



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S69 of 2020

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

and

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AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

APPELLANTS' SUBMISSIONS

Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

20 **Part II: Concise statement of issues**

2. The three issues that arise in this appeal:

(a) What is the proper approach to the objective limb of personal advice in s 766B(3)(b) of the *Corporations Act 2001* (Cth) (**Act**)? Does it depend on the expectation of a reasonable person that the advice provider had in fact considered the recipient's personal circumstances, or an expectation that the advice provider acting in the recipient's best interests should have considered those circumstances?

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(b) Does "consideration" of a person's personal circumstances within the meaning of s 766B(3) require that the advice provider engage with and evaluate those circumstances in formulating the advice?

(c) How much of a person's "objectives, financial situation or needs" must have been considered by an advice provider before the advice is "personal advice" under s 766B(3)?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Reasons for judgment of primary and intermediate court

4. The decision at first instance is *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 133 ACSR 1.
5. The decision of the Full Court of the Federal Court is *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 373 ALR 455; 141 ACSR 1.

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Part V: Facts

6. The appellants (together, **Westpac**) were issuers of superannuation products under the BT brand. During 2014, Westpac invited existing BT customers to consolidate their external superannuation accounts into their BT accounts. Each of the 15 customers¹ the subject of ASIC’s claim received from Westpac one or more form letters or emails² highlighting the potential benefits of rolling over superannuation, namely (1) the potential to save on fees and (2) the convenience and ease of management in having all of one’s super in one place (“manageability”), and offering to conduct a search of other superannuation accounts the customer may hold with other providers. These benefits were the same general benefits identified by ASIC on its “Moneysmart” website, which encouraged consumers to consolidate their superannuation accounts.³
7. Westpac called each of the 15 customers. In all but two cases, the customer had already taken up Westpac’s offer to conduct a search of other superannuation accounts the customer might hold. The Westpac representative provided the customers with any relevant search results and offered to effect the rollover of the customer’s external superannuation accounts into their BT account over the telephone.
8. The nature of the customer interactions relevant to the question of statutory construction raised on the appeal can be illustrated by reference to Customer 1:
 - (a) Westpac sent Customer 1 a letter dated 23 July 2014, enclosing her annual super statement, which relevantly contained two generic messages: that combining

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¹ Only 14 customers were in issue in the Full Court, the primary judge (Gleeson J) having found that the call to Customer 3 did not involve the provision of financial product advice of any kind, a finding not challenged by the respondent (ASIC) in the Full Court.

² Appellants' Book of Further Material (AFM) at AFM 6, 9, 31 and 45.

³ See at PJ [10] (CAB 21), AFM 208.

super into one account *could* lead to savings on administration fees and *could* lead to greater manageability from having all superannuation in one place.⁴ The letter invited Customer 1 to give her consent to Westpac searching for other superannuation accounts she may hold with other providers. The letter contained a disclaimer that it did not take into account Customer 1’s personal objectives, financial situation or needs and recommended that Customer 1 speak to her Financial Adviser (if she had one) for personal advice tailored to her specific financial situation, objectives and needs;

- 10 (b) On 10 September 2014, Customer 1 accessed the BT website and requested a search be conducted to locate amounts in any external accounts she held;⁵
- (c) On 29 September 2014, Westpac sent Customer 1 a letter setting out the results of the superannuation search she had requested, which repeated the same generic messages about the potential to reduce fees and paperwork and contained the same disclaimer;⁶
- (d) A Westpac representative made two telephone calls to Customer 1 on 3 October 2014.⁷ The first call commenced with the Westpac caller advising Customer 1 that her search results had been received, offering to help bring them over to her BT account and repeating the general message about the potential to save on fees.⁸ The caller then gave the general advice warning required by s 949A(2):⁹
- 20 “everything discussed today is general in nature, it won’t take into account your personal financial needs. Is that okay?”
- (e) After Customer 1 agreed, the Westpac caller elicited from Customer 1 the main benefits she saw in consolidating her super accounts, which were the prospect of saving fees and better manageability. The caller affirmed those perceptions as ones widely held by other customers and invited Customer 1 to provide her tax file number to process the rollover. The second call¹⁰ occurred after the customer had located her tax file number. Again, the Westpac caller provided the general

⁴ PJ [143] (CAB 52); AFM 34.

⁵ PJ [153] (CAB 54)

⁶ PJ [154] (CAB 54 – 55). The form of letter appears at AFM 66.

⁷ PJ [156] (CAB 55). Transcripts appear at AFM 116 and AFM 122.

⁸ PJ [158] (CAB 55 – 56).

⁹ As modified by ASIC Class Order CO 05/1195 (AFM 220) for oral warnings. Section 949A applied as each of the customers was a retail client by virtue of s 761G of the Act.

¹⁰ PJ [159] (CAB 56).

advice warning. Customer 1 agreed to proceed and provided the instruction to roll over the external accounts into her BT account.

