



## HIGH COURT OF AUSTRALIA

3 February 2021

### WESTPAC SECURITIES ADMINISTRATION LTD & ANOR V AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

[2021] HCA 3

Today the High Court dismissed an appeal from a judgment of the Full Court of the Federal Court of Australia. The appeal concerned whether financial product advice given by the appellants (collectively, "Westpac") to members of superannuation funds of which they are trustees was "personal advice" within the meaning of s 766B(3)(b) of the *Corporations Act 2001* (Cth) (the "Act"). During a campaign, Westpac had contacted members via phone and advised each to accept an offer to roll over their external superannuation accounts into their account with Westpac.

Section 766B(3)(b) of the Act defines "personal advice" so as to include "financial product advice" given or directed to a person in circumstances where a reasonable person might expect the provider to have considered one or more of the person's objectives, financial situation and needs. Section 766B(4) defines "general advice" as financial product advice that is not personal advice. The Act imposes more onerous obligations on an adviser who provides personal advice, obligations Westpac accepted they had breached if they had provided personal advice.

The Court held that Westpac had provided personal advice to the members during their campaign. "Considered" in s 766B(3) refers not to an active process of evaluation and reflection but rather means "took account of", consistent with its counterpoint in s 949A(2)(a) and the protective purpose of s 766B(3). The words "one or more of the person's objectives, financial situation and needs" in s 766B(3) contemplate that consideration be of at least one aspect of the client's objectives, financial situation or needs. A reasonable person in the position of each of the members called by Westpac might expect Westpac to have in fact taken into account at least one aspect of the member's objectives, financial situation or needs. This expectation was engendered by the fact that Westpac had elicited from each member, with whom Westpac had a pre-existing relationship, an indication of his or her personal objectives of saving on fees and improving the manageability of superannuation; proceeded to confirm the validity of the expressed objectives and appropriateness of the roll-over service to achieve them; and then segued into an offer to effect the roll-over. That the members' objectives were "generic" or generally applicable did not mean they ceased being personal objectives capable of giving rise to that expectation.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*