [380] and [382] that customer 6's objectives were to save on fees and to have easier manageability through account consolidation.

98 The primary judge considered the exchange with customer 6 at [254]–[255], [260] and [305]–[315] and concluded that the caller made a recommendation to accept the rollover service and statements of opinion that she may potentially save on fees, partly because her accounts would be organised, that she would reap benefits by consolidating her superannuation and that she would obtain a greater level of manageability.

99 I agree with this analysis.

100 For the reasons given above with respect to customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 7

101 The primary judge found at [382(7)] that the following was an objective of customer 7:

To earn a greater return by creating one bigger pool of funds in his account.

102 The transcript of the relevant parts of the call with customer 7, set out at [197], also records references to avoiding multiple sets of fees.

103 The primary judge considered the exchange with customer 7 at [249]–[252], [256], [260] and [316]–[320] and concluded that the caller made a recommendation to accept the rollover service and statements of opinion that consolidation of customer 7's superannuation into his BT account so that he could pay just one set of fees would potentially result in a larger pool of money and customer 7 saving on fees. The primary judge noted the mention of "better returns" in the call to customer 7 but did not consider that the transcript provided a basis for finding a further implied statement that the rollover may lead to greater returns or alternatively that any relevant statement of opinion did not extend beyond the statements of opinion that her Honour had already found to have been made.

104 I agree with this analysis.

105 For the same reasons as those relating to customer 1, a reasonable person might (indeed would)
expect the caller to have considered the objectives of the customer in making the
recommendation to accept the rollover service.

Customer 8

106 The primary judge found at [382(8)] that the following was an objective of customer 8:

To not lose money from his superannuation account.

107 The relevant parts of this call, extracted at [202], also contain references to saving on fees.

108 The primary judge considered the exchange with customer 8 at [249]–[252], [256], [260] and
[321]–[327] and concluded that the caller made a recommendation to accept the rollover
service and various statements of opinion to the effect that he may potentially save on fees,
perhaps even substantially so.

109 I agree with this analysis.

110 For the reasons expressed above regarding customer 1, a reasonable person might (indeed
would) expect the caller to have considered the objectives of the customer in making the
recommendation to accept the rollover service.

Customer 9

111 The primary judge found (implicitly) at [208], [380] and [382] that customer 9's objectives
were to save on fees and to increase manageability of his superannuation.

112 The primary judge considered the exchange with customer 9 at [257], [260] and [328]–[331]
and concluded that the caller made a recommendation to accept the rollover service and an
implied statement of opinion that customer 9 may save on fees by rolling over his external
accounts into his BT account.

113 I agree with this analysis.

114 For the same reasons I gave with respect to customer 1, a reasonable person might (indeed
would) expect the caller to have considered the objectives of the customer in making the
recommendation to accept the rollover service.

Customer 10

115 The primary judge found at [382(9)] that customer 10 had the following objective:

To ensure that he was in the best performing fund or the best performing fund in respect of which he was a member.

116 The primary judge considered the exchange with customer 10 at [257], [258], [260] and [332]–
[338] and concluded that the caller made a recommendation to accept the rollover service and
an express statement of opinion that having money in a performing fund like BT is always a
good thing and an implied statement of opinion that the sum of two or more accounts will
exceed any individual account when combined in a fund with attractive past performances.

117 I agree with this analysis.

118 For the reasons expressed above concerning customer 1, a reasonable person might (indeed
would) expect the caller to have considered the objectives of the customer in making the
recommendation to accept the rollover service.

119 Customer 10 is unique within the customers discussed. He clearly showed an appreciation in
the conversation of BT being the best returning fund for him. This will be important in any
assessment of the fairness with which he was treated, but does not affect my conclusion as to s
766B(3)(b).

Customer 11

120 The primary judge found at [382(10)] that the following was an objective of customer 11:

To have all his superannuation in the one spot to ensure that he was not losing money
in finance and fees.

121 The transcript of the call with customer 11, relevantly extracted at [219], also contains
references to saving on fees and manageability.

122 The primary judge considered the exchange with customer 11 at [259], [260] and [339]–[345]
and concluded that the caller made a recommendation to accept the rollover service and express
statements of opinion that rolling over superannuation made it a lot easier to manage and save
on costs and that customer 11's decision to consolidate his accounts was a good thing, as well
as an implied statement of opinion that a rollover to his BT account would save on fees. The
primary judge also accepted that two further statements of opinion were implied, namely that
manageability and the prospect of saving on fees provide valid reasons for a rollover, but noted
that these statements were different from the statement alleged by ASIC.

123 I agree with this analysis.

124 For the reasons that I have given in relation to customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 12

125 The primary judge found at [382(11)] and [382(12)] that customer 12 had the following two objectives:

To ensure that he was maximising the amount of interest he was receiving.

To achieve better performance on his superannuation.

126 The primary judge considered the exchange with customer 12 at [259], [260] and [346]–[351] and concluded that a recommendation to accept the rollover service and express statements of opinion were made to the effect that a rollover could potentially save customer 12 on fees, that superannuation was obviously a lot more manageable when it is all in the one place, that customer 12 could start to get the performance he was after by the proposed rollover and an implied statement of opinion that the rollover into his BT account may result in customer 12 having better performing superannuation.

127 I agree with this analysis.

128 For the same reasons that I gave concerning customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 13

129 The primary judge found at [382(13)] that the following was an objective of customer 13:

To ensure that he was maximising the principal sum in his superannuation account and thereby obtain a better return.

130 The transcript of the call with customer 13, relevantly set out at [229], also contains references to manageability and saving on fees.

131 The primary judge considered the exchange with customer 13 at [259], [260] and [352]–[359] and concluded that the caller made a recommendation to accept the rollover service and express statements of opinion that customer 13 may potentially save on fees, that customer 13 could get better performance from his superannuation, and that similarly he could start to get the

performance he wanted, as well as an implied statement of opinion that a better return was an outcome that the customer could achieve by a rollover.

132 I agree with this analysis.

133 For the reasons given with respect to customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 14

134 The primary judge found at [382(14)] and [382(15)] that customer 14 had two objectives, as follows:

To achieve a greater level of performance on his superannuation.

To ensure that he was not losing superannuation by having multiple superannuation accounts.

135 The call with customer 14, relevantly extracted at [235], also records references to manageability and saving on fees.

136 The primary judge considered the exchange with customer 14 at [257], [258], [260] and [360]–[361] and concluded that the caller made a recommendation to accept the rollover service and a statement of opinion that a rollover may lead to customer 14 saving on fees and achieving a great level of manageability.

137 I agree with this analysis.

138 For the reasons given above concerning customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Customer 15

139 The primary judge found at [382(16)] and [382(17)] that customer 15 had the following two objectives:

To ensure that he was not losing superannuation by having multiple superannuation accounts.

To increase his superannuation funds overall.

140 The relevant parts of the calls with customer 15, which are set out at [238] and [239], also refer to saving on fees.

141 The primary judge considered the exchange with customer 15 at [259], [260] and [362]–[365] and concluded that the caller made a recommendation to accept the rollover service and two statements of opinion: that customer 15 could potentially save on fees by consolidating into his BT account; and that consolidation had the benefit of putting all of customer 15’s superannuation in the one place.

142 I agree with this analysis.

143 For the same reasons as those relating to customer 1, a reasonable person might (indeed would) expect the caller to have considered the objectives of the customer in making the recommendation to accept the rollover service.

Conclusions on personal advice

144 For the above reasons, I agree with the conclusion of the primary judge that advice was given by the callers to the 14 customers, but disagree that the advice, in the form of the relevant recommendations to accept the rollover service, was not personal advice, but general advice. It was personal financial product advice.

145 This conclusion is neither forced nor technical. It reflects the substance of the human exchange. An attentive reading of the more prudent content of the PowerPoint presentation set out at [34] above would have told the framers of the QM Framework and the callers of the likelihood of the consequences of a recommendation that may be taken from driving a particular outcome even from, in form in the first instance, general advice, in particular in the manner set out in [60] of the primary judge’s reasons at [35] above.

146 The proposition that the calls were only self-interested marketing, and likely to be seen as such by the customers, should be rejected. The callers in their tone exhibited a desire to help. The content of the calls reinforced that purpose of assistance. The calls were made to existing customers. There was an existing relationship with each customer.

Consequences of the finding of personal advice

147 There being personal advice, there was a clear contravention of the duty to act in the best interests of the customers in making the relevant recommendations to accept the rollover service. This can be seen in the primary judge’s findings about s 912A(1)(a). These findings were made by her Honour on an alternative case that her Honour found open on the pleadings, even if the advice were general. Notwithstanding the context of their making, the findings are

relevant to the failure to act in the best interests of the customers. The primary judge said expressly at [463]–[464] that, if she were wrong in her conclusion that there was no personal advice, she would have found a contravention of s 961B(1), as follows:

463 On the assumption that Westpac’s “financial product advice” was “personal advice”, I am satisfied that Westpac did not act in the best interests of the customers to whom it gave that advice because those interests could only be served by advice as to whether the rollover service was in their best interests. Westpac did not attempt to inform the customers to whom it gave the “financial product advice” whether it was in their best interests to accept the advice. This conclusion is supported by Westpac’s view, recorded in the case study set out at [14] of what would be involved in providing proper personal advice to a customer who sought advice about whether to consolidate external funds into their BT account. There is no difference in the client’s best interests that depends upon whether advice was volunteered in a marketing campaign, or the subject of an express request for advice.

464 Accordingly, if I had found that Westpac gave “personal advice”, I would have concluded that it contravened s 961B(1) in giving that advice.

148 The detailed findings and conclusions on the alternative case on s 912A(1)(a) were contained in [404]–[411] and [431]–[448] of the reasons. They included the following. The callers were coached to structure their calls upon the QM Framework: [404]. The structure was inconsistent with any caller taking any steps to determine whether the rollover service was in the best interests of the customers. The premise of that was that it was not necessary since the advice was general: [406]. Westpac’s approach involved encouraging its customers to accept the rollover service on the basis of the particular “selling points” of manageability and potentially saving on fees. Except to that extent, Westpac did not have regard to the appropriateness of the BT account for the customer or whether they would roll out of a more suitable account: [407]. The objective of the QM Framework was to increase Westpac’s FUM: [409]. The QM Framework encouraged callers to influence customers to roll over involving limited identification of customers’ personal circumstances and without consideration of whether another course may be better suited to the customer: [433]. The conduct, as intended by the QM Framework, comprised an implied recommendation to accept the rollover service without explaining that a prudent customer may wish to consider matters of a kind that would be given if personal advice was sought. Thus the recommendations were made without telling customers about the possible relevant considerations that attend a decision of this kind: [444].

149 In the context of these matters, the primary judge expressed these conclusions at [445]–[448].

445 The QM Framework also involved encouraging customers to accept the rollover service with the use of “social proofing” by which customers were told that their beliefs or reasons were commonly held. The fact that a customer’s belief or rationale was commonly held was not a matter that would have provided a basis for

the recommendation, if it had been given as personal advice. In my view, as it was not a sound basis for decision making, it should not have been used to provide assurance to customers, with a view to influencing them to accept the rollover service.

446 By making the recommendations in an unsolicited call, using an informal style and a structure likely to be perceived as generic, and where consolidation of super accounts had obvious benefits, and by offering to effect a rollover on the telephone, Westpac conveyed the impression to the customers that the recommendation was an obvious and uncontroversial course of action for the particular customer, when that may well not have been the case. The impression was arguably reinforced by the “social proofing” content of the calls. The callers’ attitude of helpfulness also reinforced the impression that the recommendation was appropriate for the particular customer and that there was no possible lack of alignment between the interests of the customers and Westpac.

447 Although Westpac asserted emphatically that the calls revealed its self-interest, Westpac did not explicitly identify its interest in influencing the customers to accept the rollover service. The QM Framework approach was admittedly self-interested and did not necessarily promote the best interests of the customers but the approach did not draw the customers’ attention to either of those matters. Rather, it strongly conveyed the impression that Westpac was assisting the customer by its rollover service and, particularly by “social proofing”, the impression that customers should feel comfortable in accepting the service without giving consideration to their particular circumstances. In fact, as Westpac knew, there were matters (of the kind that would be considered if the “financial product advice” was given as “personal advice”) that, acceptance of the rollover service might have adverse consequences for the customer.

448 While not dishonest, in my view, the matters demonstrate the adoption and implementation of the QM Framework approach failed to ensure that the “financial product advice”, being a financial service covered by Westpac’s AFSLs, was provided “efficiently, honestly and fairly” in contravention of s 912A(1)(a) of the Act.

150 I would express the same matters as follows. The decision to consolidate to some extent to some extent superannuation accounts can be accepted as a straightforward and obvious one. It will enhance manageability and likely reduce the **number** of fees charged by different funds. At which fund the consolidation should take place is not necessarily straightforward or obvious. It depends, in significant part, upon the amount and charging basis of fees in the funds in question. To consolidate into fund A from funds A, B and C may in fact increase fees if funds B or C had lower fee structures than fund A. The decision would also be affected by the character of the funds and their rates of return, historical and anticipated. These factors lead to the conclusion that, while a decision to consolidate may be straightforward or obvious, a decision to consolidate into BT is not straightforward or obvious, and, as a general proposition, could not be prudently made in the interests of the customer without a consideration of the personal circumstances of the customer directed to, at least, comparative fee levels and rates of return of other funds held. A customer might not, of course, want the bother of that analysis and might decide that BT is as good as any fund, especially since Westpac has taken the trouble

to set up a system to help customers consolidate. But customers were not given that choice. They were deliberately encouraged to think that it was a straightforward and obvious decision to consolidate **into BT** on the limited proposition that they may potentially save on fees and would have a more manageable account and on the recommendation to accept the rollover service. Westpac thus intended that these customers make a decision at the conclusion of the exchange and communication, having discussed their concerns and impliedly stated that those concerns would be fulfilled. The information the callers had was inadequate to advise a consolidation into their BT accounts, unless proper consideration was given to the kind of matters to which I have referred in order to give personal advice, unless an informed choice not to seek such personal advice was made by the customer.

151 The above was plainly not acting in the best interests of its customers. The whole approach of Westpac was to obtain an advantage for itself without engaging with the personal circumstances of the customers so as to avoid the consequences of the responsibilities of providing personal advice. It is unnecessary to deal with the question of the distinction between procedure and substance discussed by Moshinsky J in *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345; 122 ACSR 47. That distinction may be seen, perhaps, to be less than of complete utility. Certainly, the detailed text of s 961B(2) and some of the extrinsic material referred to by his Honour makes the distinction relevant. But s 961B(1) expresses a concept flowing out of a relationship of advice. The obligation of a financial advisor to act in the best interests of a client draws on the concepts of fiduciary loyalty commonly resting on persons in such a position: *Daly v Sydney Stock Exchange Ltd* [1986] HCA 25; 160 CLR 371 at 377 and 385. The circumstances that will lead to a conclusion that a provider of personal advice did not act in the best interests of his or her client may be drawn in part from the list of factors in s 961B(2), but the source of equitable faithfulness of the duty in s 961B(1) should also be recognised in the content of the phrase and the possible circumstances of its contravention.

152 From this conclusion that there was a contravention of s 961B(1), it follows that there were contraventions of ss 961K(1), 912A(1)(b) and (c). There being no relevant statements of advice, there were contraventions of s 946A.

153 For the reasons that follow there was also in my view a contravention of s 912A(1)(a).

154 The relevant question for s 912A(1)(a) is whether Westpac did all things necessary to ensure that the giving of any advice was done efficiently, honestly and fairly. This was dealt with by

her Honour as an alternative case on the assumption that personal advice was not given. That was contested on the cross-appeal. Given my view on personal advice the question of the alternative case does not directly arise, though I will come to it later.

155 Westpac submitted that it had taken steps sufficient to meet the ethical standard involved in s 912A(1)(a). I disagree.

156 The primary judge recorded at [401] of the reasons ASIC's case in general terms that Westpac failed to satisfy s 912A(1)(a) by adopting and implementing the QM Framework, through training, encouraging and directing the Super Activation staff to follow the QM Framework in their calls with customers. The case was recorded at [402] as having the following greater specificity, in that Westpac:

(1) adopted and implemented a structure and approach to calls with customers in the Q2 and Q4 campaigns that was liable to lead to the Super Activation staff:

(a) providing personal advice to customers to rollover their external accounts into their BT account; and/or

(b) doing so without taking the following types of steps:

(i) Failed to adequately identify the objectives, financial situation and needs of the customer that would reasonably be considered as relevant to advice on rolling over superannuation accounts, before recommending that the customer roll over any external accounts into their BT account;

(ii) Failed to conduct a reasonable investigation into the financial products that might achieve the customer's objectives;

(iii) Failed to consider the merits of the customer rolling their superannuation account into an existing external account or a superannuation product in which they did not have an account, rather than their BT account;

(iv) Failed to consider or compare the respective features and benefits of the superannuation accounts that were the subject of the rollover;

(v) Failed to make reasonable inquiries to obtain complete and accurate information where information was incomplete, including as to the insurance needs and existing insurance coverage of the customer;

(vi) Failed to assess whether they had the necessary expertise to provide the advice and decline to provide the advice.

(2) Adopted and implemented that structure and approach:

(a) Regardless of the appropriateness of the BT account to the customer, including whether that step involved them rolling out of one or more

external accounts which were better suited to the customer than their BT account; and

(b) Without having any or sufficient details of the customer's external accounts;

(3) Adopted and implemented that structure and approach for the primary purpose and objective of generating an increase in FUM for WSAL, BTFM and or the Westpac Group and, in doing so prefer their own interests and the interests of WSAL, BTFM and or the Westpac Group in generating FUM to the interests of their customers.

157 These paragraphs set out in [402] were taken directly from paras 168 and 162(a) to (f) of the Particulars of Claim that supported the amended originating process and amended concise statement.

158 At [404]–[430] of the reasons, the primary judge made certain findings of fact and discussed the meaning and content of s 912A(1)(a).

159 At [431], [432] and [434] of the reasons, the primary judge identified four ways in which ASIC contended that Westpac had contravened s 912A(1)(a). Two of those ways were premised on the propositions, which her Honour had rejected, and which I have accepted, that use of the QM Framework was likely to lead to the provision of personal advice and that the Super Activation Team did in fact provide personal advice. 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.

160 The third and fourth matters were expressed by the primary judge at [432] and [434] not to be premised on the giving of personal advice, and were as follows:

432 The third matter was that, by the application of the QM Framework, customers were or may have been influenced and advised to accept the rollover service in a manner which took into account limited information about their personal circumstances and which gave no consideration as to whether there was another course of action better suited to the customer.

...

434 The fourth matter was that the implementation of the QM Framework was for the primary purpose and objective of generating an increase in FUM. As explained

above, Westpac accepted that this was its objective.

161 I will here deal with the matter on the assumption that these matters were premised on personal advice being given, as it was.

162 The case was not put by ASIC that the conduct of Westpac was misleading or deceptive or that it was dishonest. But the case was put that Westpac's conduct involved a contravention of s 912A(1)(a), in particular because it was self-interested and exhibited unfairness.

163 It was submitted by Westpac that the matters identified by the primary judge did not establish conduct to the required level of seriousness by reference to what was said in *ASIC v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414; 88 ACSR 206 and *ASIC v Cassimatis (No 8)* [2016] FCA 1023; 336 ALR 209; and that the primary judge, at [448] of the reasons ([149] above), did not engage with the relevant legal test or explain how Westpac's standard of conduct fell short. In my view, the conduct did reach the required level of seriousness, for the reasons to which I will come.

164 In relation to the "social proofing" finding in [445], it was submitted that Westpac never put to customers the fact that their reasons for rolling over were held by others as a basis for their decision-making. That this express statement was not made can be accepted. But what was the point of referring to other customers' views as a deliberate technique? It was plainly to reinforce and encourage the view of the customer, which the caller was trying to move to the point of decision-making and acceptance of the recommendation impliedly made.

165 As to the implied representations and impressions referred to in [446] and [447], Westpac submitted that the primary judge did not identify what parts of the calls gave rise to them and that the findings were not supported by the evidence. I reject these criticisms. The demand for the precise parts of the communications that support the implied representations and impressions reflects an approach of deconstructed particularity which is inapt and inappropriate for evaluating this kind of exchange. The whole of the conversations in tone, structure and content both express and implicit, when listened to, support the findings of the primary judge.

166 It was also submitted that, when giving general advice, a provider who has given a warning under s 949A has no burden or responsibility to explain that the recipient might want to consider other matters which would be relevant if they were seeking or receiving personal advice. It was submitted that to read a more onerous warning into s 912A(1)(a) would be contrary to the statutory intention shown by the warning prescribed in s 949A. It was submitted

that there would be a significant burden on everyday commerce if general advice providers were required to explain to recipients the kinds of matters that would be considered if personal advice were sought. These submissions founder on the finding of the provision of personal advice; but, apart from that, they also set up a rigid dichotomy, when there is none. No such conflict of ss 912A(1)(a) and 949A arises. The provisions apply in an infinite variety of circumstances. Here Westpac sought to influence decisions of people to consolidate their funds with BT. It was the aim of the carefully coached QM Framework **not** to give personal advice, but to market and communicate (by no more than general advice) to influence them to the decision on the call. That decision could not, however, be prudently made without considerations that would be relevant to personal advice, if sought. That decision was impliedly recommended and made to seem by the callers and by the QM Framework to be straightforward and obvious. Even if in each call there was an incantation that satisfied s 949A, that did not immunise the conduct from being characterised as unfair.

167 In my view, the findings of the primary judge at [404]–[411] and [431]–[448] were supported by the evidence, especially the recordings of the exchanges. The evidence also supports the way I have expressed these matters at [150].

168 Do those findings and the provision of personal advice by the implementation of the QM Framework require a conclusion of a contravention of s 912A(1)(a)? In my view they plainly do.

169 The primary judge discussed the history and meaning of the phrase “efficiently, honestly and fairly” at [412]–[430] of the reasons. There was no debate before her Honour as to the principles involved.

170 The phrase has been held to be compendious as a single, composite concept, rather than containing three discrete behavioural norms. That said, if a body of deliberate and carefully planned conduct can be characterised as unfair, even if it cannot be described as dishonest, such may suffice for the proper characterisation to be made.

171 The primary judge’s discussion of the standard of conduct expected by the terms of s 912A(1)(a) at [413]–[429], which I will not set out, was based on ASIC’s submissions and was not contested by Westpac. Whilst it is a helpful exposition, I would reserve for an occasion where the matter was fully argued the question whether the phrase is compendious and, if it is, its meaning and application. In particular, I would reserve my views as to the consequences of

demonstrating unfairness in the provision of financial services and any need for additional ethical failing.

- 172 None of the cases to which the primary judge referred sought to define the phrase. Words such as “efficiently”, “honestly” and “fairly” and a composite or compendious phrase or expression such as “efficiently, honestly and fairly” do not admit of comprehensive definition. Certainly a degree of articulation of instances or examples of conduct failing to satisfy the phrase will be helpful and of guidance, as will an articulation or description of the norms involved.
- 173 The provision is part of the statute’s legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction, but nevertheless an abstraction to be directed to the “infinite variety of human conduct revealed by the evidence in one case after another.” (See Gummow WMC, “The Common Law and Statute” in *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) at 18-19.) By the phrase itself, emphasis must be given to substance over form and the essential over the inessential in a process of characterisation by reference to the stated norm: *Attorney-General (NSW) v The Perpetual Trustee Co (Ltd)* [1940] HCA 12; 63 CLR 209 at 226–227 (per Dixon and Evatt JJ); and Gummow WMC, *ibid.* Care needs to be taken that phrases used by judges in individual cases, in which they explain and articulate their views as to the success or failure in satisfying the norm in s 912A(1)(a), do not become rules to apply as defaults for the proper process of characterisation by reference to the words used by Parliament as to whether a body of conduct satisfied or failed to satisfy the norm.
- 174 The word “fair” in its adjectival form, directed to conduct, includes a meaning of “free from bias, dishonesty, or injustice; that which is legitimately sought, pursued, done, given etc.; proper under the rules”: Macquarie Dictionary. It could hardly be seen to be fair, or to be providing financial product advice fairly, or efficiently, honestly and fairly, to set out for one’s own interests to seek to influence a customer to make a decision on advice of a general character when such decision can only prudently be made having regard to information personal to the customer. For one’s own interests, one is advising generally (on this hypothesis) to bring about a result which may not be in the interests of the customer. The general advice is given to reinforce an assumption that fewer fees (in number) will mean less fees (in amount). 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.

175 The way that the primary judge expressed the matter at [431]–[448] of the reasons (see [148]–[149] above) articulated that unfairness, as does the way I expressed it at [150] above. Perhaps to complete my articulation as to why Westpac might be said to have contravened the section and failed to exhibit the ethical values expected of it, one can summarise the conduct as follows. 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. To that extent, Westpac may be seen to have been intending to take advantage of an assumption that fewer fees brought about by acceptance of the service meant less fees in amount and so a better return. The QM Framework courted the risk of personal advice being given; and it was. I do not intend to be either flippant, or disrespectful, but the perceived importance of the “closing” being over the phone might be seen as not wanting to let the customer out of the showroom or shop. This is not ensuring that financial services covered by its licence were provided efficiently, honestly and fairly.

176 There was a contravention of s 912A(1)(a).

Whether the alternative case on s 912A(1)(a) was run

177 Given my view on personal advice, this does not arise. If I be wrong about personal advice, I do not consider that a true alternative case was pleaded or articulated by ASIC.

