

Article Information

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Personal advice or general advice? The Full Federal Court decides

The Full Federal Court has handed down a landmark decision finding Westpac Securities Administration Limited and BT Funds Management Limited provided personal advice in their telephone campaigns.

An important decision on what personal advice is was handed down by the Full Federal Court on 28 October 2019.

The Court held Westpac Securities Administration Limited and BT Funds Management Limited gave personal advice to 15 customers in two telephone campaigns conducted by members of Westpac's Super Activation Team.^[1] The financial services providers argued they provided general advice only. This was rejected by the Court.

This is a landmark decision and appealed Justice Gleeson's ruling in 2018 that Westpac's rolling over of \$640 million of superannuation balances to in-house funds was not derived from issuing 'personal' advice.^[2]

In 2014 and 2015, Westpac engaged in telephone-based sales campaigns by contacting existing BT Super customers and persuading them to consolidate their superannuation into their BT Super Account.^[3] The initial call from Westpac offered to perform a free search for other superannuation accounts that may be held by the customer. For those customers who held multiple external accounts, a follow up call would be made to persuade them to consolidate their superannuation into the BT Super account. In the course of that campaign, telephone salespeople would, among other things:

- ask customers what they were looking for in a super fund;
- ask customers about the benefits of consolidating super accounts, focusing on reducing fees and administrative convenience;
- use "social proofing" techniques to reassure customers that their concerns and desires were rational and widely held; and
- pressed the customer to agree to consolidate their super during the call, rather than encouraging the customer to consider their options and revert if they wish to proceed with consolidation.

In all cases, the purpose of the call was to persuade the customer to consolidate their super, regardless of what information the salesperson told the caller. The salespeople were given prior training about the distinction between general advice and personal advice and the need to avoid giving personal advice. They also recited a general advice warning in accordance with section 949B of the *Corporations Act* at the beginning of the call. The companies in question had AFS licenses which authorised them to provide general advice but not personal advice.^[4]

At first instance, the trial judge held that Westpac companies provided general advice only but had breached the obligation in section 912A(1)(a) to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.

ASIC made an appeal against the general advice finding, while Westpac cross-appealed the efficiently, honestly and fairly finding. The Full Federal Court on appeal reversed the trial judge's ruling on the general advice issue, finding that the callers had in fact given personal advice to customers and dismissed Westpac's cross-appeal. Westpac's advertising campaign that was intended to influence consumers was found to constitute providing financial product advice.^[5] Chapter 7 identifies provisions in place to safeguard consumers such as providing a statement of advice^[6] and acting in the consumer's best interests,^[7] which the three judges of the Full Court found that Westpac had failed to do.^[8]

The Full Court rejected Westpac's argument that a statement of opinion or recommendation must be of an advice character, as opposed to mere marketing, before it can amount to financial product advice. Consequently, in regards to the assessment of whether a customer's objectives, financial situation and/or needs were considered by the provider of financial advice, the Full Court held that "consider" does not require the active intellectual engagement that the trial judge held.^[9] It is to be interpreted according to its ordinary meaning, so that a lesser regard to, or taking into account of, either of those circumstances amounts to "consideration" of them.

All three judges in the Full Federal Court held that the circumstances of each call were such that a reasonable person might expect the caller to have considered one or more of the customer's objectives, one or more aspects of the customer's financial situation or one or more of the customer's needs when making a recommendation to consolidate into the BT Super account. This is because:

- there was a pre-existing relationship between Westpac and the customer – given this, a reasonable person would not expect Westpac to act contrary to the customer's interests;
- the calls related to the customer's superannuation, which can be inferred to be of utmost importance to the customer, so that no reasonable customer would expect their superannuation provider to recommend that they consolidate their accounts if doing so were contrary to the customer's interests;
- the tenor of the calls was ostensibly to help the customer in relation to their superannuation; and
- the caller elicited information from the customer about the customer's objectives and applied those objectives to the superannuation product.^[10]

This decision shows the need for greater caution when providing advice due to the thin boundaries between providing personal or general advice. The distinction between factual information, general and personal advice must be made clear due to the potential consequences of providing advice for which a person or company is not authorised.

When developing new products and services, it is important to be aware of what information your representatives are authorised or prohibited from providing. Piper Alderman's Financial Services Team are able to assist you and your team develop and structure products within the boundaries of your licence conditions, as well as applying for or varying AFS licenses to enable you to provide general or personal advice to your clients.

^[1] 28 October 2019, 19-293MR ASIC wins appeal against Westpac subsidiaries, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-293mr-asic-wins-appeal-against-westpac-subsidiaries/>.

^[2] Aleks Vickovich, 'ASIC win in Westpac super row threatens banks' cross-sell model', 28 October 2019, *Australian Financial Review*.

^[3] Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187 ('ASIC v Westpac') [1]

^[4] Ibid [199].

^[5] Ibid [323].

^[6] Corporations Act s 946A

^[7] Ibid s 961B(1).

^[8] ASIC v Westpac [323].

^[9] Ibid [24].

^[10] Ibid [267]-[274].