

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited [2018] FCA 2078

File number: NSD 2204 of 2016

Judge: GLEESON J

Date of judgment: 21 December 2018

Catchwords: **CORPORATIONS** – where Westpac conducted campaign to encourage customers to roll over external superannuation accounts into existing Westpac accounts – whether calls to customers involved provision of “personal advice” within meaning of *Corporations Act 2001* (Cth) s 766B – whether recommendations or statements of opinion made, including by means of Westpac’s “social proofing” technique, with intention to influence financial product decision – recommendations and statements of opinions made with requisite intent – whether Westpac considered “one or more of [the customers’] objectives, financial situation and needs”, or whether a reasonable person might expect Westpac to have done so – no consideration given, and reasonable person would not expect such consideration in context in which relevant recommendations and statements of opinions made – no “personal advice” given – no consequent failure to comply with ss 946A or 961B or breach of ss 912A(1)(b) or 961K(2)

**CORPORATIONS** – whether Westpac failed to do all things necessary to ensure financial services provided “efficiently, honestly and fairly” as required by s 912A(1)(a) – where Westpac policy directed callers to encourage customers to roll over their superannuation with limited identification of customers’ personal circumstances and no consideration of customers’ best interests, explanation of risks or sufficient warning that Westpac was not considering such matters – contraventions found

Legislation: *Corporations Act 2001* (Cth)  
*Superannuation Industry (Supervision) Act 1993* (Cth)  
*Financial Services Reform Bill 2011* (Cth)  
*Replacement Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth)

*Evidence Act 1995 (Cth)*  
*Financial Services Reform Act 2001 (Cth)*  
*Financial Services Reform Bill 2001 (Cth)*  
*Corporations Law (Cth)*  
*Security Industry (New South Wales) Code*  
*Australian Securities and Investments Commission Act 2001 (Cth)*

Cases cited:

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27  
*Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73  
*Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (In Liq (No 2))* [2017] FCA 709  
*Australian Securities and Investments Commission (ASIC) v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527  
*Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liq)* [2017] FCA 497  
*Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (In Liq)* [2012] FCA 414; (2012) 88 ACSR 206  
*Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; (2016) 336 ALR 209  
*Australian Securities and Investments Commission v Oxford Investments (Tasmania) Pty Ltd* [2008] FCA 980; (2008) 169 FCR 522  
*Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 90  
*Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* [2008] NSWSC 1224; (2008) 69 ACSR 1  
*Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd* [2017] FCA 345; 122 ACSR 47  
*Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503  
*Cussen v Federal Commissioner of Taxation* [2004] NSWCA 383; (2004) 51 ACSR 530  
*Harkness v Commonwealth Bank of Australia Ltd* (1993) 32 NSWLR 543  
*La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* [2011] FCAFC 4; (2011) 190 FCR 299

*Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1

*Legal Services Board v Gillespie-Jones* [2013] HCA 35; (2013) 249 CLR 493

*Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352

*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355

*Public Transport Commission (NSW) v J Murray- More (NSW) Pty Ltd* [1975] HCA 28; (1975) 132 CLR 336

*R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* [1989] SASC 1941; (1989) 1 ACSR 93

*Re Hres and Australian Securities and Investments Commission* [2008] AATA 707; (2008) 105 ALD 124

*Rennie Golledge Pty Ltd v Ballard* [2012] NSWCA 376; (2012) 82 NSWLR 231

*Story v National Companies and Securities Commission* (1988) 13 NSWLR 661

*Macquarie Dictionary Online*

Heydon JD, *Cross on Evidence* (10<sup>th</sup> ed, LexisNexis, 2015)

Date of hearing:	5, 6, 7, 14 and 16 February 2018
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## ORDERS

NSD 2204 of 2016

**IN THE MATTER OF WESTPAC SECURITIES ADMINISTRATION LIMITED  
(ACN 000 049 472) AND BT FUNDS MANAGEMENT LIMITED (ACN 002 916 458)**

**BETWEEN: AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION  
Plaintiff**

**AND: WESTPAC SECURITIES ADMINISTRATION LIMITED  
(ACN 000 049 472)  
First Defendant**

**BT FUNDS MANAGEMENT LIMITED (ACN 002 916 458)  
Second Defendant**

**JUDGE: GLEESON J**

**DATE OF ORDER: 21 DECEMBER 2018**

### **THE COURT DECLARES THAT:**

1. In its adoption and implementation of the QM Framework in connection with its campaign to encourage customers to roll over superannuation accounts into their account held with the first defendant, the first defendant failed to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the *Corporations Act 2001* (Cth).
2. In its adoption and implementation of the QM Framework in connection with its campaign to encourage customers to roll over superannuation accounts into their account held with the second defendant, the second defendant failed to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Act.

### **THE COURT ORDERS THAT:**

3. The parties file and serve short minutes of orders for the further conduct of the proceeding on or before Thursday 31 January 2019.
4. The proceeding be listed for a case management hearing on Thursday 7 February 2019 at 9.30 am.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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*account may or would help him cut down on fees and lead to a greater level of manageability by having all his accounts all in the one place*

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*The caller may be able to help Customer 5, through the super search that had been initiated, to potentially save on fees* [301]

*The caller could definitely help customer 5 increase the manageability of his superannuation by consolidating his superannuation and that all she needed to do so was his tax file number* [302]

*Once customer 5's external accounts were rolled over into his BT Business Account, he would achieve easier management* [303]

*Customer 5 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees and lead to a greater level of manageability* [304]

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*Potentially saving on fees and having easier manageability were probably the two main reasons that BT clients liked to consolidate their superannuation* [306]

*Consolidating superannuation accounts definitely makes sense from a logical standpoint* [307]

*Caller AA could go through customer 6's superannuation on the call and bring them all over to her BT Lifetime Account so that she could start reaping the benefits of consolidation* [308]

*A separate account customer 6 had might not have had much money in it as it may potentially have been eaten up by fees* [311]

*Once customer 6's external accounts were rolled over into her BT Lifetime Account, her accounts would be organised and she would potentially start saving on fees* [312]

*Customer 6 rolling over her external accounts into her BT Lifetime Account may or would lead to her saving on fees and obtain a greater level of manageability* [313]

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*Creating a bigger pool of money to potentially get a better performance and paying one set of fees and avoiding multiple sets of fees were some of the main reasons that clients liked to consolidate their superannuation* [317]

*Caller AA could help customer 7 consolidate his superannuation into his BT* [318]

*Lifetime Account that day so that he could pay just one set of fees and potentially have a larger pool of money which he could potentially get a better return from*

*Once customer 7's accounts were consolidated into his BT Lifetime Account, he would have a larger pool of money in his account to potentially get him better returns in the future and save him on fees* [319]

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*Customer 8 could substantially save on fees once he consolidated his external accounts into his BT business account* [325]

*In two or three weeks customer 8's external accounts would be rolled over into his BT Business Account and he would start potentially saving on fees* [326]

*Customer 8 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees* [327]

**Customer 9** [328]

*A lot of the customers that caller CC spoke to like the fact that they could potentially save on fees by combining their super and also mentioned the fact that it was a little easier to manage* [328]

*Once customer 9's external accounts were rolled over into his BT Business Account he would hopefully potentially save on fees* [329]

*Customer 9 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees* [330]

**Customer 10** [332]

*Caller AA could help customer 10 organise his superannuation by bringing all his external accounts to his BT Business Account* [332]

*A lot of BT's clients are combining their superannuation accounts into their BT fund so that they have a larger amount in their account and because they were attracted to the past performance that BT accounts have been able* [333]

*to yield for its clients*

*Having a larger amount of money in a person's account and in a performing fund like BT was always a good thing* [334]

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*In two or three weeks customer 10's external accounts would be rolled over into his BT Business Account and it would all be in the one place for customer 10 and hopefully starting to work hard for his retirement* [336]

*Customer 10 rolling over his external accounts into his BT Business Account may or would lead to him having a bigger amount in his account in a fund with attractive past performances* [337]

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*Rolling over superannuation to have it all in the one spot and not lose money in finance and fees on accounts to which customer 11 was not making contributions definitely made sense* [340]

*Rolling over superannuation on the basis of manageability and saving on fees were probably the main reasons that most of BT's clients liked to roll over their superannuation* [341]

*Rolling over superannuation made superannuation a lot easier to manage and saved on costs and, that after all it was customer 11's retirement savings at the end of the day* [342]

*Caller AA could help bring customer 11's superannuation over to his BT Business Account on the phone so that customer 11 could start potentially saving on fees and that the only thing he needed was customer 11's tax file number* [343]

*Customer 11's comment that the amounts in his other funds were dwindling away with fees and charges was a pretty common story that BT hear from a lot of their clients and that it was a good thing customer 11 was consolidating his superannuation* [344]

*Customer 11 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees and improving the manageability of his superannuation* [345]

**Customer 12** [346]

*AA could potentially save customer 12 on fees by rolling over any external* [346]

*accounts into this BT Business Account*

*Having potentially better performance is one of the main reasons that BT's clients say they like to consolidate their external accounts into their BT account* [347]

*Obviously superannuation was a lot more manageable when it is all in the one place* [348]

*Caller AA would actually help customer 12 bring his external accounts over to his BT Business Account verbally over the phone so that customer 12 would start to potentially get the performance he was after* [349]

*Customer 12 rolling over his external accounts into his BT Business Account may or would lead to him having better performing superannuation* [350]

*Customer 12 rolling over his external accounts into his BT Business Account would or may lead to a more efficient and efficacious set up of his superannuation and therefore greater returns* [351]

**Customer 13** [352]

*AA could potentially save customer 13 on fees by rolling over any external accounts into his BT Business Account* [352]

*Achieving a better performance out of a customer's superannuation is one of the main reasons that BT's clients like to consolidate their superannuation, along with the fact that it is more manageable when it is in one place* [353]

*By consolidating his superannuation, customer 13 would be potentially saving on fees, depending on if he is paying fees on other accounts* [354]

*Caller AA could go through customer 13's super results and actually help him consolidate his external accounts into his BT Business Account over the phone that day using a verbal request and that we would have all his accounts in one place so he could potentially start getting better performance from his superannuation* [355]

*In two or three weeks customer 13's external accounts would be rolled over into his BT Business Account and would be all nice and organised and he would be potentially getting the performance that he wanted* [356]

*Customer 13 rolling over his external accounts into his BT Business Account may or would lead to him having better performance from his superannuation* [357]

*Customer 13 rolling over his external accounts into his BT Business Account would or may lead to a more efficient and efficacious set up of his superannuation and therefore greater returns* [359]

**Customer 14** [360]

*A lot of customers caller CC speaks to like the fact that by combining their superannuation accounts it is a little easier to manage and that you can* [360]

<i>potentially save on fees</i>	
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## **GLEESON J:**

### **INTRODUCTION**

1 The plaintiff (“ASIC”) claims relief against the defendants (“Westpac”) for alleged contraventions of the *Corporations Act 2001* (Cth) (“Act”) in connection with a campaign to encourage customers to roll over superannuation accounts held with other entities (“external accounts”) into their existing accounts with the first defendant (“WSAL”) and the second defendant (“BTFM”) (“BT account”). The campaign included written communications by which Westpac offered its customers a service comprising a free search for other superannuation accounts they might hold (“external accounts”); and telephone calls during which customers, who may or may not have accepted the free search offer, were offered a further service of arranging a rollover of external accounts into the customer’s BT account (“rollover service”).

2 As a result of these efforts, Westpac successfully increased its funds under management (“FUM”) by almost \$650 million.

3 ASIC’s case was principally based on telephone calls made to 15 customers during 2014. Each of the 15 customers was a member of either the BT Lifetime Account Fund or the BT Business Account Fund (collectively “BT funds”), held an account in one of those funds (“collectively “BT accounts”) and was a retail client for the purposes of s 761G of the Act.

4 Westpac described its activities as a “plainly self-interested” sales or marketing exercise, by which members of its “Super Activation Team” (see [0] and following below) reiterated “generic” messaging which identified and emphasised desirable features of the rollover service (although Westpac also contended that it was necessary to consider the interactions with the 15 customers separately).

5 However, ASIC argued that the Super Activation Team did not encourage customers to roll over by *simply* doing these things. Rather, ASIC argued, the team members crossed “an important and clear line”. They encouraged customers by employing a subtle sales technique to make a personal pitch to customers that involved asking a customer about their personal motivations and then linking that to the financial product being offered.

6 ASIC claimed that, contrary to the terms of Australian financial services licences (“AFSLs”) held by each of WSAL and BTFM, Westpac’s technique involved the provision

of “financial product advice” that was “personal advice” within the meaning of s 766B(3) of the Act.

7 By this conduct, ASIC contended, the customers were subjected to a risk of harm because they received personal financial product advice which did not take into account all of their relevant personal circumstances. In particular, ASIC noted, had the advice been provided in accordance with the Act’s requirements for the provision of “personal advice”, it may have resulted in customers being advised to maintain their current fund and take no action, for example, to avoid losing part or all of particular types of insurance; or being advised to “roll into” superannuation funds that were in fact more appropriate to their personal circumstances than a BT fund, for example, because they would pay lower fees and/or premiums.