9. Both the primary judge and the Full Court held that Westpac provided financial product advice within the meaning of s 766B(1) of the Act to Customer 1 during the calls by *impliedly* recommending that Customer 1 should roll over her external accounts into her BT account¹¹ and by making statements of opinion that Customer 1 could *potentially* save on fees and that combining superannuation accounts made sense from a management point of view.¹² Similar findings were made in relation to the other customers.¹³ Those findings are not challenged, but the width of the Full Court's approach as to what constitutes financial product advice in s 766B(1) bears upon the proper construction of s 766B(3), which identifies the point at which the advice provider has travelled beyond mere general advice and has assumed the onerous obligations imposed under the Act on providers of personal advice.
10. There are concurrent findings of fact by the primary judge and all members of the Full Court that Westpac did not *in fact* consider any of Customer 1's objectives, financial situation or needs in making the implied recommendation and statements of opinion,¹⁴ such that the advice was *not* personal advice under the subjective limb in s 766B(3)(a) of the Act. The same finding was made in respect of all other customers.
11. That is, the Full Court held that the Westpac caller did not in fact "*consider*" Customer 1's objectives, financial situation or needs notwithstanding that the caller evidently heard Customer 1 say that the benefits she saw in consolidating her super were the potential to save on fees and better manageability of her super, reasons which the caller affirmed by reference to the views of other customers.
12. However, all three members of the Full Court found that a reasonable person standing in the customers' shoes with the customers' knowledge¹⁵ might expect (contrary to the fact) that Westpac had "*considered*" the customers' objectives of "minimising fees" and "manageability" in making the implied recommendation to roll over, and that the

¹¹ PJ [247] (CAB 89), FC [64] (CAB 195), [67] (CAB 196 – 197), [235] (CAB 263), [347] (CAB 298).

¹² PJ [277]-[278] (CAB 96), [282] (CAB 96), FC [65]-[67] (CAB 195 – 197), [240] (CAB 264), [340]-[341] (CAB 296 – 297).

¹³ PJ [260] (CAB 92), [285]-[366] (CAB 97 – 112), FC [84]-[85] (CAB 204 – 205), [88]-[89] (CAB 205), [94]-[95] (CAB 205 – 206), [98]-[99] (CAB 206), [103]-[104] (CAB 206 – 207), [108]-[109] (CAB 207), [112]-[113] (CAB 207), [116]-[117] (CAB 208), [122]-[123] (CAB 208 – 209), [126]-[127] (CAB 209), [131]-[132] (CAB 210), [136]-[137] (CAB 210), [141]-[142] (CAB 211), [235] (CAB 263), [240] (CAB 264), [340]-[341] (CAB 296 – 297), [347] (CAB 298).

¹⁴ FC [75] (CAB 201), [81] (CAB 204), [265] (CAB 272 – 273), [384] (CAB 308 – 309).

¹⁵ FC [30] (CAB 183 – 184), [260] (CAB 271), [377] (CAB 306).

advice was therefore personal advice under the objective limb in s 766B(3)(b) of the Act.¹⁶ As will be seen, in doing so the Full Court adopted a normative rather than a factual approach to the s 766B(3)(b) enquiry.

13. That finding overturned the finding of the primary judge, who drew a sharp distinction between what a reasonable person might expect Westpac to have *actually* considered based on what was said on the calls and their context¹⁷ and a normative judgment of what a reasonable person might expect Westpac *should* have considered,¹⁸ rejecting the latter approach¹⁹ and finding that none of the advice was personal advice.²⁰ The primary judge held that a reasonable person would not expect Westpac in fact to have “considered” one or more of the customers’ objectives, financial and needs because:²¹

- (a) at or near the commencement of every call, the customer was given the prescribed general advice warning in words to the effect “*everything being discussed today is general in nature, it won’t take into account your [personal financial needs / personal needs and objectives / personal needs, goals or objectives / personal circumstances]*” and the customer was required to confirm that was acceptable before the call proceeded (which the primary judge considered would strongly suggest to the reasonable person that the Westpac caller was not considering the customer’s personal circumstances);
- (b) the customer had provided no information to Westpac about their objectives, financial situation and needs prior to the call;
- (c) the Westpac caller had no previous relationship to the customer and was not known or understood by the customer as their financial adviser so that they were not obviously in a position to consider the customer’s objectives or financial situation;
- (d) the “advice” was provided free of charge;
- (e) to the extent that the customers identified “objectives” of saving on fees and manageability, that occurred during the course of the calls so that the Westpac callers did not have an opportunity to consider those objectives prior to making the calls; and

¹⁶ FC [80] (CAB 203 – 204), [266] (CAB 273), [387] (CAB 309).

¹⁷ PJ [394] (CAB 118 – 119).

¹⁸ PJ [395] (CAB 119).

¹⁹ PJ [396] (CAB 120).

²⁰ PJ [398] (CAB 120).

²¹ PJ [394] (CAB 118 – 119).

(f) the callers revealed a lack of knowledge about the customer’s situation (such as the amounts held by the customer in accounts with other superannuation providers, fees paid on those other accounts and whether those accounts had attached insurances).