178 The Amended Originating Process (the **AOP**) sought declaratory relief against the first and second defendants on the facts stated in the accompanying Amended Concise Statement (**ACS**) that each:

failed 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 section 912A(1)(a) of the Corporations Act.

179 After an introduction in section A of the ACS, Section B entitled “Important Facts Giving Rise to the Claim” contained a brief outline of the case. It was directed to the campaigns, of which there were 37, to contact existing customers by writing and by phone in order to have them roll over funds in external accounts to BT accounts held by them: paras B3 and B4. A description

of the telephone calls, the QM Framework and the Super Activation staff training, encouragement and direction were set out in paras B5 and B6. In para B7 it was stated that ASIC had reviewed sample calls from two campaigns and that ASIC:

contends that in the Sample Campaigns, WSAL and BTFM (through the Super Activation staff following the QM Framework) provided personal advice to customers to roll over their External Accounts into their BT Account and did so regardless of the appropriateness of that advice to the customer and with the primary purpose of generating FUM, thus preferring their own interests to those of their customers.

180 In para B8, ASIC stated its reliance on a sample of calls with 15 customers, one of which sufficed for the ACS. In paras B9–B12, ASIC explained its case in respect of this one (representative) customer. In para B9, the call was summarised. Paragraph B10 contained the allegation of advice for the purposes of s 766B(1). Paragraphs B11 and B12 contained the factual assertion and the conclusion that the caller gave personal advice for the purposes of s 766B(3). No other substantive case was identified in the ACS.

181 Section C of the ACS set out the relief sought, being declarations of contraventions of ss 912A(1)(b), 946A, 961B, 961K, 912A(1)(a) and 912A(1)(c) and a pecuniary penalty under s 1317G(1E) in respect of contraventions of s 961K.

182 Section D of the ACS set out the primary legal grounds for the relief sought. Paragraphs D16–D18 were all expressly founded on the giving of personal financial advice. Paragraph D19 concerned s 912A(1)(a) and was in the following terms:

Relief is sought in relation to s 912A(1)(a) of the Corporations Act on the grounds that WSAL and BTFM adopted and implemented the QM Framework through training, encouraging and directing staff to follow that framework in the manner described at paragraph 6 above, in circumstances where they:

- a. adopted a structure and approach to calls that was liable to lead to the Super Activation staff: (1) providing personal advice to customers to rollover their External Accounts into their BT Account; and (2) without taking steps of the type set out above at paragraph 18;
- b. did so regardless of the appropriateness of the BT Account to the customer, including whether that step involved them rolling out of one or more External Accounts which were better suited to the customer than their BT account;
- c. did so for the primary purpose of generating FUM for the Westpac Group and thereby preferring their own interests and the interests of the Westpac Group in generating FUM to those of its customers,

and, in the premises, failed to do all things necessary to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly.

183 Paragraph D19 is of some importance. ASIC contends that sub-paras (a), (b) and (c) were disjunctive and that the allegations in (b) and (c) were not premised on the allegation concerning personal advice in (a). This is not the only relevant information by reference to which the question may be assessed, but it is a far from pellucid raising of an alternative case. This lack of clear raising of an alternative case is reinforced by section E of the ACS entitled “Alleged Harm” in which it was stated in para E21:

The Defendants’ conduct created the risk that clients were influenced by either WSAL or BTFM to roll out of one or more External Accounts which were better suited to the customer’s personal objectives, financial situation and needs than their BT account, in circumstances where the customer’s circumstances were purportedly being taken into account, and, or alternatively, a reasonable person might expect they were being taken into account.

184 Thus the harm alleged was based on a conclusion of personal financial product advice.

185 The ACS was, of course, not a pleading. It is a document intended by the practice note to give a concise summary of the nature of the case alleged and the central issues involved. Its primary purpose is to facilitate effective case management and preparation for trial or mediation. Here the ACS was supported by a contemporaneous Particulars of Claim (**PoC**) of some 68 pages providing the detail of the case asserted. The ACS and PoC are to be read together to ascertain the issues tendered for trial.

186 Within the PoC, there is in sections B–D up to para 155 a detailed particularisation of each call. The allegation is made in respect of each that personal financial product advice was given by the caller. No alternative case was set out in relation to each caller on the hypothesis that the advice was general.

187 In paras 156 and 157 in section E, the contraventions are asserted. Paragraph 157 is directed to personal advice.

188 Paragraphs 158 and 159 alleged breach of s 912A(1)(b) by the provision of personal advice.

189 Paragraphs 160 and 161 alleged contravention of s 946A by the provision of personal advice.

190 Paragraphs 162–164 alleged contraventions of ss 961B and 961K(2) by the provision of personal advice. These allegations, relevantly predicated on the provision of personal advice, were directed to aspects of the failures which the primary judge found in the third and fourth ways of putting the claim. Sub-paragraphs 162(a) to (f) were the matters (1)(b)(i)–(vi) set out at [402] of the reasons and [156] above. Sub-paragraph (g) to para 162 was as follows:

[WSAL and BTFM] may well have advised the customer to roll out of External Accounts which were better suited to the customer's personal objectives, financial situation and needs than their BT Lifetime Account or BT Business Account.

191 A breach of s 961B was, of course, predicated upon personal advice being provided.

192 Paragraphs 165–170 alleged a contravention of s 912A(1)(a). Paragraphs 167–169 contain the delimitation of the case under s 912A(1)(a). Paragraph 167 alleged that, in ensuring compliance with s 912A(1), Westpac was required to ensure that the Super Activation Team:

- (a) did not adopt a structure and approach to calls that was liable to lead to provision of personal advice to roll over external accounts; and/or providing such advice (that is, personal advice to roll over external accounts) where steps of the type set out in sub-paras 162(a)–(f) (being (1)(b)(i)–(vi) set out at [156] above);
- (b) did not take steps referred to in (a) (thus predicated on personal advice as the two limbs of (a) above were); and/or
- (c) did not implement the approach in (a) and (b) (thus predicated on personal advice) for the primary purpose or objective of generating an increase in FUM and so to prefer Westpac's own interest to the interests of the clients (being a best interests obligation predicated on personal advice).

193 Giving a fair reading to para 167, it is directed wholly to a case predicated on personal advice. The “and/or” within sub-para 167(a) does not detach a case from that predicate. It means, “or providing such advice”, that is personal advice. The “approach” referred to in (c) is that set out in (a) and (b) which both depend, through (a), on a structure and approach liable to lead to personal advice or providing such advice.

194 Paragraph 167 set out the requirements of compliance with s 912A(1)(a) in terms of what was required not to happen: To ensure that the Super Activation Team **did not adopt a structure or approach** likely to provide personal advice or provide personal advice when steps to ensure customers' best interests were not taken, and **did not take such steps** regardless of appropriateness of the BT account to the customer or without having details of their account; and/or did not implement the approach for the purpose of increasing FUM.

195 Paragraph 168 then directly mirrored para 167 in the positive allegations of what **was done** in breach of (sub-paras (a), (b) and (c) of) para 167, specifically stating that Westpac:

- (a) adopted and implemented a structure and approach to calls with customers in the Sample Campaigns that was liable to lead to the Super Activation staff:
 - (i) providing personal advice to customers to roll over their External Accounts into their BT Account; and
 - (ii) doing so without taking steps of the type set out above at sub-para 162(a)–(f);

(This was predicated on the likelihood of personal advice and giving personal advice, as was sub-para 167(a).)

- (b) adopted and implemented that structure and approach:
 - (i) regardless of the appropriateness of the BT Account to the customer, including whether that step involved them rolling out of one or more External Accounts which were better suited to the customer than their BT Account; and
 - (ii) without having any or sufficient details of the customer’s External Accounts;

(The “structure and approach” was that in (a) which was predicated on the likelihood of personal advice and giving personal advice, as was sub-para 167(b).)

- (c) adopted and implemented that structure and approach for the primary purpose and objective of generating an increase in FUM for themselves and the Westpac Group, and in doing so preferred their own interests and the interests of the Westpac Group in generating FUM to the interests of their customers.

(Again, the “structure and approach” was that in (a) which was predicated on the likelihood of personal advice and giving personal advice, as was sub-para 167(c).)

196 Paragraphs 169 and 170 were then conclusory:

By reason of the matters set out in paragraph 168, WSAL and BTFM failed to do all things necessary to ensure that the financial services being provided under their respective licences were being provided efficiently, honestly and fairly as set out above at paragraph 167.

In the premises set out in the preceding paragraph, WSAL and BTFM contravened section 912A(1)(a) of the Corporations Act.

197 The above was the pre-trial structure of issues. ASIC’s case was nailed to the mast of the likelihood of personal advice being given and such advice being given in circumstances where

the best interests of the customers were not attended to. No case that customers were misled was articulated. No case was articulated that, even if personal advice was not likely to be given or was not given, s 912A(1)(a) was contravened for the kinds of reasons discussed earlier.

198 On 10 November 2017, three months before the commencement of the hearing in the first week of February 2018, ASIC filed an outline submissions of 86 pages, including 43 pages of detailed schedules of all the calls. The submissions were signed by senior and junior counsel.

199 In the overview of the case in section 1.1, the following appeared at para 3:

ASIC contends that a number of contraventions of the Corporations Act flow from the circumstances of such conduct, including a failure to comply with the terms of their AFS Licences, and a failure to act "*efficiently, honestly and fairly*". The Defendants' contraventions gave rise to a risk of harm to customers and cannot be described as merely technical or having no consequence. The Defendants' conduct resulted in customers receiving personal financial product advice which did not take into account all of their relevant personal circumstances. Had personal financial product advice been provided in accordance with the requirements of the Corporations Act, it may have resulted in customers being advised to maintain their current fund and take no action or 'roll into' superannuation funds that were in fact more appropriate to their personal circumstances than a BT Account (eg by having lower costs for fees and/or premiums, or to avoid losing part or all of particular types of insurance).

Reasonable advice was the predicate of the overview.

200 After setting out and discussing the statutory provisions, under the heading "3.1 Questions for determination", the submissions stated at para 55:

ASIC alleges that, in respect of all 15 of the Relevant Customers, WSAL or BTFM – acting by way of its agent, the Relevant Staff member – provided "*financial product advice*" that was "*personal advice*" within the meaning of s 766B of the Corporations Act. ASIC alleges this was done by way of telephone conversations with those customers or alternatively telephone conversations with those customers in addition to correspondence with those customers.

201 No question was set out as to any contravention of s 912A(1)(a) if general, rather than personal, advice was given.

202 After a detailed review of the anticipated evidence, section 4 of the submissions dealt with "Breaches Flowing From The Conduct". Sub-section 4.1 was entitled "Breaches by reasons of personal advice", and dealt, as the title suggested, with contraventions so predicated, including the contraventions of s 912A(1)(a). More detailed submissions were then made about s 912A(1)(a) but directed to the legal content of that provision. In that context, and on pp 41 and 42 (of the 43 pages of submissions before the 43 pages of the "Summary of Calls" schedule), the submissions stated the following at para 153:

ASIC alleges that the Defendants failed to act "*efficiently, honestly and fairly*" in contravention of s 912A(1)(a) through training and encouraging Super Activation staff to follow the QM Framework in their calls with customers, which had the consequence of the Defendants:

- a. adopting and implementing a structure and approach to calls with customers that was liable to lead to Super Activation staff providing personal advice to customers to roll over their External Accounts into their BT Account, and doing so without taking the necessary steps required for the provision of personal advice;
- b. doing so regardless of the appropriateness of the BT account to the customer (e.g. it may well have been in the customer's interest to roll over into one of their External Accounts) and without having any or sufficient details of the customer's External Accounts; and
- c. adopting and implementing that structure and approach for the primary purpose and objective of generating an increase in FUM for the Defendants and the Westpac Group, and in doing so preferring their own interests to the interests of their customers.

203 Senior counsel submitted on appeal that sub-paras 153 (b) and (c) contained an alternative case. Set against the ACS, PoC and the whole of the written outline, that is not a fair reading of them. There has been, to this point, no case enunciated of a contravention of s 912A(1)(a) even if personal advice was not likely to be given, or was not given. This conclusion is then reinforced by the paragraphs that follow (155–158), especially paras 155 and 156 which contain specific references to personal advice, albeit paras 157 and 158 were not textually expressly linked to the likelihood of the giving, or the giving, of personal advice.

204 The pre-trial submissions of Westpac of 28 pages, with 58 pages of annexure dealing with the calls, were directed only to a case predicated on the likelihood or fact of personal advice.

205 In its submissions in reply, ASIC set out paragraphs (paras 118 and 119), which senior counsel on appeal emphasised as reflecting an alternative case, as follows:

Thirdly, for reasons already stated, ASIC does not need to prove that customers suffered loss; it is sufficient that the Defendants adopted a practice that preferred their own self-interest in the attainment of greater funds under management at the expense of the customer's interests.

Fourthly, the fact that Westpac was seeking to increase its funds under management (as opposed to, for instance, to put customers in a better position with respect to their superannuation) is very relevant (*cf* DOS, [93]). It is further of relevance that such a position was not made clear to customers. Instead, customers were led to believe that the contrary position was true.

206 However, when these paragraphs are read against the ACS, the PoC and ASIC's submissions in chief, a separate and alternative case does not emerge. This is reinforced by an appreciation of the two preceding paragraphs, 116 and 117:

First, ASIC does not ignore the fact that staff were trained about their obligations in respect of personal versus general advice and that the QM Framework had compliance-related components (*cf* DOS, [90]). The ‘safeguards’ were immaterial in the face of such a systematic departure from the obligations as a holder of a financial services licence that was limited to the provision of general advice.

Secondly, in respect of the asserted ‘limited content’ of what was said to customers, not only was that content not ‘undoubtedly true’ (*cf* DOS, [91]) for reasons already set out, but its limited nature serves to emphasise the fact that a full and proper consideration was lacking once the personal advice threshold had been crossed.

207 The matter was called on for hearing on 5 February 2018. Senior counsel for ASIC opened the case on that day. The opening by senior counsel for ASIC was, if I may respectfully say, very clear. It would lengthen these reasons inordinately to set out too much of their content. The following extracts suffice:

DR RENWICK: ... may I just spend a couple of minutes summarising what the case is all about before diving into the detail and summarise it this way.

...

At the heart of the case, we say, are subsections (1) and (3) of section 766B of the Corporations Act[.]

...

Now, of course, Westpac is perfectly entitled to give financial product advice. It’s perfectly entitled to maximise its earnings, but that’s subject to, in this case, the terms of its licences, that is to say, they could give general, not personal, advice. And we say that’s what the real issue in this case is. Was there general advice? Was there personal advice? And that turns on subsection (3).

...

And so once the line is crossed from general to personal there’s a necessary breach of the Westpac licence because they weren’t authorised to give personal advice. There’s a necessary breach of the financial services laws. There’s a failure to provide a statement of advice, a failure to act in the best interests of the client and so on. And, furthermore, we say the overall circumstances mean that Westpac failed to comply with the compendiously expressed obligation to act efficiently, honestly and fairly, and I will explain in accordance with the authorities what that means.

Critically, we will say that the callers weren’t saved from crossing the line from general to personal by providing the general advice warning. Well, that’s obvious enough. They’re not saved also by using, in the context of this case, the word “potentially” and nor are they saved by the concept of “social proofing”, which I will come to in a minute. But this is the idea that, “Look, lots of people do it,” or, “Everyone is doing it,” or, “Many people say they have similar concerns.” That doesn’t mean it’s not personal advice. Indeed, we would say that is an inherent part of the implied recommendation.

Now why does all this matter and it’s not merely a technical breach? Because, of course, it’s not just a binary choice for the customer to stay where they are or rollover to BT or Westpac. They have many other options in the marketplace. And the legislation is there to ensure that they, if the line is crossed, they get such advice as

they wish to inform them, even if they're about things which may appear obvious or even banal. Take the question of fees, and no doubt my learned friend will say, "Everyone wants to save on fees."

...

So paragraph 162 is important to your Honour because we say that conveniently sets out what they – that the customers would have got from a personal adviser, but did not get from Westpac because it took the view that what it was providing was general advice. And I will let your Honour read that, but we say that's important.

HER HONOUR: Yes.

DR RENWICK: And then finally, in relation to the efficiently, honestly and fairly allegation, we set out what the bank did not or what the defendants did not do but should have done and the consequences and the like. So that's the position there in relation to the what we say are, pretty obviously, the pleadings in this case.

208 Properly read in context, the whole of the opening address was directed to a case based on the likelihood, or the fact, of the provision of personal advice. No part of the opening was directed to, or addressed, a case that, if the primary case was not made out and the advice given was general, there was still a contravention of s 912A(1)(a).

209 In final oral address senior counsel said the following in commencing:

DR RENWICK: ... could I just make three points to begin with. So we say, fundamentally, what has happened here is, first, there has been highly sophisticated sales techniques used which were designed to be in the best interests of the defendants and not the best interests of the customers. That's point 1. Secondly, the techniques were used to personalise the call with the customers, uncover their personal objectives, financial situation or needs, then consider them, and then present the customers with express or implied opinions and recommendations favouring a rollover to BT.

...

Then there is section 766B(1) and whether there was financial product advice, and in light of the concessions now made by Mr McHugh, we say really the issue is whether there was a recommendation or statement of opinion, and of course we say that consistently with the authorities set out in our submissions, it's clear that's what happened. The third issue, of course, is what we say is the key issue, namely, was there personal advice, and whether seen objectively or subjectively within the meaning of subsection (3), and the fourth is what consequences follow.

Again there was no articulation, least of all a clear articulation, of an alternative case based on ASIC failing on the issue described above as "the key issue".

210 In his oral address, senior counsel for Westpac began as follows:

MR McHUGH: ... The central issue in the case is whether in making any of the 15 calls Westpac or BT gave personal advice within the meaning of the statute[.]

211 Shortly thereafter the following exchange with the primary judge took place:

MR McHUGH: ... Now, the first point is this is not in any of its dimensions a case about misleading or deceptive conduct or anything like that, and the question of whether or not there was a basis for what is called a social proof is totally irrelevant to all of the issues that arise under section 766B.

HER HONOUR: But the question of fairness under 912A(1) might be about misleading or deceptive conduct.

...

MR McHUGH: ... As to the point your Honour just raised with me, no part of the particularised case in relation to 912A is that there was no basis for the social proofs. That was never part of the case particularised against my client. Particularised over hundreds of paragraphs. No part of the case at all, and we are dealing with a civil penalty case here in which the regulator is appropriately held to the case identified and articulated in the particulars.

[in discussing the question of fees]

MR McHUGH: ... That is the very thing that ASIC – although ASIC went beyond that in its website. It said you will save on fees. But that is a truism. It is never conveyed to these people who are the customers that they will save on fees. It's just not a fair interpretation of the interaction at all, particularly bearing in mind that this generally comes about as a result of a question asked by the Westpac caller of the person on the phone: "What was important to you? What was your reason?" "Well, saving on fees", and against that background where the customer is already thinking that way, the Westpac person says, "Well, potentially saving on fees is something a lot of my people – a lot of my customers" ---

HER HONOUR: Well, another way of doing that would be to say, "Caution. You might think that that might happen, but we've got to tell you" - - -

...

MR McHUGH: But, your Honour, this case is not about another way of doing things, nor is it about whether it's attractive to do what was said. The question is, was there personal advice being given. So this whole discussion we're having demonstrates the point I was making before: this issue about the social proof and whether or not there's a basis for it is not actually part of the case that's brought against me.

HER HONOUR: Well, you will have to show me the particulars of 912(1)(a), but I do tend to accept at the moment that this is about 912A(1) or whatever it is and not about 766B.

MR McHUGH: Yes. And in relation to 912A it is not in there that there was no basis for the social proof. Your Honour, we can come to it later, but it's – your Honour finds them at what is page 66 of the particulars document itself.

[Page 66 of the particulars document contained paras 163–167 of the PoC.]

[There then commenced on exchange between senior counsel for Westpac and the primary judge about the extent of the case under the PoC.]

MR McHUGH: So it's 66 at the top, I think, and it's in the court book 81. Your Honour sees paragraph 167. The complaint in A is that we didn't adopt a structure – or I should say my clients didn't adopt a structure that resulted in them not giving personal advice, and then B, didn't take the steps regardless of the appropriateness, including of one of the accounts.

HER HONOUR: Hang on. Just let me read A. I see. All right. B. Yes.

MR McHUGH: So then these are what, it's said, should have been done in discharge of the duty, and then B, nothing to do with the topic of whether there was a basis for the social proofs. C, your Honour sees it's to do with funds under management. And then 168 appears to be just the converse of 167. 167 says you should have done this; 168 says this. So where do I find in that document an allegation that my client misled customers by giving a social proof for which there was no empirical basis? It's just not part of a case that I'm here to meet. So that's my first point about that aspect of it, but I want to return to the point I was making a minute ago about whether, in fact, in relation to the matters that are the subject of the case there was a basis, and if your Honour goes in the transcript on the second day to page 129 ---

[Senior Counsel then discussed the evidence said to justify their "social proofing statements".]

...

MR McHUGH: ... So my point is this is an entire issue which should not have been raised and which is a red herring that distracts your Honour from the issue in the case, the central primary issue in the case which is concerned with section 766B.

212 At no point in the oral address in reply did senior counsel for ASIC say that Westpac had misunderstood the case made against it and had taken an overly narrow view of the matter.

213 Nevertheless, all the matters in the third and fourth way of putting the case were part of the case in circumstances where personal advice was found to be given. They take their place in my conclusion as to s 912A(1)(a).

Orders

214 The appellant should bring in draft short minutes providing for the appeal to be allowed, the cross-appeal to be dismissed, and appropriate declarations and orders in place of those made by the primary judge.

I certify that the preceding two hundred and fourteen (214) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.



Associate:

Dated: 28 October 2019

Annexure A

Customer 1 (caller AA)

149 Caller AA called customer 1 on two occasions on 1 October 2014.

...

156 On 3 October 2014, in the course of the Q4 campaign, caller AA called customer 1 twice, at about 11:22am and 11:58am.

157 By the time of the first call, customer 1 had not communicated any decision to BTFM that she wished to roll over her superannuation from any external accounts into her BT account (except in relation to superannuation held in any ATO accounts). She had merely requested that a free superannuation search be conducted on her behalf.

158 The following portions of the transcript which recorded the first call are relevant:

CALLER: ... Look, it was just a quick courtesy call regarding your BT Superannuation account, we've just had some superannuation search results.

[...]

We've got some results here we'd like to help you bring them over to your account to potentially save you on fees.

[...]

So before we continue I do need to let you know ... everything discussed today is general in nature, it won't take into account your personal financial needs. Is that okay?

C1: All right, yeah, not a problem.

CALLER: Now, before we get started can I ask you a few quick questions so I can help you.

C1: Yeah, yeah.

[...]

CALLER: So what was the main reason you asked us to look for your superannuations?

C1: Because I know I've got a few out there [...] and I wanted to roll it all into one.

CALLER: Right, and what did you see as the main benefits of bringing them altogether to the one place?

C1: Just – well, like you said, fees, it's the whole thing. [...] Because they're all over the place and I got little bits here and little bits there, so you lose those.

CALLER: I see, yeah, right, right. So it sounds like manageability and also the saving on the fees, potentially. Is that right?

C1: Yeah, yeah.

CALLER: Fair enough, no worries. Look, they are the two main reasons our

clients do like to bring their supers together, it does make a lot more sense from a management point of view, for sure.

C1: Yeah.

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

159 For the second call... :

CALLER: Yeah, I'm good, [C1]. Did you manage to grab that tax file number?

C1: Yes, I've got the number.

CALLER: Fantastic. Now before you give it to me I'll just let you know that the call's being recorded [...] and everything discussed today is general nature, won't take into account your personal financial needs. Is that okay?

C1: Yeah, all good. All good.

[Caller AA proceeded to recite the various superannuation funds that had been found. C1 indicated then that she thought one fund from "Catholic School" seemed to be missing.]

C1: ... No Catholic school?

CALLER: No.

C1: Okay.

CALLER: Yeah. Did you – if you have the account details of that one you could actually just send it to me via email and I can...

C1: Yeah, all right. I'll have a – I'll have a look. I probably haven't got anything in there.

CALLER: Oh, I see, that's probably why, but – it could have been potentially swallowed up by fees and that's why it hasn't turned up in the search.

[AA proceeds to arrange the rollover.]

CALLER: Great, not a problem at all, [C1]. Just to recap, I'll process the – your request in the next 10 minutes. You'll get a confirmation email from us. [...] And everything gets rolled over in two or three weeks, so it's all in the one spot and nice and organised for you. How does that sound?

C1: Yes, sounds good. [...]

Customer 2 (caller AA)

160 Caller AA called customer 2 on 1 October 2014.

...

169 The following portions of the 1 October 2014 call are relevant:

CALLER: Look, [customer 2], I'm calling about your BT Lifetime Super Account that you have here with us. [...] Yeah, just a quick courtesy call today

to see how you're tracking and also to go through your superannuation search results and potentially save you on fees by bringing them over to your account here.

[...]

CALLER: Now, look, before we continue we'll need to let you know the call is being recorded and everything discussed today will be general in nature and won't take into account your personal needs. Is that okay?

C2: Yeah it is. [...]

CALLER: So, what was the main reason you asked us to look for your supers? Hello?

[...]

C2: Yep, that's [indistinct] I'm retiring, mate, and I just need to get them all put together.

