


CASE SUMMARY: Westpac Securities Administration Ltd v ASIC - [2021] HCA 3

Description: Westpac Securities marketing campaign by superannuation trustees amounted to giving “personal advice”.

	
20	Corporations
20K1746-K1772	Financial services and markets
20K1749-K1759	Financial services providers
20K1749-K1753	Licensing and regulation
20K1751	General obligations

financial product advice — permissible extent — superannuation products — rollover of external accounts — whether ‘personal advice’ outside limits of financial services licence

Did the appellants' marketing campaign involve the giving of ‘personal advice’?

The appellants were trustees of superannuation funds. They conducted a marketing campaign, contacting their existing superannuation clients with the aim of persuading those clients to roll their external superannuation accounts into accounts held with the appellants. Contact was made initially by letter and later by telephone. Those making the telephone calls had no specific knowledge of the clients' financial position, but used a technique called “social proofing” to persuade the clients that such concerns as cost saving and improved manageability of accounts were commonly held, before offering to help with the consolidation of their accounts. The respondent regulator contended that the appellants' activities amounted to the giving of ‘personal advice’ in relation to a financial product within the meaning of the [CORPORATIONS ACT 2001 \(CTH\), S 766B](#), which was not permitted by the appellants' relevant financial service licences.

Held:

(1) (by Kiefel CJ, Bell, Gageler and Keane JJ) Each telephone call was a personal communication to a fund member, which specifically related to the member's financial situation in relation to superannuation. The disclaimer given at the commencement of each call was not apt to alter either the character of the recommendation in each case as specifically about the member's situation or the expectation as to the quality of advice that the call was apt to engender in the member.

(2) The circumstance that the rollover service was offered “free of charge” was at best neutral in relation to the reasonable expectations of a member so approached. The members had already paid fees for financial services related to superannuation and the appellants' interest in bringing more funds under management to obtain fees was both real and obvious. In the circumstances a reasonable person in a member's position

might have seen the benefit to the appellants as attributable either to fees already paid or to the appellants' business development.

(3) Nothing in the text or context of [S 766B\(3\)](#) conveys any suggestion that advice is personal for the purposes of the regulatory scheme only if it comprehends the totality of the client's objectives, financial situation and needs. To the contrary, [S 766B\(3\)](#) expressly provides that personal advice is given where "the provider ... has considered one or more of the person's objectives, financial situation and needs": it does not say that the provider must have considered all of them.

(4) Advice that is 'personal advice' within [S 766B\(3\)\(B\)](#) does not cease to be so because its content is such as to be generally applicable to all or most persons in the client's position as well as to the particular client. By segueing into an offer to effect the rollover, the callers implicitly recommended that each member accept the offer there and then on the evident footing that his or her interests were being served without any need for further consideration of objectives, financial situation or needs. Each member might reasonably have expected that the appellants had taken the elicited objectives into account in recommending the rollover service. It could not sensibly be suggested that the impression created did not reasonably include an expectation on the member's part that the recommendation was appropriate for him or her as an individual.

(5) There is no basis in the text of [S 766B\(3\)](#), or the context in which it appears, to read the word 'considered' as importing a requirement of an active and comprehensive process of evaluation. Such a gloss on 'considered' would impermissibly narrow the scope of a provision intended to protect consumers while at the same time adding a layer of uncertainty to its operation.

(6) The recommendation to roll funds over was put forward in a manner productive of an expectation that each member's objectives of saving fees and improving manageability were taken into account, or in the words of [S 766B\(3\)\(B\)](#), 'considered'. The social proofing technique was calculated to create that impression.

(7) (by Gordon J) The financial product advice given to the fund members was 'personal advice' within the meaning of [S 766B\(3\)\(B\)](#). It was given or directed to each member in circumstances where a reasonable person might expect that the appellants had 'considered' one or more of the members' objectives, financial situation and needs.

(8) [SECTION 766B\(3\)\(B\)](#) poses an objective test, assessed at the time the financial product advice was given and having regard to the circumstances in which it was given. It refers to the expectation of a reasonable person standing in the shoes of the person receiving the advice and to things that a reasonable person might expect, which has a wider meaning than what the reasonable person would expect. The standard is one of reasonable possibility, not reasonable probability.

(9) The phrase "to have considered" bears its ordinary meaning. [SECTION 766B\(3\)\(B\)](#) therefore captures circumstances where a reasonable person might expect the provider to have taken into account, had regard to, or given attention to one or more of the person's objectives, financial situation and needs. The words "one or more of" convey that [S 766B\(3\)](#) applies where an adviser has (or might be expected to

have) 'considered' one or more – but not necessarily all – of a person's objectives, financial situation and needs. They also convey that advisers cannot avoid the disclosure and conduct obligations attaching to the provision of 'personal advice' simply by failing to consider one or more of the matters referred to in the provision.

(10) The phrase "objectives, financial situation and needs" bears its ordinary meaning and the relevant objectives, financial situation and needs referred to must be personal to the client. [SECTION 766B\(3\)\(B\)](#) is engaged if an adviser (whether in fact or by reasonable apprehension) considers at least an aspect of one of those three categories.

(11) [SECTION 766B\(3\)\(B\)](#) is engaged if an adviser (whether in fact or by reasonable apprehension) considers at least an aspect of one of the three categories of objectives, financial situation or needs. Whether that has occurred will be a fact specific inquiry. What a reasonable person standing in the member's shoes might expect requires regard to be had to all the circumstances, but that does not add some additional normative element to the inquiry.