14. Moreover, in a number of calls the customer was offered the possibility of receiving personal advice through Westpac’s advisory channel (for a fee), which none of the customers took up.²²

15. Having found that Westpac gave personal advice on each of the calls, the Full Court held that Westpac had contravened:

- 10 (a) section 961B of the Act (and therefore s 961K, civil penalty provision) by failing to act in the customers’ best interests.²³ The Full Court held that compliance with s 961B would require Westpac to consider: (per Allsop CJ)²⁴ at a minimum, the comparative fee levels and rates of return on the other funds held by the customer, or (per O’Byrne J)²⁵ the amounts held in the other funds; the chosen investment options in those funds; the relative historical and expected future performance of the external funds compared to the equivalent BT fund; the rate, nature and scale of fees charged on each external fund and the BT fund; and the insurances provided by each external fund and the BT fund;²⁶
- 20 (b) section 946A of the Act by failing to give each customer a written Statement of Advice;²⁷ and
- (c) sections 912A(1)(a), (b), and (c) of the Act on the basis that, by providing personal advice when the advice may well not have been in the customers’ interests, Westpac breached the “efficiently, honestly and fairly” standard, its

²² See Customer 8: p 13.22-14.11 (AFM 109 – 110); Customer 10: p 10.06-10.23 (AFM 194); Customer 13: p 11.11-12.04 (AFM 167 – 168). The same suggestion was made in the prior correspondence to each customer – “Of course, 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” and “Or if you’d like more tailored advice on your super speak to your financial adviser”: see, for example, the correspondence sent to Customer 1 (AFM 34 and 66).

²³ FC [147]-[151] (Allsop CJ) (CAB 212 – 214), [292]-[301] (Jagot J) (CAB 282 – 284), [400]-[401] (CAB 312 – 313), [411]-[412] (O’Byrne J) (CAB 315 – 316).

²⁴ FC [150] (CAB 213 – 214).

²⁵ FC [412] (CAB 315 – 316).

²⁶ Jagot J did not address this question directly, instead referring to the primary judge’s findings that, if the advice were personal advice, Westpac did not act in the customers’ best interests as it did not attempt to advise customers whether it was in their interests to accept the advice and did not know whether it was in the interests of the customer to roll over: FC [299]-[300] (CAB 283).

²⁷ FC [152] (CAB 215).

licence conditions (which only licensed Westpac to provide general advice) and the financial services laws.²⁸

Part VI: Argument

16. Westpac contends that the Full Court made three related errors in the interpretation of s 766B(3)(b), corresponding to the first three grounds of appeal, which had the effect of collapsing into personal advice much advice which is in truth only general advice. Each provides an alternative basis for overturning the Full Court's decision.

Section 766B of the Corporations Act

- 10 17. Ch 7 of the Act regulates the provision of financial services. Its object includes the promotion of 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.²⁹ Necessarily that involves balancing the pursuit of consumer protection and the burdens imposed on providers of financial services.
18. Part 7.1 contains definitions of key concepts used in Ch 7, one of which is “financial product advice”. The provision of financial product advice constitutes a financial service.³⁰ A person who carries on a business of providing financial product advice is required to hold an Australian financial services licence unless otherwise exempted.³¹
- 20 19. The meaning of financial product advice is given in s 766B(1), namely a recommendation or statement of opinion intended to influence the making of a decision in relation to financial products or which could reasonably be regarded as intended to have such an influence.
20. Section 766B(2) divides financial product advice into two types: personal advice and general advice. Section 766B(3) relevantly provides:

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

²⁸ FC [152]-[153] (CAB 215), [176] (CAB 220) (Allsop CJ), [286] (CAB 280), [302] (CAB 284) (Jagot J), [427] (CAB 320) (O'Bryan J). All members of the Full Court accepted that ASIC's s 912A(1)(a) case as pleaded and run at trial was dependent upon a finding of personal advice and that, in the absence of such a finding, the s 912A(1)(a) case must fail: FC [177]-[213] (CAB 220 – 230) (Allsop CJ), [303] (CAB 284) (Jagot J), [418] (CAB 317) (O'Bryan J).

²⁹ Section 760A(a) of the Act.

³⁰ Section 766A(1)(a) of the Act.

³¹ Section 911A(1) of the Act.

(b) a reasonable person might expect the provider to have considered one or more of those matters.

21. All other financial product advice is “*general advice*”: s 766B(4).

22. This binary division has been fundamental to the scheme of regulation of financial product advice since the financial services provisions were introduced into the Act by the *Financial Services Reform Act 2001* (Cth).³² Since that time, a person providing personal advice to a retail client has been under an obligation:

(a) not to provide personal advice unless the advice is appropriate to the client;³³

(b) to provide a written Statement of Advice to the client unless otherwise exempted,³⁴ the content of which (including as to the substance of, and basis for, the advice, the advice provider’s remuneration and the particular consequences for the client where the advice recommends that the client replace one financial product with another) is prescribed by ss 947A-947D; and

(c) to provide the client with a Product Disclosure Statement for a financial product where the advice recommends the acquisition of the financial product.³⁵

23. In 2012 the Act was amended to strengthen the obligations on providers of personal advice. Those amendments were made by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth), which replaced Part 7.7 Div 3 with current Div 7.7A which relevantly:

(a) imposes on providers of personal advice a quasi-fiduciary duty to act in the best interests of a retail client (s 961B) and to give priority to the client’s interests where there is a conflict between the interests of the client and the provider of the advice (s 961J);³⁶ and

(b) regulates the charging by an advice provider of ongoing fees to a retail client and prohibits certain types of remuneration (Pt 7.7A, Divs 3-5).