CALLER: Oh, I see, I see. And, you know, what do you personally see as the main benefits of bringing all your supers into the one account?

C2: Yeah, the fees, easy to manage, I suppose, and all that.

CALLER: Okay. So saving on those fees and – that'd be the most important factor for you, would you say?

C2: Yeah, that's right.

CALLER: Fair enough. No worries. Look, you're not alone there. Most of our customers say the same thing. It does make a lot more sense to pay, you know, only one set of fees, potentially, and – rather than multiple so – now, what we can do for you today is we can actually help you bring all your accounts over to your BT account over the phone and do it all electronically. It saves you from having to do any forms and that way you can start potentially saving on those fees. Is that something I can do for you today?

C2: Yes.

[...]

CALLER: All right, fantastic. Now do you know roughly how much you might be bringing over from those two other accounts?

[...]

CALLER: Look, just to recap, I'll process your rollover in the next five minutes. You'll get a confirmation email. Everything gets rolled over into your BT Lifetime Super account in the next two or three weeks so it's all in the one spot so you start potentially saving on those fees. How does that sound?"

Customer 4 (caller FF)

176 Caller FF called customer 4 on 7 October 2014.

...

180 The following portions of the 7 October 2014 call are relevant:

CALLER: I'm calling in relation to the super account that you've got with us. [...] You asked us to do a search for you to find any other super accounts that you've got out there.

C4: Yeah, that's right.

CALLER: Yeah. So, we've got the results and I'm ringing to see if we can combine it all for you--

C4: Yeah.

CALLER: --and possibly save you on time and fees.

C4: Yeah.

CALLER: Now, just before I continue I need to let you know that anything we discuss is general in nature and won't take into account your personal needs and objectives.

C4: Yep, no worries.

[...]

CALLER: Great. And so I can make the most of your time, do you mind if I go through a few questions with you?

C4: No, that's fine.

CALLER: That's okay. So what was your reason for wanting to find your other superannuation accounts?

C4: To cut down on fees and stuff, just have them all in one place where I can look at it and manage it, I guess.

CALLER: Okay. You wanted to save on fees and also be able to see what you've got as well and manage better?

C4: Yeah, that's right.

CALLER: That's okay, that's fine. [...]

[...]

CALLER: Okay, great, thank you, all right. So we found one account at AustSafe. Did you have any other super accounts apart from that one?

C4: No, not that I could remember, no.

CALLER: Okay, that's fine. So what we can do is we can combine that AustSafe account into your BT account. [...] It's a very simple process to do that. All we need is your tax file number [...] play you two legal recordings and then from then on we'll act on your behalf and organise it all for you.

[...]

CALLER: So I'll play you the last recording. So this one allows us to do everything for you over the phone [...] and we don't have to fill out any paperwork.

[...]

CALLER: All right, great. So I'll organise to have that done for you. And did you know roughly how much you had in that account?

[...]

CALLER: Great [indistinct] also organise everything combined for you and hopefully will make it a bit easier for you to manage and you'll save on things like fees as well.

Customer 5 (caller DD)

181 Caller DD called customer 5 on 2 October 2014.

...

186 The following portions of the 2 October 2014 call are relevant:

CALLER: [...] The reason for my call today is in regards to your superannuation account with BT. [...] I'm calling to touch base to see how everything is going with it for you and to see if I can help you combine the super we found through the super search you've initiated, to potentially save you on some fees.

[...]

CALLER: Now, before I go any further, I will let you know that this call is recorded for quality and training purposes.

[...]

CALLER: And anything you and I discuss today is general in nature and does not take into account your personal needs, goals or objectives. Is this okay?

C5: Yep, no worries.

CALLER: Now, so that I can focus on what's important to you today, is it okay that I ask you some questions in regards to your superannuation?

C5: Yeah.

CALLER: Excellent. What was the reason that you set up the super search with us?

C5: I originally called to find out some details about my account and the person I spoke to suggested I do it because there was a – it was an unusually low amount for someone my age apparently. [...] So he set up the search for me.

CALLER: Right, okay. [Customer 5], how many superannuation accounts are you aware of that you've got out there?

C5: I had thought I had already put them into one but I must have missed a couple.

[...] I decided to consolidate everything but I had a lot of other employers before then [...]

CALLER: So do you think you may have multiple accounts with us?

C5: I don't think I have multiple accounts with you but I think when I consolidated them with you guys, I thought that was the one that my employer

had set up for me but I'm not sure it was.

CALLER: Sure, well, I can definitely have a look at that for you.

[Conversation follows about the different superannuation funds customer 5 is a member of]

CALLER: Now, in terms of that account, I can definitely help you and combine it all in the one place. What was the reason that you wanted to put all your super altogether?

C5: Just to keep track of it, like you said, you lose it here and there, you forget which accounts you've got.

CALLER: So it's pretty much for the management of your superannuation. Is that right?

C5: Yeah, just to keep track of it.

CALLER: Perfect, okay.

C5: Easier.

CALLER: Now, [customer 5], in terms of that super fund, I can definitely help you with. All I need from you today would be the tax file number because I already have the account number for Australian Super.

[...]

CALLER: So, just to recap the call, what's going to happen from here is I'm submitting the rollover request for you now.

C5: Yeah.

CALLER: All your super is going to come into the one place from the next two to four weeks, for easy management for you.

Customer 6 (caller AA)

187 Caller AA called customer 6 on 3 October 2014.

...

191 The following portions of the 3 October 2014 call are relevant:

CALLER: Look, today I'm calling about your BT Lifetime superannuation account. Are you happy with us? [...] Just a quick courtesy call today and also to go through your superannuation search results and potentially save you on fees by bringing them over to your account.

[...]

CALLER: Now, just before we continue do you mind if I ask you a few quick questions so I can best help Sure.

CALLER: Great. So what was the main reason you asked us to look for your supers?

C6: Well, I've got a few floating around, I just thought it would be easier and save fees and that if I just put them all together.

CALLER: Okay, rightio. So you mainly wanted ... to have that easier manageability and also potentially save on fees.

C6: Yeah.

CALLER: Those are the most important things for you when it comes to your super at the moment?

C6: Yeah.

CALLER: Yeah, fair enough, not a problem. Looks, that's one of the – they're probably the two main reasons that our clients do like to consolidate. It definitely makes a lot of sense from a logical standpoint. So what we can do for you today is actually go through your supers and actually bring them all over to your account so you can start potentially reaping those benefits. How does that sound?

C6: Okay, cool, yeah. [...]

CALLER: So I can see here that we found for you one account only, so Hostplus. You mentioned that you [...] had a few. Were you aware of any others?

C6: I'm not sure. I've had a few jobs, I'm not sure if even paid me super but.

CALLER: I see, I see. Well, look, if you didn't work for them for very long there might not have been too much in there which may have potentially been eaten up by fees.

C6: Yeah.

CALLER: So that's probably why we only found the one. [...]

CALLER: So did you know roughly how much you might be bringing over from your Hostplus account by any chance just as a rough ...

C6: No idea.

CALLER: Okay. Can you remember who – which of your employers used that account?

C6: Yeah, it was the Big Group.

CALLER: Okay. And how long were you with them for?

C6: Maybe eight months or something.

CALLER: Eight months full-time?

C6: No, casual.

CALLER: I see, I see, not a problem at all. [...]

CALLER: Just to recap I'll process your rollover in the next 10 minutes. Everything gets rolled over – sorry, you'll get a confirmation email and it all comes into your account in the next two or three weeks so it will all be in the one spot, nice and organised and you potentially start saving on those fees. How does that sound?

Customer 7 (caller AA)

192 Caller AA called customer 7 on 20 November 2014.

...

197 The following portions of the 2 October 2014 call are relevant:

CALLER: Hi there, [caller AA] calling from BT Financial Group I'm looking for [customer 7], please.

C7: Yes, speaking.

CALLER: Hey, [customer 7], how are you today?

C7: Good, how are you?

CALLER: I'm good, thanks for asking. Look, I was just calling about your BT Lifetime superannuation account - - -

C7: Sure.

CALLER: - - - that you've got here with us. So just a quick courtesy call with you today to check in with you to see how you were going and also we did a superannuation search on your behalf recently and we'd just like to go through the results with you and help you organise your supers by combining them to your account.

C7: Excellent.

CALLER: All right. Now, before we continue with that [customer 7] I will just let you know the call is has been being recorded for quality and training and everything we discuss today is general and won't take into account your personal and financial needs. Is that okay?

C7: No problem.

CALLER: Okay, great. And so I can best help you and make the most of your time, can I ask you a few questions, please.

C7: Sure.

CALLER: All right, [customer 7], so what was the main reason that prompted you to ask us to look for your supers?

C7: The usual reasons. You know, I guess you get more interest - - -

CALLER: Mm.

C7: - - - when you've got more money in there, I guess.

CALLER: Okay, fair enough. So that's something that a lot of our client say. Is that – so basically one of the main reasons was to bring it all together to create a bigger pool of money to potentially get performance out of it. Is that right?

C7: Yeah, and I heard the other day that you can also – I guess you pay costs for each one you have so you reduce the costs to one super.

CALLER: Okay. So it sounds like you just wanted to pay one set of fees and avoid multiple sets of fees.

C7: Yeah.

CALLER: Yeah, fair enough though. Again, one of the other main reasons our clients like to consolidate. So what we can do for you, we'll help you bring across your other supers today and that way you can just pay that one set of fees and you've got potentially a larger pool of money where you can get a potentially better return from. How does that sound?

C7: Very good.

CALLER: All right. Now, I'll just get you to confirm for me your date of birth and address so we can talk about your account.

[...]

CALLER: Yeah, too easy. Now, the only thing that we need from you today to get your verbal consent to do the consolidation for you over the phone is your tax file number. So did you have that on hand today?

C7: Yes, I do.

CALLER: Okay, great. So don't give it to me just yet because I will need to play you a legal script first. Now, keep in mind any insurances on that account we're bringing over will be cancelled upon transfer. Are you okay with that?

C7: Sorry, what was that?

CALLER: Any insurances that you have on the other account that you're bringing across to your BT account will get closed when – once it transfers over so any insurances will be cancelled. Is that okay with you?

C7: Yeah, yeah.

[...]

CALLER: All right, thanks for that. Now, did you know how much you might have in you SuperTrace funds?

C7: SuperTrace, what's that? The other one?

CALLER: No, no, this is just the one that we found for you that I'm rolling over today. Do you know how much you've got in it?

C7: No, wouldn't have a clue.

CALLER: Okay. You wouldn't remember which employer might have used that account by any chance?

C7: Where was I, I was - so you've got all the Logicalis and Netstar Networks, I'm guessing. The one before that was Memorex Telex.

CALLER: Okay.

C7: Before that was Mitsui Computers.

CALLER: Okay. And were they all going into that one or you're just listing off all your previous employers at the moment?

[...]

CALLER: All right, great, all right. So just to recap for you, [customer 7], I'll

process this to rollover in the next five minutes, you'll get a confirmation email and everything comes across to your account in two or three weeks and it's all under the one roof and you've got a larger pool of money there to potentially get you better returns in the future.

Customer 8 (caller AA)

198 Caller AA called customer 8 on 2 October 2014.

...

202 The following portions of the 2 October 2014 call are relevant:

CALLER: Hi, it's [caller AA] calling from BT Financial Group. I'm looking for [customer 8], please.

C8: Speaking.

CALLER: Hi, [customer 8]. How are you today?

C8: Good.

CALLER: That's good. Look, [customer 8], I'm calling about your BT Lifetime superannuation account that you have here with us.

[...]

C8: It's a – it's an employee one, yeah, okay.

CALLER: That's the one, yes. So look, I'm just calling about your – yeah, just – sorry, so a quick courtesy call today and also to go through your superannuation search result and potentially save you on fees by bringing over any accounts you might have into your BT account.

CALLER: Before we continue, [customer 8], I will let you know the call is being recorded [...] and everything discussed today is general, won't take into account your personal needs. Is that okay?

C8: Okay, that's fine.

CALLER: Fantastic. And look, so we can best help you today do you mind if I ask you a couple of quick questions before we get started?

C8: Go right ahead.

CALLER: All right. So what was the main reason you asked us to look for your superannuations?

C8: To rollover other funds.

CALLER: Oh, okay, so you wanted to bring them all together.

C8: Yeah.

CALLER: And what did you see personally as the main benefit of bringing all those other accounts together?

C8: Well, I don't know if it's – it's just mainly to centralise or basically to have – instead of having all those different accounting fees and all of that, just [indistinct] a month, and you can have one accounting fee out of it and - - -

CALLER: Sure, sure.

C8: - - - go from there.

CALLER: Yeah, absolutely. So it sounds like saving on fees, that's the main thing for you - - -

C8: Yeah.

CALLER: - - - better than the multiple sets.

C8: Oh, yeah. Well, you know, you've got three or four - I've got - oh, got more than three or four, but the amount that I have, yeah, it's just, yeah, not being - this money being - going out the door.

CALLER: Yeah, yeah, exactly. Look, a lot of our clients say the same thing about their supers. You know, if they've had a lot of funds opened for them in the past by their employers, you are potentially paying multiple sets of fees, so it definitely makes a lot of sense from a logical standpoint.

C8: Okay.

CALLER: Now, [customer 8], what we can do for you today we can go through your results, see how many we've found for you - - -

C8: Yes.

CALLER: - - - and then we can actually help you bring them all over into your BT account over the phone.

C8: Okay. Can you just – can you just hang on a minute? I've got to just ask my wife something.

CALLER: Sure thing.

C8: Okay. If you found an MLC one, we don't want that to come over.

CALLER: Right, okay, not a problem at all.

C8: Everything else you found can come over.

CALLER: Sure thing. Not a problem at all. So as I was saying, we can help you do that all verbally - - -

C8: Yes.

CALLER: - - - over the phone, saves you from having to fill out multiple forms.

C8: That would be good.

CALLER: And, you know, you can start potentially saving on fees once it comes over. How does that sound?

C8: How many did you find?

CALLER: Sure. So look, before we go through those results I will need to ask you for your full name, date of birth and address –

[...]

CALLER: [...] Not a problem at all. Now, with those six other accounts that

I'm bringing over - - -

C8: Yes.

CALLER: - - - so I'm not bringing any of the MLC stuff over - - -

C8: Yeah.

CALLER: - - - with those six other accounts do you know roughly how much might be in them at all?

C8: Oh, look - - -

C8: Well, I know that the Essential Services has about 11 grand, 10 or 11 grand.

CALLER: Okay, yes, yes.

C8: The two – the one at the rollover place doesn't have a huge amount. I think it's sort of five or six hundred, I can't remember, a couple of thousand in them.

CALLER: Okay. And what about the CBUS and all the AMP accounts?

C8: The AMP, I can't remember.

C8: I can't – yeah, I can't remember either.

CALLER: Okay. No worries.

C8: The CBUS account, I don't know, was it around four?

C8: Yeah.

C8: I don't remember.

C8: The – yeah, it was - - -

C8: I'd have to look them all up.

C8: Between - - -

C8: I've got them somewhere.

CALLER: Oh, no, that's okay. No, it's all good. I just need an estimate.

C8: Does that sound right?

CALLER: Oh, you're asking me?

C8: Yeah.

C8: Yeah.

CALLER: Oh, look, I have no idea. Like, all I see is what fund it's coming from and the account number. I know – I know nothing about it.

C8: Oh - - -

C8: Oh, okay..

[...]

CALLER: It's all good. Well, just to recap I'll process the rollover in the next 10 minutes, you'll get a confirmation email, everything gets rolled over into your BT business super account in two or three weeks, so all your super's in the one spot and you start potentially saving on those fees. How does that sound?

[...]

Customer 9 (caller CC)

203 Caller CC called customer 9 on 16 June 2014.

...

208 The following portions of the 16 June 2014 call are relevant:

CALLER: Hi, my name's [caller CC]. I'm calling from BT Financial Group hoping to speak with [customer 9].

C9: Yes, speaking.

CALLER: How are you today?

C9: I'm good, thanks.

CALLER: That's good. I was giving you a call in regards to your BT super account set up by your employer, Sportingbet Australia.

C9: Yes, yes.

CALLER: Is now a good time to speak with you about that?

C9: Yeah, that's fine.

CALLER: Excellent. I've got to let you know the call's recorded for training and quality purposes and anything discussed is general and doesn't take into account your personal needs. Is that okay?

C9: Yeah, that's fine.

CALLER: Excellent. Now – a product specialist here at BT and the purpose of the call was to help you understand and organise your super. Now, just so I can get an understanding of where you're at with your super, do you mind if I ask you a few quick questions?

C9: Sure.

CALLER: Excellent. So what was your experience of super before BT?

C9: Not much.

CALLER: That's fine. Did you have any other accounts before BT?

C9: My previous employer had one set up with Suncorp.

CALLER: Suncorp. And how have you gone in rolling in that other account into BT?

C9: I have been thinking about rolling it into the BT one for a while, but I've been too lazy to do it.

CALLER: No, that's fine. The reason I ask is we actually do it for you

electronically over the phone, so you don't have to do any paperwork.

C9: Oh, good.

CALLER: Yeah. So for us to do that we need a tax file number and the member number of your other super. Do you have that on you at all?

[...]

CALLER: All right. What I'm going to do, I'm going to send you a consent email in the next half an hour. What you need to do is just copy and paste the bolded text and send it back to me, because that will give me the consent to do the rollover, and then the money will come across in three to four weeks. Does that all make sense?

C9: Yes.

CALLER: Excellent. So I'll do that now. Okay, all right. If I send it in to you in about half an hour, when do you reckon you'll be able to reply with your consent?

C9: Within about half an hour after receiving it.

CALLER: Half an hour, great. And what did you see as the benefit of combining your super into BT?

C9: Well, just fees, I guess.

CALLER: Yeah, look, a lot of the customers I speak to like the fact that by combining your super you could potentially save on fees, as you've just mentioned, and also the fact that, you know, it's a little easier to manage because you've got it all there in one account, especially you can log on to the online portal and check your - check your balance through there.

C9: Yeah, absolutely.

CALLER: Okay.

C9: Yeah. [...]

CALLER: No worries. I'll get that done now. If you have any questions you'll have my email but as I said, and just to summarise, you just need to copy and paste the bolded text, send it back to me, and then it will roll in within three to four weeks and then hopefully you could potentially save on some fees. Okay.

Customer 10 (caller AA)

209 Caller AA called customer 10 on 29 October 2014

...

211 The following portions of the 29 October 2014 call are relevant:

CALLER: Hi, [customer 10], it's AA calling from BT Financial Group. How are you today?

C10: Yeah, not bad thanks.

CALLER: That's good to hear. Look, I was just calling today about your BT Business Super account - - -

C10: Yeah.

CALLER: - - - that you've got here with us, yeah. So it's just a quick courtesy call today to go through your superannuation search results and help to organise all your superannuations by bringing over all those accounts to you.

C10: Yeah.

CALLER: Great. Now, before we continue I will just let you know the call is being recorded for quality and training purposes and everything discussed today will be general in nature and won't take into account your personal financial needs. Is that okay?

C10: Yeah, that's cool.

CALLER: Great. And so we can best help you, do you mind if I start by asking a few quick questions, please.

C10: Yeah.

CALLER: All right. So what was the main reason you asked us to look for your supers?

C10: I just needed – wanted to get them all into the one account. Yours was the only one that was giving sort of an interest.

CALLER: Oh, I see. I see, fair enough. And how did you feel that combining all your supers together would help you in your future financial goals?

C10: Oh, just because, like I said, yours was the only sort of making money so I figured best to get it all into the one account.

CALLER: Right. So would it be fair to say that performance of the fund would be the most important thing for you?

C10: Yes.

CALLER: Definitely, definitely. And, look, I see a lot of our clients here combining for the very same reason, to have a bigger amount in the account and they are attracted also to the past performances that our accounts have been able to yield for our clients, so that's always a good thing. Now, what we can do for you today, we can go through your results and we can help you bring them all over to your account. We can do that all over the phone which means we can get your account all nice and organised and you can avoid doing those forms. How does that sound?

C10: Sounds good.

CALLER: Great, all right. So first of all we'll need to ask you for your full name, date of birth and address please so we can freely through your account.

[...]

CALLER: Right, okay. Would you happen to have access to the member numbers by any chance?

C10: I do. If you give me a sec I'll find the - - -

CALLER: Great.

C10: - - - paperwork for it.

CALLER: Sure thing. And with this account did you know roughly how much was in the Australian Super by any chance?

C10: The Australian Super?

CALLER: Yeah.

C10: I think that one had, like, three grand, four grand in it or something.

CALLER: Okay. And what about your AUSfund?

C10: I think it's only got, like, \$300.

[...]

CALLER: Great, all right. So just to recap for you, I'll process your request in the next 10 minutes or so and you'll get a confirmation email from us and everything gets rolled over to your BT account in the next two or three weeks so it's all in the one place for you and hopefully starts working hard for you for your retirement.

Customer 11 (caller AA)

212 Caller AA called customer 11 on 18 September 2014.

...

219 The following portions of the 18 September 2014 call are relevant:

CALLER: Hi there, it's AA calling from BT Financial Group, looking for [customer 11], please.

C11: Yeah, that's me, matey. [...]

CALLER: Look, [customer 11], I'm calling about your BT corporate superannuation account that was opened [...] for you by your employer..

C11: Yes.

CALLER: Now, the reason why we've called is to – just a quick courtesy call today to see how you're going with the account but also to go through your superannuation search result and help you bring them over to your BT account to potentially save you on fees.

C11: Mm'hm.

CALLER: Yes. So look, before we continue I do need to let you know the call's being recorded for quality and training purposes and everything discussed is general and won't take into account your personal needs. Is that okay?

C11: All good, man.

CALLER: Oh, right, no worries. Now, so I can get up to speed with your situation can I ask you a few quick questions, please?

C11: Yeah.

CALLER: All right. So what was the main reason you asked us to do the super

search?

C11: I do have multiple accounts, like, super accounts from past employers and that sort of stuff, so ---

CALLER: Yes.

C11: --- was looking at getting them all consolidated into one.

CALLER: Right, right. And do you know roughly how much - how many you might have had?

C11: At last count I probably had about six different ones, I believe.

CALLER: Okay, fair enough. And personally what do you see as the main benefits of bringing them all together to the one place?

C11: The – basically that, having it all in the one spot and -.

CALLER: Mm.

C11: – not losing money in finance – in fees and that sort of stuff –

CALLER: Sure.

C11: – on accounts that aren't being added to.

CALLER: Yeah, for sure, for sure. It definitely makes sense. So basically manageability and saving on the fees?

C11: Mm.

CALLER: Yeah, fair enough. Look, that's probably the main reasons that most of our clients like to do that.

C11: Mm'hm.

CALLER: It's just a lot easier to manage it, you said, and also you're saving costs, and it is your retirement savings at the end of the day.

C11: Yes.

[...]

CALLER: Now, I can see here that we found four supers for you, so we have an Australian Super, Prime Super, AMP and Sun Super. So you said that you had six. Now, were those other two accounts maybe with employers that you were only with for a few months or-

C11: Not sure, mate, 'cause I – like I was on the Westpac site and I did – looking at the super transfer thing on there.

CALLER: Yes.

C11: And that search came back with - I'm pretty sure it was six –

CALLER: Right.

C11: – potential accounts. But I mean there could have been a couple that weren't mine, I'm not sure how it works. [...]

CALLER: Okay, fair enough. Well, look, we normally do a bi-annual search

for our clients for their other supers, so if we do dig up anything we will let you know. But for now we can help you bring over the four supers that we found for you.

C11: Mm'hm.

CALLER: The only thing we'll need from you to do that so you can start potentially saving on those fees is your tax file number.[...] And just to let you know as well, any insurances on the other accounts will get cancelled once you bring them across to your BT account. Is that okay?

C11: Yeah, I don't think – the other accounts, mate, I don't think I've had anything in them for quite some time now, so it's just sort of dwindling away with fees and charges.

CALLER: No. Yeah, look, that's a pretty common story we hear from a lot of our clients. [...] So it's good that you're getting it all together. How much do you think you've got in those other accounts, by the way?

C11: I think if I added them all up it was about \$20,000.

[...]

CALLER: Well look, just to recap, I'll process your rollover in the next 10 minutes. You'll get a confirmation email and it will all get rolled over into your BT business super account but – yeah, sorry, in the next two or three weeks.[...] It will all be in the one spot, nice and manageable for you. Does that sound good?

Customer 12 (caller AA)

220 Caller AA called customer 12 on 7 October 2014.

...

226 The following portions of the 7 October 2014 call are relevant:

CALLER: Look, [customer 12], I'm calling today about your BT Business Superannuation that you have here with us.

C12: Yeah.

CALLER: Just a quick courtesy call today and also to go through your superannuation search results to potentially save you on fees by bringing them over to your account.

C12: Okay.

CALLER: All right, fantastic. Now, before we go on I do need to let you know the call's being recorded and everything discussed today will be general in nature and won't take into account your personal financial needs. Is that okay?

C12: Yeah, that's fine.

CALLER: Fantastic. Now, before we get started do you mind if I grab – sorry, ask you a few quick questions so I can best help you today?

C12: Yeah, sure.

CALLER: Great. Now, what was the main reason you asked us to look for

your supers?

C12: Well, I just need to consolidate - - -

CALLER: Right.

C12: - - - the accounts that I've got hanging around everywhere.

CALLER: Okay. And in terms of consolidating, what sort of benefits did you see for yourself in doing that?

