wotton kearney

Case Alert

Shaping the future of insurance law

High Court finds general advice can get personal

***Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3**

12 FEBRUARY 2021

AT A GLANCE

- On 3 February 2021, the High Court unanimously dismissed Westpac's appeal from the Full Federal Court in *Westpac Securities Administration Ltd v ASIC* [2021] HCA 3. It held that Westpac's call centre operators, in making outbound calls to existing members, provided personal advice to retail clients in breach of Australian financial service licence (AFSL) conditions.
- This is the first High Court pronouncement on the limits of a 'general advice' model, which will have wide-ranging implications for the life insurance, retail super and self-managed superannuation fund sectors, as well as industry super funds.
- Businesses that have used, or continue to use, 'general advice' models now face an assertive regulator armed with the High Court's findings.
- Insurers who cover those business will need to adjust their underwriting to reflect the increased risks.

The background

Following the Hayne Royal Commission's recommendations, and in some cases questionable profitability, most financial services providers (FSPs) have stopped using 'general advice' models delivered by call centres. However, ASIC has pursued civil penalty proceedings regarding some historic practices.

This High Court case dealt with historic practices at Westpac, which involved employees making outbound calls to fund members of WSAL and BT Funds Management (Westpac-owned businesses and trustees of Westpac-branded retail superannuation funds). The callers encouraged members to rollover monies into their Westpac superannuation fund from any third party superannuation funds. Westpac offered to assist them to do so through its 'rollover service'.

The callers provided the members with a "general advice warning"[1] at the beginning of the call. They framed the call as a helpful "courtesy call" about the availability of the rollover service. The members were not charged for the call or the service.

[1] Under s.949A(2) of the Corporations Act, a general advice warning must state that: *"(a) the advice has been prepared without taking account of the client's objectives, financial situation or needs; and (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs ...*".

The evidence was that the callers, at times, demonstrated a lack of knowledge of the customer's personal financial affairs. However, during the calls the callers sought – and usually elicited – the members' wishes and objectives to "save on fees" and "improve the manageability" of their superannuation.

Once those objectives were agreed, the callers offered to rollover any external funds during the call if the customer supplied their tax file number. This resulted in a large increase to Westpac funds under management, which the High Court said was the "raison d'être" of the calls.

WSAL and BT Funds Management were not authorised under their AFSLs to provide financial product advice on superannuation funds that was 'personal advice' within the meaning of s.766B of the *Corporations Act 2001* (Cth) (Corporations Act).

Was it personal advice?

The sole issue before the High Court was whether the calls constituted personal advice or general advice under the Corporations Act.

It was not disputed that:

- Westpac called its existing superannuation members
- in doing so, it provided financial product advice to members regarding a financial product (membership in one of the funds)
- the advice was intended to influence the member to make a decision regarding their superannuation, and
- the advice comprised an implied recommendation that that member "should rollover their external accounts into their BT account or, in other words, they should accept the rollover service".

'Personal advice' is defined in s.766B(3) of the Corporations Act as:

> "*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."*

Accordingly, the agreed question for the High Court was:

> *"whether a reasonable member might expect that Westpac had in fact considered one or more of the member's objectives, financial situation and needs and not whether the member might expect that Westpac should have considered those circumstances [emphasis added]."*

The High Court's decision

In two judgments, the High Court unanimously answered the agreed question in the affirmative, finding that Westpac had provided members with 'personal advice' during the call.

The majority (Kiefel CJ, Bell, Gageler and Keane JJ, who also agreed with Gordon J on orders) provided useful guidance on the test for personal advice. Their Honours said that:

- the giving of a general advice warning did not alter the fact that what occurred in the calls involved a recommendation that had the character of "advice specifically about the member's situation"
- the general advice warning did not alter the "expectation as to the quality of the advice that the phone call was apt to engender in the member"
- the callers elicited personal objectives and needs from the members by confirming their wishes to "save on fees" and "improve the manageability" of their superannuation – these were the types of objectives likely to be considered by members when deciding whether to consolidate superannuation funds
- the fact that the rollover service was offered "free of charge" had, at best, a neutral effect on a member's reasonable expectations
- the fact that the callers at times did not know all of the financial circumstances of members was not inconsistent with "an expectation that the members' objectives were taken into account by Westpac in recommending acceptance of its rollover service"
- s.766B(3) of the Corporations Act expressly provides that personal advice has been given where "the provider of the advice has considered one or more of the person's objectives, financial situation and needs" – there is no need to know or consider all of them