8 ASIC sought declarations to the effect that the defendants’ conduct involved:

- (1) breaches of conditions of their respective AFSLs by providing personal financial product advice in contravention of s 912A(1)(b);
- (2) contraventions of s 946A of the Act, because such personal financial product advice was provided without the provision of a “Statement of Advice” within the meaning of the Act;
- (3) contraventions of s 961K(2) of the Act, because the defendants failed to act in the best interests of the customer for the purposes of s 961B(1);
- (4) contraventions of s 961K(2) of the Act, because the defendants adopted and implemented a “QM Framework” (see [0] below) to provide personal advice to customers to roll over their external accounts into their BT account, regardless of the appropriateness of the BT account to the customer, for the primary purpose of generating FUM for Westpac, and thereby not doing all things necessary to ensure that the financial services covered by the licence were provided “efficiently, honestly and fairly”; and
- (5) per se breaches of s 912A(1)(c) of the Act.

9 Westpac denied any contravention of the Act. As Westpac put it, they simply sought to encourage customers to roll over superannuation into their existing BT account by offering to do it for them on the telephone. The exercise clearly and obviously had a marketing aspect, Westpac argued. According to Westpac, the main issue for the Court was whether, on any of the 15 sets of interactions with their customers, their conduct of what was otherwise a

legitimate commercial activity breached the law because it involved the provision of “personal advice” within the meaning of the Act.

### **Consolidating super funds**

10 As a general proposition, there are benefits that accrue to consumers from consolidating multiple superannuation funds. At the relevant times, ASIC itself promoted consolidation on its “Moneysmart” website, on the page “Consolidating super funds”, under the heading “Reduce your super stress”. ASIC encouraged consumers to recognise that holding multiple super funds is a problem, saying relevantly:

How many super statements did you receive this year? Do you find it hard to keep track of your super accounts? Have you lost some of your super over the years? You’re not alone. Here are the steps to take to sort it out and save on fees.

#### **Why you should consolidate your super**

The benefits of putting all your small super into one account include:

- Saving costs by paying only one set of fees
- Reducing your paperwork
- Making it easier to keep track of your super

11 The “Moneysmart” website page also makes some important cautionary points that were not routinely made by Westpac during the telephone calls that are the subject of the proceeding:

#### **Before you decide to move funds**

Before you consolidate your super funds here are some things to check:

- Are there any termination fees
- Will you be able to get the same level of insurance in your chosen fund
- That your employer can contribute to your chosen fund

12 The “Moneysmart” website also notes that consolidating super funds involves making a choice as to the fund in which multiple funds will be consolidated. It says:

#### **Smart tip**

When consolidating your super, don’t just choose the fund with the highest balance. The best fund for you may be one of your small accounts, or a completely new fund.

13 In this case, there was no evidence that any of the relevant 15 customers was disadvantaged by Westpac’s conduct. Conversely, on its own defence, Westpac did not consider the issues identified on the “Moneysmart” website for those customers or routinely

advise the customers that those issues warranted consideration before they accepted the rollover service. Accordingly, except to the extent that the 15 customers did it without Westpac's knowledge, there was no analysis of whether the BT fund was the "best" choice for the customer who wished to consolidate their super into a single fund before the customers accepted the rollover service

14 As explained below, "financial product advice" within the meaning of the Act may be "personal advice" or "general advice". An important element of Westpac's case was its efforts to ensure that members of the "Super Activation Team" understood the difference between general and personal advice and did not provide personal advice. The evidence included a BT PowerPoint presentation dated January 2014 concerning the distinction between personal and general advice. A case study in the presentation included a response to the customer's question whether the consultant would recommend a rollover of other funds into their BT account. The response given is:

As I am only qualified to provide general advice, I am unable to advise you as to whether you should consolidate all these funds into BT Super. This would require personal advice from a qualified financial advisor who would consider information such as:

whether you will have to pay any termination fees moving from existing funds

whether you will lose any insurance benefits

whether the fund you want to consolidate into has all the services you want

whether employer can contribute to your chosen fund

Would you like me to refer you to one of our financial advisors? If not, I can provide you with general advice regards the features and benefits of the BT Super Fund for you to consider.

15 The response is described as "Factual information" and explained as follows:

The consultant has reiterated the fact that they can only provide general advice and recognised that the client may be seeking personal advice and has offered to pass the client on to an adviser to obtain more specific advice.

16 ASIC argued that Westpac's approach in the PowerPoint presentation reflected "orthodoxy" in relation to the distinction between general and personal advice, in contrast to the approach of the "Super Activation" team. ASIC's case was that it was not legally significant that the alleged recommendations (or statements of opinion) were unsolicited and not in response to a customer's request for advice.

### **Summary of conclusions**

17 Except in the case of customer 3, the calls to the 15 customers involved the provision of “financial product advice” within the meaning of s 766B(1) of the Act. In particular, and contrary to Westpac’s case study above stating that a consultant qualified to provide only general advice was unable to advise customers as to whether they should consolidate their funds into the BT account, each caller impliedly made a recommendation to that effect.

18 Each recommendation was intended to influence the relevant customer in making a decision in relation to a particular financial product, being their respective BT accounts or their respective external accounts. ASIC has not demonstrated a relevant intention to influence customer 3.

19 In some cases, the calls also involved the provision of “statements of opinion” that were “financial product advice” within the meaning of s 766B(1), however, for each customer, the “recommendations” and “statements of opinion” were given in the same circumstances for the purposes of determining whether s 766B(3) applies. Accordingly, even if the “recommendations” and “statements of opinion” comprised separate pieces of “financial product advice”, there is no need to give separate consideration to whether the “statements of opinion” were “personal advice”.

20 The “financial product advice” was not “personal advice” within the meaning of s 766B(3)(a) of the Act because the callers did not consider one or more of the objectives, financial situation and needs of the customers to whom the advice was given.

21 Further, the “financial product advice” was not given in circumstances where a reasonable person might expect the provider of that advice to have considered the financial situation of the customer.

22 Accordingly, the “financial product advice” was not “personal advice” within the meaning of s 766B(3)(b).

23 It follows that ASIC has failed to demonstrate the alleged contraventions of s 912A(1)(b) of the Act, being that WSAL and BTFM breached the conditions of their respective AFSLs by providing personal financial product advice.

24 Similarly, ASIC has failed to demonstrate the alleged contraventions of s 946A and 961B of the Act, both of which depended upon proving that Westpac had provided “personal advice”.

25 By adopting the approach recorded in the QM Framework, Westpac provided “financial product advice” comprising the implied recommendation to accept the rollover service without explaining that a prudent customer may wish to consider matters of the kind that would be considered if the recommendation had been given as personal advice. The QM Framework also involved encouraging customers to accept the rollover service with the use of “social proofing” by which customers were told that their beliefs or reasons were commonly held. The fact that a customer’s belief or rationale was commonly held was not a matter that would have provided a basis for the recommendation, if it had been given as personal advice. The QM Framework approach was admittedly self-interested and did not necessarily promote the best interests of the customers but the approach did not draw the customers’ attention to either of those matters. Rather, it strongly conveyed the impression that Westpac was assisting the customer by its rollover service and, particularly by “social proofing”, the impression that customers should feel comfortable in accepting the service without giving consideration to their particular circumstances. In fact, as Westpac knew, there were matters (of the kind that would be considered if the “financial product advice” was given as “personal advice”) that, acceptance of the rollover service might have adverse consequences for the customer.

26 While not dishonest, in my view, the adoption and implementation of these aspects of the QM Framework approach failed to ensure that the “financial product advice”, being a financial service covered by Westpac’s AFSLs, was provided “efficiently, honestly and fairly” in contravention of s 912A(1)(a) of the Corporations Act 2001 (Cth).

## **BACKGROUND FACTS**

27 WSAL and BTFM are, and at all material times were, each holders of an “AFSL” granted under s 913B of the Act, and authorising them, as persons who carried on a financial services business in Australia within the meaning of s 911D, to provide financial services.

28 Under their respective AFSLs, WSAL and BTFM were authorised to provide “financial product advice”, including in relation to superannuation products, being “general advice” within the meaning of s 766B(4) of the Act. However, they were not authorised to

provide financial product advice, including in relation to superannuation products, being “personal advice” within the meaning of s 766B(3) of the Act.

29 WSAL and BTFM are and were at all material times wholly-owned subsidiaries of Westpac Banking Corporation; members of the Westpac group of companies, which also includes BT Financial Group Pty Ltd (“BTFG”); and part of the BT Financial Group, being the wealth management division of the Westpac group of companies.

30 WSAL is the trustee of the Westpac MasterTrust – Superannuation Division (ABN 81 236 903 448) (“BT Business Account Fund”). BTFM is the trustee of the Retirement Wrap (ABN 39 827 542 991) (“BT Lifetime Account Fund”).

31 The BT Business Account Fund and BT Lifetime Account Fund are:

- (1) “regulated superannuation funds” for the purposes of s 19 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (“SIS Act”);
- (2) “regulated superannuation funds” within the meaning of s 10 of the SIS Act; and
- (3) “superannuation entities” within the meaning of s 10 of the SIS Act.

32 A membership in the BT Business Account Fund or BT Lifetime Account Fund is:

- (1) a beneficial interest in a superannuation entity;
- (2) a “superannuation interest” within the meaning of s 10 of the SIS Act; and
- (3) a “financial product” within the meaning of Ch 7, Div 3 of the Act, including by reason of s 764A(1)(g) of the Act.

33 WSAL is the issuer of a superannuation product, referred to as the BT Business Super account (“BT Business Account”). The BT Business Account forms part of the BT Business Account Fund.

34 BTFM is the issuer of a superannuation product, referred to as the BT Lifetime Super – Employer Plan Account (“BT Lifetime Account”). The BT Lifetime Account forms part of the BT Lifetime Account Fund.

35 In providing financial product advice, including in relation to superannuation products, WSAL and BTFM were persons providing financial services within the meaning of s 766A of the Act.

### **Westpac's Super Activation Team**

36 Westpac's campaign to encourage rollovers into the BT funds involved a team of employees operated by one or more entities within the Westpac group and referred to at various times as the "Super Activation" or "Investor Solutions – Outbound" or "Investor Solutions" telephone unit (collectively, the "Super Activation Team").

37 The parties agreed that, during the period 18 May 2013 to September 2016:

(1) members of the Super Activation Team contacted and actually spoke with approximately 95,682 Westpac group customers;

(2) approximately 31,506 customers were regarded by the Westpac group as having satisfied the following criteria:

(a) during the call from the Super Activation Team, the customer stated they intended to:

(i) roll over an external account into a superannuation account with the Westpac Group ("Westpac account"); or

(ii) contribute additional funds into their Westpac account; and

(b) funds were received into that customer's Westpac account within 12 months of the customer's statement of intention, noting that for "Corporate Superannuation customers", funds over \$1,000 were required to be received.

38 An amount of approximately \$646,719,225.51 in FUM was generated during the period from 1 January 2013 to 16 September 2016 in respect of the customers who satisfied the criteria set out above.

39 BT accounts comprised some or all of the relevant Westpac accounts.

40 Super Activation Team members participated in the following campaigns that are the subject of this proceeding:

(1) campaign titled "FY 14 02 Consolidation CAP FUP" which occurred between 2 April 2014 and 5 July 2014 ("Q2 campaign"); and

(2) campaign titled "FY 14 04 Consolidation CAP FUP" which occurred between 1 October 2014 and 19 January 2015 ("Q4 campaign").

41 The telephone calls that are the subject of this proceeding was made by six members of the Super Activation Team, referred to as Callers AA, BB, CC, DD, EE and FF.

42 The parties agreed that, at the time they made the telephone calls, the relevant Super Activation staff :

- (1) were employed by either Westpac or BTFM;
- (2) were acting as agents for BTFM when contacting members of the BT Lifetime Account;
- (3) were acting as agents for WSAL when contacting members of the BT Business Account;
- (4) were acting as agents for WSAL or BTFM and were engaging in conduct on behalf of either WSAL or BTFM as the case may be for the purposes of s 769B of the Act within the scope of their actual or apparent authority, such that:
  - (a) the conduct of the relevant Super Activation staff is taken under s 769B(1) of the Act to be conduct by either WSAL or BTFM itself respectively; and
  - (b) the state of mind of the relevant Super Activation staff is taken under s 769B(3) to be the state of mind of either WSAL or BTFM itself respectively;
- (5) were acting as representatives of either WSAL or BTFM respectively within the meaning of ss 910A and 960 of the Act; but
- (6) were at no stage authorised representatives of either WSAL or BTFM within the meaning of s 916A of the Act.

**The “marketing aspect” of Westpac’s customer calls**

43 Westpac claimed that “[n]o customer could have been under any illusion that Westpac was anything other than self-interested in offering” the rollover service. Westpac argued that it was engaging in a sales exercise to encourage customers to roll over their super into their BT account. It acknowledged that the purpose of the campaign was to increase FUM.

44 Westpac contended that the marketing aspect of its calls, which I understood to mean, Westpac’s aim of winning business by the calls, could not have been lost on the objective observer. Whatever might be the objective interpretation, there was no evidence as to the actual understanding of any of the 15 customers about Westpac’s aims or how Westpac would benefit from the rollovers. No doubt that understanding may have been affected by the context in which the customer received an unsolicited call.

