

CASES AND TRIBUNAL DECISIONS

Federal Court finds first breach of best interests duty

Australian Securities and Investments Commission v NSG Services Pty Ltd [2017] FCA 345

[Link to decision](#)

Summary

The Federal Court has made the first finding of liability against a financial services licensee for a breach of the Future of Financial Advice (Part 7.7A) provisions of the *Corporations Act 2001* ('the Act').

In the decision of *Australian Securities and Investments Commission v NSG Services Pty Ltd*, the Court found that financial advice firm NSG Services Pty Ltd (NSG) had failed to take reasonable steps to ensure that its advisers acted in the best interests of its clients when providing advice and as a result, on a number of occasions, NSG advisers provided clients with advice that was inappropriate.

Facts

On several occasions between July 2013 and August 2015, representatives of NSG sold to clients insurance products and/or advised them to rollover superannuation accounts.

Prior to the hearing NSG and ASIC reached an agreement in relation to NSG's liability. NSG accepted that on the occasions in question its advisers had failed to act in the best interests of clients and provided inappropriate advice. It further accepted that the contravention of the best interests duty by its representatives (other than its authorised representatives) resulted in a contravention of this duty by NSG under s961K(2) of the Act.

NSG also accepted that it had breached s961L of the Act, as it had failed to take reasonable steps to ensure that its advisers complied with the best interests duty. In this regard the following deficiencies in NSG's processes and procedures were noted:

- NSG's new client advice process was designed to be completed quickly, with little time for clients to reflect on advice provided before it was implemented. As a result insufficient information was obtained from, and given to, the client.
- NSG's training on legal and regulatory obligations failed to provide advisers with sufficient information about their obligations under the Act, including their individual obligations as a result of the Future of Financial Advice reforms.
- NSG did not conduct regular or substantive performance reviews of its advisers. While some internal audits were conducted, no disciplinary action was taken against advisers who were found not to have complied with their obligations under the Act.
- NSG engaged third parties to conduct external audits. The audits conducted identified issues in the provision of advice. However, NSG failed to follow the advice provided by external auditors and recommended changes were not implemented or addressed.

- NSG's compliance policies were inadequate. They did not address representatives' legal or regulatory duties. In any event, despite receiving a number of complaints about the advice provided by representatives, compliance procedures were not followed or enforced by NSG.

The Court made declarations of liability by consent. There will be a hearing in July this year to determine the pecuniary penalty to be imposed on NSG.

Implications

The case represents the first action taken by ASIC alleging breaches of the best interests obligations. It does not set any new legal ground as Moshinsky J was not required to reach a concluded view on any matters of interpretation. However, his Honour did provide some commentary on the operation of the best interest provisions.

1. The steps listed in s961B(2) may be treated as providing a 'safe harbour' for providers accused of breaching the best interests duty. If the provider can prove that they have done each of the steps listed in that section, they will have satisfied the best interests duty in s961B(1). A provider may still be able to satisfy the best interests duty even though they do not fall within s961B(2). However, it was noted that ASIC felt that in a practical sense s961B(2) was likely to cover all the ways of showing a person had complied with the best interests duty.
2. There is support for the view that s961B (which requires advice to be in a client's best interest) is concerned with the process or procedure involved in providing advice, while s961G (duty to provide appropriate advice) is concerned with the content or substance of that advice. Although it was not necessary to reach a conclusion on whether that view was correct.