24. The 2012 amendments were in response to the 2009 *Inquiry into Financial Products and Services in Australia* by the Parliamentary Joint Committee on Corporations and Financial Services which considered issues associated with prominent corporate collapses in the financial planning industry, including Storm Financial and Opes

³² Effective 12 March 2002.

³³ Section 961G of the Act; Former s 945A of the Act (prior to 1 July 2012).

³⁴ Sections 944A, 946A(1) of the Act

³⁵ Section 1012A of the Act.

³⁶ Duties which cannot be contracted out of (s 960A) and breach of which attracts a civil penalty (s 961K).

Prime.³⁷ Parliament's intention in 2012 was to impose these obligations on participants in the financial planning industry, to regulate the conflicts inherent in the financial adviser/client relationship.³⁸

25. Section 961B assumes, by its terms,³⁹ that personal advice will be "sought" from the advice provider, that the recipient of personal advice is a "client" of the provider and that disclosure of the client's "objectives, financial situation and needs" will occur through instructions from the client to the adviser.

26. If, in the other hand, advice is "*general advice*", the only specific obligation imposed on the provider is to provide a general advice warning to retail clients in the terms of s 949A(2).⁴⁰ For both types of advice, the provider remains subject to its general obligations as a financial services licensee under s 912A.⁴¹

Ground 1: The Full Court erroneously introduced a normative element into the s 766B(3)(b) test

27. The first error in the Full Court's construction of s 766B(3)(b) was to introduce a normative element to the enquiry, not embodied in the Act, based on assumptions as to what a reasonable person might generally expect the advice provider *should* have considered if it were acting in the recipient's best interests.

28. The normative assumption emerges most explicitly from the judgments of Jagot and O'Bryan JJ and can be seen also to underpin the Chief Justice's approach to the subsection.

Jagot J

29. At FC [267]-[274] (CAB 273 – 275), her Honour identified 8 factors pointing to satisfaction of the objective limb in s 766B(3)(b), notwithstanding the general advice warning given on each call. The third, fourth and fifth factors at FC [269]-[271] (CAB 273 – 274) are that there was a pre-existing relationship between Westpac and the customer; that the calls were about the customer's superannuation, which may be inferred to have been of the utmost importance to the customer; and that the tenor of

³⁷ Senate Revised Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth), p 3

³⁸ Senate Revised Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth), p 3, [1.2], [1.6]

³⁹ Section 961B(2)(b)

⁴⁰ For advice provided orally, s 949A(2) was modified during the relevant period by ASIC Class Order CO 05/1195 such that a provider was required only to warn that the advice was general and may not be appropriate for the client.

⁴¹ For both types of advice, where the advice is provided to a retail client the provider is also required to give a Financial Services Guide if it has not done so at an earlier time: ss 941A(1), 941C(1) of the Act.

the calls reinforced that the purpose of the call was to help the customer. Common to Jagot J's explanation of each of those factors is the premise that a reasonable person in the position of an existing customer, when invited to make a decision over a matter of financial significance such as rolling over superannuation, would expect Westpac to be acting in the customer's best interests and that it would not be in the customer's best interests for a rollover recommendation to be made without consideration of the customer's personal circumstances.

- 10 30. The remaining factors identified by Jagot J are either justifications for discounting factors otherwise suggesting a reasonable person might expect Westpac had not considered the customer's personal circumstances,⁴² are equivocal on the critical question⁴³ or, with respect, in error.⁴⁴
31. That Jagot J adopted a normative approach to the sub-section is evident from FC [278] (CAB 277 – 278) approving a passage from the primary judge at PJ [395] (CAB 119), which is a passage where the primary judge is sharply distinguishing the normative approach (“*should have* been given in circumstances where one or more of the customer's objectives and financial situation was considered”) from the factual approach (“*did not* consider any of the customer's objectives and financial situation”) which her Honour was taking at PJ [394] (CAB 118 – 119): see at PJ [396] (CAB 120).

O'Bryan J

- 20 32. At FC [388]-[395] (CAB 309 – 311), his Honour provides a different list of factors supporting the conclusion at FC [396] (CAB 311 – 312) that, on balance, the s 766B(3)(b) test was satisfied. The first five factors point in favour of that conclusion and the last three point against. Of the factors supporting his Honour's conclusion, the first three (that for most customers superannuation is a very significant financial decision; that there was an existing customer relationship; and that customers would reasonably expect Westpac to act for their benefit and in their interests in relation to their superannuation affairs) proceed on the clear normative premise that a financial services provider should act in its clients' best interests.

⁴² Sixth and eighth factors at FC [272] (CAB 274), [274] (CAB 274 – 275).

⁴³ Second and seventh factors at FC [268] (CAB 273), [273] (CAB 274).

⁴⁴ First factor at FC [267] (CAB 273). The use of “*might*” in s 766B(3)(b) does not indicate a low threshold of possibilities rather than probabilities. Rather, as the primary judge held at PJ [130]-[131] (CAB 49 – 50), its use indicates the hypothetical posed by the subsection, namely the expectation of the reasonable person contrary to the fact.

33. O'Bryan J's fourth and fifth factors (that the callers asked the customers' reasons for wanting to consolidate and that the calls conveyed an implicit recommendation to act) assume (Westpac submits erroneously) that whenever any personal circumstances are revealed and a recommendation is made, the advice must be personal and not general. Such a conclusion denies the option, allowed by the Act,⁴⁵ of an advice provider having some information about the personal circumstances of a customer and recommending the customer acquire a product but using that information to tailor, or reinforce, general advice without assuming the heavy obligations imposed on personal advice providers.