45 The evidence did not establish an understanding by any customer that Westpac was self-interestedly marketing its own products in making the calls. Why should a customer have

appreciated that? It is significant that the customers received an unsolicited call, expressed as an exercise in assisting the customer and not as an exercise in promoting Westpac's self-interest. There were obvious benefits to customers accruing from a consolidation of a customer's super accounts (although not necessarily from a consolidation into their BT account). Why would a customer not reasonably think that Westpac was seeking to build its relationship with the customer, by engaging in an exercise in which the interests of the customer and Westpac were aligned? As Westpac itself argued, the calls were intended to build its existing relationships with customers by providing a free service. As Mr John Cannons, initially employed by BTFG as a "Sales Coach" of consultants in the Super Activation Team and then as the manager of the team, and who gave evidence on behalf of Westpac, said: "It's good to have a conversation with a customer". Mr Cannons also said that part of the reason for asking the customers questions was to "make sure they're happy with BT".

46 As appears from the transcripts set out below, what could not have been lost on any customer was that Westpac was seeking to convey an aim of providing assistance to the customer. That message was conveyed by the friendly tone of the calls, references to the calls as a "courtesy", expressions of a desire to "help" and requests to understand what was important to the customer.

47 While I accept that a customer receiving a call from Westpac would assume that Westpac was making the call self-interestedly, I also consider it quite likely that the customer would believe that Westpac was making the call in the customer's interests. Importantly, in the context of an unexpected telephone call, the customer would not necessarily be on guard and alert to the possibility that Westpac might be seeking to obtain a benefit which (to Westpac's knowledge) may have an adverse outcome for the customer.

**Internal training on difference between general and personal advice.**

48 ASIC noted that members of the Super Activation Team participated in "induction training". This training included guidance about the difference between "general advice" and "personal advice". ASIC submitted, and it was not substantially in dispute, that the training was to the effect of the PowerPoint presentation mentioned above. ASIC drew attention to the following statements included in the presentation:

- a. *'NOTE: If you provide/suggest or imply an opinion/recommendation in relation to the factual information you present to a client, then you are providing advice'* (page 1);
- b. *'The client needs to receive a general advice warning at the outset and at any time where you need to reinforce the nature of the engagement. **However, be aware that providing a warning does not cover instances where you have provided personal advice (Implied or actual) to the client'*** (page 2);
- c. *'General advice should **NEVER** be provided in such a way as to drive a particular outcome. Doing so is unlikely to provide a balanced view of the options available to the client and could in fact constitute personal advice i.e. the client need has been taken into consideration in recommending the preferred outcome'* (page 2);
- d. *'The client can volunteer personal information, yet the use of this information must be contained to what people generally consider. You should only use this information to provide more relevant general advice e.g. It is presented from what clients in a group or age bracket or life stage would generally consider'* (page 2);
- e. *'When comparing products, you cannot state or imply that one of the products better meets the client's objectives, financial situation or needs e.g. you cannot state or imply that specific product features will be suitable for the client'* (page 2);
- f. At 'Case Study 6', a case study about a staff member calling a customer about consolidation of their superannuation, there is a warning against making statements which involve *'a recommendation to essentially rollover the clients existing superannuation funds'* and a warning against making statements which *'attempted to influence the clients [sic] decision to invest further into*

49 ASIC also referred to the case study mentioned at [0] above.

### **QM Framework and "social proofing"**

50 ASIC contended that, notwithstanding Westpac's internal training, Super Activation Team staff were also in fact trained and encouraged during the course of their employment to provide personal advice to customers. The basis for this contention was a document referred to as a "QM Framework" or "quality monitoring document". ASIC argued that the QM Framework encouraged the Super Activation Team to provide advice to customers in a way which sought to use the client's personal circumstances to drive an outcome of the customer rolling over their external superannuation accounts into their BT account.

51 The QM Framework was updated from time to time. ASIC referred to a version dated April 2014. Westpac did not suggest that it was unreasonable to accept that the relevant members of the Super Activation Team were instructed to follow this version of the QM Framework, or a document that was not materially different.

52 As Mr Cannons explained, the QM Framework was a document which set out risk compliance obligations for the Super Activation Team. It was first introduced to staff members during induction training and was used in a variety of ways to monitor the quality of calls and compliance. Mr Cannons' evidence was that he coached callers to structure their calls based on the QM Framework.

53 What follows concerning the QM Framework was not substantially in dispute.

54 The QM Framework set out a four part structure for calls, under the following headings:

- (1) Open;
- (2) Gather;
- (3) Presenting; and
- (4) Objection Handling/Closing.

55 The "Open" phase was designed to put the customer in a positive, receptive frame of mind and to gain permission from the customer to ask them questions. For example, a staff member might introduce themselves and ask a question such as "So I can focus on what's important to you, do you mind if I ask you a few questions?"

56 The "Gather" phase" involved asking the customer questions to "gather, uncover, clarify and develop" an understanding of the customer's requirements. For example:

(1) "What do you look for in a super fund? What's important to you in a super fund? What do you care about in a super fund?" In the October 2013 version of the QM Framework, an equivalent question is framed: "A lot of customers that I speak to tell me that fees, investment options, online actions and insurance are important to them. Of these, which one of these is important to you?" According to the QM Framework, such questions were asked to "find out what's important to the customer and draw the need and want to help you develop urgency to the close". They were described as important to "help you present the features and benefits to the points of relevance to the customer. This will help you maintain rapport, ignite the thinking and emotions of the customer and uncover what will spur them to take action".

(2) "What do you see as the benefits of combining your super? Can you tell me a little bit more about that? Is (what the customer thinks the benefit of combining is) important to you?"

In the October 2013 version of the QM Framework, an equivalent question is framed “When you said that you liked ... can you tell me a little more about that?” According to the QM Framework, such questions were asked to “find out more about the customer’s need and to build it through the use of questioning’. Such questions were said to be important to “encourage the customer to continue to talk to help you with your presentation & need what you are offering”.

(3) “How much do you have in your super accounts?” How long have you been working for?” According to the QM Framework, this was important because the “information derived through this question is going to help you to prioritise your follow up according to value of consolidation, age and number of years the customer has been working”.

57 In the “Presenting” phase, the aim was to “conduct a persuasive, interactive presentation to the customer based on what the customer told you in your questioning”. This included:

(1) “Social proofing” the customer with a statement such as “I understand where you are coming from & many customers are also in a similar situation”. According to the QM Framework, such a statement created a “space of comfort, assurance and confidence that other customers have had the same concerns and agreed to the same benefits”.

(2) “Articulating the feature(s) as benefit(s)”. In the October 2013 version of the QM Framework, the equivalent description was written as “related the motivation/benefit back to what was picked up during the Gathering Requirements”. According to the QM Framework, this was done to “link the customer’s motivation to the features of the product / service that was found during your questioning”. It was said to be important “to create an emotional connection to how a service will benefit them rather than what the service provides”.

58 Mr Cannons gave evidence to the effect that “social proofing” is a sales and service technique, having the purpose of showing empathy to the customer and being intended to give the customer some comfort and assurance that they are in the same position as other customers. Mr Cannons agreed that, in this context, the purpose was to provide customers with a sense of assurance that their reasons for wanting to roll over are held by others, and that their aims are valid and reasonable.

59 Westpac submitted that the reference to experience of other customers underlined the fact that it was engaged in a marketing exercise and not an attempt to convey a judgment to the customer about what is in fact best for them. I do not agree. My reaction to the “social

proofing” aspects of the calls was that they were incongruous: as a recipient of an unsolicited call from Westpac, why would I be interested in the opinions of other customers? It is probably reasonable to assume that “social proofing” is used because some customers are influenced by that technique. However, another likely interpretation of “social proofing” is that the caller was simply attempting to build rapport or to make conversation for some other reason.

60 Finally, the “Objection Handling/Closing” phase was aimed at overcoming any objections raised by the customer and seeking a “commitment for action that moves the customer closer to the sale”. This phase included:

(1) Using all relevant information to overcome any customer objection. This included trying to “find out any underlying reasons that could hold the customer back from following the next steps”. The Super Activation staff member was to be scored “zero points” if they “accepted the customer’s objection without questioning further or using a strategy to overcome it”. In the October 2013 QM Framework, staff were to overcome the customer’s objection using “the important points taken from the call to create the connection between their needs and wants and their objections”.

(2) Providing “clearly articulated next steps” to “provide direction to the customer to ensure the end outcome is achieved”.

(3) “Effectively end[ing] the call with a powerful benefit based on the customers motivation / interest”, by “link[ing] the customer’s motivation using a relevant benefit after you demonstrate your advance”. This was said to be important because it will “help you build urgency for the service. Providing this linking statement at the end of the call can help leave a lasting need in the customer’s mind”.

61 As part of their ongoing training, the calls of the staff were reviewed by a “sales coach” and scored in accordance with a scoring system set out in the QM Framework. The staff attended one-on-one meetings with their “sales coach” approximately once per week to assess how closely they were following the QM Framework and how they might more closely follow its requirements.

62 ASIC noted that the QM Framework set out specific techniques for which staff were scored, including questioning techniques designed “to maintain rapport, to gather the right information, and to build desire in the customer”. For example, staff received points for:

(1) Using “open questions” such as “what’s important to you?”. These were said to be important because they would:

“obtain uninfluenced responses to allow you to begin to understand what’s important to the customer and help you through the sales process. Open questions are the key to unlocking every customer’s unique requirements. Aim to uncover their problems or needs so when you present, they will pay more attention”.

(2) Using “leading” questions such as “What benefits do you see in combining your super?” These were asked because “[o]nce you’ve gathered bits of information derived from the open questions, the use of leading questions will narrow down to your customer’s need”. These were said to be important because they were “[g]ood for leading the customer in the direction you want them to go and finding out more specific information about their requirements”.

63 Westpac noted that a call would be classified as an “autofail” in circumstances which included where an operator:

- (1) did not expressly warn a customer at the start of the call that the information provided on the call was general in nature and did not take into account the customer’s needs or objectives;
- (2) failed the “personal advice” prohibitions;
- (3) did not refer a customer to appropriate advice channels if the customer asked certain questions; or
- (4) exerted undue pressure or influence on the customer.

64 When the relevant calls were made, members of the Super Activation Team were eligible for bonus payments. Approximately 15% of such payments were calculated by reference to scores that their calls were given under the QM Framework. Approximately 30% of any such bonus payment was calculated by reference to the FUM which the relevant staff member generated for Westpac on their calls. On the other hand, staff became ineligible for bonuses if they had a specified number of compliance “fails”.

65 In final submissions, ASIC sought several findings of fact, which generally did not appear to me to be controversial and I make them to the following extent:

(1) Westpac had the QM Framework in place over an extended period and used it on campaigns that were aimed at encouraging customers to roll over their superannuation. The

QM Framework was updated from time to time to take into account feedback from consultants, managers and coaching staff.

(2) Staff in the Super Activation Team were trained and encouraged by coaches to follow the QM Framework.

(3) Staff were marked and assessed based on the QM Framework and a substantial part of how their performance and any bonus was assessed was their ability to follow the QM Framework and their ability to generate FUM.

(4) The calls to the 15 customers reflected the terms of the QM Framework to varying extents, including through opening by saying that they were calling about the relevant customer's superannuation, as a "courtesy call" or to "help them potentially save on fees", uncovering the personal motivations of the customer and then linking those motivations to influence the customer to roll over their external superannuation accounts into the customer's BT account. The callers were encouraged to, and typically did, seek information about the customer's personal circumstances.

(5) Based on the transcripts of the various calls, some callers attempted to personalise the calls, listen to the customers and encourage the belief that they were being listened to and that their reasons for rolling over funds into their BT account were valid and reasonable. The callers attempted to use the information provided by the customers to inform what they said subsequently.

(6) Based on the transcript of the various calls, staff apparently considered that they could seek to influence customers to roll over funds into their BT account by saying words to the effect that they "would potentially save on fees".

(7) There is no reason to think that any of the callers knew whether it was in the best interests of the customers to roll over their external accounts into the customer's BT account.

66 Having made these findings, I do not generally consider it necessary to make findings by reference to ASIC's lengthy "Evidence Table". My factual findings concerning whether callers "considered" the objectives, financial situation and needs of customers are set out below.

67 ASIC contended that the evidence supported a finding that the Super Activation Team adopted their approach to calls regardless of whether or not it was beneficial to the customer, because they did not know whether or not it was in the interests of customers to roll over their external accounts. I do not accept that this is a fair reflection of the QM Framework, which

encapsulated the team's approach. As ASIC's "Moneywise" website noted, consolidation of superannuation accounts is beneficial, at least to the extent that it reduces paperwork and makes it easier for the customer to keep track of the customer's super. According to ASIC, there is also a financial benefit, namely, saving costs by paying only one set of fees. Thus, in my view, it is fair to say that the Super Activation Team did know that it was in the interests of customer to roll over their external accounts into a single account, although they did not know whether it was in their best interests to roll over the accounts into a BT account.

## LEGAL FRAMEWORK

### Relevant statutory provisions

68 Chapter 7 of the Act is entitled "Financial services and markets". Section 760A sets out the main object of Chapter 7 as follows:

The main object of this Chapter is to promote:

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and
- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

69 Part 7.1 of Ch 7 contains definitions of key concepts and commonly occurring expressions in Ch 7. Division 3 of Pt 7.1 is entitled "What is a financial product?" As noted earlier, it is not in dispute that membership in the BT Business Account Fund or BT Lifetime Account Fund is a "financial product" within the meaning of the relevant statutory provisions.