C12: I just think that I'm not gaining any interest by having accounts in other - having money in other accounts sitting there and stuff.

CALLER: So you're really for potentially better performance. That's the main thing for you?

C12: That's right.

CALLER: Right, not a problem at all. Look, that is one of the main reasons that our clients say they like to consolidate and also obviously it's a lot more manageable when it's in the one place as well. Now, what we can do for you is we [c]an actually go through your superannuation search results today and help you bring them all over to your account verbally over the phone - - -

C12: Right.

CALLER: - - - so you start to potentially get that performance that you're after. Is that something we can do for you?

C12: It is but I'm just working now and I probably can't for another probably two hours or so if that's okay with you.

[...]

CALLER: Not a problem at all. Now, did you know roughly how much might be in those other accounts just as a rough estimate?

C12: 12 grand, 15 grand.

CALLER: 2 to 15, thanks for that.

C12: Yeah.

Customer 13 (caller AA)

227 Caller AA also called customer 13 on 7 October 2014.

...

229 The following portions of the 7 October 2014 call are relevant:

CALLER: Hi there, it's [caller AA] calling from BT Financial Group. I'm looking for [customer 13], please.

C13: Yes, that's me. [...]

CALLER: Look, [customer 13], I'm calling you today about your BT Business Superannuation account that you have here with us.

C13: Yes, yep.

CALLER: Yep, just a quick courtesy call today to go through your superannuation search results and potentially save you on fees by bringing them to your account.

C13: Right.

CALLER: All right, perfect. Now, look, before we continue I will need to let you know that the call is being recorded and everything discussed today will be general in nature and won't take into account your personal financial needs. Is that okay?

C13: Yeah, no worries.

CALLER: Great. And before we get started, do you mind if I ask you a few quick questions so I can best help you today.

C13: Yeah.

CALLER: Sure. So, [customer 1], what was the main reason you asked us to look for your supers?

C13: Yes, yeah, I did.

CALLER: And what was the main reason for that?

C13: Well, I'm aware that I've got super – different supers from previous employments.[...]

CALLER: And what did you personally see as the main benefits of bringing all your supers together?

C13: Well, put them all in one large – or one larger sum and get a better return from them, I suppose.

CALLER: Oh, okay. So it sounds like performance is the main thing for you. Is that right?

C13: Yes, yeah, that's right.

CALLER: Fair enough. Well, look, yeah, that is one of the main reasons that our clients like to consolidate their supers, along with the fact that obviously it's a lot more manageable when it's in one place, you're not chasing it everywhere.

C13: Yeah, that's right.

CALLER: And potentially you are saving on fees, depending on if you are paying fees on the other accounts so -.

C13: Yeah.

CALLER: What we can do, we'll go through your super results and we can actually help you bring them together over the phone today using a verbal request.

C13: Okay.

CALLER: And that way you've got all your accounts in one place so you can potentially start getting better performing on that. How does that sound for you?

C13: Yeah, good. [...]

CALLER: So I see here that we've found only one account for you. It's a REST account. Does that sound familiar?

C13: Yes, that is.

CALLER: Right. You mentioned that you had at least two.

C13: Well, yeah, I might - I think I might have had one Hostplus [...]

CALLER: Oh, I see and was it just for, like, a part-time or casual job?

C13: Yes.

CALLER: Yeah. Potentially that could have been eaten up by fees but if it is still around we do a bi-annual search of our client's super accounts.

[...]

CALLER: Now, did you know roughly how much you might be bringing over from your REST account?

C13: No, I've got no idea really.

CALLER: Okay, not a problem at all. Do you know how long you were working for the employers that was using that account?

C13: Yeah, about four years, I think.

CALLER: Four years. And was that full-time?

C13: Yes.

CALLER: Okay, not a problem at all. And roughly what was the salary that you had back then?

C13: Would have been, like, 35,000, I think.

CALLER: 35 over four years, okay, so it's about 10 to 12 thousand dollars I would say in that account.

C13: Yeah, hopefully.

CALLER: Potentially any performance on top minus any fees.

C13: Yeah.

[...]

CALLER: Well, just to recap, I'll process your rollover in the next 10 minutes and you'll get a confirmation email from us and everything gets rolled over in the next two or three weeks so it's all in the one spot, it's nice and organised potentially getting that performance you want.

Customer 14 (caller CC)

230 Caller CC called customer 14 on 29 August 2014.

...

235 The following portions of the 29 August 2014 call are relevant:

CALLER: Hi, my name is [caller CC]. I'm calling from BT Financial Group. I was looking to speak with [customer 14]?

C14: That's me. [...]

CALLER: I was giving you a call in regards to your BT Super account set up by your employer, Castle Trading Corporation.

C14: Yeah, okay. [...]

CALLER: I've just got to let you know, the call is recorded for training and quality purposes and anything discussed is general and doesn't take into account your personal needs. Is that okay?

C14: Yeah, sure.

CALLER: Excellent. Now, the purpose of the call was to see how you're going with understanding and organising your BT account. Now, just so we can make the most out of our time, [customer 14], do you mind if I ask you a few quick questions?

C14: Sure.

CALLER: Excellent. So before BT, what was your experience with superannuation?

C14: Not too sure, to be completely honest I don't really understand too much of it. [...] It's whatever my, you know, employee would – whatever they recommended, that was it, you know.

CALLER: Sure, and [customer 14], how many other super accounts do you think you have out there?

C14: I know I definitely have another one and I'm trying to get that sorted out now but I know there's definitely one more out there.

CALLER: Okay, well, look we can actually help you consolidate your super, [customer 14], if that's what you want to do and we actually do it over the phone so it's quite easy and it saves you time doing the paperwork. Now, what did you see as the benefit of combining your super into one account?

C14: Yeah, I would definitely want to merge it, yeah, definitely.

[...]

CALLER: Now, I mean what did you see as the benefit though of putting your accounts together rather than having two?

C14: It's easier to keep track of it I guess, you know, like, the – you know, you see those ads on TV all the time about lost super and all this sort of stuff and I think it eventually just goes to the government or something, so I wouldn't want that to happen.

CALLER: Okay, great, not a problem. Yeah, look a lot of the customers I speak to like the fact, you know, as you said, by combining your account it's a little easier to manage. You'll get one statement and [...] you'll know exactly where your money is and how much you've got. Also the fact that you could potentially save on fees, so say if you had three accounts out there, you could potentially pay multiple sets of fees rather than just the one there.

C14: Yeah.

CALLER: Yeah, is saving fees important to you, [customer 14]?

C14: Yeah, definitely, yeah.

CALLER: Excellent.

C14: I mean, you're paying for nothing basically if you got multiple accounts kind of out there, yeah.

CALLER: Yeah, look that's completely fine. Look, what I need from you to do the rollover though is the ANZ member number and a tax file number. Now, when do you think I'll be able to contact you again and we can do the rollover? It'll take five minutes.

[...]

CALLER: How much do you reckon you've got on your ANZ account, do you have a rough idea?

C14: I have no idea to be completely honest.

CALLER: Well, how long have you been working for, would you say? How many years?

C14: I've been working for, you know, over 10 years, yeah.

CALLER: Okay, not a problem. You could potentially have a fair amount out there, so look, more than happy to help you roll it all in and help and then you could potentially save on some fees and it'll be a little easier to manage, as you mentioned before.

C14: Yeah, for sure. [...]

CALLER: Well, as I said, I'll call you Monday, I'll just grab the tax file number and the member of ANZ. We'll roll it all in, it'll take three to four weeks to come across and then, as I said, potentially save on some fees there.

Customer 15 (callers DD and EE)

236 Customer 15 received two calls from the Super Activation Team: on 23 June 2014, from caller DD, and on 15 October 2014, from caller EE.

...

238 The following portions of the 23 June 2014 call are relevant:

CALLER: Hi, my name is [caller DD]. I'm calling from BT Financial Group. May I please speak to [customer 15]?

C15: Speaking. [...]

CALLER: [Customer 15], the reason for my call today is pretty much to see how you are going with your super account and to see whether I can potentially help you save on some fees by combining any other super that you've got out there.

C15: Yeah, yeah, that's what I – actually, I'd like you to do that, but the problem is I don't know where my super is. You know, I've changed that many jobs over the last few years.

CALLER: Okay, sure. [customer 15], before we do go ahead with the call, I do need to let you know that this call is recorded for training and quality purposes and anything discussed today is general in nature and does not take into account your personal circumstances. Is that okay?

C15: Yeah.

CALLER: Okay, great. So, [customer 15], what I can do is I can have a look whether we've had any super match details for you, but before I do that I do need to identify you.

[...]

C15: So, [customer 15], is it okay if I ask you a few questions just so that you can get a better understanding of your account so I can better help you?

CALLER: Yeah.

C15: Fantastic, thank you. [customer 15] what was your experience with super like before this account was opened for you?

CALLER: What was it - what, sorry?

C15: What was your experience with super like before this account was opened for you?

CALLER: With super?

C15: Yeah.

CALLER: What, the other places I've been with?

C15: Yeah. You were saying that you've had quite a few. Is that right?

CALLER: There's a few out there, yeah, yeah.

C15: Mm'hm.

[...]

CALLER: And how long was that that you were self-employed for and you didn't pay in your super?

C15: 17 years.

CALLER: [...] And how long have you been employed and that super has been paid for you?

C15: Since 2002, maybe something before, not sure. There would have been, yeah, there would have been the odd couple of jobs before that actually.

CALLER: Okay. And how much approximately do you think you would probably have had in your super?

C15: I've got no idea.

CALLER: Considering it's nine per cent - sorry, 9.25 per cent of super going into it at the moment.

C15: I've got no idea, no idea.

CALLER: Okay.

C15: Could be up to 10,000 or more, I don't know. I really don't know.

CALLER: Okay. Well, [customer 15], we can definitely - I can definitely help you out with that. Do you have a pen and paper at all? [...] Okay. So what you will need to do is you will need to call the ATO on 13 10 20 [...] with your tax file number handy, and what they will be able to do is they will be able to do a super search for you. They will provide you with the fund name and member number, and once you obtain those details I can actually give you a call back and complete the rollover for you so that, you know, you can have all your super in one place.

C15: Okay then, great.

CALLER: What do you see as the benefit of combining all your super?

C15: Well, I'm not losing money anywhere else.

CALLER: Yeah.

C15: And plus I can roll it over into (indistinct) wanted to get an increase in my money taken out. I don't know if I can do that or not, you know, add more super to myself.

[...]

CALLER: Okay. [Customer 15], well, I'll be giving you a call tomorrow at 5.00, and if you do like to consolidate the other separate accounts that you do find with the Australian Tax Office, I'll be able to help you with that.

C15: Yeah, I will.

CALLER: Ok.

C15: I will for sure.

239 The following portions of the 15 October 2014 call are relevant:

CALLER: Good afternoon. Once again it's [caller EE] from BT Financial Group Superannuation. Am I speaking to [customer 15]?

C15: Yes, you are.

CALLER: And first of all, I just need to let you know the call is recorded for training and quality purposes. Is that okay? And any advice or information discussed with you is of a general nature and does not take into account your own personal goals, needs or objectives there. So, yeah, [customer 15], yeah, so basically, do you – just to make the most of your time there, if I could just ask you a couple of questions. Now, did you request some time ago with us to try and find your super? Is that right?

C15: Yes.

CALLER: Yep, okay then, sure. So at BT here, we've gone and we've got a report here now to let you know what we've actually found in terms of other super.

[...]

CALLER: And what do you see the benefits yourself in combining them into one fund rather than having multiple super funds?

C15: Well, I'm not getting any money by leaving them somewhere else. They're just taking money off me so I may as well put it all in one.

CALLER: So from a fee point of view, important there.

C15: Sorry?

CALLER: From a – potentially, you know, the fees side of it.

C15: Yeah, the fees, yeah, that's right.

CALLER: Yeah. So that's what many of my clients mention, yes, having the one super potentially can save on those fees. But, [customer 15], I can check that report now and just check to see what we've found for you when we've done a search.

[...]

C15: Now, I've actually found - just having a look now at your account, when we did the search we only found three other super funds that you had.

[...]

CALLER: But what we do is we can look at closing those down or you, we'd cancel any insurance cover that may be in existence with those two funds. Sometimes they have an insurance where premiums come out. We just close them down, shut them down altogether and get them rolled. We just deal directly with those super funds and within one to four weeks we can get those rolled over for you and then potentially save on those fees that you mentioned were important. [...]

[...]

CALLER: I can help you with these three, get these rolled over for you.

[...]

CALLER: Okay then. [customer 15], so are you happy for me to close those three supers and roll them to BT?

C15: Yeah, that's fine.

REASONS FOR JUDGMENT

JAGOT J:

215 I consider that ASIC’s appeal should be allowed and Westpac’s cross-appeal should be dismissed. Westpac’s conduct involved the giving of financial product advice and personal advice to its superannuation customers and, in acting as it did, Westpac contravened various provisions of the *Corporations Act 2001* (Cth). My reasons follow.

Financial product advice – s 766B(1)

216 It may be accepted that, as Westpac submitted, the defined term in s 766B(1) of the Corporations Act is “financial product advice” and that the word defined, if it has an ordinary meaning, may influence the interpretation of the definition: *Rennie Golledge Pty Limited v Ballard* [2012] NSWCA 376; (2012) 82 NSWLR 231 at [129]. In s 766B(1), “financial product advice” means a recommendation or a statement of opinion, or a report of either of those things, that is either intended to influence a person in making a decision in relation to a financial product or could reasonably be regarded as being intended to have such an influence. Accordingly, a recommendation or statement of opinion necessarily involves something that is capable of influencing a person about a financial product. To go further, as Westpac seeks, and to say that the communication as a whole must be capable of being characterised as “advice” in its ordinary meaning is to go too far.

217 As the primary judge said at [83], the terms “recommendation” and “statement of opinion” have been interpreted broadly and include an implicit recommendation or statement of opinion: *Australian Securities and Investments Commission (ASIC) v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [364]-[366]. While it is necessary to consider whether a recommendation or statement of opinion was made in the context of the whole of the relevant communication, a recommendation or statement of opinion may be found by reason of the whole or any part of the communication. It is not necessary, as Westpac would have it, for the whole of the communication to bear the character of an advice for the statutory definition to be satisfied.

218 The dichotomy which Westpac seeks to establish in this case between advertising and marketing on the one hand and advice on the other hand is unhelpful. It is true that all advertising and marketing is intended to influence the listener to acquire the provider’s products but that advertising and marketing is not necessarily advice. 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. As the primary judge found at [47], while the customer would assume that Westpac was making the call to the customer self-interestedly, the customer would also assume that Westpac was making the call in the customer's interest.

219 Contrary to Westpac's submissions, the overall context of the calls was not contrary to the primary judge's finding that Westpac made implicit recommendations in each of the calls that customers should rollover their other superannuation into their existing BT superannuation accounts. What Westpac describes as mere marketing and not advisory in character, in fact, ignores the relevant context from the perspective of the customer. As noted, there was an existing relationship between Westpac and each customer. Each customer already had a BT superannuation account. Westpac was thus already responsible for part of the customer's superannuation. In each call there was an emphasis (usually repeated) by the caller from Westpac on helping the customer in relation to their superannuation. The purpose of the call was to enable the caller to complete the transaction by the customer agreeing to Westpac consolidating their superannuation accounts as part of the call.

220 Customer 1 was told that "we'd like to help you bring them [the other superannuation accounts] over to your account to potentially save you on fees". The customer was asked what benefits they saw in combining their superannuation and their answer was reinforced by the caller saying "[s]o it sounds like manageability and also the saving on fees, potentially. Is that right?". The customer was then told manageability and potentially saving on fees were the two main reasons Westpac's clients "do like to bring their supers together" and "it does make a lot more sense" to do so "from a management point of view, for sure".

221 Customer 2 was told the call was to "see how you're tracking and also to go through your superannuation search results and potentially save you on fees". The customer was asked why they wanted to combine their superannuation and what they saw as the main benefits of so doing. Having answered fees and easy to manage, the customer was told that they were not alone, most customers say the same thing and "[i]t does make a lot more sense to pay...only

one set of fees, potentially” and that Westpac could help by doing the rollover over the telephone saving the customer from having to do any forms “and that way you can start potentially saving on those fees”.

222 Customer 4 was told that Westpac had the results of their super search and the caller was ringing to see if “we can combine it all for you...and possibly save you on time and fees”. When the customer said they wanted to combine their superannuation accounts the caller said “[y]ou wanted to save on fees and also be able to see what you’ve got as well and manage better”. When told that was right the caller said “[o]kay, great” and that “what we can do is we can combine that...account into your BT account” by a very simple process and that having “everything combined for you and hopefully will make it a bit easier for you to manage and you’ll save on things like fees as well”.

223 Customer 5 was told the caller was calling to touch base to see how everything was going with their superannuation “and to see if I can help you combine the super we found...to potentially save you on some fees”. The customer was also told that “all your super is going to come into the one place from the next two to four weeks, for easy management for you”.

224 Customer 6 was told it was a quick courtesy call and “to go through your superannuation search results and potentially save you on fees by bringing them over to your account” and that “what we can do for you today is actually go through your supers and actually bring them all over to your account so you can start potentially reaping those benefits” and that “everything comes into your account in the next two or three weeks so it will all be in the one spot, nice and organised and you potentially start saving on those fees”.

225 Customer 7 was told that the caller wanted to go through the customer’s superannuation search results and “help you organise your supers by combining them to your account” and that “so I can best help you and make the most of your time” the caller had a few questions. When the customer said in response to the question about what had prompted them to have the search undertaken was the “usual reasons” and to get more interest if there was more money, the caller said “[o]kay, fair enough. So that’s something a lot of our client say. ...so basically one of the main reasons was to bring it all together to create a bigger pool of money to potentially get performance out of it. Is that right?”. When the customer then mentioned reducing the costs to one super, the caller said that again, that was one of the main reasons “our clients like to consolidate. So what we can do for you, we’ll help you bring across your other supers today and that way you can just pay that one set of fees and you’ve got potentially a larger pool of

money where you can get a potentially better return from”. The customer was told “everything comes across to your account in two or three weeks and it’s all under the one roof and you’ve got a larger pool of money there to potentially get you better returns in the future”.

226 Customer 8 was told it was a courtesy call and to go through your superannuation search results “and potentially save you on fees by bringing over any accounts you might have into your BT account”. The caller told the customer “a lot of our clients say the same thing [as the customer] about their supers. You know, if they’ve had a lot of funds opened for them in the past...you are potentially paying multiple sets of fees, so it definitely makes a lot of sense from a logical standpoint” and that the customer could “start substantially saving on fees once it comes over” and that everything would be rolled over in two to three weeks “so all your super’s in the one spot and you start potentially saving on those fees”.

227 Customer 9 was told that the purpose of the call was “to help you understand and organise your super”. When the customer was asked what they saw as the benefit of combining their super and answered “just fees, I guess” the caller said “[y]eah, look, a lot of the customers I speak to like the fact that by combining your super you could potentially save on fees...and also the fact that, you know, it’s a little easier to manage because you’ve got it all there in one account” and that the rollover would take place in three to four weeks “and then hopefully you could potentially save on some fees”.

228 Customer 10 was told it was a quick courtesy call to go through your superannuation search results and “help to organise all your superannuation by bringing over all those accounts to you”. When the customer responded to a question about the benefits of combining their superannuation by saying “yours was the only sort of making money so I figured best to get it all into the one account” the caller said “[d]efinitely, definitely. And, look, I see a lot of our clients combining for the very same reason, to have a bigger amount in the account and they are attracted also to the past performance that our accounts have been able to yield for our clients, so that’s always a good thing. Now, what we can do for you today, we can go through your results and we can help you bring them all over to your account. We can do that all over the phone which means we can get your account all nice and organised and you can avoid doing those forms. How does that sound?”. The caller also said “I’ll process your request in the next 10 minutes or so and you’ll get a confirmation email from us and everything gets rolled over to your BT account in the next two or three weeks so it’s all in the one place for you and hopefully starts working hard for you for your retirement”.

229 Customer 11 was told it was a quick courtesy call “to see how you’re going with the account but also to go through your superannuation search result and help you bring them over to your BT account to potentially save you on fees.” When the customer said in response to a question that they wanted to have their superannuation all in one spot the caller said “[y]eah, for sure, for sure. It definitely makes sense. So basically manageability and saving on the fees?”. When the customer said the other accounts were dwindling away with fees and charges the caller said “Yeah, look, that’s a pretty common story we hear from a lot of our clients. [...] So it’s good that you’re getting it all together”. The caller also said “[y]ou’ll get a confirmation email and it will all get rolled over into your BT business super account but – yeah, sorry, in the next two or three weeks.[...] It will all be in the one spot, nice and manageable for you. Does that sound good?”.

230 Customer 12 was told it was “a quick courtesy call today and also to go through your superannuation search results to potentially save you on fees by bringing them over to your account”. When the customer responded to a question about why they wanted to consolidate their superannuation accounts by saying that they were not gaining interest by having money sitting in other accounts, the caller said “[s]o you’re really for potentially better performance. That’s the main thing for you?”. The customer responded “[t]hat’s right” and the caller then said “[r]ight, not a problem at all. Look, that is one of the main reasons that our clients say they like to consolidate and also obviously it’s a lot more manageable when it’s in the one place as well. Now, what we can do for you is we [c]an actually go through your superannuation search results today and help you bring them all over to your account verbally over the phone... so you start to potentially get that performance that you’re after. Is that something we can do for you?”.

231 Customer 13 was told it was a “quick courtesy call today to go through your superannuation search results and potentially save you on fees by bringing them to your account”. When the customer responded to a question about the benefits they saw to consolidating their superannuation by saying “get a better return” the caller said “[o]h, okay. So it sounds like performance is the main thing for you. Is that right?” and “[f]air enough. Well, look, yeah, that is one of the main reasons that our clients like to consolidate their supers, along with the fact that obviously it’s a lot more manageable when it’s in one place, you’re not chasing it everywhere” and “potentially you are saving on fees, depending on if you are paying fees on the other accounts”. The caller said “[w]hat we can do, we’ll go through your super results and we can actually help you bring them together over the phone today using a verbal request” and

that “that way you’ve got all your accounts in one place so you can potentially start getting better performing on that. How does that sound for you?”. The caller also said “I’ll process your rollover in the next 10 minutes and you’ll get a confirmation email from us and everything gets rolled over in the next two or three weeks so it’s all in the one spot, it’s nice and organised potentially getting that performance you want”.

232 Customer 14 was told “the purpose of the call was to see how you’re going with understanding and organising your BT account” and “we can actually help you consolidate your super, [customer 14], if that’s what you want to do and we actually do it over the phone so it’s quite easy and it saves you time doing the paperwork”. When the customer said in response to a question that it would be easier to keep track of their superannuation if it was combined the caller said “[o]kay, great, not a problem. Yeah, look a lot of the customers I speak to like the fact, you know, as you said, by combining your account it’s a little easier to manage. You’ll get one statement and [...] you’ll know exactly where your money is and how much you’ve got. Also the fact that you could potentially save on fees, so say if you had three accounts out there, you could potentially pay multiple sets of fees rather than just the one there”. The caller also said “[y]ou could potentially have a fair amount out there, so look, more than happy to help you roll it all in and help and then you could potentially save on some fees and it’ll be a little easier to manage, as you mentioned before” and “[w]e’ll roll it all in, it’ll take three to four weeks to come across and then, as I said, potentially save on some fees there”.

233 Customer 15 was told the purpose of the call was to see how “you are going with your super account and to see whether I can potentially help you save on some fees by combining any other super that you’ve got out there”. Customer 15 was then asked a series of questions about the customer’s experience with superannuation, length of self-employment, how much the customer had in superannuation, and was told that the caller could “definitely help you out with that” by combining the superannuation accounts. The customer was asked what benefits they saw in combining their superannuation and had their answer repeated back to them “[s]o from a fee point of view, important there”. The customer was told this was what “many of my clients mention, yes, having the one super potentially can save on those fees”. This was repeated on the basis that if the customer accepted the service “we can get those rolled over for you and then potentially save on those fees that you mentioned were important”.

234 The idea that these calls were mere marketing by Westpac in its self-interest is unsustainable. Equally unsustainable is Westpac’s position that it was merely offering a service to the

customers and no more. Westpac's callers were at pains to convey the impression that they were acting to help the customers by providing a service that the customers *should accept in their own interests*, that is, consolidating the customers' other superannuation accounts into their BT accounts. The callers did this, as the primary judge found, by (in some cases repeated) implicit recommendations to the effect that, as it were, it went without saying that accepting the service was in the customer's interest. The general advice warning that each caller gave to each customer at the beginning of each call in no way changed the message that was being consistently conveyed. Nor did the fact that the calls followed letters sent to each customer that Westpac also characterised as "marketing" make any difference. Those letters were themselves more than mere marketing. They were part of a sophisticated campaign intended to encourage customers into believing that it was in their interests to consolidate other superannuation accounts into their BT superannuation account.

235 The clear message conveyed by the callers in each call was that Westpac was calling to help the customer by providing them with a service that would be in the customer's interest to accept. 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. Accordingly, the primary judge's conclusion at [260] that each customer received a recommendation that that they should rollover their external accounts into their BT account is unassailable.