Allsop CJ

10 34. The reasons of the Chief Justice indicate that his Honour also injected a normative element into his approach to the s 766B(3)(b) test. At FC [5] (CAB 174), the Chief Justice reasoned that it is not possible to recommend the consolidation of superannuation funds through general advice because the decision to consolidate is not one suitable for general advice; rather, it is a decision which requires attention to the personal circumstances of a customer and the features of the multiple funds held by the customer. That reasoning was expanded upon at FC [150] (CAB 213 – 214), where his Honour held that, as a general proposition, a decision to consolidate could not prudently be made in the interests of the customer without consideration of the personal circumstances of the customer directed to at least comparative fee levels and rates of return on the various funds.⁴⁶

20 35. The Chief Justice's reasons also gave critical significance to the concept of the "closing" of the calls where the customer is invited to give instructions to effect the rollover. The "closing" is the primary basis upon which the Chief Justice found at FC [77] (CAB 202 – 203) an implied statement of opinion⁴⁷ that the implied recommendation to roll over would "*meet or fulfil*" the customers' stated objectives of saving on fees and enhanced manageability. This implied statement of opinion is central to the Chief Justice's ultimate conclusion at FC [80] (CAB 203 – 204) that the tone and character of the call (being one of assistance), the existing relationship between financial institution and customer and the taking of the customer to the point of decision (the "closing") meant that a reasonable person might expect that Westpac

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⁴⁵ And accepted by ASIC: see extracts from ASIC Regulatory Guide RG 244 *Giving information, general advice and scaled advice* at paras RG 244.46 to RG 244.49 (AFM 217 – 219).

⁴⁶ The same reasoning appears also at FC [174] (CAB 219 – 220).

⁴⁷ Which was not part of ASIC's pleaded case.

had “*taken up and considered*” the customers’ stated objectives of saving on fees and better manageability such that they would be “*fulfilled and met*” if the rollover service were taken up.

10 36. It might be asked how does concluding the call by inviting the customer to make a decision say anything about the critical question of whether a reasonable person might expect Westpac to have considered the customer’s personal circumstances in recommending a rollover? The answer to the statutory question could not differ if Westpac had invited the customer to take time to consider their decision before coming back to Westpac. The “*implied opinion*” conceived of by the Chief Justice at FC [77] (CAB 202 – 203) can be seen as a step to reach the normative conclusion at FC [150] (CAB 213 – 214) that Westpac’ customers should not be rolling over their superannuation without the added protections of personal advice unless they had made an informed choice not to seek those extra protections.

20 37. The Act does not embody any such premise, at least within the definition of personal advice. It is not contrary to the Act for a person to choose to make a financial investment, large or small, based on general advice only or no advice at all. The Act does not require retail investors to be provided with personal advice, which will usually come at additional cost, before making a financial investment decision. Nor does the Act require a financial product provider to ensure that a customer has made an informed choice not to seek personal advice before transacting with the customer. Where general advice is given, the Act relevantly requires only a general advice warning.

30 38. The Chief Justice’s finding of personal advice on the objective limb is not premised on any view that Westpac misled the customers (and ASIC made no allegation of misrepresentation, misleading or deceptive conduct or unconscionable conduct against Westpac). More generally, the Chief Justice’s reasons do not explain how the helpful tone of the calls and the “closing” falsified the express general advice warning given on the calls, especially when none of the calls elicited any information on the fees paid by the customers on their other accounts, being the very information the Chief Justice held would be necessary to provide personal advice.

The statute does not mandate a normative approach

39. It can thus be seen that the reasoning of the Full Court hinged on a two stage normative assumption: *first*, that the reasonable person in the customer’s position might expect that Westpac would be acting in the customer’s best interests in making any implied

recommendation to roll over superannuation; and, *second*, that the customer's best interests can only be served through personal advice.

40. Neither assumption is reflected in the statutory text or the scheme of Ch 7 of the Act.

41. The Full Court's interpretation of s 766B(3)(b) conflates the customer's personal circumstances with their best interests. Whether a reasonable person might expect Westpac to act in the customer's best interests is not the statutory test. An expectation that Westpac had actually considered the customers' personal circumstances in giving advice is conceptually distinct from an expectation that Westpac would be acting in the customer's best interests in giving advice.

10 42. The Full Court's reasoning, with respect, entails circularity: the finding of personal advice and the resulting imposition of the best interests obligation in s 961B flowed from the normative judgment that a reasonable person would expect Westpac to be acting in its customers' best interests, which required personal rather than general advice. The circular effect of the Full Court's construction of s 766B(3)(b) is to impose a best interests duty as a necessary incident of the financial services provider / customer relationship – imposing by default quasi-fiduciary duties on a financial services provider to act in the best interests of current or prospective customers (and to prefer those interests over its own interests) in circumstances where the provider has not voluntarily assumed those obligations and is not entitled to remuneration for performing them. That is to extend the best interests obligations under Part 7.7A to contexts far removed from the financial adviser/client relationship which Parliament intended.