70 Division 4 of Pt 7.1 is entitled "When does a person provide a financial service?" As it stood at the relevant time, Div 4 contained five provisions, headed as follows:

766A When does a person provide a *financial service*?

766B Meaning of financial product advice

766C Meaning of *dealing*

766D Meaning of *makes a market* for a financial product

766E Meaning of provide a custodial or depository service

71 By s 766A(1)(a), for the purposes of Chapter 7, and subject to s 766A(2)(a), a person provides a “financial service” if they provide “financial product advice”.

72 Section 766B provides:

**Meaning of financial product advice**

- (1) For the purposes of this Chapter, *financial product advice* means a recommendation or a statement of opinion, or a report of either of those things, that:
  - (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
  - (b) could reasonably be regarded as being intended to have such an influence.
- (1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.
- (1B) Subsection (1A) does not apply for the purpose of determining whether a recommendation or statement of opinion made by an outside expert, or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice provided by the outside expert.
- (2) There are 2 types of financial product advice: personal advice and general advice.
- (3) For the purposes of this Chapter, *personal advice* is 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 (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or
  - (b) a reasonable person might expect the provider to have considered one or more of those matters.
- (4) For the purposes of this Chapter, *general advice* is financial product advice that is not personal advice.

73 As noted earlier, under their respective AFSLs, WSAL and BTFM were permitted to provide financial product advice that was “general advice” but not “personal advice”.

74 Part 7.6 of Ch 7 is entitled “Licensing of providers of financial services”. Division 3 of Pt 7.6 is entitled “Obligations of financial services licensees”. Division 3 sets out a series

of “baseline” or minimum obligations on all holders of an AFSL – whether providing “financial product advice” or otherwise.

75 By s 912A(1), a financial services licences must:

- (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
- ...
- (b) comply with the conditions on the licence; and
- (c) comply with the financial services laws; and

76 Part 7.7 of Ch 7 is entitled “Financial services disclosure”. Part 7.7 Div 2 is entitled “Person provided with financial service as retail client to be given a Financial Services Guide”. In respect of both the providers of “general advice” and “personal advice”, Pt 7.7, Div 2 imposes a minimum disclosure obligation on providers in circumstances where financial services are being provided to “retail clients” (as defined in s 761G).

77 In respect of the providers of “personal advice” to retail clients (see s 944A), Pt 7.7, Div 3 imposes a number of additional obligations. In particular, by s 946A, the provider has an additional obligation of disclosure: to provide the client with a “Statement of Advice” which satisfies the requirements of Sub-Divs C and D of Pt 7.7, Div 3. These Sub-Divs impose a number of prescriptive requirements regarding what that advice must contain, including by s 947B:

- (1) information about the basis on which the advice is or was given;
- (2) information about any remuneration (including commission) or other benefits the providing entity or an employee of the providing entity is to receive that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice; and
- (3) information about: (i) any other interests, whether pecuniary or not and whether direct or indirect, of the providing entity or of any associate of the providing entity; and (ii) any associations or relationships between the providing entity or any associate of the providing entity and the issuers of any financial products; that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice.

78 In relation to the provision of “general advice”, s 949A requires the provider to:

- ... warn the client that [*inter alia*]:

- (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 ...

79 Further, in relation to the provision of "personal advice" to a person as a retail client:

- (1) by s 961B(1), the provider must act in the best interests of the client;
- (2) by s 961G, the provider may only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied that duty under s 961B; and
- (3) by s 961J, in the case of a conflict, the provider must give priority to the client's interests when giving the advice.

### **Principles of statutory interpretation**

80 Key principles of statutory construction identified by the parties as applicable in this case are that:

- (1) words in a statute must be considered in context, which context includes legislative history and extrinsic materials, but such materials cannot displace the clear meaning of the text: *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, 519 at [39];
- (2) the construction of the text arrived at should have both internal logical consistency, and involve an overall harmonious interpretation: *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1, 20-21 at [31] citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 381-382 at [69]-[70];
- (3) while the task of statutory construction must begin with a consideration of the text itself, the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision and the mischief it is seeking to remedy: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]; and
- (4) the Court will also have regard to the consequences of a particular interpretation, and will prefer a construction that will avoid consequences which appear irrational or unjust: *Legal Services Board v Gillespie-Jones* [2013] HCA 35; (2013) 249 CLR 493 at [48]; *Public*

*Transport Commission (NSW) v J Murray- More (NSW) Pty Ltd* [1975] HCA 28; (1975) 132 CLR 336 at 350.

### **General observations**

81 As ASIC contended, the definition of personal advice in s 766B(3) is fundamental to the legislative scheme regulating financial advice, as it demarcates the important boundary between “personal advice” and “general advice”: the former requires advice appropriate to the client and stricter obligations of disclosure and disinterestedness.

82 Both “general advice” and “personal advice” are types of “financial product advice”. Under s 766B(1), both types of advice are permitted to be subjectively or objectively intended to influence a person or persons in making a decision about, relevantly, “a particular financial product”. The fundamental distinction between the two types of advice is that personal advice is given or directed to a person “in circumstances where” the provider “has considered one or more of the person’s objectives, financial situation or needs”, or “a reasonable person might expect the provider to have considered one or more of those matters”. It is the subjective or objective consideration of the individual’s personal circumstances that distinguishes the two types of advice.

### **Section 766B(1): “Recommendation or a statement of opinion”**

83 The terms “recommendation” and “statement of opinion” in s 766B(1) have been interpreted broadly, and include an implicit recommendation or statement of opinion: *Australian Securities and Investments Commission (ASIC) v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 (“*Park Trent*”) at [364]-[366].

84 In *Park Trent*, noting that dictionary definitions do not control the construction of a statutory provision, Sackville AJA set out the following at [364]:

The dictionary definition of “recommendation” includes “anything that serves to recommend a person or thing or induce acceptance or favour”. The definitions of “recommend” include:

1. to commend by favourable representations; present as worthy of confidence, acceptance, use etc.
2. to represent or urge as advisable or expedient.

The dictionary definition of “opinion” includes:

1. judgment or belief resting on grounds insufficient to produce certainty.

...

3. the expression of a personal view, estimation or judgment.

85 As to implied recommendations and statements of opinion, his Honour continued at [365]:

The construction of s 766B(1) must take into account that the language encompasses a recommendation or statement of opinion that is intended to influence a person in making a decision relating to a financial product or could reasonably be regarded as having such an influence. A person wishing to influence another person (the client) to make a decision relating to a financial product ... may do so in ways other than by express recommendations or explicit statements of opinion. Information or other material may be presented to the client in a form implying that the presenter favours or recommends a particular course of action without saying so explicitly. Similarly information or other material may be presented in a form that implies that the presenter's view is that the contemplated course of action is likely to be beneficial to the client. The authorities have accepted that the statutory language should be given a broad interpretation. Specifically, they support the proposition that a person may provide information or present material in a way that implicitly makes a recommendation or states an opinion in relation to a financial product.

86 Sackville AJA found (at [370]-[389]) that in the course of its interactions with investors the company made statements recommending, both explicitly and implicitly, that investors invest in property using a self-managed superannuation fund. His Honour further found that statements of opinion were made that investing in properties through a self-managed superannuation fund was a sound investment strategy likely to produce strong returns in the medium to long term that the attendees at certain seminars should favourably consider establishing one.

87 Westpac contended that *Trent Park* is distinguishable from the present case because the bespoke analysis provided to individual investors in the former plainly represented an expression of opinion that the investment was appropriate for them.

88 In *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; (2012) 205 FCR 90, Besanko J found that an online trading platform known as MetaTrader 4 provided trading analysis information, which could be construed as an expression of opinion that trading in a certain way, namely a way that makes use of the "trading indicators" made accessible by the platform (such as market trend, strength and volatility information), was likely to be profitable.

89 In *Australian Securities and Investments Commission v Oxford Investments (Tasmania) Pty Ltd* [2008] FCA 980; (2008) 169 FCR 522 ("*Oxford Investments*"), Heerey J found that the defendants made implied recommendations or statements of opinion that were

intended to influence persons attending courses of instruction in making a decision in relation to share price index futures. The relevant statements “necessarily implied that [the defendants] held the opinion that application of the Methodology would enable the user to trade profitably” ([17]).

90 In *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* [2008] NSWSC 1224; (2008) 69 ACSR 1 (“*Sydney Investment House Equities*”), Hamilton J noted at [358] that, while there were no decisions directly on point as to what could be characterised as a recommendation or a statement of opinion, there were decisions that “endorse the taking of practical and substantive approach to legislative provisions of this type”.

91 At [359], Hamilton J found that the offer of a high (18%) interest rate (“we can give you an 18% interest rate”) and promise of a mortgage (“we can arrange a mortgage that will allow you to invest with us”) were enough to convey a recommendation to the addressee that the investment was advantageous. This finding was made in relation to the defendants’ property investment scheme, whereby investors were invited to make loans to two of the defendants of monies to be lent to property developers (which, as it turned out, were insolvent related entities).

92 Westpac argued that the reasoning in this case must be incorrect because it seems to suggest that drawing attention to any advantageous feature of a financial product would amount to conveying a recommendation for the purposes of the statute. They noted that the relevant defendant (an individual who controlled the companies concerned) was unrepresented and the judgment does not indicate that he offered a substantive response to ASIC’s contentions on this issue: see [344].

93 Applying Sackville AJA’s interpretation, the terms “recommendation” and “statement of opinion” are to be given a broad interpretation, consistent with their ordinary meaning. The legislature has singled out “recommendations” and “statements of opinion” (and reports of either those things) as the conduct that constitutes “financial product advice”, where the conduct satisfies one of the two limbs of s 766B(1). Thus, for any particular statement that satisfies one of those two limbs, that statement will not constitute “financial product advice” unless it is also, relevantly, a “recommendation” or a “statement of opinion”.

94 In this context, in my view, the expression “statement of opinion” is intended to exclude statements of fact from the meaning of “financial product advice”. This construction is consistent with the legislative scheme which is designed to enable confident and informed decision making, and to impose obligations on AFSL holders in relation to the provision of “financial product advice”. As a general proposition, it might be thought that consumers need to understand why a recommendation is made, or an opinion is expressed, but not why a statement of fact is articulated: the explanation for the latter is the existence of the fact itself. Thus, there is an obligation to give a “Statement of Advice” where personal advice is provided to a person as a retail client under Pt 7.7 Div 3. By s 946A(2), the Statement of Advice may be the means by which the advice is provided, or a separate record of the advice. By s 947B(2)(b), a Statement of Advice must include information about the basis on which the advice is or was given.

95 However, as the law of evidence reveals, the distinction between fact and opinion is not always obvious: see, for example, *La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd* [2011] FCAFC 4; (2011) 190 FCR 299 at [43] and [44]. In that context, an opinion is commonly taken to mean “an inference from observed and communicable data”: *Lithgow City Council v Jackson* [2011] HCA 36; (2011) 244 CLR 352 (“*Lithgow City Council*”) at [10], citing *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73 at 75. As explained in Dyson Heydon’s *Cross on Evidence*, 10<sup>th</sup> ed, at [2001], the origins of rules concerning opinion evidence reflect a concern that opinion had an uncertain or unreliable basis.

96 In *Lithgow City Council*, the High Court considered the nature of a statement made by ambulance officers. The appellant sought to distinguish between an opinion and a statement which merely raised a question, arguing that the relevant representation did no more than raise a question as to a fact (that the respondent had fallen 1.5 metres onto concrete), or speculate whether this was the fact, or raise as a possibility that fact. In dealing with a contention that the relevant representation was an inference from observed and communicable data (and therefore an opinion), French CJ, Heydon and Bell JJ (Gummow and Crennan JJ agreeing) noted the range of possible bases for a representation, as follows (at [28]):

What the ambulance officers did observe and could have observed could have caused them to draw an inference from the observations. But the present question is whether they actually did do so, not whether they could have. The question turns on the form

of what they said in the context in which they were speaking. That is because what it means to raise a query about something can vary with the context. “I query whether that is so” can mean “That is probably so, though I am not sure” or “That may well be so, though I am not sure”. But it can also mean: “I raise a question about whether it is so”, or “I speculate whether it is so”, or “I raise the possibility that it is not so”, or “I doubt that that is so”. It can even mean “I deny that that is so”.

97 At [37] and [38], the High Court rejected a finding of the Court of Appeal of the Supreme Court of New South Wales that the relevant statement was “an opinion, in the sense of an inference drawn, that there was a question” whether the respondent had fallen 1.5 metres onto concrete. Their Honours also rejected the appellant’s submission that to characterise the impugned representation as an opinion that there was a question whether there had been a 1.5 metre fall was to render it inadmissible, saying (at [38]):

The ambulance officers’ records are so shrouded in obscurity about what data they observed and suggest so great an unlikelihood that that data could support, or were seen as pointing to, any definitive inference that it is not possible to find on the balance of probabilities what the impugned representation was stating. It is therefore not possible positively to find that it stated an opinion.

