

CASES AND TRIBUNAL DECISIONS

Crossing the “important and clear line” between general and personal advice

Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187

[Link to decision](#)

Background

The licensees were licenced to provide general advice. They wrote to the members of their respective superannuation funds offering a free search for other superannuation accounts the customer might hold. A dedicated “Super Activation Team” then made telephone calls during which the customers, who may or may not have accepted the free search offer, were offered a further service of arranging a rollover of external accounts to consolidate their funds.

ASIC alleged the licensees had crossed “an important and clear line” and had given personal advice.

The licensees agreed that the initial mail out campaign, which successfully increased funds under management by \$650M, contained marketing material intended to promote their funds, but denied that customers had received personal advice in the subsequent individual telephone calls.

At first instance, the Federal Court did not conclude the line had been crossed and considered that the telephone calls contained only general advice. However, the Court also concluded that the licensees had nevertheless acted unfairly and hence were in breach of the general obligation to do all things necessary to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly.

ASIC appealed to the Full Court of the Federal Court, and the licensees cross appealed.

The Judgment

Personal Advice

In a detailed series of judgments from the Court, which consider the architecture of section 766B of the Corporations Act 2001 very closely, some themes are apparent.

His Honour Chief Justice Allsop observes for instance at paragraph 17 of his judgment that;

“The protection of people from potentially selfishly motivated advice is not advanced by making fine logical distinctions based on overly precise linguistic choices about words of a general kind employed by Parliament in furtherance of the protective purpose.”

His Honour consequently commended the reasoning of the primary judge in adopting the approach of Sackville AJA in *ASIC v Park Trent Properties Group Pty Ltd* (No 3)¹ that a person may be influenced to make a decision about a financial product “in ways other than by express recommendations or explicit statements of opinion.”

There were no or explicit statements of opinion by the licensees in the calls. However, in a passage from the same judgment approved by his Honour, Justice Sackville observed that someone may commend a course of action without saying so explicitly and it may simply be implied “that the contemplated course of action is likely to be beneficial to the client”.

The judges of the Court were generally of the view that there was an assumption implicit in the phone calls that consolidation would be a beneficial personal objective for the

customer because they would save management fees as a result of eliminating the fees for their other accounts.

Under scrutiny by the Court the basis of this assumption was immediately called into question and the members of the Court did not consider it could simply be accepted at face value without a thorough and detailed product comparison.

The Court also looked closely at the licensees Quality Monitoring or QM framework which was both designed to ensure that only general advice was ever given and to encourage customers to ultimately agree to consolidate their superannuation accounts, including using relevant information to overcome customer objections and *"seeking a commitment for action that moves the customer closer to the sale"*.

Chief Justice Allsop concluded that taken as a whole the purpose of the QM structure was *"intended to influence a decision in relation to a particular financial product"*² and ultimately it was to increase the licensees' funds under management.³

The Full Court diverged from the views expressed in the judgment at first instance over whether a reasonable person might have expected the licensees to have considered one or more of the customer's objectives, financial situation and needs, within the meaning of section 766B (3)b of the Corporations Act, rendering the representations personal advice.

Significant in the Full Court's reasoning on this point was its view that the customer's interests should have been considered where the licensees knew it was in their own interests that the funds be rolled over, increasing their funds under management, but did not know all of the matters relevant to whether it would be in the customer's interests (such as for example the fees that applied to the other accounts and how those fees were applied).

Chief Justice Allsop consequently concluded that while he agreed with the judgment at first instance that *"the caller from the licensee's Super Activation Team was following the QM framework and was not taking into account the customer's objectives, the overall context of the campaign would lead a reasonable person to think the consolidation recommendation was appropriate for each particular customer's circumstances"*.

Unfairness

The reasoning that the conduct was unfair and consequently in breach of the general licence obligation in section 912A(1) (a) that the financial services covered by the licence must be provided "efficiently, honestly and fairly" essentially turned on the same inequality of knowledge between the licensee and the customer.

Essentially, the licensee could not make the recommendation when it did not know whether it would be in the customer's best interests or not, and not taking into account matters that would enable it to assess what the customer's best interests were, did not absolve the licensees when they benefited from making the recommendation.

Implications

There are some significant takeaways for Australian financial services licensees in this judgment.

No matter how much a licensee may try to script individual customer conversations to limit the nature of the product advice, whether personal advice is being given, will always be judged by the overall context of the entire interaction.

This contextualising will affect how the representations and the recommendations made to the customer are construed and will also shape the expectations of a reasonable person about whether personal circumstances are being taken into account.

Consequently, the decision is further affirmation that the courts will be looking at the ways a customer has been influenced to make a decision about a financial product that are not necessarily reflected in an explicit statement of opinion or recommendation.

A protocol that is intended to avoid personal advice being given is unlikely to be effective in circumstances where a court feels that the proposition being put to the customer ought to have been the subject of personal advice in the first place and was not.

This suggests that the first question a licensee needs to ask before it shapes a customer conversation is whether that conversation really requires personal advice to be fair to the customer.

Not fully explained in the judgment is the possibility briefly raised by Chief Justice Allsop that the conclusion personal advice was provided may have been altered if the callers had not sought to get the customers agreement before the call ended and instead “the customers had the opportunity to consider their own positions and, having done so, later communicated an acceptance”.⁴

This observation, at the very least, suggests that giving a customer time to reflect will be the way the courts prefer that licensees do business.

¹ [2015] NSWSC 1527

² Paragraph 38

³ Paragraph 148

⁴ Paragraph 5