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43. The normative approach employed by the Full Court cannot be supported by the words "*might expect*" in s 766B(3)(b). The expectation of the reasonable person is not one as to a norm of conduct since no such norm can be found in the Act. Nothing in the Act presumes a financial services provider will provide personal rather than general advice, either generally or in relation to particular financial products or financial decisions, much less that it will provide personal advice gratuitously. The Act does not embody a paternalism which assumes retail investors cannot prudently make decisions for themselves. Retail clients are entitled to make decisions in their own interests without first seeking and bearing the costs of personal advice.

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44. The expectation of the reasonable person in s 766B(3)(b) is an expectation as to a state of affairs which cannot be known with certainty, namely the advice provider's mental deliberations. So understood, it is consistent with the ordinary meaning of the term

“*expect*” when used as a verb with a clause as its object⁴⁸ and also its common usage being to have a view about what is likely to happen in the future (by definition, a state of affairs not known with certainty by the person having the expectation).⁴⁹

45. Westpac contends the s 766B(3)(b) enquiry is, as the primary judge held, a purely factual one as to whether a reasonable person in the recipient’s position might expect, based on the interactions between the advice provider and recipient and their context, that the provider had *in fact* considered the recipient’s personal circumstances. Such a construction is consistent with the purpose of the objective limb, which is to protect a reliance interest: if the provider so behaves in its interactions with the recipient as to lead a reasonable person in the recipient’s shoes to expect that the recipient is receiving advice which has “considered” the recipient’s personal circumstances, then the recipient is entitled to the same protections as if the provider had engaged in that consideration. To take the paradigm example, a client who seeks advice from a financial planner, discloses his or her objectives, financial situation and needs through instructions and pays for and receives advice is entitled to expect that the adviser has considered the client’s personal circumstances in formulating the advice even if the adviser had not done so. The Act affords the client the full protections of the personal advice provisions accordingly.

46. Applied to the facts of this case, such an approach leads to the conclusion that personal advice was not provided on any of the calls, essentially for the reasons given by the primary judge at PJ [394] (CAB 118 – 119). In particular, a reasonable person in the position of the customers would not expect Westpac actually to have considered the customers’ financial situation, needs or objectives when the reasonable person would know:

- (a) Westpac had said explicitly it would not be considering the customers’ personal circumstances and the customers agreed to proceed on that basis;
- (b) the relevant objectives of the customers, as found by the Full Court, were of the most general kind: *first*, saving on fees; and, *secondly*, improved manageability;⁵⁰

⁴⁸ Macquarie Dictionary, 7th Ed: “3. *to suppose or surmise*”; Oxford English Dictionary: “15. *With clause as object: to suppose, surmise; to be inclined to think, to imagine.*”

⁴⁹ Macquarie Dictionary, 7th Ed: “1. ... *regard as likely to happen*”; Oxford English Dictionary: “11. *To regard as probable or imminent; to envisage; to anticipate.*”

⁵⁰ FC [71] (CAB 199), [83] (CAB 204), [87] (CAB 205), [93] (CAB 206), [102] (CAB 206), [107] (CAB 207), [111] (CAB 207), [121] (CAB 208), [130] (CAB 209), [275] (CAB 275), [381] (CAB 307 – 308). For some customers, further (but substantively related) objectives were found: FC [92] (CAB 205), [101]

- (c) none of the customers disclosed to Westpac information about the fees charged on their external superannuation accounts, or particular issues they were having in effectively managing multiple superannuation accounts, and there was no reason to think Westpac had any knowledge of such matters; and
- (d) these are matters that Westpac would need to know before it would be able to consider the customers' stated objectives of saving on fees and better manageability in making the implied recommendation to roll over the customers' external accounts.

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

- 10 47. The Full Court’s second error in construing s 766B(3)(b) was to give the expression “considered” an undemanding role in the statutory test. The members of the Full Court variously held that the expression can mean no more than “pay attention or regard to”,⁵¹ “any taking into account”⁵² or “pay attention to, to have regard to or to view attentively”.⁵³ However, in giving content to that construction, the Full Court did not require that there be any meaningful or sensible engagement with the “objective(s)”, “financial situation” or “need(s)” in giving the advice.
48. Allsop CJ held that the implied recommendation to roll over “took account of, and paid regard to, the customer’s objectives by fulfilling them”.⁵⁴ On that construction of “considered”, it is difficult to conceive of an implied recommendation by a product issuer which would not be personal advice because in almost every case the
20 recommendation could be said to have “paid regard to” the recipient’s expressed objectives by impliedly recommending that those objectives would be “fulfilled” if the recommendation were accepted.⁵⁵
49. These findings overturned that of the primary judge, who held that “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.⁵⁶
50. The Full Court’s interpretation of “considered” involved three subsidiary errors.

(CAB 206), [106] (CAB 207), [115] (CAB 208), [120] (CAB 208), [125] (CAB 209), [129] (CAB 209), [381] (CAB 307 – 308).

⁵¹ FC [25]-[26] (CAB 181 – 182), [77] (CAB 202 – 203) (Allsop CJ).

⁵² FC [247]-[248] (CAB 266 – 267) (Jagot J).

⁵³ FC [373] (CAB 305) (O’Byrne J).

⁵⁴ FC [77] (CAB 202 – 203) (Allsop CJ).

⁵⁵ FC [80] (CAB 203 – 204) (Allsop CJ).