98 In the context of s 766B(1), a “practical and substantive” approach would support an interpretation of the words “statement of opinion” to exclude statements of fact, being statements that are not based upon inference, and statements that do not involve any definitive inference (such as speculation). A statement of possibility may be made on the basis of inference and may therefore be a “statement of opinion”. It may be necessary to understand surrounding context to determine whether a statement is the product of inference so as to be a “statement of opinion” within the meaning of s 766B(1).

99 For example, the bare statement “If you buy this product, you could be better off” may be the expression of an inference based on a fact or facts about the consumer’s financial position (or other facts), or it may be based on nothing more than the logic that purchase of the product may or may not lead to the consumer being better off. In my view, where there is no evidence that the statement is an inference based on other facts, there is no basis for a conclusion that the statement is a “statement of opinion”.

100 It is not necessary for me to determine whether the findings in *Sydney Investment House Equities* were wrong: the issue in this case is whether various statements made by the callers were recommendations or statements of opinion, or implied recommendations or statements of opinion.

101 Westpac accepted, and I agree, that an implicit statement that the provider favours or commends a particular course of action without saying so in terms, or that the provider's view is that the contemplated course of action is likely to be beneficial to the client, is capable of amounting to "financial product advice". A recommendation or a statement of opinion may be made implicitly where information or other material is presented in a form that implies that the presenter's view is that the contemplated course of action is likely to be beneficial to the client.

102 Westpac argued that a recommendation or statement of opinion could not comprise "any ... sales message or expression of enthusiasm...in an interaction with a customer". I do not agree. The character of words as "sales message" or "expression of enthusiasm" does not answer whether those words are a "recommendation" or a "statement of opinion": it is necessary to consider the content of the words to determine whether a recommendation or statement of opinion is made.

103 As ASIC observed, it was the overlap between the concept of sales and advice that was one of the key concerns addressed by the Parliamentary Joint Committee on Corporations and Financial Services in its November 2009 Report – the precursor to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth). The Committee noted a key focus as being the "sales-advice conflict" and "the effect of sales imperatives on the quality of financial advice" in the financial sector (at [5.1]).

104 The defendants submitted that the reference to a "report" in s 766B(1) suggests a degree of formality, and is consistent with the natural sense of the terms "recommendation" and "statement of opinion" as involving advice as such. They argued that, taken together, these terms import some application of estimation and judgment. The same point was said to emerge from the use of the word "advice" in the defined term "financial product advice", bearing in mind that the ordinary English meaning of a word defined in a statute may properly influence the interpretation of the definition: *Rennie Golledge Pty Ltd v Ballard* [2012] NSWCA 376; (2012) 82 NSWLR 231 at [129].

105 I do not accept that the use of the words "report" and "advice" operate to limit the meaning of the terms "recommendation" and "statement of opinion" in s 766B(1), as I have described them above. Rather, the reference to a "report" is expressed in the alternative and appears to be intended to extend the scope of the section beyond a case of a

“recommendation” or “statement of opinion”. The construction I have identified corresponds with the ordinary English meaning of “advice”.

**Section 766B(1): “Intended to influence a person in making a decision in relation to a particular financial product”**

106 To satisfy s 766B(1)(a), the relevant recommendation or statement of opinion must be “intended to influence a person or persons in making a decision in relation to a particular financial product ...”.

107 This element requires the identification of:

- (1) a person or persons who are intended to be influenced;
- (2) a decision that is or may be under consideration by the person; and
- (3) a particular financial product to which the decision relates.

108 In this case, a recommendation or statement of opinion intended to influence a customer in making a decision to rollover external accounts into a BT account would satisfy the requirements of s 766B(1)(a).

**Section 766B(3): Financial product advice given “in circumstances where”...**

109 I accept ASIC’s contention that, for s 766B(3)(a), the phrase “in circumstances where” does not require a causative nexus or connection between the advice provided and the personal circumstances considered, or that the advice be provided on the basis of the particular personal circumstances of the person. Rather, it directs attention broadly to the circumstances in which the financial product advice was given.

110 Thus, I accept, a provider of advice cannot avoid the application of the section by alleging that they would have provided the same recommendation regardless of the person’s personal circumstances.

**Section 766B(3): “Provider of advice has considered one or more of the person’s objectives, financial situation and needs...”, or “a reasonable person might expect the provider to have considered one or more of those matters”**

***A person’s objectives, financial situation and needs***

111 The terms “objectives, financial situation and needs” are not defined in the Act. ASIC pointed to the following definitions in the *Macquarie Dictionary*:

- (1) “objective”: “an end towards which efforts are directed; something aimed at”;

- (2) “situation”: “the state of affairs; combination of circumstances”; and
- (3) “needs”: “a case or instance in which some necessity or want exists”.

112 On ASIC’s interpretation, the use of the word “and” requires that the phrase “the person’s objectives, financial situation and needs” be considered together. Seen this way, the necessary result is that the term “one or more of” refers to the whole phrase. Accordingly, ASIC argued that the provision ought to be read as referring to one or more of a person’s objectives; one or more aspects of the person’s financial situation or one or more of the person’s needs.

113 ASIC contended that the words “one or more” were added to s 766B(3) to make it clear that the provision was not limited to a context where a provider has a considered a range of the person’s objectives, financial situation and needs or represented to a customer that they had considered a range of the person’s objectives, financial situation and needs. It is sufficient that only one objective, aspect of a financial situation or need be considered or could be expected to have been considered. In support of that contention, ASIC referred to a Supplementary Explanatory Memorandum to the *Financial Services Reform Bill 2011* (Cth), which stated relevantly:

[3.20] As currently drafted, proposed subsection 766B(3) defines personal advice as financial product advice that is given or directed to a person in circumstances where the provider has considered the ‘objectives, financial situation and needs’ of the person (or where a reasonable person might expect the provider to have considered these matters).

[3.21] Item 19 amends proposed subsection 766B(3) to define personal advice as advice given or directed to a person where the provider has considered one or more of the person’s objectives, financial situation and needs (or where a reasonable person might expect the provider to have considered one or more of these matters).

[3.22] The purpose of this proposed amendment is to ensure that a financial services provider will be subject to the requirements of proposed Divisions 3 or 5 of Part 7.7 (including the requirement to provide a SOA) when advising a retail client that a particular financial product (or class of financial products) is appropriate to them as an individual.

[3.23] As subsection 766B(3) is currently drafted, a financial services provider could recommend a financial product or class of financial product as being appropriate to a retail client’s individual needs and objectives, but avoid the requirements of proposed Divisions 3 or 5 of Part 7.7 because they had not considered the client’s financial situation.

114 ASIC suggested that, if its construction were not correct, then a provider could almost always be able to evade personal advice obligations by not considering the whole of a person’s objectives, needs or financial situation before providing advice and even by telling

the customer (somewhat ambiguously) that they were not considering the whole of that customer's objectives, needs or financial situation.

115 ASIC also drew attention to s 961B(2)(b)(ii), by which the provider may satisfy the duty to act in the best interests of the client in relation to the provision of personal advice by identifying, relevantly, "the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter". By this provision, ASIC argued, the legislature had contemplated that advice may be "scaled", or not directed to the whole of the financial circumstances of a client. ASIC referred to the *Replacement Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) which stated as follows (at [1.34]):

This process is designed to accommodate the provision of limited advice (also referred to as 'scaled advice') that only looks at a specific issue (for example, single issue advice on retirement planning) and 'holistic' advice that looks at all the financial circumstances of the client. In some situations, the client might prefer to receive more targeted advice on a matter that is particularly concerning them rather than comprehensive advice. As long as the provider acts reasonably in this process and bases the decision to narrow the subject matter of the advice on the interests of the client, the provider will not be in breach of their obligation to act in the client's best interests. The scaling of advice by the provider must itself be in the client's best interests, especially since the client's instructions may at times be unclear or not appropriate for his or her circumstances.

116 For its part, Westpac argued that ASIC's construction was inconsistent with the language of the section and the explanatory materials and was "unworkable". It pointed out that the words "one or more" could not be applied distributively to the category of "financial situation". That is, it is a nonsense to speak of "one or more of a person's financial situation". Thus, it is one or more of the three categories of objectives, financial situation and needs that must be considered and this construction is consistent with the language of the explanatory memorandum extracted above.

117 Westpac argued that this construction gives the provision a workable and sensible operation and is consistent with the statutory scheme and, in particular, the mandatory content of the Statement of Advice required by ss 944A and 946A when "personal advice" is given. The argument was that it makes sense to impose the s 947B mandatory content where the client would reasonably expect the provider to have taken into account the whole of the client's objectives, or financial situation, or needs, in giving financial product advice. In that situation, the client would be entitled to expect that the provider was acting in the client's best interests (as the statute requires by s 961B) and the s 947B context permits the client to

make an informed decision about whether the advice is truly in the client's best interests. Conversely, Westpac contended, it makes no sense to impose that requirement where a customer would reasonably understand that a financial institution was self-interestedly marketing its own products and there was no reason to think any recommendations were made on the basis that they were appropriate to the customer's personal situation as a whole.

118 In my view, particularly having regard to the language of s 961B(2)(b), this phrase has the meaning contended for by ASIC. It is not necessary to apply the words "one or more" distributively, as proposed by Westpac. Rather, the phrase "the person's objectives, financial situation and needs" refers to be considered together.

119 On ASIC's interpretation, the use of the word "and" requires that the phrase "the person's objectives, financial situation and needs" refers to the multiplicity of objectives, financial situations and needs of a client that may be relevant to personal advice provided to that client. As s 961B(2)(b)(ii) contemplates, a person's "financial situation" may comprise something less than the totality of their financial situation.

120 I also accept that the concepts of "objectives", "financial situation" and "needs" are not mutually exclusive and may contain significant overlap. For example, a customer with a dependent disabled child may characterise the goal of accumulating sufficient wealth to provide for that child as both an objective and a need. Further, the dependence of the child on the customer may form part of the customer's "financial situation".

121 The relevant "objectives, financial situation and needs" are "the person's objectives, financial situation and needs". In my view, that would not include aims that are universal, such as the aim of avoiding the unnecessary payment of fees or the aim of having one's super arranged in a way that is as easily tracked and managed as possible.

122 Whether a person has "needs" may extend beyond an obvious necessity that could be identified by someone apart from the person themselves, to include an urgent want identified by the relevant person (where minds might reasonably differ as to whether the urgent want is properly characterised as a "need"). In this case, ASIC identified the alleged "needs" as matters identified by the customers themselves, either expressly or by implication. An example is the alleged "need to save on fees", which is not an obvious necessity in the absence of other facts. Customers 2 and 12 expressed a need to consolidate their super. I

would not accept that this was a need within the meaning of s 766B(3) without more evidence as to the basis of the asserted need.

***Subjective limb (a): Provider of advice has “considered” relevant matters***

123 The term “consider” is not defined in the Act. ASIC submitted that it should be given a broad interpretation and referred to the following *Macquarie Dictionary* definitions: “to think; suppose”; “to make allowance for”; “to pay attention to; regard”; “to view attentively, or scrutinise”. ASIC contended that there is no further requirement that a provider has given detailed, extensive or careful consideration to any of the personal circumstances in question.

124 Senior counsel for ASIC, Dr Renwick SC, argued against a narrow interpretation of the word “considered” that would permit unscrupulous advisers to evade the operation of the scheme by failing to consider the objectives, needs or financial situation of their clients.

125 ASIC accepted that the “mere mention” by one of Westpac’s callers of one or more of a customer’s objectives, financial situation and needs, or the fact that an aspect of a customer’s financial affairs is “noticed” by the caller, would not be sufficient to show that such matters had been “considered”. Nor would it be sufficient to show that a caller had learned some personal detail concerning the customer.

126 ASIC also noted that what amounts to consideration is a question of fact. ASIC contended that, if advice was given “in light of any personal objectives, financial situation or needs identified by the recipient”, that would be sufficient to meet the requirement of consideration of one of those matters. ASIC appeared to accept that the meaning of “considered” involves an evaluation of relevant subject matter, arguing that the social proofing technique is “inherently evaluative” because the customer states what is important to them and the caller responds with encouragement which “purports to consider what customers have told BT generally and distil them into the main reasons” for action by other customers.

127 In my view, the word “considered” refers to an active process of evaluating or reflecting upon the subject matter of the consideration, appropriate to the provision of “financial product advice”. It does not require a process that is “detailed, extensive or careful”, however, it does involve an intellectual engagement with the subject matter of the consideration. If it were suggested, I do not accept that such an interpretation will permit

unscrupulous advisers to evade the scheme by failing to give the client's personal circumstances due consideration: in my view, s 766B(3)(b) is intended to capture those cases.

128 I do not accept that the social proofing technique necessarily involved, or was likely to involve, consideration of information obtained from the customer. First, it occurred in the context of a telephone conversation and involves an immediate reaction to the information obtained so that the opportunity for consideration or reflection is negligible. Secondly, as appears from the conversations the subject of this proceeding, the social proofing involved affirming the customer's stated reasons for wishing to consolidate their super funds by asserting that their reasons were held in common with others. I do not accept that identifying a commonality between stated reasons and reasons held by others involves evaluation of the customer's stated reasons: it merely involves a recognition of the nature of those reasons.

***Objective limb (b): What a reasonable person might expect a provider of advice to have considered***

129 ASIC accepted that the words "might expect" in s 766B(3)(b) are constrained by notions of reasonableness – a situation where only an unreasonable person might expect the provider to have considered the relevant matters will not fall within the definition of "personal advice".