236 Westpac submitted that the logic of the primary judge's approach was that every financial product issuer would provide financial product advice whenever it produced advertising or marketing materials highlighting the benefits and attractive features of its products which were intended to influence recipients to acquire them. I disagree. The context of the present case is quite different from that which Westpac describes. Westpac was not engaged in mere marketing highlighting the benefits of its superannuation products. If s 766B(1) requires a communication having the character of advice as opposed to nothing more than a recommendation or statement of opinion with the requisite intent, then the unavoidable conclusion is that Westpac's calls in fact involved advice. The form of the advice was subtle but its content was unmistakeable, that it would be in the customer's interest to consolidate their other superannuation accounts into their BT account in circumstances where Westpac could not possibly have known how the customer's best interests in respect of their superannuation would be served.

237 The fact that Westpac was not a disinterested or neutral party but was the issuer of the BT accounts does not assist Westpac. As I have said, Westpac was not merely pointing out the benefits and positive features of its superannuation products. It was conveying a view that the customers should accept the service that was being offered in their own interests.

238 Nor do the consequences of a finding that a person was providing financial product advice suggest any different approach to the construction of s 766B(1) is warranted. Those consequences, a warning under s 949A for general advice and far more extensive requirements for personal advice, are tailored to that distinction drawn by the statute. Contrary to Westpac's case, not every statement of fact, sales message or expression of enthusiasm which a financial product issuer makes about its own financial products will involve financial product advice. More is required in the form of a recommendation or statement of opinion. In the present case Westpac's communications, in my view, fall well on the side of the line of financial product advice in distinction from mere marketing.

239 This said, I agree with Westpac's submission that the primary judge's reference to the context of the law of evidence in her construction of "statement of opinion" involved a diversion. While, as Westpac said, the primary judge was undoubtedly correct at [94] to say that mere statements of fact could not be a statement of opinion, the statutory context in which the phrase applies in s 766B(1) has nothing to do with the meaning of an opinion in the law of evidence. Accordingly, her Honour's search for statements involving inferences from facts, with respect, was misdirected.

240 What I do not accept, however, is the distinction Westpac sought to draw between mere "logical possibilities" or statements of "self-evident logic" or "truisms" on the one hand and "statements of opinion" on the other. A statement of opinion is simply a statement of a view. In the context of s 766B(1) it is a statement of a view about a financial product either intended to influence a person in making a decision about the product or that could reasonably be regarded as being intended to have such an influence. The fact that the view may also be characterised as "self-evident logic" or a "truism" does not mean it is not also an opinion. As with a recommendation, a statement of opinion may be express or implied. "Statement" is defined in s 9 as including matter that is not written but conveys a message. The statements in the calls conveyed a message consisting of the caller's view that the customers should rollover their other superannuation accounts into their BT account. The statements thus constituted statements of opinion to this effect.

Personal advice – s 766B(3)

Overview

241 In s 766B(3), personal advice is financial product advice that is given or directed to a person (including by electronic means) in circumstances where either (a) the provider of the advice has considered one or more of the person’s objectives, financial situation and needs; or (b) a reasonable person might expect the provider to have considered one or more of those matters. Section 766B(3), in common with s 766B(1), is to be construed as a whole in its entire statutory context. The parties were in dispute about the meaning of “considered”, “in circumstances where” and “one or more of the person’s objectives, financial situation and needs” as they appear in s 766B(3). I do not consider that the phrases “considered”, “in circumstances where” and “one or more of the person’s objectives, financial situation and needs” are capable of being given meaning outside of the full context in which they appear.

“In circumstances where”

242 If read in isolation the phrase “in circumstances where”, as the primary judge found, does not naturally connote a causal connection between the person’s objectives, financial situation and needs and the financial product advice that is given or directed to the person. When the statutory text is considered as a whole, however, the need for some such causal connection becomes apparent. Read in context it is apparent, in my view, that personal advice is financial product advice which is connected to the consideration of one or more of the person’s objectives, financial situation and needs. The connecting words “in circumstances where” are capable of conveying the causal connection required. If it were otherwise, and the financial product advice could be entirely disconnected from the consideration of the person’s objectives, financial situation and needs, then the relevant object of the provision, ensuring that personal advice does in fact consider one or more of those matters, would be defeated. To the same end, the express statutory object of Ch 7 of promoting “confident and informed decision making by consumers of financial products and services” would not be facilitated.

243 ASIC’s contrary view, which the primary judge accepted at [109], not only tends to undermine this object of Ch 7 and of s 766B(3) itself, but is difficult to reconcile with the additional requirements that apply to a person giving personal advice. The required Statement of Advice under s 947B of the Corporations Act requires the Statement to include “information about the basis on which the advice is or was given”: s 947B(2)(b). In the usual course that information will be the person’s objectives, financial situation and needs or one or more of them that were

considered in the giving of the personal advice. Further, by s 961B(2)(b)(ii) (a safe harbour provision) the provider of the advice will be deemed to have satisfied the duty to act in the best interests of the client in relation to the advice if, amongst other things, the provider has identified the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter. In other words, the statutory scheme envisages that personal advice will be given on the basis of one or more of the client's objectives, financial situation and needs.

244 The primary judge preferred the contrary construction of "in circumstances where" as meaning nothing more than broadly directing attention to the circumstances in which the advice was given: [109]. One reason her Honour preferred this construction was explained at [110] where her Honour said "[t]hus, I accept, a provider of advice cannot avoid the application of the section by alleging that they would have provided the same recommendation regardless of the person's personal circumstances". It is not apparent that this example would change if the provision was construed as requiring a connection between the objectives, financial situation and needs considered and the advice provided.

"Considered"

245 The primary judge looked to the principles of administrative law to give meaning to the word "considered" concluding at [127] that:

...the word "considered" refers to an active process of evaluating or reflecting upon the subject matter of the consideration, appropriate to the provision of "financial product advice". It does not require a process that is "detailed, extensive or careful", however, it does involve an intellectual engagement with the subject matter of the consideration.

246 In the present case there is a danger in adopting the descriptions of consideration from the context of administrative law. In that context, the object is to ascertain whether the repository of a statutory power has fulfilled a statutory duty to consider a mandatory relevant matter or not. In that context, the concepts of proper, genuine and realistic consideration and active intellectual engagement with the required subject-matter have been developed as criteria against which the conduct of the decision-maker may be judged as either meeting the required standard of consideration or not.

247 In the present context, the object is different. It is to bring within the rubric of personal advice financial product advice which is given or directed to a person where the provider of the advice has considered one or more of the person's objectives, financial situation and needs or a

reasonable person might expect the provider to have considered one or more of those matters. In that context, “considered” should be taken to mean nothing more or less than the required matter being “taken into account” in the giving of the financial product advice. As such, the mere fact that a person may mention their objectives, financial situation and needs to the provider of the advice does not necessarily mean that these matters have been taken into account. But if the provider of the advice has taken into account one or more of the person’s objectives, financial situation and needs or a reasonable person might expect the provider to have done so then this will be sufficient to meet the requirement of consideration. It is not necessary to go further to analyse the extent, degree or quality of the consideration; any taking into account of the identified matter will suffice.

248 As ASIC submitted, the primary judge’s construction is apt to lead to ambiguity because it will be difficult to know what level of intellectual engagement is required before it may be said that the person has considered one or more of the relevant matters. If “considered” means nothing more than “taken into account”, as is my view, a factual question remains to be answered but without the overlay of administrative law concepts relevant to the sufficiency of consideration necessary for a decision-maker to discharge a statutory duty.

“One or more of the person’s objectives, financial situation and needs”

249 Westpac took issue with the primary judge’s approach to “one or more of the person’s objectives, financial situation and needs”. The primary judge accepted ASIC’s proposition that the phrase was to be understood as referring to “one or more of a person’s objectives; one or more aspects of the person’s financial situation or one or more of the person’s needs”: [112]. As Westpac submitted, this does not immediately appear to be the most obvious and natural reading of the provision. For one thing it does not make sense to refer to a person’s one or more “financial situation”. A person has one financial situation with different aspects of it. This is not to say that Westpac’s construction is to be preferred, however. Westpac said that personal advice required consideration of the person’s “objectives, financial situation and needs” as relevant to the advice being provided. According to Westpac this was supported by:

- (1) the language of the provision (which uses the conjunction “and”);
- (2) the terms of the general advice warning in s 949A(2) which is that the “the advice has been prepared without taking account of the client’s objectives, financial situation or needs”;

- (3) the terms of s 961B(2)(b)(ii) that the provider of the advice will act in the best interests of the client if, amongst other things, the provider has identified the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter;
- (4) the Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2011* (Cth), quoted by the primary judge at [113], in particular at [3.23] that:

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

250 Westpac said that the intent of the provisions is that each of the objectives, financial situation and needs is a category or matter which a provider of personal advice is required to consider *as a whole* to the extent it is relevant to the advice being provided. While I agree that objectives, financial situation and needs is each a category, I consider that the words "one or more of" make it clear (as does the Supplementary Explanatory Memorandum) that the provider of personal advice may consider the person's objectives, financial situation *or* needs in giving financial product advice which is personal advice. There is no requirement that they consider the person's objectives, financial situation *and* needs for the provider to be giving personal advice.

251 Further, there is the potential for mischief in Westpac's formulation that what must be considered is the category *as a whole* to the extent that it is relevant to the advice being provided. The potential mischief is in the concept of the extent to which the category is relevant to the advice being provided. Assume that a person informed a provider about their financial situation as they thought relevant to a particular financial product and taking into account that information the provider was willing to provide financial product advice and did so. The provider could not deny having provided personal advice on the ground that the person's financial situation was in fact more complicated than had been conveyed to them. No doubt such examples are part of the explanation for s 961B(2) which deems the provider to have acted in the client's best interests if, amongst other things, the provider has identified "the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the *client's relevant circumstances*)" (s 961B(2)(b)(ii)) and "where it was reasonably apparent that information relating to the client's relevant

circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information” (s 961B(2)(c)).

252 If the legislature had intended that personal advice would be given only if the provider of the advice had considered *the whole of* one or more of the person’s objectives, financial situation and needs then there would be no need for the legislation to expressly contemplate that that information relating to the client’s relevant circumstances may be incomplete for any category. Further, as ASIC submitted, it would lead to a perverse outcome if the client is protected by the personal advice provisions where the provider undertakes a detailed consideration of their personal circumstances but stops short of considering the whole of their circumstances. To the same effect, ASIC said, as must be the case, that the legislature could not have intended that the personal advice protections are engaged when only *some* needs but *all* objectives are considered or vice versa but are not engaged if *nearly* all needs and *nearly* all objectives are considered.

253 What is the answer to this conundrum? I consider that the answer which best reflects the language of the statute as a whole is that which ASIC proposed and the primary judge accepted. The answer is not wholly satisfactory because, as I have said, it must be accepted that it does not make grammatical sense to refer to one or more of a person’s financial situation. But the primary judge’s construction, in my view, does less violence to the statutory language than the construction which Westpac proposed. Westpac’s construction effectively reads out the words “one or more” altogether and reads in the words “as a whole” after each of the identified categories.

254 The primary judge’s construction also accords better with the statutory scheme as a whole than Westpac’s construction. It is a decision for the provider whether or not to provide personal advice. If the provider does not feel they have enough information to give personal advice they have two options – to seek more information or to decline to give the personal advice. Section 961B(2) provides a safe harbour for the providers of personal advice which contemplates that something less than the whole of a client’s objectives and needs may be considered, provided that reasonable inquiries have been made for complete and accurate information and the objectives and needs of the client which would reasonably be considered relevant to advice on that subject matter forms the basis of the advice.

255 A fundamental problem with Westpac’s approach is that the whole of each category must be considered to the extent relevant to the advice in question is that it leaves uncertain the

determination of relevance. Does this mean to the extent that the client considers relevant to the advice in question or to the extent that the provider considers relevant to the advice in question? Or does it mean to the extent that a reasonable person in the position of the client or the provider would consider relevant to the advice in question? These questions remain unanswered on Westpac's construction.

256 The primary judge's approach, while not a perfect synthesis of statutory language and context, has the advantage of simplicity, accords with the statutory purpose apparent from the Supplementary Explanatory Memorandum to make it harder (not easier) for providers to avoid their statutory obligations (by, for example, giving advice having considered a person's objectives and needs but not their financial situation), and leaves it to the provider to decide whether or not they have sufficient information about one or more of the client's objectives, financial situation and needs to give personal advice. As I have said, if the provider takes the view that there is insufficient information about any category of identified matter to provide personal advice, the provider may decide to seek further information or not to give the personal advice. The primary judge's construction ensures that it is the provider's decision whether the provider has sufficient information to give the personal advice or not, which fully accords with the scheme in s 961B of the Corporations Act, both that the provider must act in the best interests of the client in relation to the advice and that the provider has the benefit of the safe harbour provisions in s 961B(2).

257 For these reasons, I accept ASIC's submission that if a person (the provider) gives financial product advice to a person that a decision about a financial product should be made one way or another, taking into account any of that person's objectives, financial situation or needs, then the provider may (i) decline to give personal advice, (ii) make reasonable inquiries to obtain complete and accurate information about the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter as provided for in s 961B(2)(b)(ii) and then give personal advice, or (iii) fail to make reasonable inquiries to obtain complete and accurate information about the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter and give the personal advice anyway. In example (ii) the provider will have satisfied one of the requirements of the safe harbour provision in s 961B(2). In example (iii) the provider will have given personal advice and will not have the benefit of the safe harbour provision in s 961B(2). As will become apparent, it is my view that the callers from Westpac engaged in conduct within example (iii).

The reasonable person

258 The primary judge also rejected Westpac’s submission that for the purposes of s 766B(3)(b) of the Corporations Act (“a reasonable person might expect the provider to have considered one or more of those matters”) the reasonable person’s knowledge of the objective circumstances in which advice is given could not extend to matters extraneous to the interactions between the provider of the advice and the customer and which are not known to the customer at all: [134].

259 The primary judge said at [135]:

I do not accept that the relevant circumstances are only those that could have been known by a reasonable person. In my view, s 766B(3) directs attention to all of the relevant circumstances in which the financial product advice is given. Section 766B(3)(b) requires an assessment of what a reasonable person would expect in those circumstances.

260 I take a different view. I consider that s 766B(3) is directing attention to a reasonable person in the position of the person to whom the financial product advice is given or directed. While the provision does use the indefinite article “a” reasonable person, which arguably provides support for the primary judge’s approach, I consider that the construction of “a reasonable person”, in the context of the provision as a whole, is capable of meaning a reasonable person in the position of the person to whom the advice is given or directed and that this construction better accords with the statutory purpose. In short, if a reasonable person in the position of the customer might have expected the provider to have considered one or more of the identified matters then, to my mind, it cannot matter if there is other information of which the reasonable person was unaware that might lead to a different conclusion.

Westpac’s callers

261 The primary judge concluded that the Westpac callers had not considered one or more of the customer’s objectives, financial situation and needs. In [128] her Honour said:

I do not accept that the social proofing technique necessarily involved, or was likely to involve, consideration of information obtained from the customer. First, it occurred in the context of a telephone conversation and involves an immediate reaction to the information obtained so that the opportunity for consideration or reflection is negligible. Secondly, as appears from the conversations the subject of this proceeding, the social proofing involved affirming the customer’s stated reasons for wishing to consolidate their super funds by asserting that their reasons were held in common with others. I do not accept that identifying a commonality between stated reasons and reasons held by others involves evaluation of the customer’s stated reasons: it merely involves a recognition of the nature of those reasons.

262 Her Honour also applied her construction of “consideration” to conclude that Westpac’s callers had not considered the information they had about and elicited from the customers. At [386] the primary judge said:

Mere knowledge of facts about customers, particularly that they held multiple superannuation accounts, and an intention to persuade the customer to accept the rollover service does not support an inference that the caller engaged in any reflection upon the customer’s position that amounted to “consideration”. Active listening does not evidence an intellectual engagement with the information provided by a customer, such as would permit a finding that the caller had “considered” that information: it simply demonstrates that the information has been heard. The use of facts, apparently identified as matters that might be used to influence the customer in the course of the call does not, without more, indicate the caller “considered” those facts.

263 Applying her construction of “a reasonable person” within the meaning of s 766B(3)(b) the primary judge identified circumstances that would suggest to a reasonable person that the caller who provided the “financial product advice” did not consider any of the customer’s objectives and financial situation (at [394]) and the circumstances that might suggest to a reasonable person that the caller who provided the “financial product advice” did consider any of the customer’s objectives and financial situation (at [395]). In the latter list there is a matter that would not have been known to a reasonable person in the position of the customer being:

- (1) The fact that, in Westpac’s view, a customer’s request for advice as to whether to accept the rollover service was a request for personal advice, requiring consideration of matters personal to the customer.

264 On my construction of “a reasonable person” within the meaning of s 766B(3)(b) this matter would not be taken into account as it could not have been known to a reasonable person in the position of the customer. Similarly, the reasonable person in the customer’s position would not know about Westpac’s QM Framework.

265 In common with the primary judge at [376], I accept that each caller knew about an aspect of the financial situation of each customer, that the customer had multiple superannuation accounts including a BT account. It may be accepted that the fact of the multiple superannuation accounts was the reason that each customer was being called but that does not mean the Westpac caller in fact considered (in the sense of took into account) that fact in giving the financial product advice to each customer to the effect that they should rollover their other superannuation accounts into their BT account. Also in common with the primary judge, I am unable to conclude that any caller in fact considered anything any customer said in order to give that financial product advice. ASIC’s case depended on the proposition that the callers used the information that the customers gave to the callers in order to encourage them to

rollover their other superannuation accounts into their BT account and, accordingly, must be taken to have considered the information the customers provided. My inference from the evidence is to the contrary. From both the QM Framework which the callers were using and the text of the calls I am not satisfied that anything that was said by the customers was in fact taken into account in the giving of the financial product advice. The callers were following a form of script which was intended to induce the customers to rollover their other superannuation accounts into their BT account irrespective of the information elicited from the customers during the call. The customers, of course, knew nothing about the QM Framework, the fact that the calls were scripted generally in accordance with the QM Framework, or that the answers they were giving to the very specific questions they were being asked were in fact irrelevant to the callers' implicit recommendations.

266 The callers' lack of knowledge of these matters is one of the reasons I have reached a different view from the primary judge about s 766B(3)(b) of the Corporations Act, in terms of what a reasonable person in the position of the customer might expect. In my view neither the general advice warning which was given at the commencement of each call, nor the context of the calls, nor any other matter on which Westpac relied negated the fact that a reasonable person in the position of each customer might have expected the Westpac callers to have considered one or more of the identified matters which the callers deliberately elicited from the customers.

267 First, s 766B(3)(b) refers to what the reasonable person *might* expect. This is a lower standard than, for example, what the reasonable person *would* have expected. The standard is one of reasonable possibility not reasonable probability.

268 Second, I do not accept Westpac's characterisation of the earlier written communications as mere promotional or marketing material. Those communications contained a general advice warning in the fine print because they too constituted financial product advice. They were not mere advertising of Westpac's products or the mere offer of a service. The pro-forma letter, in particular, contained a general recommendation to the customer to combine their other superannuation accounts into their BT account.

269 Third, as I have said, there was a pre-existing relationship between Westpac and each customer. Given that pre-existing relationship, a reasonable person in the customer's position would not expect that Westpac might act contrary to the customer's interest in the context of offering a service about such an important matter as the customer's superannuation.

270 Fourth, the calls were about the customer's superannuation, which may have been inferred to have been of the utmost importance to the customer. No reasonable customer would expect that their current superannuation provider would be giving them an implicit recommendation to rollover their other superannuation accounts into their BT account if it was contrary to their interests to do so.

271 Fifth, the tenor of the calls, with the repeated emphasis on the purpose being to help the customer in relation to their superannuation, would have reinforced in the mind of the reasonable person in the customer's position that the purpose of the call was in fact, as stated, to help the customer by Westpac ensuring what was done was in the customer's interest even if, at the same time, it was also in Westpac's interest by increasing the amount of the customer's funds in their BT superannuation account.

272 Sixth, the general advice warning that was given occurred early in the conversation with each customer, before the customer was asked what their objectives were and before the use of the social proofing marketing technique in a number of the calls (that is, by informing the customer that many other customers had the same views as the customer and were combining their superannuation accounts with their BT accounts for the same reasons). As ASIC put it, the customers were given a formulaic warning at the beginning of the call which was then immediately followed by a more substantive discussion that sought to elicit the customer's personal circumstances and apparently apply those circumstances to the product that in which it was being recommended they invest more money.

273 Seventh, the calls were not mere short courtesy calls as they were frequently said to be. They were relatively lengthy calls in which the customers were specifically asked about their objectives. As ASIC put it:

A reasonable person would not expect that Westpac was asking about the customer's objectives and recommending a rollover *not necessarily to assist the customer and irrespective of what the customer told them.*

(Emphasis in original.)

274 Eighth, the fact that the information was elicited by the callers during the call so that the Westpac caller had only a brief time to consider the information elicited is not determinative. The customer did not know they were being subjected to a sophisticated marketing technique. They did not know, as Mr Cannons (who trained the callers) said, that for example the callers were being trained to avoid saying to customers that they will save on fees and to say instead "you may save on fees" or "you could potentially save on fees" to "leave it up to the customer

to make their own mind about saving on fees [sic]”. The vice in this is that the customer was being implicitly advised, through the techniques of questioning and repetition and so-called social proofing by the caller, to rollover their other superannuation accounts into their BT account. The customers were not the subjects of mere marketing of a financial product. As far as the customer was concerned what they said was being considered and taken into account in the giving of that implicit advice.

275 To take but a few examples, why would a reasonable person in the position of customer 1 not have expected that having had elicited from them by the caller that fees and manageability were relevant to combining the customer’s superannuation accounts, the caller did not then consider that objective of the customer when responding that they were two main reasons Westpac clients do like to bring their superannuation together and that once the accounts had been rolled over then it would “all be in the one spot and nice and organised for you”. Why would a reasonable person in the position of customer 5 not expect that the Westpac caller had considered the response elicited from that customer that they wanted to be able to keep track of their accounts when the caller repeated that objective to the customer and then confirmed that all the customer’s superannuation would be coming into the one place “for easy management for you”? Customer 6 is a particularly compelling example (but there are others). Customer 6 was asked why they had the superannuation search undertaken, responded that it would be easier and save fees, was asked if their objective was to have easier manageability and to potentially save on fees, was asked if those were the things important to them, was told that these were probably the two main reasons Westpac’s customers did like to consolidate and that it made a lot of sense from a logical standpoint, and was told that they could start “potentially reaping those benefits” if they proceeded to use the service. Why would a reasonable person in the position of customer 6 not have expected that Westpac would have taken into account the customer’s stated objectives in giving the financial product advice?

276 To my mind these matters outweigh the factors to which the primary judge referred at [394] as indicating to the reasonable person that the caller did not consider the customer’s objectives and financial situation in giving the financial product advice. Those factors are set out below:

- (1) The call containing the “financial product advice” was not preceded by the provision of information from the customer to Westpac about their objectives, financial situation and needs.

- (2) The “financial product advice” was offered proactively by members of the Super Activation Team, who had no previous relationship to the customer, and was not known or understood by the customer as their adviser so that they were not obviously in a position to consider one or more of the customer’s objectives and financial situation.
- (3) The callers did not present themselves as making statements on the basis of their consideration of the customer’s objectives or financial situation. To the contrary, they presented themselves as offering the rollover service on the basis that the calls would not take into account the customer’s individual situation.
- (4) The “financial product advice” was provided free of charge:
- (5) To the extent that the customers identified “objectives”, it occurred during the course of the calls so that the callers did not have an opportunity to consider those objectives prior to making the calls.
- (6) In some cases, the callers revealed a lack of knowledge about the customer’s situation that was inconsistent with a capacity to consider or have considered one or more of the customer’s objectives and financial situation.
- (7) The “social proofing” technique emphasises a comparison between the customer’s reasons and the reasons of others, which is not a comparison involving a consideration of the customer’s particular circumstances.

277 I accept ASIC’s submissions about these factors and otherwise respond as follows:

- (1) Consideration of a customer’s objectives and financial situation can occur during a telephone call. Further, the very reason for the calls was the fact known to Westpac that the customers had multiple superannuation accounts.
- (2) The calls were by a representative of Westpac who knew the customers had multiple superannuation accounts and were represented to be about helping the customers with their superannuation. In this context, the caller was in a position to consider the information deliberately elicited from each customer.
- (3) As noted, the general advice warning occurred early in each call and was followed by a lengthier conversation in which the caller elicited personal information from the customer and gave the financial product advice as identified above. As ASIC put it, in this context the reasonable customer would have expected that Westpac was calling and asking such specific questions because it was intended to consider the responses in the process of “helping” the customer. Having been asked about their own objectives, no

reasonable person in the customer's position would have expected the caller to disregard those objectives, particularly not when the callers took care to reassure the customer that they had correctly understood their objectives by repeating them and asking if they had been correctly understood.

- (4) It is true that the advice was provided free of charge but these were existing customers of Westpac who were being personally called and were offered help with respect to their superannuation.
- (5) As noted, the reasonable customer would have expected that the information being elicited was considered by the caller. The callers were at pains to present to the customer that they had correctly understood their objectives which would have reinforced this expectation.
- (6) It may be accepted that the caller exhibited a lack of knowledge of the customer's situation during some of the calls. But in each call the caller sought to elicit information from the customer about their objectives for their superannuation and then implicitly recommended that the customer rollover their other superannuation accounts into their BT account.
- (7) In my view, the "social proofing" technique was more than a mere comparison with other customers. As ASIC said, it was a device to encourage and influence the customer to rollover their superannuation into their BT account because their reasons were held by others. In ASIC's words, a customer's particular circumstances were deliberately elicited and then used to reinforce that the rollover was an obvious course for that particular customer. As Mr Cannons said, social proofing is "an effective sales and service technique". For these reasons I do not share the primary judge's view of the social proofing technique as incongruous: [59]. Nor was it a mere attempt to build rapport with the customer. It was used to induce the customer to accept the implicit recommendation to rollover their other superannuation into their BT account and, as Mr Cannons said, an effective sales method.