- in this case, the callers did know the objectives and needs of the members relevant to the rollover service
- it was reasonable for a member to think that Westpac considered that acceptance of the rollover services would meet those members' needs
- "considered" in s.766B(3) does not mean an active, comprehensive evaluation; it means "took account of", and
- consideration need only be of "at least one aspect of the client's objectives, financial situation or needs" – it does not need to be "so much of each category as is relevant to the subject matter of the advice".

Westpac argued that the identified needs, for example to save on fees, were "highly generic and … obviously correct". Financial advice that considered those generic needs was not apt, the bank said, to cause members to expect that the advice was based on one or more of their objectives, financial situation and needs.

The High Court rejected that submission. It stated that advice that is personal does not cease to be personal "because the content of that advice is such as to be generally applicable to all or most persons in the position of the [member] as well as to the particular" member.

The majority said that Westpac designed the calls to create the impression for members that rolling over funds into a single Westpac account would benefit them. Westpac cannot complain, they said, because that plan succeeded. The majority also found that Westpac, by doing so, had generated the relevant expectations.

It was not in dispute that if Westpac was found to have provided personal advice, the bank had:

- breached the conditions of the AFSLs and the financial services laws, as it was not authorised to provide personal advice
- failed to do all things necessary to ensure that the financial services covered by the AFSLs were provided efficiently, honestly and fairly within the meaning of s.912A(1), and
- breached s.961B(1) (best interest duty), and thereby contravened s.961K(2), which is a civil penalty provision.

The implications for insurers

This High Court decision highlights the 'thin line' between general and personal advice. The majority found: personal objectives can be almost universally shared and still be personal; that recommendations can be implied from the context of discussions; and the mere giving of a general advice warning is, of itself, not determinative of compliant conduct.

For FSPs, these findings may well create uncertainty about where that 'thin line' falls in their own business – both today and historically.

Any FSP that fails to understand and mitigate 'general advice' risk factors in their business should be a red flag for insurers, given the potentially far-reaching consequences of a breach. Insurers should also make sure that their underwriting reveals where such 'general advice' risks may exist, either in historical practices or in current practices that have 'general advice' risks. In doing so, insurers should assess:

- the detail of how a FSP communicates with its customers, including by phone
- whether there is a practice of scripted call communications with customers, and, if so, how robustly it is monitored and updated, and
- the procedures that are in place to identify and address 'general advice' risks.

ASIC's 'why not litigate?' approach may yet give rise to further civil penalty proceedings for other cases involving historical conduct. The regulator may also consider significant breach notices or remediation options where an FSP identifies similar past conduct, which had resulted in breach of the best interest duty. These matters have obvious implications for insurers, including the potential for class actions.

> **"Any FSP that fails to understand and mitigate 'general advice' risk factors in their business should be a red flag for insurers.**

Need to know more?

For more information please contact the author.

Grant Covington
Special Counsel, Sydney
T: +61 2 8273 9834
E: grant.covington@wottonkearney.com.au

Other financial institutions contacts:

Andrew Moore
Partner, Sydney
T: +61 2 8273 9943
E: andrew.moore@wottonkearney.com.au

Suzanne Craig
Partner, Sydney
T: +61 2 8273 9840
E: suzanne.craig@wottonkearney.com.au

Dean Pinto
Partner, Sydney
T: +61 2 8273 9938
E: dean.pinto@wottonkearney.com.au

Chris Busuttil
Special Counsel, Melbourne
T: +61 3 9604 7913
E: chris.busuttil@wottonkearney.com.au

Naomi Miller
Special Counsel, Melbourne
T: +61 3 9604 7953
E: naomi.miller@wottonkearney.com.au