130 The word "might" can be used to refer to a situation contrary to the fact: in this case, it may signify a situation in which a reasonable person would expect a provider of advice to have considered a relevant matter, contrary to the fact.

131 In some contexts, the word "might" is used to convey a possibility. ASIC submitted that the word connotes a situation where the reasonable person considers that it is possible that the provider has considered a relevant matter. This interpretation is in tension with the stipulation of a test limited by reference to the position of a "reasonable" person (as opposed to any customer) and also limited by reference to what that person might "expect", that is, what that person might regard as likely to happen. There is no obvious reason why the legislation should be construed to cover possibilities that could be contemplated by a reasonable person.

***Who is a reasonable person?***

132 ASIC submitted that, particularly given the focus of the legislation on the protection of retail clients, the "reasonable person" should be understood as an ordinary member of the

community with some but not any particular knowledge as to what superannuation is and some knowledge of the objective circumstances in which the advice is given.

133 ASIC suggested that the standard here should be that of the ordinary person who is not necessarily a university graduate nor has a background in the financial world or indeed any specialised knowledge of superannuation products. In support of this proposition, ASIC referred to Young J's contemporised antipodean adaption in *Harkness v Commonwealth Bank of Australia Ltd* (1993) 32 NSWLR 543 at 545-546 of the classic "man on the Clapham omnibus" standard, namely "the person on the Bondi bus", itself adopted in the context of s 588FG(b)(ii) of the Act in *Cussen v Federal Commissioner of Taxation* [2004] NSWCA 383; (2004) 51 ACSR 530 at [17], [31].

134 Westpac contended that the reasonable person's knowledge of the objective circumstances in which advice is given could not extend to matters extraneous to the interactions between the provider of the advice and the customer and which are not known to the customer at all. Thus, it contended that the reasonable person is a hypothetical person standing in the actual customer's shoes.

135 This submission is directed to the identified relevant "circumstances" in s 766B(3). I do not accept that the relevant circumstances are only those that could have been known by a reasonable person. In my view, s 766B(3) directs attention to all of the relevant circumstances in which the financial product advice is given. Section 766B(3)(b) requires an assessment of what a reasonable person would expect in those circumstances.

### **WESTPAC'S INTENTIONS**

136 ASIC's case was that each "recommendation" or "statement of opinion", made by a caller to one of the 15 customers, was intended by the caller to influence the customer in deciding to consolidate their external accounts into the relevant BT account.

137 Westpac did not dispute that its "messaging" was plainly intended to encourage customers to roll over their super into their existing BT account. However, Westpac noted that in some cases, the customer apparently needed no encouragement: it was evident from the terms of the conversation that they had made a decision to consolidate their accounts at the commencement of the call.

138 Ultimately, Westpac did not dispute the subjective intention of the callers to influence the customers in the way regulated by s 766B(1)(a), although senior counsel for Westpac,

Mr McHugh SC, noted that a consideration of the individual calls reveals that the position was more complex and this should not be understood to have been the sole purpose of the callers. In particular, Westpac ultimately accepted that a social proof in the form of “They’re probably the two main reasons our clients do like to consolidate” clearly reflected an intention to influence and encouragement. However, as Mr McHugh SC noted, the calls included recorded messages played for compliance reasons which could not be characterised as intended to influence the customer.

### **ISSUES FOR DETERMINATION**

139 In relation to ASIC’s case based on s 766B, the issues for determination are:

- (1) For each of the 15 calls, did the relevant caller provide one or more “recommendations” and or “statements of opinion” to the customer and thus provide financial product advice within the meaning of s 766B(1)?
- (2) If the caller provided a “recommendation” or a “statement of opinion”:
  - (a) was that “recommendation” or “statement of opinion” intended to influence the relevant customer in making a decision in relation to their BT account or their external accounts, each such account being a particular financial product?; or
  - (b) could that “recommendation” or “statement of opinion” reasonably be regarded as being intended to have such an influence?
- (3) For each of the 15 calls, did the personal matters about the customer identified by ASIC in its “Particulars of Claim” constitute the customer’s “objective, financial situations or needs” within the meaning of s 766B(3)?
- (4) Whether any financial product advice was provided in circumstances where the relevant caller considered one or more of the customer’s objectives, financial situations or needs?
- (5) Whether any financial product advice was provided in circumstances where a reasonable person might expect the caller to have considered one or more of the alleged objectives, financial situations or needs?

140 Section 140(2) of the *Evidence Act 1995* (Cth) applies in this case, which involves claims for civil penalties: see *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (In Liq (No 2))* [2017] FCA 709 at [8]. Accordingly, it was

necessary for ASIC to establish its case by clear and cogent proof of the necessary elements of the alleged contraventions.

## **COMMUNICATIONS WITH CUSTOMERS**

141 At all material times, four of the 15 customers (customers 1, 2, 6 and 7) were members of the BT Lifetime Account Fund; the remaining 11 customers (customers 3, 4, 5, 8, 9, 10, 11, 12, 13, 14 and 15) were members of the BT Business Account Fund.

142 Each of the customers was sent written communications by which BTFM or WSAL:

- (1) offered to search for any “external accounts” that the customer had;
- (2) offered to roll over any “external accounts” held by the customer into his or her BT account; and
- (3) sought to influence the customer to take up such offers.

143 In the case of each customer except customer 15, there was evidence that they were sent an “annual super statement letter”. This letter enclosed the customer’s annual super statement for the year ended 30 June 2014, and stated:

It’s a great time of year to review your financial situation and make sure your super is working hard for you. On average, most Australians will receive three super statements around this time of year. By having multiple super accounts you’re probably also paying multiple administrative fees. However, if you combine your super into one account, you could save on administrative fees and enjoy the convenience of having all your super in the one place. To help get you started, we’ve enclosed a Rollover form, simply complete the form and return it in the reply paid envelope and we’ll do the rest.

### **Let us help find all your super**

Did you know that there’s \$18.2 billion in lost and ATO-held super in Australia and some of it could be yours? With your consent we can search for any other super you may have on a regular basis.

Visit **bt.com.au/supermatch** and enter your unique security code ..., member number ... and details to give your consent. We’ll search any other super you may have on a regular basis. It’s that easy, so why not get started today.

144 The letter contained a disclaimer which, relevantly, disclosed a possible fee of up to 1% for accepting rollovers; recommended that the customer “check with your other fund/s to determine whether there are any exit fees for moving your benefit, or other loss of benefits (e.g., insurance cover); states that it provided an overview or summary only “and it should not be considered a comprehensive statement on any matter or relied upon as such”. The disclaimer also states:

This letter doesn't take into account your personal objectives, financial situation or needs and so you should consider its appropriateness having regard to these factors before acting on it.

145 In most, but not all, cases, following an offer to search, the relevant customer accessed the BT website and requested that a search be conducted to locate amounts held on his or her behalf in external accounts. Such a request was made by all the customers except customers 9 and 14 (although, in the case of customer 15, the request was made after he had also received a telephone call from a Super Activation Team member).

146 In some, but not all cases, following the search request, BTFM or WSAL sent the customer a letter which set out the results of the requested superannuation search. This occurred in the cases of customers 1, 3, 6, 11 and 13. ASIC's case does not allege that customers 2, 4, 5, 7, 8, 10 and 12 were sent such a letter (or customers 9 and 14).

147 In each case, the telephone call to the customer (or at least the first call) commenced with a statement by the caller to the effect that the call concerned their BT account.

#### **“General advice warnings”**

148 As appears below, in the call to customer 1, caller AA said “everything discussed today is general in nature, it won't take into account your personal financial needs”. Each customer received a similar though not identical statement, referred to by Westpac as a “general advice warning”. Particularly, some “warnings” ended with the caller noting that they would not take into account the customer's “personal needs”, “personal needs and objectives” or “personal needs, goals or objectives”, rather than the customer's “personal financial needs” (as caller AA said to customer 1). Nothing turns on this difference in semantics.

#### **Customer 1 (caller AA)**

149 Caller AA called customer 1 on two occasions on 1 October 2014.

150 Prior to the calls, BTFM sent three relevant pieces of correspondence to customer 1, dated respectively 23 July 2014 (annual super statement letter), 11 August 2014 and 29 September 2014.

151 The 11 August 2014 correspondence was headed “[customer 1], let us do the legwork and you could WIN” (“Let us do the legwork” letter). To the right of the page was a green

spot containing the words “WIN one of two \$10,000 travel vouchers”. The letter also included the following:

When your to-do list is ever growing, combining your super is left in the too hard basket. Yet in less than two minutes you can give BT your consent to search for all your other super and help sort it out for you.

Give us the OK to combine your super by 30 September and you’ll have the chance to win one of two \$10,000 Flight Centre vouchers. Then you can relax knowing there’s one less thing on your to-do list.

By combining all of your super into your BT super account, you’ll pay just one set of fees, cut down on paperwork and make it easier to track your super’s performance. So take the load off and let us do the hard work for you.

152 Under the heading “Things you should know”, in very small pink font, is a disclaimer to the effect of the disclaimer noted at [0] above.

153 On 10 September 2014, customer 1 accessed the BT website and requested a search be conducted to locate amounts held in External Accounts. As part of requesting that search, customer 1 completed an electronic form, including checking a button beside the words “I agree to giving consent for SuperMatch”. Under those words was the following:

By ticking this box I consent to BT Limited – Personal Super, BT Retirement Selection – Personal Super BT Classic Lifetime – Personal Super, BT Superannuation Savings Fund, BT Superannuation Investment Fund, BT Lifetime Super – Employer Plan and BT Business Super (BT Super) using my Tax File Number (TFN) to search Australian Taxation Office (ATO) records to locate superannuation amounts held on my behalf by other superannuation funds or by the ATO now and in the future. If search results include superannuation amounts held on my behalf by the ATO. I also consent to BT Super requesting the ATO to transfer those amounts into my BT Super account where possible and using and disclosing my TFN for that purpose. Once you provide your consent it will be held in perpetuity this will allow BT Super to complete periodic searches on your behalf of which you will be notified. If at any time you wish to remove your consent please contact BT Customer Relations on 132 125. For details regarding the use of your personal information please refer to the BT Privacy Policy.

154 On 29 September 2014, BT sent a letter to Customer 1 which set out the results of the superannuation search which she had requested. The letter stated, relevantly:

Having your super in multiple places may mean you’re paying multiple sets of fees. By bringing it together in one account, you could potentially reduce fees and paperwork.

155 Again, the letter contained a disclaimer to the effect of the disclaimer noted at [0] above.

156 On 3 October 2014, in the course of the Q4 campaign, caller AA called customer 1 twice, at about 11:22 am and 11:58 am.

157 By the time of the first call, customer 1 had not communicated any decision to BTFM that she wished to roll over her superannuation from any external accounts into her BT account (except in relation to superannuation held in any ATO accounts). She had merely requested that a free superannuation search be conducted on her behalf.

158 The following portions of the transcript which recorded the first call are relevant:

CALLER: ...Look, it was just a quick courtesy call regarding your BT Superannuation account, we've just had some superannuation search results.

[...]

We've got some results here we'd like to help you bring them over to your account to potentially save you on fees.

[...]

So before we continue I do need to let you know... everything discussed today is general in nature, it won't take into account your personal financial needs. Is that okay?

C1: All right, yeah, not a problem.

CALLER: Now, before we get started can I ask you a few quick questions so I can help you.

C1: Yeah, yeah.

[...]

CALLER: So what was the main reason you asked us to look for your superannuations?

C1: Because I know I've got a few out there [...] and I wanted to roll it all into one.

CALLER: Right, and what did you see as the main benefits of bringing them altogether to the one place?

C1: Just – well, like you said, fees, it's the whole thing. [...] Because they're all over the place and I got little bits here and little bits there, so you lose those.

CALLER: I see, yeah, right, right. So it sounds like manageability and also the saving on the fees, potentially. Is that right?

C1: Yeah, yeah.

CALLER: Fair enough, no worries. Look, they are the two main reasons our clients do like to bring their supers together, it does make a lot more sense from a management point of view, for sure.

C1: Yeah.

CALLER: Now, what we can do is we can go through your superannuation search results and we can actually help you bring them altogether over the phone now, the only thing we'll need from you today to do that is your tax file number.

159 For the second call, ASIC relied on the following conversation:

CALLER: Yeah, I'm good, [C1]. Did you manage to grab that tax file number?

C1: Yes, I've got the number.

CALLER: Fantastic. Now before you give it to me I'll just let you know that the call's being recorded [...] and everything discussed today is general nature, won't take into account your personal financial needs. Is that okay?

C1: Yeah, all good. All good.

[Caller AA proceeded to recite the various superannuation funds that had been found. C1 indicated then that she thought one fund from "Catholic School" seemed to be missing.]

C1: ... No Catholic school?

CALLER: No.

C1: Okay.

CALLER: Yeah. Did you – if you have the account details of that one you could actually just send it to me via email and I can...

C1: Yeah, all right. I'll have a – I'll have a look. I probably haven't got anything in there.

CALLER: Oh, I see, that's probably why, but – it could have been potentially swallowed up by fees and that's why it hasn't turned up in the search.

[AA proceeds to arrange the rollover.]