278 I agree with the primary judge at [395] that:

- (4) By making the recommendation in an unsolicited call, using an informal style and a structure likely to be perceived as generic, and where consolidation of super accounts had obvious benefits, and by offering to effect a rollover on the telephone, Westpac conveyed the impression to the customers that the recommendation was an obvious and uncontroversial course of action for the particular customer. That impression was arguably reinforced by the "social

proofing” content of the calls.

- (5) The callers’ attitude of helpfulness [would have been expected] to be genuine, which reinforced the impression that the recommendation was appropriate for the particular customer.

279 In response to Westpac’s submissions, to the extent not discussed above, in the context of each call as a whole, I do not accept that the fact that the offer by the caller of consolidation early in the call makes it less likely that a reasonable person in the customer’s position would have expected their objectives and financial situation not to be taken into account. Nor do I accept that the fact that the earlier written communications said “if you have a Financial Adviser, then we recommend you speak to them for personal advice tailored to your specific financial situation, objectives and needs” means that a reasonable person in the position of the customers during the calls as they occurred would not have expected the matters which were elicited from them about their objectives to be considered. Everything that occurred during the calls before and after the general warning indicated to the contrary.

280 As to customer 8, the offer after a lengthy conversation about the customer’s objectives was whether they would be interested in “a bit more tailored advice regarding your...superannuation”. The offer, which was refused, did not suggest that what had occurred during the call to date involved the caller ignoring all of the customer’s objectives as elicited. The same conclusion applies to customers 10 and 13.

The QM Framework

281 Contrary to Westpac’s submissions, there was ample evidence which supported the primary judge’s conclusion at [387] that the calls were conducted in accordance with the QM Framework. The callers were trained to apply the QM Framework and their calls were assessed by reference to compliance with the QM Framework. The calls followed a clear pattern the source of which, it is apparent, is the QM Framework.

282 The primary judge accepted that the implementation of the QM Framework in the case of the 15 customers and more generally in Westpac’s campaign to encourage customers to accept the rollover service, involved a failure on the part of Westpac to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly: [443]-[448]. However, her Honour did not accept that the implementation of the QM Framework was liable to cause the callers to give customers personal advice: [431].

283 I accept ASIC's submissions to the contrary. The QM Framework directed the caller to use techniques which involved encouraging the customer to accept the implicit recommendation that the rollover of their other superannuation accounts into their BT account would be beneficial to them and which would have led a reasonable customer to expect that the information directed by the QM Framework to be obtained in the call would be considered as relevant to that advice (even when, in fact, it was not relevant to the caller at all). Accordingly, while the QM Framework provided that the call would be an "Auto fail" if the caller provided the customer with personal advice, it contained a structure and content which implicitly encouraged such advice to be given.

284 For example, the QM Framework in its Gather Requirements section speaks of finding out what the customer is interested in and questioning to build on the need/interest of the customer (that is, in rollover of their superannuation), and summarising what you learnt from the customer. The techniques to be used here included questioning the customer about what the customer wanted to achieve for their superannuation, summarising the customer's responses, and using the social proofing technique. The Gathering section was said to be to gather, uncover, clarify and develop customer's requirements for your presentation and to build. This means developing in the call knowledge of the customer's individual requirements for their superannuation. The Presenting section speaks of building on the need and urgency (that is, to rollover their superannuation), and identifying true objections and using all relevant information (that is, obtained from the customer) to handle objections. The Presenting section was said to be to conduct a persuasive, interactive presentation based upon what the customer told you in your questioning. The caller was directed to relate the customer's motivation back to what was picked up in the Gathering Requirements and to link the customer's motivation to the features of the product/service that was found during your questioning. The Questioning section speaks of re-positioning questioning of the desired response when not received. The caller was directed through the use of questioning to use the important points taken from the call to create the connection between the customer's needs and wants and their objections.

285 By these sophisticated techniques, Westpac created a framework within which the callers were liable to transgress by giving personal advice to the customers who were the subject of the techniques. ASIC should have obtained a declaration to that effect as sought.

Provide services efficiently, honestly and fairly – 912A(1)(a)

286 It follows from the above that I agree with the primary judge’s conclusion that Westpac contravened s 912A(1)(a) of the Corporations Act (which requires a financial services licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly) by (a) in all cases making the recommendations without informing the customers about the possible relevant considerations for a prudent customer, (b) the social proofing that occurred in a number of the cases was not a sound basis for decision making and should not have been used to provide assurance to customers, with a view to influencing them to accept the rollover service, (c) conveying the impression to the customers that the recommendation was an obvious and uncontroversial course of action for the particular customer, when that may well not have been the case, and (d) doing so when Westpac knew that acceptance of the rollover service might have adverse consequences for the customer.

287 I do not agree with Westpac that, in the context of her Honour’s conclusions (that is, assuming I am wrong about the financial product advice being personal advice), no finding of contravention of s 912A(1)(a) should have been made because the primary judge had not expressly found the conduct to be serious conduct that displayed a lack of sound ethical values and judgment of the kind referred to in *Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (In Liquidation)*; *In the Matter of Camelot Derivatives Pty Limited (In Liquidation)* [2012] FCA 414; (2012) 88 ACSR 206 and did not amount to sufficiently serious departures from reasonable standards of performance of advice of the kind referred to in *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; (2016) 336 ALR 209.

288 The primary judge expressly referred to Westpac’s submission as follows:

Westpac contended that the evidence showed staff were specifically trained about the significance of the distinction between personal advice and general advice; the QM Framework explicitly recognised that distinction and recognised the need to abide by it as a “compliance” requirement; and Westpac’s compliance monitoring was directed at, inter alia, identifying infractions of the prohibition against giving personal advice. If, despite these safeguards, personal advice was in fact given because the QM Framework was followed, it was despite Westpac’s well-intentioned efforts to avoid that outcome. Westpac argued that this facts hardly connoted the serious conduct that would display a lack of sound ethical values and judgment of the kind referred to in *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (In Liq)* [2012] FCA 414; (2012) 88 ACSR 206 (“Camelot”).

289 It is also apparent that her Honour was aware of and applied the relevant principles derived from the authorities which she reviewed at [417]-[429], including *Camelot* and *Cassimatis*. Her Honour was right to be satisfied that Westpac's conduct was sufficiently egregious to amount to a contravention of s 912A(1)(a). 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. The matters to which the primary judge referred at [442]-[447] provided ample support for her conclusion at [448] that:

While not dishonest, in my view, the matters demonstrate the adoption and implementation of the QM Framework approach failed to ensure that the "financial product advice", being a financial service covered by Westpac's AFSLs, was provided "efficiently, honestly and fairly" in contravention of s 912A(1)(a) of the Act.

290 In short, on the primary judge's approach to the facts (that is, that Westpac did not give personal advice) it can nevertheless be said that Westpac was guilty of what would colloquially be described as systemic sharp practice about what must have been one of their clients' major financial concerns, their superannuation. 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.

291 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.

Act in the best interests of the client – s 961B(1)

292 The primary judge concluded at [463] that if Westpac had given personal advice to the customers then it:

...did not act in the best interests of the customers to whom it gave that advice because those interests could only be served by advice as to whether the rollover service was in their best interests. Westpac did not attempt to inform the customers to whom it gave the “financial product advice” whether it was in their best interests to accept the advice. This conclusion is supported by Westpac’s view, recorded in the case study set out at [14] of what would be involved in providing proper personal advice to a customer who sought advice about whether to consolidate external funds into their BT account. There is no difference in the client’s best interests that depends upon whether advice was volunteered in a marketing campaign, or the subject of an express request for advice.

293 The case study at [14] has been set out above.

294 Westpac submitted that the primary judge’s reasoning reversed the onus of proof of the contravention of s 961B(1) by treating the possibility that advice may have been given which was contrary to the best interests of the clients as sufficient to establish the contraventions. Section 961B(1), Westpac said, is directed to the substance of the advice provided and whether the provider acted in the client’s best interests in providing it. According to Westpac, ASIC eschewed the burden of proving its case and neither alleged nor attempted to prove that the best interests of any of the 14 customers would have been served by not tolling over their other superannuation into their BT account.

295 As ASIC pointed out, the Replacement Explanatory Memorandum *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) states in [1.23] that:

There are steps that providers may prove they have taken to demonstrate that they have acted in the best interests of the client. These steps recognise that the requirement to act in a client’s best interests is intended to be about the process of providing advice, reflecting the notion that good processes will improve the quality of the advice provided. The provision is not about justifying the quality of the advice by retrospective testing against financial outcomes.

296 In *Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd* [2017] FCA 345; (2017) 122 ACSR 47 at [21] Moshinsky J explained:

It was common ground that, while s 961B is concerned with the process or procedure

involved in providing advice that is in the best interests of the client, s 961G is concerned with the content or substance of that advice. At first blush, the text of s 961B does not appear to support the proposition that s 961B is concerned with the process or procedure involved in providing advice that is in the best interests of the client. However, support for this way of viewing the focus of s 961B is provided by the context in which it appears, including the language of s 961G, the legislative history, and the legislative materials (see, in particular, the revised explanatory memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) at [1.23], [1.24], [1.57]). It is unnecessary for present purposes to reach a concluded view on this issue.

297 Section 961G, to which Moshinsky J referred, provides that:

The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.

298 In *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; (2018) 131 ACSR 484 at [129] O’Callaghan J said:

Section 961B(1) of the Corporations Act provides that the individual advice provider must act in the best interests of the client in relation to the advice. This obligation relates to the conduct of the advice provider, not the advice ultimately given.

299 ASIC noted that Westpac did not challenge the primary judge’s findings that (i) Westpac did not attempt to advise customers whether it was in their interests to accept the advice: [457], (ii) Westpac did not know whether or not it was in the best interests of customers to roll over: [458], or (iii) Westpac acted in a manner that could have encouraged customers to act against their own interests: [460]. ASIC submitted that personal advice was given but no attempt was made to understand what was in the customer’s best interests.

300 In these circumstances, ASIC said that there has been no reversal of the onus of proof. ASIC has established to the requisite standard the factual matters which establish the contraventions of s 961B(1) of the Corporations Act. Westpac’s submissions, ASIC said, are directed to the separate question of the loss which the customers may have suffered by reason of the contraventions.

301 I accept ASIC’s submissions. To discharge the duty in s 961B(1) the provider must have as its purpose or object acting in the best interests of the client. The provider can effectively prove that their purpose or object was to act in the best interests of the client by doing each of the matters in s 961B(2), each of which is essentially procedural. As the Explanatory Memorandum explains the fact of harm is not the criterion against which performance of this duty is measured. Given the unchallenged facts as found by the primary judge, 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. This is sufficient to establish a contravention of s 961(B)(1) of the Corporations Act.

Other contraventions

302 For the reasons given I am also satisfied that Westpac contravened:

- (1) s 912A(1)(b) of the Corporations Act – by not complying with the conditions of its licences not to give personal advice;
- (2) s 912A(1)(c) of the Corporations Act – by not complying with the financial services laws in respect of its licences;
- (3) s 961K of the Corporations Act (a civil penalty provision) – by its contravention of s 961B(1) of the Corporations Act.

Procedural fairness issue

303 Given my conclusions, it is not necessary to deal with the question whether ASIC ran an alternative case based on the giving of general advice. It is sufficient to note that I agree with the conclusions of Allsop CJ and O'Bryan J in relation to this issue.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:



Dated: 28 October 2019

REASONS FOR JUDGMENT

O'BRYAN J:

Introduction

304 In this proceeding, the plaintiff (**ASIC**) seeks relief against the defendants, Westpac Securities Administration Limited (**WSAL**) and BT Funds Management Limited (**BTFM**), for alleged contraventions of Chapter 7 of the *Corporations Act 2001* (Cth) (**Act**). Amongst other things, Chapter 7 is concerned with the licensing and regulation of providers of financial services.

305 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). Each is and was at all relevant times the holder of an Australian financial services licence (**AFSL**) 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).

306 Over a number of years from 2013 to 2016, the defendants (to which I will refer collectively as **Westpac**) engaged in a campaign to encourage members of the superannuation funds of which they were trustees (the **BT superannuation funds**) to roll over superannuation held by the member in an account with other funds (**external superannuation accounts**) into their account in the BT superannuation funds (**BT account**). The campaign included written communications by which Westpac offered those members (also referred to by the primary judge as customers) 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. As a result of the campaign, Westpac successfully increased its funds under management in the BT superannuation funds by almost \$650 million.

307 ASIC's case was principally based on telephone calls made to 15 customers during 2014. Each
of the 15 customers was a member of the BT superannuation funds and was a retail client for
the purposes of s 761G of the Act.

308 I have had the advantage of reading the reasons for judgment of Allsop CJ. I gratefully adopt
his Honour's summary of the detailed factual findings of the primary judge.

309 ASIC sought declarations that Westpac's conduct involved:

- (a) breaches of conditions of Westpac's Australian financial services licences by providing personal advice in contravention of s 912A(1)(b) of the Act;
- (b) the provision of personal advice without providing a statement of advice in contravention of s 946A of the Act;
- (c) a contravention of s 961K of the Act by reason of a failure by relevant staff to act in the best interests of clients in contravention of s 961B(1) of the Act;
- (d) a failure to ensure that financial services were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Act; and
- (e) a failure to comply with financial services laws in contravention of s 912A(1)(c) of the Act.

310 ASIC also sought orders that Westpac pay a pecuniary penalty in respect of the contraventions of s 961K of the Act.

311 The primary judge summarised her conclusions as follows:

[17] Except in the case of customer 3, the calls to the 15 customers involved the provision of "financial product advice" within the meaning of s 766B(1) of the Act. In particular, and contrary to Westpac's case study above stating that a consultant qualified to provide only general advice was unable to advise customers as to whether they should consolidate their funds into the BT account, each caller impliedly made a recommendation to that effect.

[18] Each recommendation was intended to influence the relevant customer in making a decision in relation to a particular financial product, being their respective BT accounts or their respective external accounts. ASIC has not demonstrated a relevant intention to influence customer 3.

[19] In some cases, the calls also involved the provision of "statements of opinion" that were "financial product advice" within the meaning of s 766B(1), however, for each customer, the "recommendations" and "statements of opinion" were given in the same circumstances for the purposes of determining whether s 766B(3) applies. Accordingly, even if the "recommendations" and "statements of opinion" comprised separate pieces of "financial product advice", there is no need to give separate consideration to whether the "statements of opinion" were "personal advice".

[20] The “financial product advice” was not “personal advice” within the meaning of s 766B(3)(a) of the Act because the callers did not consider one or more of the objectives, financial situation and needs of the customers to whom the advice was given.

[21] Further, the “financial product advice” was not given in circumstances where a reasonable person might expect the provider of that advice to have considered the financial situation of the customer.

[22] Accordingly, the “financial product advice” was not “personal advice” within the meaning of s 766B(3)(b).

[23] It follows that ASIC has failed to demonstrate the alleged contraventions of s 912A(1)(b) of the Act, being that WSAL and BTFM breached the conditions of their respective AFSLs by providing personal financial product advice.

[24] Similarly, ASIC has failed to demonstrate the alleged contraventions of s 946A and 961B of the Act, both of which depended upon proving that Westpac had provided “personal advice”.

[25] By adopting the approach recorded in the QM Framework, Westpac provided “financial product advice” comprising the implied recommendation to accept the rollover service without explaining that a prudent customer may wish to consider matters of the kind that would be considered if the recommendation had been given as personal advice. The QM Framework also involved encouraging customers to accept the rollover service with the use of “social proofing” by which customers were told that their beliefs or reasons were commonly held. The fact that a customer’s belief or rationale was commonly held was not a matter that would have provided a basis for the recommendation, if it had been given as personal advice. The QM Framework approach was admittedly self-interested and did not necessarily promote the best interests of the customers but the approach did not draw the customers’ attention to either of those matters. Rather, it strongly conveyed the impression that Westpac was assisting the customer by its rollover service and, particularly by “social proofing”, the impression that customers should feel comfortable in accepting the service without giving consideration to their particular circumstances. In fact, as Westpac knew, there were matters (of the kind that would be considered if the “financial product advice” was given as “personal advice”) that, acceptance of the rollover service might have adverse consequences for the customer.

[26] While not dishonest, in my view, the adoption and implementation of these aspects of the QM Framework approach failed to ensure that the “financial product advice”, being a financial service covered by Westpac’s AFSLs, was provided “efficiently, honestly and fairly” in contravention of s 912A(1)(a) of the Corporations Act 2001 (Cth).

312 The appeal by ASIC and cross-appeal by Westpac raise four principal questions:

- (a) Did Westpac’s conduct involve the provision of financial product advice within the meaning of s 766B(1) of the Act?
- (b) If so, was the advice “personal advice” within the meaning of s 766B(3) of the Act or “general advice” within the meaning of s 766B(4) of the Act?
- (c) If the advice was personal advice, did Westpac’s representatives who provided the advice contravene s 961B of the Act (thereby causing Westpac to contravene s 961K of the Act)?

(d) Did Westpac's conduct involve a contravention of s 912A(1)(a) of the Act?

313 There was no challenge by ASIC or Westpac to the primary judge's factual findings concerning Westpac's conduct, although challenge was made to the proper characterisation of the conduct in reference to the legislative requirements. The appeal primarily concerns the circumstances and content of the telephone calls made to Westpac's customers that were the subject of the findings by the primary judge, other than customer 3 (thus 14 customers in total).

314 Each of the questions raised by the appeal and cross-appeal concern the proper construction of the statutory provisions and their application to the facts as found. In the course of argument before the primary judge and on this appeal, the statutory provisions have been subjected to detailed analysis. The excessive focus on the meaning of individual words within a statutory provision, separated from the sentence of which the words form part, can have a tendency to obscure meaning. Neither the statutory provisions in issue in this proceeding, nor the commercial matters with which they are concerned, are complex. The provisions require providers of financial services to adhere to certain standards of conduct when, relevantly, they provide advice.

315 The primary judge summarised the key aspects of Chapter 7 of the Act, providing the relevant statutory context in which to construe the provisions in dispute. It is helpful to reiterate certain of those matters at the outset.

316 Section 760A states that the main object of Chapter 7 is 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;
- (b) fairness, honesty and professionalism by those who provide financial services;
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

317 The objects stated in paragraphs (a) and (b) of s 760A are particularly relevant to the statutory provisions in dispute in this proceeding.

318 Part 7.1 of the Act defines the key concepts and expressions used in the remainder of Chapter 7. A key concept within Chapter 7 is the provision of a financial service, as it is the provision of

financial services that is licensed and regulated by the Chapter. Section 766A(1)(a) provides that a person provides a financial service if, relevantly, they provide financial product advice. The expression “financial product advice” is defined in s 766B(1) which is central to the questions raised on the appeal. There are two types of financial product advice: personal advice (defined in s 766B(3)) and general advice (defined in s 766B(4)).

319 Part 7.6 of the Act is titled “Licensing of providers of financial services”. Division 2 of that Part requires persons who carry on a financial services business to hold an Australian financial services licence covering the provision of the financial services, subject to various exemptions stated in the Division. Division 3 of Part 7.6 imposes various obligations on financial services licensees. Section 912A imposes general obligations on licensees, including the obligation in s 912A(1)(a) to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.

320 Part 7.7 of the Act regulates the disclosures that are required to be given by financial services licensees in various circumstances, including in relation to the provision of financial product advice, whether general advice or personal advice. More stringent obligations are imposed in relation to the provision of personal advice.

321 Part 7.7A of the Act imposes additional obligations on a licensee in relation to the provision of personal advice to a person as a retail client, including particularly the obligation to act in the best interests of the client in relation to the advice (under s 961B).

322 The definition of financial product advice in s 766B(1), and the dependent definitions of “personal advice” and “general advice”, play an important role in the regulation of the provision of financial services under Chapter 7 of the Act. As the primary judge found (at [81]), adopting a contention advanced by ASIC, the definition of personal advice in s 766B(3) is fundamental to the legislative scheme regulating financial advice, as it demarcates the important boundary between “personal advice” and “general advice”: the former requires advice appropriate to the client and strict obligations of disclosure and disinterestedness.

323 For the reasons set out below, I would allow ASIC’s appeal and dismiss Westpac’s cross-appeal. In my view, Westpac’s campaign to influence members of its superannuation funds to roll over their external superannuation accounts into their BT accounts is conduct to which the relevant provisions of Chapter 7 are directed. By the campaign, Westpac communicated a recommendation to its members to undertake that action with the intention of influencing them

to do so, thereby providing financial product advice. The techniques deployed by Westpac in the campaign created the circumstance that a reasonable member, receiving the advice, might expect Westpac to have considered the member's objectives, financial situation and needs in providing the advice. A consumer of financial services who is placed in that circumstance is vulnerable to the risk of making uninformed decisions because they wrongly believe that the advice given to them is fair and balanced when it is partial and incomplete. Chapter 7 protects consumers of financial services being placed in that circumstance by classifying advice given in those circumstances as personal advice and imposing consumer safeguards. Those safeguards include the obligations imposed on the adviser to provide the consumer with a statement of advice and to act in the best interests of the consumer in relation to the advice. Westpac did not comply with those obligations. The advice it gave to its members was partial and incomplete. It failed to act in the best interests of its members and it failed to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly.

Did Westpac's conduct involve the provision of financial product advice within the meaning of s 766B(1) of the Act?

Primary judge's conclusion

324 Section 766B(1) provides as follows:

(1) [**Meaning of financial product advice**] For the purposes of this Chapter, **financial product advice** means a recommendation or a statement of opinion, or a report of either of those things, that:

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

325 The primary judge concluded that the telephone calls made to Westpac's customers involved the provision of financial product advice within the meaning of s 766B(1) of the Act (at [372]). That conclusion was based on three intermediate findings:

- (a) that in the course of the calls to each customer, the following statements of opinion were made (at [366]):
 - (i) statements to the effect that, by rolling over the customer's external superannuation accounts into the customer's BT account, the customer could or may (but not would, except in the case of customer 11) save on fees;

- (ii) statements to the effect that, by rolling over the customer's external superannuation accounts into the customer's BT account, the customer would improve the "manageability" of their superannuation;
 - (iii) statements to the effect that a rollover into the customer's BT account would be beneficial to the customer because, for example, it would be beneficial to pay only one set of fees or because there would be unspecified benefits; and
 - (iv) statements to the effect that, by rolling over the customer's external superannuation accounts into the customer's BT account, the customer could get a better return on their superannuation or could improve the performance of their superannuation.
- (b) that in the course of the calls to each customer, and wholly or predominantly through the statements of opinion, an implied recommendation was made that the customer should roll over their external superannuation accounts into their BT account (at [260] and [367]); and
- (c) that each of the recommendations and the statements of opinion was intended by the caller to influence the customer in making a decision to roll over the customer's external superannuation account into their BT account (at [370]).

Westpac's cross-appeal

326 By ground 1 of its cross-appeal, Westpac contends that the primary judge erred in finding that Westpac made recommendations or statements of opinion, within the meaning of s 766B(1), during the calls. In support of that contention, Westpac advanced three principal submissions concerning the proper construction of s 766B(1).

327 First, the primary judge's approach to the interpretation of s 766B(1) involved construing the expressions "recommendation" and "statement of opinion" in isolation from the text and subject matter of the provision as a whole. The subject matter of the section is the identification of "financial products advice", a statutory concept upon which a series of rights and obligations depend. Westpac submitted that the subsidiary expressions "recommendation" and "statement of opinion" must be construed in light of the fact that they are being used in a provision which defines the ambit of conduct bearing the character of "advice". Westpac relied on *Rennie Golledge Pty Ltd v Ballard* (2012) 82 NSWLR 231 at [129] for the proposition that the ordinary meaning of a word defined in a statute may properly influence the interpretation of the definition. Westpac observed that the word "advice" is relevantly defined in the Macquarie dictionary as "an opinion recommended, or offered, as worthy to be followed". It followed, on

Westpac's submission, that the whole of the communication must be analysed to determine whether it contains a recommendation or statement of opinion having the character of advice.

328 Second, Westpac submitted that the proper construction of s 766B(1) ought be informed by the statutory consequences of a finding that a person provides financial product advice. Where the financial product advice is personal advice, a statement of advice with a mandatory content must generally be provided (see ss 944A, 946A and 947B(2) of the Act). Westpac submitted that the requirement that the statement set out the advice, and the information about the basis on which the advice is given, would be unworkable if the relevant recommendation or statement of opinion could comprise every statement of fact, sales message or expression of enthusiasm which a financial product issuer makes about its own financial products.

329 Third, Westpac submitted that the primary judge erred by ascribing meaning to the statutory expression "statement of opinion" by recourse to analogy with the law of evidence and the distinction between fact and opinion in that context. Westpac agreed that the expression "statement of opinion" excludes mere statements of fact. However, Westpac submitted that it does not follow that any statement about a financial product which involves a process of inferential reasoning is a "statement of opinion" within the meaning of s 766B(1). Westpac submitted that, in the context of s 766B(1), a statement of opinion means an opinion about whether the recipient should make a decision relating to a financial product.