⁵⁶ PJ [127] (CAB 49).

- 10 51. First, it produced an inconsistency in meaning between the use of the term in the subjective limb in s 766B(3)(a) and the objective limb in s 766B(3)(b). On the former, the Full Court held that the Westpac callers had not “considered” the customers’ stated objectives of saving fees and improving manageability notwithstanding the callers had elicited those objectives and affirmed them by reference to the views of other customers. That finding was undoubtedly correct – the Westpac callers never sought to engage with the customers’ personal circumstances for the purpose of formulating advice; they were following up on the offer made in the earlier correspondence to effect a rollover of external accounts into the customers’ BT account. The finding that there was no “consideration” on the subjective limb necessarily acknowledged the role of “consideration” in the statutory test as the required link or nexus between the recipient’s personal circumstances to the advice given.
52. However, on the objective limb, the Full Court held that a reasonable person might expect those same objectives to have been “considered” because they were so elicited, acknowledged and affirmed. The disparity of outcome can only be explained by giving the term “*considered*” a less demanding role on the objective limb.
- 20 53. Second, the meaning attributed by the Full Court to the term “*considered*” is at odds with the purpose of the section. The primary judge rightly held that the concept of consideration in s 766B(3) is concerned with an active process of evaluating or reflecting upon the recipient’s personal circumstances *appropriate to the provision of financial product advice*.⁵⁷ That meaning accords with what has been described as the word’s definite meaning in the judicial context.⁵⁸
- 30 54. That is, the consideration of which s 766B(3) speaks is actually taking the recipient’s personal circumstances into account by evaluating them for the purpose of providing the advice in question. The section presupposes a nexus (in fact or reasonable apprehension) between the advice provider’s consideration of the client’s personal circumstances and the advice provided. The giving of the advice must involve, at least in part, the provider’s evaluation of the recipient’s personal circumstances before it can be said that the provider had “considered” the recipient’s personal circumstances so as to provide advice personal to the recipient. That is the essence of personal advice.

⁵⁷ PJ [127] (CAB 49), quoted at FC [24] (CAB 181).

⁵⁸ *Tickner v Chapman* (1995) 57 FCR 451 at 462C (Black CJ), 495F–496A (Kiefel J).

55. Third, the Full Court was wrong to justify its undemanding approach to “consideration” as appropriate in the context of a protective provision.⁵⁹ In doing so, the Full Court overlooked that the concept of “consideration” is used variously throughout Ch 7, not merely as an element of the gateway to the imposition of the personal advice obligations but as an important part of the substantive content of those obligations once imposed: see s 961B(2)(b)(ii) and (e) (thrice occurring). The use of “consideration” as an element of the substantive obligations was even more acute in former s 945A of the Act,⁶⁰ which assessed the appropriateness of personal advice having regard to the “consideration” given by the advice provider to the client’s personal circumstances. To give the concept of “consideration” an undemanding content would undermine those substantive obligations. In any event, identifying the boundaries of the personal advice regime is not advanced by resolving all doubts about the reach of the provisions in favour of the consumer on the basis the object of the regime is protective: *Carr v Western Australia* (2007) 232 CLR 138 at [6]-[7].

56. The Full Court’s undemanding approach to “consideration” is one of the key ways in which it escaped an essential conundrum of this case. How could a reasonable person in the customer’s shoes have expected that Westpac was in fact considering the customer’s desire for less fees and easier management in the process of formulating and making its recommendation when that person knew:

- (a) the customer was told via the general advice warning that Westpac would *not* be considering the customer’s personal circumstances and the customer was content for the call to continue on that basis;
- (b) the personal objectives of the customer elicited in the call were those of the most general kind – the customer would prefer less fees to more, and less management to more – objectives which ASIC publicly promoted as reasons to consolidate super;
- (c) the customer had not been asked to provide, nor had the customer volunteered, any information about the fees he or she was paying other providers, or the particular management issues the customer was having, for Westpac to consider those matters in formulating a recommendation; and

⁵⁹ FC [25] (CAB 181 – 182) (Allsop CJ).

⁶⁰ Former s 945A was introduced at the same time as s 766B(3) and, prior to the 2012 amendments, contained the obligation that personal advice be appropriate for the client (now found in s 961G).

(d) the benefits of rolling over were never expressed in the calls in terms that went beyond the *potential* to save on fees and improve manageability, consistently with the prior correspondence.

57. The reasonable person would know that the Westpac was incapable of “*considering*” the personal objectives of each customer in the sense of engaging with and evaluating them in formulating the recommendation. Consideration of those objectives within the context of s 766B(3)(b) could only meaningfully be performed by Westpac taking into account the fees charged on the customers’ other accounts and the particular issues the customers had in managing their other accounts to arrive at the reasoned conclusion that the customers should roll over. The reasonable person could only have concluded, as was the fact, and consistently with the general advice warning, that the only way in which Westpac might be using the revealed personal preferences of the customer was in affirming the general advice which Westpac had given in the earlier correspondence (about which no complaint is made).

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

58. The third contended error is closely related to the second: what must the “consideration” be about? A majority of the Full Court (Allsop CJ and O’Byrne J) accepted that the phrase “one or more of” applies to the *categories* of “objectives, financial situation and needs”,⁶¹ a conclusion confirmed by the extrinsic material.⁶² But their Honours did not articulate a touchstone for determining *what aspects* of those categories must be considered in order for personal advice to occur.