CALLER: Great, not a problem at all, [C1]. Just to recap, I'll process the – your request in the next 10 minutes. You'll get a confirmation email from us. [...] And everything gets rolled over in two or three weeks, so it's all in the one spot and nice and organised for you. How does that sound?

C1: Yes, sounds good. [...]

### **Customer 2 (caller AA)**

160 Caller AA called customer 2 on 1 October 2014.

161 Prior to the call, BTFM sent four relevant pieces of correspondence to customer 2.

162 The first was an email (“Win \$20,000” email) sent in around April 2014. It included a prominent blue box containing the words “You still have time to WIN \$20,000 cash\*” and, underneath, the following:

How would you spend the cash? This decision could be yours when you combine \$5,000 or more of your super into your BT super account **by 30 May 2014**.

**One super account means less hassle and paper work.**

There’s only one [sic], so why have more than one super account? There may be no need to. By combining all your super<sup>^</sup> into your BT super account you could stop paying multiple account keeping fees, which is one way to help your super grow. Plus, having your money in one place can make it easier to manage.

163 The symbol <sup>^</sup> following “combining all your super” refers to the following statement which forms part of a larger disclaimer, including a statement to the effect of the disclaimer described at [0] above:

Before requesting the rollover, you should check with your other fund/s to determine whether there are any exit fees for moving your benefit or other loss of benefits (e.g. insurance cover).

164 The second was another email, sent in around July 2014 (“Take your super out of the too hard basket” email).

165 The email included a prominent blue box containing the words “Take your super out of the too hard basket” and included the following messages:

- Take your super out of the too hard basket” [Accompanied by a checklist of items: ‘Lodge tax return’, ‘Organise health insurance’, ‘Sort out super’, ‘Join the gym’]
- When you’ve got a lot on your plate, your super is left in the too hard basket. We know we should combine our super, but it takes ages, right? Wrong. In just one click you can get BT to help take care of it for you.
- By combining<sup>^</sup> all your super into your BT super account, you could stop paying multiple fees and help your super grow. Plus, it’s easier to manage when it’s all in one place. So sit back and let us do the hard work for you.
- Get sorted to win.
- Why combine your super?
  - Only pay one set of fees
  - Cut down on paperwork
- It’s easy to track your super’s performance.

166 There was a disclaimer at the end of the email, in similar terms to the earlier email and substantially similar to the disclaimer at [0] above.

167 The third, a letter dated 23 July 2014, was in the form of the annual super statement letter.

168 Finally, there was an email sent in September 2014, also headed with a prominent blue box containing the words “Take your super out of the too hard basket” (“Last chance” email). This email contained the following messages and the same disclaimer as the other emails:

- Take your super out of the too hard basket [Accompanied by a checklist of items: ‘Lodge tax return’, ‘Organise health insurance’, ‘Sort out super’, ‘Join the gym’]
- It’s your last chance to combine your super for a chance to win one of two \$10,000 Flight Centre travel vouchers.
- We understand you’ve got a lot on your plate and sorting your super could take ages and that’s why it’s often left in the too hard basket ... you can relax and unwind knowing there’s one less thing on your to-do list.
- By combining all your super into your BT super account, you could stop paying multiple fees and help your super grow. Plus, it’s easier to manage when it’s all in one place. So sit back and let us do the hard work for you.
- Get sorted to win.
- Why combine your super?
  - Only pay one set of fees
  - Cut down on paperwork
  - It’s easy to track your super’s performance

169 The following portions of the 1 October 2014 call are relevant:

CALLER: Look, [customer 2], I’m calling about your BT Lifetime Super Account that you have here with us. [...] Yeah, just a quick courtesy call today to see how you’re tracking and also to go through your superannuation search results and potentially save you on fees by bringing them over to your account here.

[...]

CALLER: Now, look, before we continue we’ll need to let you know the call is being recorded and everything discussed today will be general in nature and won’t take into account your personal needs. Is that okay?

C2: Yeah it is. [...]

CALLER: So, what was the main reason you asked us to look for your supers? Hello?

[...]

C2: Yep, that’s [indistinct] I’m retiring, mate, and I just need to get them all put together.

CALLER: Oh, I see, I see. And, you know, what do you personally see as the main benefits of bringing all your supers into the one account?

C2: Yeah, the fees, easy to manage, I suppose, and all that.

CALLER: Okay. So saving on those fees and – that'd be the most important factor for you, would you say?

C2: Yeah, that's right.

CALLER: Fair enough. No worries. Look, you're not alone there. Most of our customers say the same thing. It does make a lot more sense to pay, you know, only one set of fees, potentially, and – rather than multiple so – now, what we can do for you today is we can actually help you bring all your accounts over to your BT account over the phone and do it all electronically. It saves you from having to do any forms and that way you can start potentially saving on those fees. Is that something I can do for you today?

C2: Yes.

[...]

CALLER: All right, fantastic. Now do you know roughly how much you might be bringing over from those two other accounts?

[...]

CALLER: Look, just to recap, I'll process your rollover in the next five minutes. You'll get a confirmation email. Everything gets rolled over into your BT Lifetime Super account in the next two or three weeks so it's all in the one spot so you start potentially saving on those fees. How does that sound?"

### **Customer 3 (caller BB)**

170 Caller BB called customer 3 on 2 October 2014 and 10 October 2014.

171 Prior to the call, WSAL sent him two relevant pieces of correspondence. The first, dated 14 August 2014, was substantially in the form of the annual super statement letter.

172 The second, dated 24 September 2014, was a letter which provided the results of a super search conducted by Westpac at Customer 3's request ("search results letter"). The letter included the following:

#### **Next steps**

Having your super in multiple places may mean you're paying multiple sets of fees. By bringing it together in the one account, you could potentially reduce fees and paperwork.

173 The letter included a disclaimer similar (but not identical) to the disclaimer on the annual super statement letter.

174 The following portions of the 2 October 2014 call are relevant:

CALLER: Have I got you at a good time to have a chat in regards to your BT Business Super account that was set up previously by your employer?

[...]

CALLER: Great, thank you. I do just need to let you know that this call is being recorded for quality and training purposes and just anything we discuss today is just general in nature and doesn't take into consideration your personal needs. Is that okay?

C3: That is fine, [BB].

CALLER: Thank you so much. Now, [customer 3], you may have approved us to complete a super search on your behalf to see if we could locate any other external superannuation accounts.

C3: Yes, I did that a bit over a week ago, I think.

CALLER: Perfect.

C3: I've actually been waiting for you guys to call me.

CALLER: Great. I'm glad I've got a hold of you. So that's definitely the reason for my call today and to see if I can assist you in combining those into your BT Business Super account today.

[...]

CALLER: So that's definitely the reason for my call today and to see if I can assist you in combining those into your BT Business Super account today.

C3: Yes, I would like to do that.

[...]

CALLER: Now, for us to combine those into your BT Business Super Account I absolutely can do that today. I just would need to let you know that if you held any insurances with those funds [...] that they would be cancelled because you'd be closing off the accounts and bringing the balance across. Would that be okay?

C3: Well, what insurances do I have with you people?

CALLER: Yeah, of course. Let's go through those. So currently at the moment you've got death cover and total permanent disablement cover of \$60,000. [...] and that's with a monthly premium cost to you at \$33.80. [...] So if you wanted to increase that level of cover I can send you an email with an application attached to do that at a later date or we could do that –

C3: That would be really good.

CALLER: Or you could do that before we actually rolled in the external funds, whatever you feel more comfortable with.

C3: Yeah, look, as soon as I roll over the funds the better, I think.

[...]

CALLER: But just to let you know though that the insurances, as I mentioned, would be cancelled. So you're okay with that.

C3: Yeah, I'm fine with that, no problem.

[...]

C3: Just one thing, what are the charges? What are the costs involved in having it all transferred?

CALLER: Yeah, of course. We don't charge you anything at BT. [...] We just put that in the script because the other external funds may charge you an exit fee. [...] Now, there is not an industry set standard. Some funds will charge you nothing, others may charge you, say, 30 to 40 dollars as an exit fee. [...] I don't know what your other funds would charge, if there would be any applicable fee at all. [...] What we do find is most of our clients do prefer just to pay the one-off exit fee rather than paying ongoing other fees. [...] But completely it's your call, [customer 3].

[Caller BB then calls up customer 3's other fund with customer 3 on the line and inquires about what exit fee would be payable by customer 3 on his external account.]

[Customer 3 inquires about whether it is possible to "bring my level of insurance up to where it was with MLC as well". Caller BB agrees to send him the form for that and to be in touch over the next few days.]

175 ASIC also relied on the following portions of the 10 October 2014 call:

[Caller BB discusses what customer 3's insurance is on his other accounts and asks what customer 3 would like to do with his insurance. BB indicates that to increase customer 3's insurance would require a "whole new application process"].

C3: Yeah, and I don't want to go through the process. I haven't got the time for it.

CALLER: So, look, failing – I mean, you're well and healthy, [customer 3]?

C3: Reasonably.

CALLER: Yeah, okay.

C3: Look, you know, I've got to be honest, I'm a type II diabetic. [...] Which I've had that for, I think, nine years now. [...] But it doesn't stop me from doing anything like playing golf or doing normal activities. [...] It doesn't affect my work. It really doesn't affect much of what I do at all to be honest. [...]

[Caller BB agrees to send him a letter in the mail confirming what was being offered.]

CALLER: The guide obviously that I'm giving you today is a good indication, I would hope. [...] And, look, once that's all in place and you're comfortable with the cover then we can obviously roll in that MLC policy and have everything propped [sic] into your BT account.

[Customer 3 complains about the time that this is taking him and that he wanted to do this quickly.]

CALLER: Look, I do apologise for that [the time customer 3 spent on the phone with MLC]. I mean, obviously that's out of my control but, look, at the end of the day I was hoping to get you [...] you know, in a better position so that – I mean, you mentioned you weren't really happy with MLC so [...] this is the kind of process, I guess we need to go through. I mean, that form is only – it's only a few pages long, it's not that involved.

[CALLER then assists C3 filling out the forms that he needs to fill out.]

CALLER: Look, as far as MLC goes – as you mentioned, it's out of my control there but if you can pop that through and I'll keep an eye and look, once it's all in place I can call you back and then we can see if you still want to go ahead with posting off that [...] rollover form to MLC. [...] As I said, it's completely up to you, [customer 3], if you'd like to do it or not. I was just hoping that I was being helpful".

#### **Customer 4 (caller FF)**

176 Caller FF called customer 4 on 7 October 2014.

177 Prior to the call, WSAL sent customer 4 two relevant pieces of correspondence.

178 The first, sent on about 11 August 2014, was a "Let us do the legwork" letter.

179 The second, sent on about 27 August 2014, was an annual super statement letter.

180 The following portions of the 7 October 2014 call are relevant:

CALLER: I'm calling in relation to the super account that you've got with us. [...] You asked us to do a search for you to find any other super accounts that you've got out there.

C4: Yeah, that's right.

CALLER: Yeah. So, we've got the results and I'm ringing to see if we can combine it all for you--

C4: Yeah.

CALLER: --and possibly save you on time and fees.

C4: Yeah.

CALLER: Now, just before I continue I need to let you know that anything we discuss is general in nature and won't take into account your personal needs and objectives.

C4: Yep, no worries.

[...]

CALLER: Great. And so I can make the most of your time, do you mind if I go through a few questions with you?

C4: No, that's fine.

CALLER: That's okay. So what was your reason for wanting to find your other superannuation accounts?

C4: To cut down on fees and stuff, just have them all in one place where I can look at it and manage it, I guess.

CALLER: Okay. You wanted to save on fees and also be able to see what you've got as well and manage better?

C4: Yeah, that's right.

CALLER: That's okay, that's fine. [...]  
[...]

CALLER: Okay, great, thank you, all right. So we found one account at AustSafe. Did you have any other super accounts apart from that one?

C4: No, not that I could remember, no.

CALLER: Okay, that's fine. So what we can do is we can combine that AustSafe account into your BT account. [...] It's a very simple process to do that. All we need is your tax file number [...] play you two legal recordings and then from then on we'll act on your behalf and organise it all for you.  
[...]

CALLER: So I'll play you the last recording. So this one allows us to do everything for you over the phone [...] and we don't have to fill out any paperwork.  
[...]

CALLER: All right, great. So I'll organise to have that done for you. And did you know roughly how much you had in that account?  
[...]

CALLER: Great [indistinct] also organise everything combined for you and hopefully will make it a bit easier for you to manage and you'll save on things like fees as well.

**Customer 5 (caller DD)**

- 181 Caller DD called customer 5 on 2 October 2014.
- 182 Prior to the call, WSAL sent three relevant pieces of correspondence to customer 5.
- 183 The first, sent on about 29 July 2015, was a "Take your super out of the too hard basket" email.
- 184 The second, sent on about 7 August 2014, was an annual super statement letter.
- 185 The third, sent on about 17 September 2014, was a "Last chance" email.

186 The following portions of the 2 October 2014 call are relevant:

CALLER: [...] The reason for my call today is in regards to your superannuation account with BT. [...] I'm calling to touch base to see how everything is going with it for you and to see if I can help you combine the super we found through the super search you've initiated, to potentially save you on some fees.

[...]