Meaning of s 766B(1)

330 In my view, Westpac has failed to show any error in the primary judge's construction of s 766B(1) of the Act. Westpac's narrower construction involves the addition of impermissible glosses to the plain words of the section.

331 The primary judge commenced her consideration of the section by referring to the following key principles of statutory construction that had been identified by the parties as applicable in this case (at [80]):

- (a) words in a statute must be considered in context, which context includes legislative history and extrinsic materials, but such materials cannot displace the clear meaning of the text: *Commissioner of Taxation (Cth) v Consolidated Media Holdings Limited* (2012) 250 CLR 503 at 519 [39];
- (b) the construction of the text arrived at should have both internal logical consistency, and involve an overall harmonious interpretation: *Independent Commission Against*

Corruption v Cunneen (2015) 256 CLR 1 at 20-21 [31] citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky Inc*) at 381-382 [69]-[70];

- (c) while the task of statutory construction must begin with a consideration of the text itself, the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision and the mischief it is seeking to remedy: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]; and
- (d) the Court will also have regard to the consequences of a particular interpretation and will prefer a construction that will avoid consequences which appear irrational or unjust: *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [48]; *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 350.

332 Three further principles of statutory construction are relevant to the disposition of Westpac's cross-appeal. The first is that general words will be given their plain and ordinary meaning unless the context otherwise requires: *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 647 per Dixon J. The second is that all words in a statutory provision are ordinarily to be given some meaning and effect: *Commonwealth v Baume* (1905) 2 CLR 405 at [414] per Griffith CJ, affirmed in *Project Blue Sky Inc* at [71]. The third, often referred to by the Latin phrase *noscitur a sociis*, is that a statutory provision should be read and construed as a whole and not as a series of isolated words. In *Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595, Lord Halsbury stated (at 599-600):

It certainly is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the separate meaning of each of such parts when severed.

333 Westpac's submission that the words "recommendation" and "statement of opinion" should be construed in the context of the provision as a whole is correct. Those words appear within the definition of the expression "financial product advice", the provision of which is defined to be a financial service regulated by Chapter 7 of the Act. However, Westpac's further submission that the words "recommendation" and "statement of opinion" are to be construed in light of the fact that they are part of the definition of "financial product advice", and should be limited to recommendations or statements of opinion having the character of "advice", should not be accepted. Westpac seeks to add a qualification to the ordinary meaning of the words "recommendation" and "statement of opinion" by reference to the ordinary meaning of the

word “advice”, as being a recommendation or a statement of opinion that is worthy to be followed. However, Westpac’s approach overlooks that the statutory provision provides the qualification to those words, as prescribed by Parliament, that give them the character of “advice”.

334 Section 766B(1) states that the expression “financial product advice” means a recommendation or a statement of opinion (or a report of either of those things) that is intended to influence a person (or persons) in making a decision in relation to a particular financial product or could reasonably be regarded as being intended to have such an influence. The qualification that Westpac seeks to add to the words “recommendation” and “statement of opinion” (worthy to be followed) is provided by the statutory provision itself (intended to influence a person, or could reasonably be regarded as being intended to have such an influence). Reading the section as a whole, there is no reason to construe the words “recommendation” or “statement of opinion” as having the qualification suggested by Westpac.

335 As the primary judge observed (at [84]), the words “recommendation” and “statement of opinion” in s 766B(1) were given their ordinary meaning by Sackville AJA in *ASIC v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527. While noting that dictionary definitions do not control the construction of a statutory provision, his Honour nevertheless observed (at [364]) that the dictionary definition of “recommendation” includes to commend by favourable representations and to represent or urge as advisable or expedient; and the dictionary definition of “opinion” includes a judgment or belief resting on grounds insufficient to produce certainty and the expression of a personal view, estimation or judgment. His Honour also observed (at [365]) that the construction of s 766B(1) must take into account that the language encompasses a recommendation or statement of opinion that is intended to influence a person in making a decision relating to a financial product or could reasonably be regarded as having such an influence.

336 It is important to note that the words “recommendation” and “opinion” have different meanings. The word “recommendation” means to commend or urge a particular course of action. The word “opinion” means the expression of a belief, view, estimation or judgment. A person may express an opinion without making a recommendation. For example, an opinion may be expressed that a particular financial product is expected to achieve a particular financial return in a future period. The expression of that opinion need not be accompanied by a recommendation to buy the financial product. However, the expression of that opinion will be

financial product advice within the meaning of s 766B(1) if it is intended to influence a person in making a decision in relation to the financial product or could reasonably be regarded as being intended to have such an influence. Westpac's submission that an opinion within the meaning of s 766B(1) is confined to an opinion whether the recipient should make a decision relating to a financial product finds no support in the statutory text, context or purpose of the provision. Westpac's approach erroneously conflates the meaning of the words "recommendation" and "opinion".

337 Contrary to Westpac's submissions, construing the words "recommendation" and "opinion" in accordance with their ordinary meaning does not give rise to unworkable consequences. If the communication involves general advice and the communication is made by the holder of a financial services licence, obligations of honesty and fairness are imposed by s 912A(1)(a) and a general advice warning must be given in accordance with s 949A. If the communication involves personal advice, more extensive obligations are imposed. However, there is no reason to conclude that adopting the ordinary meaning of the words renders the legislative framework unworkable, unjust or irrational.

338 Underlying Westpac's submission that the primary judge's construction of s 766B(1) would give rise to unworkable consequences was the contention that her Honour's construction would mean that statements made in marketing and promotional material published by the issuer of a financial product would constitute financial product advice and be regulated by Chapter 7 of the Act, because such material is intended to influence members of the public to acquire the issuer's product. There are numerous difficulties with that submission. First, it is stated at a high level of generality, divorced from the circumstances of the present case. Second and relatedly, opinions are likely to differ on whether particular statements made by the issuer of a financial product, whether in a marketing context or otherwise, should be subject to regulation under Part 7 of the Act. As the Full Court of the Federal Court observed in *Esso Australia Resources Limited v Commissioner of Taxation (Cth)* (1998) 83 FCR 511, when different views can be held about whether the consequence of a particular interpretation is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention and choice of the Parliament (at 518-519 per Black CJ and Sundberg J and at 566 per Finkelstein J) (which statements were approved by a subsequent Full Court in *ConnectEast Management Limited v Commissioner of Taxation (Cth)* (2009) 175 FCR 110 at [41]).

339 In my view, marketing and promotional material relating to financial products does not necessarily, or even ordinarily, involve the making of recommendations, in the sense of commending or urging as advisable or expedient. Nor do such materials necessarily or ordinarily contain statements of opinion such as expected returns over a future period. However, if they do so, and the recommendation or statement of opinion is intended to influence a person in making a decision in relation to the financial product or could reasonably be regarded as being intended to have such an influence, I see nothing anomalous in the material being regulated under Chapter 7 of the Act. If, as will typically be the case, the marketing or promotional material constitutes general advice, the obligations under s 912A(1)(a) to act honestly and fairly, and the obligation under s 949A to give a general advice warning, will arise. As discussed below, the more stringent obligations associated with the giving of personal advice only arise in a much narrower set of circumstances.

Did the calls constitute financial product advice?

340 Turning to the facts as found by the primary judge, I respectfully agree with her Honour's conclusions that the calls conveyed statements of opinion that were intended by Westpac to influence customers to roll over their external superannuation account into their BT account.

341 There can be no doubt that statements to the effect summarised by her Honour at [366] were conveyed during the calls, either directly or indirectly through the social proofing technique that had the effect of adding the caller's affirmation to the customer's belief. Westpac's submission that the statements do not constitute "opinions" within the meaning of s 766B(1) cannot be accepted. The statements are opinions because they are judgments about the consequences of a potential course of action in relation to a financial product (rolling over superannuation into another account) which cannot be known for certain. For example, the statement that it would be beneficial for the customer to pay only one set of fees may or may not have been correct, depending on the fee structures of the superannuation accounts concerned. If the fees charged on the BT account were calculated as a percentage of the funds in the account and the fees charged on the customer's other account were calculated as a fixed amount per annum, the rollover of funds from the latter to the former may have resulted in the overall fees charged to the customer increasing. So too if a wider range of fees were charged on the BT account compared to the customer's other account. Likewise, the statement that by rolling over the external account the customer could get a better return may or may not have

been correct, depending on the relative future returns of the superannuation accounts concerned.

342 While it may be accepted that the statements of opinion as found by the primary judge were general in nature, the evidence shows that the statements were intended by Westpac, through the callers, to influence the customers in relation to their superannuation. The QM Framework was a carefully designed campaign to increase the funds under management in the BT superannuation funds by encouraging existing BT fund members to roll over funds from other superannuation accounts into their BT account.

343 While I agree with the primary judge's conclusions that the calls conveyed statements of opinion, the question whether the calls contained a recommendation within the meaning of s 766B(1) is more difficult.

344 As noted above, the primary judge concluded that each of the calls (other than the call to customer 3) contained an implied recommendation that the customer should roll over their external superannuation account into their BT account. Her Honour did not identify any express recommendation made on the calls. Instead, her Honour found that the statements of opinion that were conveyed on the calls, when combined with other features of the calls, gave rise to an implicit recommendation to roll over the superannuation accounts. The primary features of the calls to which her Honour referred, separate to the statements of opinion, were (at [357]):

- (a) that the callers conveyed that they were ringing in order to help the customer, which was reinforced by the callers asking (in order to better help the customer) what the customer saw as the main benefits of consolidating their superannuation funds, and ultimately offering to help effect the consolidation of the customer's external superannuation accounts into the BT account; and
- (b) by affirming the customer's reasons to consolidate their superannuation funds through the social proofing language.

345 The concepts of recommendation and statement of opinion in s 766B(1) should not be conflated. Each of the words "recommendation" and "opinion" has a different meaning and should be given work to do within the section. It may be accepted that some statements might be both a recommendation and an opinion; for example, a statement that a particular financial product is the best product for the customer's circumstances. However, other statements of

opinion are not recommendations; for example, a statement that consolidating superannuation accounts may save the customer fees. The statement is an opinion but, without more, is not a recommendation. The statement does not urge any particular course of action. There is a material difference between influencing a person in respect of a decision and urging the person to make a particular decision.

346 Characterising all statements of opinion that might influence a person in making a decision about a financial product as an implied recommendation would involve error. Such an approach renders the word “recommendation” in the section otiose. As discussed below in the context of s 766B(3), the distinction between recommendations and statements of opinion may have significance in determining whether financial product advice is general advice or personal advice.

347 The primary judge appreciated that not all statements of opinion intended to influence a person in relation to a decision are recommendations, within the meaning of s 766B(1). However, her Honour found that particular features of the calls in this case had the effect, when coupled with the statements of opinion, of implicitly recommending a course of action: that the customer consolidate their external superannuation accounts into their BT account. In my view, her Honour’s finding is correct. The callers did not merely convey information, in the form of opinions about the potentially beneficial effects of consolidation. The call methodology that was implemented, under the QM Framework, had the effect of commending consolidation as advisable. This was brought about by the fourfold structure of the calls as summarised by the primary judge at [54] – [60]:

- (a) in the “open” phase, the callers initiated the call with a statement that they were ringing to help the customer;
- (b) in the “gather” phase, the callers asked the customer why the customer thought that consolidation of superannuation accounts may be beneficial;
- (c) in the “presenting” phase, the callers used the social proofing technique which affirmed the customer’s thoughts about the beneficial consequences of consolidation as valid and reasonable, in order to conduct a persuasive presentation; and
- (d) in the “closing” phase, the callers sought to overcome any objections and directed the customers to taking action by offering to help with the consolidation.

348 The callers did not expressly recommend consolidation. As the primary judge found (at [46]), their induction training warned against making a recommendation. Nevertheless, I respectfully

agree with the primary judge's conclusion that the calls conveyed an implicit recommendation to the customers to consolidate their external superannuation accounts into their BT account.

349 I would therefore dismiss ground 1 of Westpac's cross-appeal.

Did Westpac's conduct involve the provision of "personal advice" within the meaning of s 766B(3) of the Act?

Primary judge's conclusion

350 Section 766B(3) and (4) provide as follows:

(3) [**Meaning of "personal advice"**] For the purposes of this Chapter, **personal advice** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

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

(4) [**Meaning of "general advice"**] For the purposes of this Chapter, **general advice** is financial product advice that is not personal advice.

351 Within the section, a person who provides financial product advice is referred to as the "provider". For convenience and clarity, I will refer to the person who receives the advice as the "recipient". The recipient may or may not be a customer or client of the provider. In the present case, the recipients of the calls were existing customers of Westpac because Westpac was the trustee of superannuation funds of the recipients. For that reason, the primary judge refers to the recipients of the calls as customers. However, when discussing the statutory language, I will use the neutral word "recipient" which does not pre-suppose an existing customer or client relationship with the provider of the advice.

352 The primary judge concluded that the financial product advice given by Westpac to its customers through the calls was not personal advice within the meaning of s 766B(3) because the advice was not given in circumstances where:

- (a) Westpac (through the callers) considered any of the customer's objectives, financial situation or needs (at [393]); or
- (b) a reasonable person might expect Westpac (through the callers) to have considered one or more of the customer's objectives, financial situation or needs (at [396]).

353 It followed from that conclusion that the financial product advice given by Westpac (through the callers) was general advice within the meaning of s 766B(4).

ASIC's appeal

354 By its appeal, ASIC contends that the primary judge erred in finding that the financial product advice provided by Westpac was not personal advice. ASIC's contention is that the primary judge erred in construing the word "considered" in s 766B(3) of the Act and also erred in the application of that word to the facts as found.

355 In relation to the construction of the word, ASIC submitted that the primary judge erred in construing the term as meaning "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" (at [127]). ASIC submitted that her Honour imported into the ordinary meaning of the word "considered" both qualitative and temporal criteria as to the type and duration of time that is necessary to be undertaken for consideration. ASIC submitted that the word "considered" in s 766B(3) should be given its ordinary meaning: to think; to make allowance for; to pay attention to; to view attentively or to scrutinise.

Westpac's contentions

356 By grounds 2 to 5 of its amended notice of contention, Westpac contends that, while the primary judge was correct to conclude that the calls did not involve the giving of personal advice, the primary judge erred in the construction of the phrases "in circumstances where", "one or more of the person's objectives, financial situation and needs" and "a reasonable person" within s 766B(3) of the Act.

357 In relation to the phrase "in circumstances where", Westpac contends that the primary judge erred in deciding that the phrase does not require a connection between the advice provided and the personal circumstances considered and that its function is only to direct attention broadly to the circumstances in which the advice is given (at [109]). Westpac submitted that the words require a connection between the consideration of the person's objectives, financial situation and needs and the advice that is given.

358 In relation to the phrase "one or more of the person's objectives, financial situation and needs", Westpac contends that the primary judge erred in deciding that the phrase contemplates one or more of the person's objectives, one or more aspects of the person's financial situation or one or more of the person's needs (at [112], [118]). Westpac submitted that the consequence of

that construction is that consideration of a single, isolated aspect of a person's financial situation is sufficient to stamp advice with the character of personal advice if that aspect was considered by the provider of the advice. Westpac submitted that financial product advice is personal advice within the meaning of s 766B(3) only if the provider has considered (or a reasonable person might expect the provider to have considered) one or more of the categories of a person's objectives, financial situation and needs as a whole to the extent relevant to the advice being given. Westpac also contends that the primary judge should have found that the personal matters about each of Westpac's customers which were known to the callers did not constitute the customer's "objectives, financial situation and needs" within the meaning of s 766B(3) of the Act.

359 In relation to the phrase "a reasonable person", Westpac contends that the primary judge should have found that the phrase refers to a hypothetical person standing in the recipient's shoes with the recipient's knowledge of the circumstances in which the advice is given.

Meaning of s 766B(3)

360 As mentioned earlier, the arguments advanced by the parties with respect to s 766B(3), which involved the dissection of the provision into individual phrases separated from the provision as a whole, has a tendency to obscure rather than elucidate meaning. It is important to keep sight of the place of each word and phrase within the single sentence that is the statutory provision.

"in circumstances where"

361 The primary judge concluded (at [109]) that the phrase "in circumstances where" does not require a causative nexus or connection between the advice provided and the personal circumstances considered, or that the advice be provided on the basis of the particular personal circumstances of the person; rather, it directs attention broadly to the circumstances in which the financial product advice was given. I respectfully agree with that conclusion, although I would not use the word "broadly".

362 The phrase "in circumstances where" has a straightforward meaning within the section – for financial product advice to be personal advice, it must be given in one of two alternative circumstances. The first circumstance, in paragraph (a), is where the provider has considered one or more of the recipient's objectives, financial situation and needs. As discussed below, "considered" means had regard to or taken into account. The section does not require that the advice be based on the recipient's objectives, financial situation and needs: the section only

requires that the provider has had regard to those matters in giving the advice. It may be accepted that there is a temporal requirement associated with the consideration of the recipient's objectives, financial situation and needs: the use of the present perfect tense (had considered) conveys that the consideration occurred at an indefinite time in the past, preceding the giving of the advice, although that time might continue up until the giving of the advice.

363 The second circumstance is where a reasonable person might expect the provider to have considered the recipient's objectives, financial situation and needs. The expectation is to be assessed as at the time the advice is given. The matter to be expected is that the provider has considered the recipient's objectives, financial situation and needs. Again, the use of the perfect infinitive tense (to have considered) conveys that the expectation is that the consideration would have occurred at an indefinite time in the past, although that time might continue up until the giving of the advice.

364 Contrary to Westpac's submission, the phrase "in circumstances where" does not require a causal nexus between the advice provided and the personal circumstances considered in the sense that the advice must be based on or reflect the personal circumstances considered. The definition is satisfied if the provider has considered the recipient's personal circumstances in giving the advice, but the advice disregards those circumstances (in other words, the advice is not appropriate having regard to those circumstances). All the section requires is that the provider of the advice has considered the recipient's personal circumstances in giving the advice or a reasonable person might expect the provider to have considered those circumstances in giving the advice.

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

365 With respect to the phrase "the person's objectives, financial situation and needs", neither party challenged the primary judge's reference to the ordinary meaning of those words (at [111]):

- (a) an objective is an end towards which efforts are directed;
- (b) a situation is a state of affairs or combination of circumstances; and
- (c) a need is a case or instance in which some necessity or want exists.

366 The primary judge accepted ASIC's submission that the phrase "one or more of the person's objectives, financial situation and needs" means one or more of a person's objectives, one or more aspects of the person's financial situation or one or more of the person's needs (at [112], [118]). Her Honour concluded that the phrase "the person's objectives, financial situation and

needs” refers to the multiplicity of objectives, financial situations and needs of a client that may be relevant to financial product advice provided to the client (at [119]). The primary judge also considered that the concepts of “objectives”, “financial situation” and “needs” are not mutually exclusive and may contain significant overlap. Her Honour gave the example of a customer with a dependent disabled child who may characterise the goal of accumulating sufficient wealth to provide for that child as both an objective and a need, and the dependence of the child on the customer may form part of the customer’s “financial situation” (at [120]).

367 Respectfully, I agree with the effect of the primary judge’s construction of the phrase “one or more of the person’s objectives, financial situation and needs”, but would express my views differently. I agree with Westpac’s submission that the phrase means one or more of the categories of a person’s objectives, financial situation and needs, but I disagree that the phrase means one or more of those categories *as a whole* to the extent relevant to the advice being given. Westpac’s construction adds an unnecessary gloss to those words.

368 First, starting with the meaning of each of the three expressions “objectives”, “financial situation” and “needs”, I disagree that the expressions have overlapping meanings, although I agree that a person’s objectives, financial situation and needs may often be related. In my view, each of the expressions has a distinct meaning. As set out above, the ordinary meaning of the word “need” is a necessity or want. A person’s necessity or want exists independently of the person’s financial situation. Taking her Honour’s illustration, the necessity or want is to obtain medical care for the disabled child. A person’s financial situation may or may not enable them to obtain that medical care. An objective, being a goal or end toward which efforts are directed, is also distinct from a need. Again using her Honour’s illustration of a disabled child, the objective may be to obtain sufficient funds to meet the cost of medical care required.

369 Second, both the grammatical form of the phrase “one or more of the person’s objectives, financial situation and needs” and the extrinsic materials support the conclusion that the words “one or more” refer to the three matters that follow, being objectives, financial situation and needs, such that the section requires that the provider has considered the recipient’s objectives, or their financial situation or their needs or more than one of them. As to grammar, the use of the words “one or more” in reference to a list of items ordinarily conveys the meaning of one or more of the items on the list. That ordinary grammatical meaning is supported by the extrinsic materials. The legislative history of s 766B(3) shows that the words “one or more” were added to s 766B(3) to make it clear that the provision was not limited to circumstances

where a provider of advice had considered each of a person's objectives, financial situation and needs, and had only considered one of the three. This is made clear from the Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2011* (Cth) which stated:

[3.20] As currently drafted, proposed sub-section 766B(3) defines personal advice as financial product advice that is given or directed to a person in circumstances where the provider has considered the "objectives, financial situation and needs" of the person (or where a reasonable person might expect the provider to have considered these matters).

[3.21] Item 19 amends proposed sub-section 766B(3) to define personal advice as advice given or directed to a person where the provider has considered one or more of the person's objectives, financial situation and needs (or where a reasonable person might expect the provider to have considered one or more of these matters).

[3.22] The purpose of this proposed amendment is to ensure that a financial services provider will be subject to the requirements of proposed Divisions 3 or 5 of Part 7.7 (including the requirement to provide a SOA) when advising a retail client that a particular financial product (or class of financial products) is appropriate to them as an individual.

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

370 Third, in my view there is no warrant in the statutory language for the gloss sought to be added by Westpac that the phrase means one or more of those categories *as a whole* to the extent relevant to the advice being given. The qualification "as a whole" is not implicit in the statutory language and the addition of that qualification has the potential to undermine the consumer protection purposes of the legislation. The effect of the qualification is that advice will not be personal advice and the provider of the advice can avoid the consumer protection obligations associated with giving personal advice if the provider can show that he or she did not have regard to the whole of the recipient's objectives, financial situation or needs, but only had regard to part of them. Such an outcome is inconsistent with the implicit obligations imposed by s 961B. As discussed further below, s 961B(1) requires that a person who provides personal advice to a retail client must act in the best interests of the client. Section 961B(2) states that a provider will satisfy the obligation in subsection (1) 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. Such a construction would defeat the very purpose of s 961B.

371 For those reasons, in my view paragraph (a) of s 766B(3) requires only that the provider has considered to some extent one or more of the recipient's objectives, financial situation or needs; the paragraph does not require that the provider has considered any of them "as a whole". Paragraph (b) has a corresponding meaning.

372 Whether the provider has considered matters that can be regarded as a person's objectives, financial situation or needs is a fact specific enquiry. I respectfully agree with the primary judge's observation (at [121]) that a person's objectives, financial situation and needs does not include aims that might be characterised as universal or generic, such as the aim of having one's superannuation arranged in a way that is more easily managed. In the context of Chapter 7 of the Act, the phrase "the person's objectives, financial situation and needs" is directed to an individual's personal circumstances. That is implicit from the significant obligations that arise in connection with the giving of personal advice, including the obligation to give a statement of advice under s 946A and the obligation to act in the best interests of the client under s 961B. In my view, the detailed requirements associated with those obligations would be unnecessary and nonsensical if the only matters considered, or which might be expected to be considered, were universal or generic and not personal.

"considered"

373 As the primary judge observed (at [123]), the ordinary dictionary meaning of the word "considered" includes to make allowance for, to pay attention to, to have regard to or to view attentively or scrutinise. In my view, there is no need to travel beyond the ordinary meaning of the word. Read in context, the definition of personal advice in s 766B(3) means financial product advice that is given to a person in circumstances where the provider of the advice has taken into account or given attention to one or more of the person's objectives, financial situation and needs or in circumstances where a reasonable person might expect the provider of the advice to have done so. No greater explication of the word "considered" is required.

374 ASIC contends that the primary judge erred in concluding (at [127]) that:

...the word "considered" refers to an active process of evaluating or reflecting upon the subject matter of the consideration, appropriate to the provision of "financial product advice". It does not require a process that is "detailed, extensive or careful", however, it does involve an intellectual engagement with the subject matter of the consideration.

375 With respect, I agree that her Honour's conclusion on the meaning of the word "considered" in s 766B(3) involves some narrowing of the ordinary meaning of the word, and introduces phrases which are not within the statute and which have uncertain meaning. The phrase "intellectual engagement" is unobjectionable if all it conveys is that the mind of the provider of the advice was engaged with one or more of the person's objectives, financial situation and needs. Such an engagement is implicit in the ordinary meaning of the word "considered". However, the phrase "active process of evaluating" refers to a particular standard or level of consideration that is not mandated by the statutory language. The further requirement that the evaluation or reflection upon the person's objectives, financial situation and needs "be appropriate to the provision of the financial property advice" adds a further requirement that is not within the statutory language.

"reasonable person"

376 The primary judge recorded and responded to Westpac's submission with respect to the meaning of the words "a reasonable person" as follows (at [134] and [135]):

Westpac contended that the reasonable person's knowledge of the objective circumstances in which advice is given could not extend to matters extraneous to the interactions between the provider of the advice and the customer and which are not known to the customer at all. Thus, it contended that the reasonable person is a hypothetical person standing in the actual customer's shoes.