59. Each member of the Full Court reached a different conclusion as to the meaning of the words “one or more of” in s 766B(3), such that on the Full Court’s judgment the personal advice obligations are variously said to arise whenever the provider considers, or might reasonably be expected to have considered:

⁶¹ FC [28]-[29] (CAB 182 – 183), [367] (CAB 303). Jagot J held that the words “*one or more of*” apply not to the three categories of objectives, financial situation and needs but distributively to each of the person’s objectives and needs and each aspect of the person’s financial situation, such that consideration of an isolated aspect of a person’s financial situation (e.g. that the person holds two or more superannuation accounts) is sufficient to render the advice personal advice: FC [249] (CAB 267 – 268), [253] (CAB 269), [277(2)] (CAB 276).

⁶² Senate Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2001* (Cth), [3.20]-[3.23], [3.99]-[3.102]

- (a) “*sufficient aspects of*” the person’s objectives, financial situation or needs “*so as to make the conclusion that there has been a consideration of that subject appropriate*” (FC [29] per Allsop CJ (CAB 183));
- (b) “*one or more of a person’s objectives; one or more aspects of a person’s financial situation or one or more of the person’s needs*” (FC [249] (CAB 267), [253] per Jagot J (CAB 269)); or
- (c) “*to some extent*” one or more of the recipient’s objectives, financial situation or needs (FC [371] per O’Bryan J (CAB 305)).

10 60. The consequence of the Full Court’s various interpretations is evident from its application of s 766B(3) to the facts. Having found that a reasonable person might expect Westpac to have considered the customers’ (entirely generic) objectives of “minimising fees” and “manageability” in making the implied recommendation to roll over, the Full Court held that the implied recommendation was personal advice.⁶³ But because Westpac did not consider *all* of the customer’s relevant personal circumstances (such as comparative fee levels on different funds and rates of return of other funds held), it contravened s 961B.⁶⁴

20 61. The correct construction, once the definition in s 766B(3) is read together with s 961B, is that the advice provider must, in fact or reasonable apprehension, consider the minimum irreducible personal circumstances of the customer *relevant to the subject matter of the advice* in question. The touchstone of relevance to the advice sought on the particular subject matter finds its statutory foundation in ss 961B(2)(b)(ii), (f).

62. Such a construction promotes the object of the personal advice provisions, which is to ensure that a person who might reasonably expect to be receiving personalised advice in fact receives advice which has considered the person’s relevant personal circumstances necessary to give appropriate advice on the subject matter in question.

30 63. The purposive interpretation for which Westpac contends avoids what are otherwise real practical difficulties in the operation of the provision. The tests proposed by Allsop CJ (“sufficient aspects” of the person’s objectives) and by O’Bryan J (consideration “to some extent” of the person’s objectives) are, with respect, criteria of indeterminate reference and no test at all.

64. A customer who has told a superannuation provider only that they want to save on fees and make their super more manageable (objectives which might fairly be described as

⁶³ FC [77] (CAB 202 – 203), [275] (CAB 275), [396] (CAB 311 – 312).

⁶⁴ FC [150] (CAB 213 – 214), [412] (CAB 315 – 316).

universal) would not reasonably expect to receive free personalised advice which considered their tax position, the returns and investment profile of their other superannuation accounts, their insurance position and their retirement objectives.

65. Applied to the facts of the present case, a reasonable person in the customer’s position would not expect Westpac to have considered the customer’s minimum personal circumstances (objectives, financial situation or needs) relevant to a decision whether to roll over external super accounts into the customer’s BT account. As the Full Court observed, personal advice on that question would require at a minimum consideration of comparative fee levels and rates of return across the customer’s various accounts.
10 The customers never provided that information to Westpac, by instructions or otherwise, and Westpac never asked for it.

Part VII: Orders sought

66. Appeal allowed.

67. Set aside orders 1, 2 and 3 of the Full Court made on 28 October 2019 and the orders of the Full Court made on 12 November 2019 and in lieu thereof order:

- a. the appeal be dismissed.⁶⁵
- b. the cross-appeal be allowed.
- c. the declarations made on 21 December 2018 by Gleeson J be set aside and in lieu thereof order that the Amended Originating Process be dismissed with costs.

Part VIII: Estimate for oral argument

68. The appellants estimate they will require up to 2.25 hours for oral argument.

Dated: 12 June 2020



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⁶⁵ There is an error in the Notice of Appeal as filed: para 7(a) (CAB 361) should read “the appeal be dismissed”.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S69 of 2020

BETWEEN: **WESTPAC SECURITIES ADMINISTRATION LTD ACN 000 049 472**

First Appellant

BT FUNDS MANAGEMENT LTD ACN 002 916 458

Second Appellant

and

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AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Respondent

ANNEXURE

LEGISLATIVE PROVISIONS REFERRED TO IN APPELLANTS' SUBMISSIONS

Legislation	Version
<i>Corporations Act 2001</i> (Cth)	1 July 2014 to 18 December 2014 (C2014C00519)
<i>Corporations Act 2001</i> (Cth)	11 March 2002 to 10 April 2003 (C2004C03061)