This submission is directed to the identified relevant "circumstances" in s 766B(3). I do not accept that the relevant circumstances are only those that could have been known by a reasonable person. In my view, s 766B(3) directs attention to all of the relevant circumstances in which the financial product advice is given. Section 766B(3)(b) requires an assessment of what a reasonable person would expect in those circumstances.

377 In so far as the primary judge concluded that the expression "a reasonable person" extends beyond a hypothetical reasonable person standing in the recipient's shoes, and extends (as ASIC submitted) to an ordinary member of the community, I respectfully disagree with her Honour. In my view, reading s 766B(3) as a whole, the expression "a reasonable person" contemplates a hypothetical reasonable person standing in the recipient's shoes.

378 The function of the section is to define the circumstances in which financial product advice that is given or directed to a person is to be characterised as personal advice for the purposes of Chapter 7, thereby triggering enhanced obligations on the provider of the advice. The section describes two circumstances. The first circumstance, in paragraph (a), is where the provider of the advice has considered one or more of the recipient's objectives, financial

situation and needs. The second circumstance, in paragraph (b), is where the provider of the advice has not considered one or more of the recipient's objectives, financial situation and needs, but where a reasonable person might expect the provider to have considered one or more of those matters. In my view, the use of the words "reasonable person" in paragraph (b) is a reference to a reasonable recipient of the advice. It is not a hypothetical person uninvolved in the receipt of the advice.

379 In the chapeau to the provision, the word "person" is used to refer to the recipient of the advice. In paragraph (a), the word person is used in the same sense. In paragraph (b), the word person has been qualified by the word "reasonable", which suggests a reasonable recipient of the advice. That meaning is confirmed by the use of the phrase "one or more of those matters" in paragraph (b). That phrase incorporates by reference the phrase "one or more of the person's objectives, financial situation and needs" in paragraph (a). Understood in that way, the circumstance described by paragraph (b) is where a reasonable person might expect the provider to have considered one or more of the person's objectives, financial situation and needs. In my view, the words used aptly describe a circumstance where a reasonable person, standing in the shoes of the recipient, might expect the provider to have considered one or more of the person's objectives, financial situation and needs. That interpretation of paragraph (b) is harmonious with paragraph (a). In contrast, there is no sound basis for concluding that the circumstance in paragraph (b) refers to the expectation of a reasonable bystander to the giving of the financial product advice.

380 It follows that the expectations of the reasonable person in paragraph (b) (being a reasonable person standing in the shoes of the recipient of the advice) will be informed by the interactions between the provider and the recipient. However, the expectations will not be limited to those matters. The expectations of a reasonable person standing in the shoes of the recipient of the advice will also be informed by other facts that are likely to be known by such a person, but which did not form part of the express interactions between the provider and the recipient.

Did Westpac consider one or more of the recipient's objectives, financial situation and needs (paragraph (a) of s 766B(3))?

381 I agree with the primary judge that, during the calls, the customers conveyed various of their personal objectives within the meaning of paragraph 766B(3)(a). Those objectives were identified by the primary judge (at [382]) in respect of individual customers, but generally fell into the following four categories:

- (a) to maximise the performance (in terms of financial return) of the customer's overall superannuation;
- (b) to minimise the fees payable in respect of the customer's overall superannuation;
- (c) to ensure that the insurance coverage for the customer is appropriate for the customer's circumstances or is maintained at a particular level; and
- (d) to organise the customer's overall superannuation in a manner that is appropriate to the fact the customer was retiring.

382 Although each of the above aims is stated at a level of generality, in my view they are encompassed by the concept of "objectives" within the statutory provision. They are matters that are apt to be considered in providing financial product advice that is in the best interests of the customer.

383 I have some reservations about the primary judge's conclusion (at [376]) that the fact that the customers had multiple superannuation accounts was a "financial situation" within the meaning of the statutory provision. It is difficult to see that the fact that a person has two assets of a particular kind, here two superannuation accounts, conveys anything meaningful about the person's financial situation. By analogy, a statement that a person has two bank accounts can hardly be regarded as conveying any information about the person's financial situation. Both accounts may have very little money in them, or both may have substantial amounts of money in them. The information is at too high a level of generality to answer the description of "financial situation".

384 In any event, I agree with the primary judge's conclusion (at [393]) that the evidence shows that the callers did not consider any of the customers' objectives, financial situation and needs. I agree with the primary judge that the mere fact that the callers listened to the customer does not compel a conclusion that the caller considered the information conveyed by the customer. The evidence shows that the callers did not intend to take into account, or have regard to, the customers' objectives, financial situation and needs; the caller conveyed a similar message regardless of the customers' objectives, financial situation and needs. As the primary judge found (at [387]):

Accepting that each of the 15 calls was conducted in accordance with the QM Framework, I do not infer from that fact that the callers "considered" any "objective" or "financial situation" that was identified by a customer during the course of the call. To the contrary, the QM Framework did not require or engage consideration of those matters. To the extent that such information is elicited, the QM Framework

encouraged the callers to use it to “drive an outcome”, as ASIC put it. That outcome was the customer’s rollover of their external superannuation accounts into their BT account.

385 I would therefore dismiss ground 2 of ASIC’s notice of appeal.

Might a reasonable recipient of the advice have expected Westpac to have considered one or more of the recipient’s objectives, financial situation and needs (paragraph (b) of s 766B(3))?

386 The primary judge also reached the conclusion that the circumstances referred to in paragraph (b) of s 766B(3) were not satisfied: that a reasonable person would not expect the provider of the advice to have considered one or more of the person’s objectives, financial situation and needs (at [398]). In reaching that conclusion, her Honour took into account a range of circumstances, some of which pointed towards the circumstance described in paragraph (b) and some of which pointed away from that circumstance.

387 While recognising the advantage enjoyed by the primary judge in considering the totality of the evidence, with respect I am unable to agree with her Honour’s conclusion. In my view, the content of the calls, in the circumstances in which they were made, would have led a reasonable person standing in the shoes of the recipients of the advice to expect the provider to have considered one or more of the recipient’s objectives, financial situation and needs. I consider that the following circumstances are relevant to the assessment required by paragraph (b).

388 First, the advice concerned superannuation and, specifically, the consequences of consolidating multiple superannuation accounts. For most customers, that is a very significant financial decision. The decision necessarily affects the future financial return on the customer’s overall superannuation, including through the payment of fees and the availability and content of insurance, particularly life insurance. It can be accepted that, for persons with very little superannuation, the decision may have little financial significance. However, abstracted to the position of a hypothetical reasonable recipient of the advice in the circumstances of this case, I consider it to be a factor that points in favour of the circumstance described in paragraph (b).

389 Second, the calls were made, and the advice was given, on behalf of Westpac and the recipients were customers of Westpac (in the sense that they held superannuation accounts with Westpac). Thus, there was an existing customer relationship. In my view, that factor also points towards the circumstances described in paragraph (b). The calls were not “cold calls”; the calls emanated from an existing customer relationship. Indeed, the callers identified themselves by

reference to that relationship at the beginning of the call. In my view, that fact points towards the circumstance described in paragraph (b).

390 Third, the effect of the first two factors is cumulative. An individual that has invested superannuation with an institution would reasonably expect that institution to act for their benefit and in their interests in relation to their superannuation affairs. Such an expectation arises from the nature of the product, which is held by a financial institution on trust for the superannuation member. In my view, the combined facts that a financial institution calls and gives advice to an individual who is a member of a superannuation fund held or managed by that institution about rolling over superannuation points towards the circumstance described in paragraph (b).

391 Fourth, during the course of the calls, the callers asked the recipients about the considerations that were relevant to them in deciding whether to consolidate their superannuation accounts. Asking that question would ordinarily create the impression in the mind of the reasonable person receiving the call that the caller sought that information because it was relevant to the matters being discussed. In most of the calls, the questions were preceded by a statement to the effect that the caller was asking the question so as to be able to better help the recipient of the call. The social proofing language would ordinarily reinforce the impression in the mind of the reasonable person receiving the call that the caller was taking account of the answers given by the recipient. The social proofing language conveyed that the answer given by the recipient was valid or reasonable. In that way, the caller affirmed the answer given. In my view, those facts also pointed towards the circumstance described in paragraph (b).

392 The fifth factor is that each of the calls conveyed an implicit recommendation for the customer to act. A different expectation in the mind of the hypothetical reasonable recipient of advice may arise depending upon whether the advice conveys a recommendation or merely conveys a statement of opinion. In my view, such a person is less likely to expect the provider of the advice to have considered one or more of the person's personal circumstances if the advice is merely a statement of opinion; for example, the expected return of a financial product in a future period. Although the opinion might be conveyed with the intention to influence a person to acquire the product, without more the statement of opinion may not cause a reasonable recipient of the advice to expect the provider of the advice to have considered one or more of the recipient's personal circumstances. Conversely, if the advice conveys a recommendation, the expectation referred to in paragraph (b) is more likely to arise. If the provider of the advice

urges the recipient to follow a particular course of action, there is a greater likelihood that a hypothetical reasonable recipient of the advice might expect the provider of the advice to have considered the recipient's personal circumstances.

393 Sixth, it is relevant that the callers gave a general advice warning. By that warning, the callers expressly stated that they were not taking into account the recipient's personal circumstances. This is an important factor that points away from the circumstance described in paragraph (b). However, the force of this factor in any given case will depend upon the manner in which the general advice warning is given in the course of the advice. In the present case, it was given at the outset of the call. There is nothing inappropriate in doing so. But by giving the warning at the outset of the call and not reinforcing the warning at any other point in the call, the caller runs the risk that a hypothetical reasonable recipient of the advice will lose sight of the warning in the course of the call.

394 Seventh, it is relevant that the advice was provided free of charge. This is a factor that points away from the circumstance described in paragraph (b). All other things being equal, a hypothetical reasonable recipient of the advice is less likely to expect the provider of the advice to have considered their personal circumstances if there is no fee or charge for the advice.

395 Eighth, it is relevant that in some cases the callers revealed a lack of knowledge about the customer's personal circumstances. That is a factor that points away from the circumstance described in paragraph (b). It would suggest to a hypothetical reasonable recipient of the advice that the caller is not aware of the recipient's personal circumstances, and therefore the reasonable recipient would not expect the provider of the advice to have considered those circumstances.

396 On balance, and having regard to all of the factors referred to above, in my view paragraph (b) of s 766(3) is satisfied in this case. The combination of those factors leads to the conclusion that a hypothetical reasonable recipient of the advice might expect the provider of the advice to have considered one or more of the recipient's objectives, financial situation and needs. Put simply, in my view the first five factors outweigh the final three factors. The decision concerned an important financial asset of each customer; the callers were known to the customers in the sense that the calls were made on behalf of one of the customer's superannuation funds; the callers offered to help the customers and asked the customers about matters that were important to them; the callers affirmed the answers given by the customers as being valid or reasonable objectives; the callers implicitly recommended that the customers

consolidate their external superannuation accounts into their BT account. Notwithstanding the general advice warning that was given at the outset of the call; notwithstanding no fees were charged for the offer of help; and notwithstanding that it was apparent that the callers did not have information about the customer's external superannuation accounts, in my view a reasonable person standing in the shoes of the customers might expect the callers to have considered one or more of the person's objectives, financial situation and needs.

397 There is nothing strained about that conclusion. It is consistent with and gives effect to the objects of Chapter 7 of the Act, particularly the object to promote confident and informed decision making by consumers of financial services and fairness, honesty and professionalism by those who provide financial services. Those objects are promoted by ensuring that, if personal financial product advice is given to a person, the consumer protections in Part 7.7 (the requirements for a statement of advice) and Part 7.7A (the requirement to act in the best interests of the client) apply. Those obligations attach to the provision of personal financial product advice because the recipients of such advice are likely to rely and act upon the advice.

398 By its conduct, Westpac engendered a circumstance in which it conveyed an implicit recommendation to its customers to consolidate their external superannuation accounts into their BT account, and engendered a circumstance in which customers might rely and act on that recommendation because they might expect Westpac to have considered one or more of their personal circumstances in making that recommendation. As discussed further below, in my view Westpac's conduct undermined informed decision making by its customers and was not consistent with the promotion of fairness, honesty and professionalism by a provider of financial services.

399 I would therefore uphold ground 3 of ASIC's notice of appeal.

Did Westpac fail to act in the best interests of the customer in contravention of s 961K(2)?

Primary judge's conclusion

400 Section 961B, within Part 7.7A of the Act, applies to the provision of personal advice by an individual (referred to as the provider) to another person as a retail client (referred to as the client). Subsection 961B(1) states that the provider must act in the best interests of the client in relation to the advice. Subsection 961B(2) states that the provider satisfies the duty in subsection (1) if the provider proves it has done a number of things, specified in the subsection (2), that relate to the steps taken and matters considered in giving the advice.

Subsection 961K(2), which is a civil penalty provision, provides (relevantly) that a financial services licensee contravenes s 961K(2) if a representative of the licensee contravenes s 961B and the licensee is the responsible licensee in relation to that contravention.

401 Although the primary judge found that Westpac did not give personal advice during the calls, her Honour nevertheless considered, on the assumption that that finding was wrong, whether Westpac contravened s 961K(2) by reason that the callers contravened s 961B. Her Honour found that, on the assumption that the calls constituted personal advice, Westpac (through its representatives making the calls) failed to act in the best interests of the customers to whom the advice was given and thereby contravened s 961B(1) (at [463] and [464]). Her Honour concluded that Westpac contravened that provision because the best interests of the customers could only be served by advice as to whether the rollover service was in their best interests and Westpac did not attempt to inform the customers whether it was in their best interests to accept the advice.

Westpac's notice of contention

402 By ground 6 of its amended notice of contention, Westpac contends that the primary judge should have found that, even if Westpac provided personal advice within the meaning of s 766B(3) of the Act, ASIC did not establish that Westpac had failed to act in the best interests of the customers in relation to that advice in contravention of s 961B(1) of the Act.

403 Westpac criticised the primary judge's reasoning for reversing the onus of proof of contravention of s 961B(1). Westpac submitted that the error in the primary judge's finding was to treat the possibility that advice may have been given which was contrary to the interests of customers as sufficient to establish the contravention. It submitted that s 961B(1) is directed to the substance of the advice provided and whether the provider acted in the client's best interests in giving it.

Meaning of s 961B

404 The nature of the obligation in s 961B(1) was considered by Moshinsky J in *ASIC v NSG Services Pty Ltd* (2017) 122 ACSR 47; 35 ACLC 17-005. His Honour considered whether s 961B is concerned with the process or procedure involved in providing advice, or whether it is concerned with the content or substance of that advice. Without expressing a concluded view, his Honour considered that the statutory context, including the language of s 961G, the

legislative history and the relevant extrinsic materials supported the view that s 961B is concerned with the process or procedure involved in providing advice (at [21]).

405 In my view, textual and contextual considerations compel a conclusion that s 961B is not concerned with the question whether the substance of the advice is in the best interests of the client and, if it was necessary to refer to it, the relevant extrinsic materials confirm that conclusion. Rather, the section is concerned with the actions taken by the provider in the formulation of the advice and the objective purpose of the provider in taking those actions and giving the advice. The following textual and contextual matters can be noted.

406 First, s 961B(1) states that the provider must act in the best interests of the client in relation to the advice; the section does not state that the advice must be in the best interests of the client. The section is directed to how the provider must “act” in relation to the advice and stipulates that the provider must act in the best interests of the client.

407 Second, s 961B(2) states the provider satisfies the duty in subsection (1) if the provider proves that he or she has done each of the following:

- (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
- (b) identified:
 - (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
 - (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client’s relevant circumstances),
- (c) where it was reasonably apparent that information relating to the client’s relevant circumstances was incomplete or inaccurate, made reasonable enquiries to obtain complete and accurate information;
- (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
- (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

- (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
- (ii) assessed the information gathered in the investigation;
- (f) based all judgments in advising the client on the client's relevant circumstances; and
- (g) taken any other step that, at the time the advice was provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

408 Consistently with the use of the word "act" in subsection (1), subsection (2) focuses on what the provider has "done". It describes actions to be taken by the provider; it does not refer to the substance of the advice given. All of the actions are directed to the pursuit of the best interests of the client and describe diligent efforts directed to that pursuit through the identification of the client's objectives, financial situation and needs; by basing judgments on those matters; and by declining to advise if the provider does not have the requisite expertise to advise. Subsection (2) states that a provider satisfies the duty in subsection (1) if the provider does the things stipulated in subsection (2). It is implicit in that language that the legislature considered that the obligation imposed by subsection (1) requires the types of actions referred to in subsection (2).

409 To the extent it is necessary to have regard to it, the Replacement Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) affirms that conclusion. Paragraph 1.23 states:

...the requirement to act in a client's best interest is intended to be about the process of providing advice, reflecting the notion that good processes will improve the quality of the advice that is provided. The provision is not about justifying the quality of the advice by retrospective testing against financial outcomes.

410 For those reasons, Westpac's submissions directed to the content of the advice must be rejected.

Did Westpac fail to act in the best interests of the customer in contravention of s 961K(2)?

411 The facts found by the primary judge compel a conclusion that the callers contravened s 961B(1) and Westpac thereby contravened s 961B(1).

412 Westpac, through its representatives, failed to act in any of the ways referred to in paragraphs (b) to (g) of s 961B(2). The callers failed to obtain the most basic information that would have been required in order to act in the best interests of the customers. That information would

likely have included the amounts held by the customers in each external superannuation fund; the investment options chosen by the customers in each external fund; the relative historical and expected future performance of the investments in those external funds compared with the equivalent BT fund option; the range, nature and scale of fees charged in each external fund compared with the BT fund; and the nature and amount of insurances provided by each external fund in comparison to the BT fund. The information was not sought because the object of the calls was not to act in the best interests of the client. The object of the calls, to influence customers to consolidate their external superannuation accounts into a Westpac account, was for the benefit of Westpac by increasing the funds under management in its superannuation funds.

413 I would therefore dismiss ground 6 of Westpac's amended notice of contention

Did Westpac fail to ensure that financial services were provided efficiently, honestly and fairly in contravention of s 912(1)(a) of the Act?

Primary judge's conclusion

414 Section 912A(1)(a) of the Act provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.

415 The primary judge concluded that the implementation of the QM Framework in the cases of the 15 customers the subject of the proceeding, and more generally in connection with Westpac's campaign to encourage customers to accept the rollover service, involved a failure on the part of Westpac to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly (at [443]). In support of that conclusion, her Honour referred to four matters:

- (a) First, Westpac made an implicit recommendation to customers to roll over their external superannuation accounts into their BT account without informing the customers about potentially relevant considerations for a prudent customer (at [444]).
- (b) Second, the QM Framework involved encouraging customers to proceed with the rollover through the use of the social proofing technique by which customers were told that their beliefs or reasons for consolidating their superannuation funds were commonly held. However, the fact that a customer's belief or rationale was commonly held was not a matter that would have provided a sound basis for the decision (at [445]).

- (c) Third, Westpac conveyed the impression to customers that the decision to roll over their external superannuation funds was an obvious and uncontroversial course of action for the customer, when that may well not have been the case (at [446]).
- (d) Fourth, while the QM Framework was a course of conduct that was admittedly in Westpac's self-interest and did not necessarily promote the best interests of the customers, the approach conveyed the impression that Westpac was assisting the customer (at [447]).

The parties' contentions

- 416 By grounds 2 and 3 of its cross-appeal, Westpac contends that the primary judge erred in finding that Westpac failed to do all things necessary to ensure that the financial services covered by their financial services licenses were provided "efficiently, honestly and fairly" in contravention of s 912A(1)(a) of the Act. Westpac advanced three submissions in support of that contention.
- 417 First, Westpac submitted that it did not provide financial product advice on the calls and therefore did not provide a financial service during the calls, which rendered s 912A(1)(a) inapplicable. For the reasons given earlier, I reject that submission.
- 418 Second, Westpac submitted the findings made by the primary judge with respect to s 912A(1)(a) were outside ASIC's pleaded case. Westpac submitted that ASIC's allegation of a contravention of s 912A(1)(a) was premised on the allegation that, through the calls, Westpac provided personal advice to customers. As the primary judge found that Westpac had not provided personal advice, Westpac submitted that it was not open, as a matter of procedural fairness, for her Honour to find that Westpac had contravened s 912A(1)(a). I accept that submission for the reasons explained by Allsop CJ. However, as I have reached a different conclusion to the primary judge on the issue of personal advice, the finding of contravention of s 912A(1)(a) remains open on ASIC's pleaded case.
- 419 Third, Westpac submitted that the matters identified by the primary judge do not establish conduct to the required level of seriousness to establish a contravention of s 912A(1)(a), being conduct capable of resulting in a conclusion of an absence of competence and lack of "sound ethical values and judgment" of the kind referred to in *ASIC v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206 (*ASIC v Camelot*) at [69(b)] or "serious departures from reasonable

standards of performance of advice” of the kind referred to in *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209 at [673].

420 By its notice of contention, ASIC contends that the primary judge should have found that, by the QM Framework, Westpac adopted and implemented an approach to calls with customers in the campaign which was liable to lead to staff providing personal advice to a customer to roll over their superannuation into an account with Westpac:

- (a) despite Westpac only being authorised to provide general advice; and
- (b) without acting in the best interests of the customer in relation to the advice, and Westpac thereby contravened s 912A(1)(a) of the Act.

Did Westpac contravene s 912A(1)(a)?

421 In my view, Westpac contravened s 912A(1)(a) of the Act by adopting and implementing a campaign, which included a telephone campaign, which was liable to lead to callers giving personal advice to customers containing an implicit recommendation to consolidate their superannuation into an account with Westpac in disregard of their best interests. Put simply, the campaign was inherently likely to result in financial advice being given to customers in a manner that was unfair to those customers, contrary to the requirement in s 912A(1)(a).

422 The primary judge traced the legislative history of the words “efficiently, honestly and fairly” now found in s 912A(1)(a) of the Act. As her Honour observed, the phrase appears to have its origin in the former s 60 of the *Securities Industry Code* of each of the States which provided that a dealer’s licence might be revoked if the National Companies and Securities Commission (a predecessor body to ASIC) was satisfied that the dealer did not perform the duties of a holder of such a licence efficiently, honestly or fairly. The phrase was considered by Young J in *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 (*Story*) at 672. His Honour concluded that:

...the group of words “efficiently, honestly and fairly” must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

423 As the primary judge observed, that approach to the interpretation of the words has been followed in numerous cases, including by Foster J in *ASIC v Camelot* at [69]-[70] and by Beach J in *ASIC v Avestra Asset Management Limited (In Liq)* (2017) 348 ALR 525 at [191].

424 Although not the subject of argument on this appeal, I have considerable reservations about the view that the words “efficiently, honestly and fairly” as used in s 912A(1)(a) of the Act should be read compendiously in the manner suggested by Young J in *Story*. His Honour gave two reasons for interpreting the phrase in that manner. The first is that it is impossible to carry out all three tasks concurrently. His Honour explained that conclusion by reference to the following example (at 672):

To illustrate, a police officer may very well be most efficient in control of crime if he just shot every suspected criminal on site. It would save a lot of time in arresting, preparing for trial, trying and convicting the offender. However, that would hardly be fair. Likewise, a judge could get through his list most efficiently by finding for the plaintiff or the defendant as a matter of course, or declining to listen to counsel, but again that would hardly be the most fair way to proceed.

425 The second is the use of the conjunction “and” rather than the disjunctive “or” in the phrase “efficiently, honestly and fairly”.

426 With respect, it is not apparent that either reason provides a sound basis for reading the phrase, as it appears in s 912A(1)(a) of the Act, compendiously in the manner suggested by his Honour. In particular, it is not apparent why a licensee cannot comply with each of the three obligations, efficiently, honestly and fairly, applying the ordinary meaning of each word. One of the meanings of the word “efficiently”, and the meaning well adapted to the statutory provision, is competent, capable and having and using the requisite knowledge, skill and industry: cf *ASIC v Camelot* at [69(c)]. The word “honestly” includes dishonesty in the criminal sense but may also comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110. The word “fair” as used in s 912A(1)(a) has not received detailed judicial consideration. However, it seems to me that there is no reason why it cannot carry its ordinary meaning which includes an absence of injustice, even-handedness and reasonableness. As is the case with legislative requirements of a similar kind, such as provisions addressing unfair contract terms, the characterisation of conduct as unfair is evaluative and must be done with close attention to the applicable statutory provision: cf *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [364]. It seems to me that the concepts of efficiently, honestly and fairly are not inherently in conflict with each other and that the ordinary meaning of the words used in s 912A(1)(a) is to impose three concurrent obligations on the financial services licensee: to ensure that the financial services are provided efficiently, and are provided honestly, and are provided fairly.

427 In the present case, the significant aspect of s 912A(1)(a) is the requirement to ensure that the financial services covered by the licence are provided fairly. Fairness must be assessed having regard to all relevant circumstances bearing upon the provision of the financial services in question. In my view, the facts found by the primary judge compel a conclusion that Westpac did not do all things necessary to ensure that the financial product advice given by it through the calls was provided fairly. 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. That conduct can rightly be described as unfair and involved a contravention of s 912A(1)(a) of the Act.

428 I would therefore dismiss grounds 2 and 3 of Westpac's cross-appeal, and uphold ASIC's notice of contention.

Conclusion

429 In conclusion, I would allow ASIC's appeal and dismiss Westpac's cross-appeal. I agree with the orders proposed by Allsop CJ.

I certify that the preceding one hundred and twenty-six (126) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan.

Associate: 

Dated: 28 October 2019