CALLER: Now, before I go any further, I will let you know that this call is recorded for quality and training purposes.

[...]

CALLER: And anything you and I discuss today is general in nature and does not take into account your personal needs, goals or objectives. Is this okay?

C5: Yep, no worries.

CALLER: Now, so that I can focus on what's important to you today, is it okay that I ask you some questions in regards to your superannuation?

C5: Yeah.

CALLER: Excellent. What was the reason that you set up the super search with us?

C5: I originally called to find out some details about my account and the person I spoke to suggested I do it because there was a – it was an unusually low amount for someone my age apparently. [...] So he set up the search for me.

CALLER: Right, okay. [Customer 5], how many superannuation accounts are you aware of that you've got out there?

C5: I had thought I had already put them into one but I must have missed a couple.

[...] I decided to consolidate everything but I had a lot of other employers before then [...]

CALLER: So do you think you may have multiple accounts with us?

C5: I don't think I have multiple accounts with you but I think when I consolidated them with you guys, I thought that was the one that my employer had set up for me but I'm not sure it was.

CALLER: Sure, well, I can definitely have a look at that for you.

[Conversation follows about the different superannuation funds customer 5 is a member of]

CALLER: Now, in terms of that account, I can definitely help you and combine it all in the one place. What was the reason that you wanted to put all your super altogether?

C5: Just to keep track of it, like you said, you lose it here and there, you forget which accounts you've got.

CALLER: So it's pretty much for the management of your superannuation. Is that right?

C5: Yeah, just to keep track of it.

CALLER: Perfect, okay.

C5: Easier.

CALLER: Now, [customer 5], in terms of that super fund, I can definitely help you with. All I need from you today would be the tax file number because I already have the account number for Australian Super.

[...]

CALLER: So, just to recap the call, what's going to happen from here is I'm submitting the rollover request for you now.

C5: Yeah.

CALLER: All your super is going to come into the one place from the next two to four weeks, for easy management for you.

### **Customer 6 (caller AA)**

187 Caller AA called customer 6 on 3 October 2014.

188 Prior to the call, BTFM sent two relevant pieces of correspondence to customer 6.

189 The first, dated 30 July 2014, was a letter relevantly identical to an annual super statement letter.

190 The second, sent on about 24 September 2014, was a search results letter.

191 The following portions of the 3 October 2014 call are relevant:

CALLER: Look, today I'm calling about your BT Lifetime superannuation account. Are you happy with us? [...] Just a quick courtesy call today and also to go through your superannuation search results and potentially save you on fees by bringing them over to your account.

[...]

CALLER: Now, just before we continue do you mind if I ask you a few quick questions so I can best help Sure.

CALLER: Great. So what was the main reason you asked us to look for your supers?

C6: Well, I've got a few floating around, I just thought it would be easier and save fees and that if I just put them all together.

CALLER: Okay, rightio. So you mainly wanted ... to have that easier manageability and also potentially save on fees.

C6: Yeah.

CALLER: Those are the most important things for you when it comes to your super at the moment?

C6: Yeah.

CALLER: Yeah, fair enough, not a problem. Looks, that's one of the – they're probably the two main reasons that our clients do like to consolidate. It definitely makes a lot of sense from a logical standpoint. So what we can do for you today is actually go through your supers and actually bring them all over to your account so you can start potentially reaping those benefits. How does that sound?

C6: Okay, cool, yeah. [...]

CALLER: So I can see here that we found for you one account only, so Hostplus. You mentioned that you [...] had a few. Were you aware of any others?

C6: I'm not sure. I've had a few jobs, I'm not sure if even paid me super but.

CALLER: I see, I see. Well, look, if you didn't work for them for very long there might not have been too much in there which may have potentially been eaten up by fees.

C6: Yeah.

CALLER: So that's probably why we only found the one. [...]

CALLER: So did you know roughly how much you might be bringing over from your Hostplus account by any chance just as a rough ...

C6: No idea.

CALLER: Okay. Can you remember who – which of your employers used that account?

C6: Yeah, it was the Big Group.

CALLER: Okay. And how long were you with them for?

C6: Maybe eight months or something.

CALLER: Eight months full-time?

C6: No, casual.

CALLER: I see, I see, not a problem at all. [...]

CALLER: Just to recap I'll process your rollover in the next 10 minutes. Everything gets rolled over – sorry, you'll get a confirmation email and it all comes into your account in the next two or three weeks so it will all be in the one spot, nice and organised and you potentially start saving on those fees. How does that sound?

**Customer 7 (caller AA)**

192 Caller AA called customer 7 on 20 November 2014.

193 Prior to the call, BTFM sent two relevant pieces of correspondence to customer 7.

194 The first, sent on about 17 February 2014, sent on about 17 February 2014, was a letter picturing a male taking a selfie next the words “There’s only one [customer 7]” (“There’s only one you” letter), and containing the following statements relied on by ASIC:

- If you’ve had more than one job, you probably have more than one super account. Yet multiple super accounts can be hard to keep track of and could be costing you in account keeping fees. We can help combine your other super into your BT Business Super account, leaving you with just one super account to manage. And what you could save on fees, could mean more money in your super.
- Give us the OK and we’ll help search for your other super accounts in order to roll them into your BT Business Super account.
- Give your consent to do a super search and we can help track down your other super accounts – it’s that easy!
- Win \$20,000 cash prize.
- Sort your super for your chance to win. There’s only one you and only you know how you’d spend \$20,000. We’re giving you the chance to do just that. Simply combine \$5,000 or more of your other super into your BT super account by 30 May 2014 to go into the draw to win.

195 Like the other forms of written correspondence, there was a disclaimer to the effect of that set out at [0] above under the heading “Things you should know”.

196 The second, sent on about 14 August 2014, was in the form of the annual super statement letter.

197 The following portions of the 2 October 2014 call are relevant:

CALLER: Hi there, [caller AA] calling from BT Financial Group I’m looking for [customer 7], please.

C7: Yes, speaking.

CALLER: Hey, [customer 7], how are you today?

C7: Good, how are you?

CALLER: I’m good, thanks for asking. Look, I was just calling about your BT Lifetime superannuation account - - -

C7: Sure.

CALLER: - - - that you’ve got here with us. So just a quick courtesy call with you today to check in with you to see how you were going and also we did a superannuation search on your behalf recently and we’d just like to go through the results with you and help you organise your supers by combining them to your account.

C7: Excellent.

CALLER: All right. Now, before we continue with that [customer 7] I will just let you know the call is has been being recorded for quality and training and everything we discuss today is general and won't take into account your personal and financial needs. Is that okay?

C7: No problem.

CALLER: Okay, great. And so I can best help you and make the most of your time, can I ask you a few questions, please.

C7: Sure.

CALLER: All right, [customer 7], so what was the main reason that prompted you to ask us to look for your supers?

C7: The usual reasons. You know, I guess you get more interest - - -

CALLER: Mm.

C7: - - - when you've got more money in there, I guess.

CALLER: Okay, fair enough. So that's something that a lot of our client say. Is that – so basically one of the main reasons was to bring it all together to create a bigger pool of money to potentially get performance out of it. Is that right?

C7: Yeah, and I heard the other day that you can also – I guess you pay costs for each one you have so you reduce the costs to one super.

CALLER: Okay. So it sounds like you just wanted to pay one set of fees and avoid multiple sets of fees.

C7: Yeah.

CALLER: Yeah, fair enough though. Again, one of the other main reasons our clients like to consolidate. So what we can do for you, we'll help you bring across your other supers today and that way you can just pay that one set of fees and you've got potentially a larger pool of money where you can get a potentially better return from. How does that sound?

C7: Very good.

CALLER: All right. Now, I'll just get you to confirm for me your date of birth and address so we can talk about your account.

[...]

CALLER: Yeah, too easy. Now, the only thing that we need from you today to get your verbal consent to do the consolidation for you over the phone is your tax file number. So did you have that on hand today?

C7: Yes, I do.

CALLER: Okay, great. So don't give it to me just yet because I will need to play you a legal script first. Now, keep in mind any insurances on that account we're bringing over will be cancelled upon transfer. Are you okay with that?

C7: Sorry, what was that?

CALLER: Any insurances that you have on the other account that you're bringing across to your BT account will get closed when – once it transfers over so any insurances will be cancelled. Is that okay with you?

C7: Yeah, yeah.

[...]

CALLER: All right, thanks for that. Now, did you know how much you might have in you SuperTrace funds?

C7: SuperTrace, what's that? The other one?

CALLER: No, no, this is just the one that we found for you that I'm rolling over today. Do you know how much you've got in it?

C7: No, wouldn't have a clue.

CALLER: Okay. You wouldn't remember which employer might have used that account by any chance?

C7: Where was I, I was - so you've got all the Logicalis and Netstar Networks, I'm guessing. The one before that was Memorex Telex.

CALLER: Okay.

C7: Before that was Mitsui Computers.

CALLER: Okay. And were they all going into that one or you're just listing off all your previous employers at the moment?

[...]

CALLER: All right, great, all right. So just to recap for you, [customer 7], I'll process this to rollover in the next five minutes, you'll get a confirmation email and everything comes across to your account in two or three weeks and it's all under the one roof and you've got a larger pool of money there to potentially get you better returns in the future.

### **Customer 8 (caller AA)**

198 Caller AA called customer 8 on 2 October 2014.

199 Prior to the call, WSAL sent two relevant pieces of correspondence to customer 8.

200 The first, sent on about 17 February 2014, was a "There's only one you" letter.

201 The second, sent on about 14 August 2014, was an annual super statement letter.

202 The following portions of the 2 October 2014 call are relevant:

CALLER: Hi, it's [caller AA] calling from BT Financial Group. I'm looking for [customer 8], please.

C8: Speaking.

CALLER: Hi, [customer 8]. How are you today?

C8: Good.

CALLER: That's good. Look, [customer 8], I'm calling about your BT Lifetime superannuation account that you have here with us.

[...]

C8: It's a – it's an employee one, yeah, okay.

CALLER: That's the one, yes. So look, I'm just calling about your – yeah, just – sorry, so a quick courtesy call today and also to go through your superannuation search result and potentially save you on fees by bringing over any accounts you might have into your BT account.

CALLER: Before we continue, [customer 8], I will let you know the call is being recorded [...] and everything discussed today is general, won't take into account your personal needs. Is that okay?

C8: Okay, that's fine.

CALLER: Fantastic. And look, so we can best help you today do you mind if I ask you a couple of quick questions before we get started?

C8: Go right ahead.

CALLER: All right. So what was the main reason you asked us to look for your superannuations?

C8: To rollover other funds.

CALLER: Oh, okay, so you wanted to bring them all together.

C8: Yeah.

CALLER: And what did you see personally as the main benefit of bringing all those other accounts together?

C8: Well, I don't know if it's – it's just mainly to centralise or basically to have – instead of having all those different accounting fees and all of that, just [indistinct] a month, and you can have one accounting fee out of it and - - -

CALLER: Sure, sure.

C8: - - - go from there.

CALLER: Yeah, absolutely. So it sounds like saving on fees, that's the main thing for you - - -

C8: Yeah.

CALLER: - - - better than the multiple sets.

C8: Oh, yeah. Well, you know, you've got three or four - I've got - oh, got more than three or four, but the amount that I have, yeah, it's just, yeah, not being - this money being - going out the door.

CALLER: Yeah, yeah, exactly. Look, a lot of our clients say the same thing about their supers. You know, if they've had a lot of funds opened for them in the past by their employers, you are potentially paying multiple sets of fees, so it definitely makes a lot of sense from a logical standpoint.

C8: Okay.

CALLER: Now, [customer 8], what we can do for you today we can go through your results, see how many we've found for you - - -

C8: Yes.

CALLER: - - - and then we can actually help you bring them all over into your BT account over the phone.

C8: Okay. Can you just – can you just hang on a minute? I've got to just ask my wife something.

CALLER: Sure thing.

C8: Okay. If you found an MLC one, we don't want that to come over.

CALLER: Right, okay, not a problem at all.

C8: Everything else you found can come over.

CALLER: Sure thing. Not a problem at all. So as I was saying, we can help you do that all verbally - - -

C8: Yes.

CALLER: - - - over the phone, saves you from having to fill out multiple forms.

C8: That would be good.

CALLER: And, you know, you can start potentially saving on fees once it comes over. How does that sound?

C8: How many did you find?

CALLER: Sure. So look, before we go through those results I will need to ask you for your full name, date of birth and address –  
[...]

CALLER: [...] Not a problem at all. Now, with those six other accounts that I'm bringing over - - -

C8: Yes.

CALLER: - - - so I'm not bringing any of the MLC stuff over - - -

C8: Yeah.

CALLER: - - - with those six other accounts do you know roughly how much might be in them at all?

C8: Oh, look - - -

C8: Well, I know that the Essential Services has about 11 grand, 10 or 11 grand.

CALLER: Okay, yes, yes.

C8: The two – the one at the rollover place doesn't have a huge amount. I think it's sort of five or six hundred, I can't remember, a couple of thousand in them.

CALLER: Okay. And what about the CBUS and all the AMP accounts?

C8: The AMP, I can't remember.

C8: I can't – yeah, I can't remember either.

CALLER: Okay. No worries.

C8: The CBUS account, I don't know, was it around four?

C8: Yeah.

C8: I don't remember.

C8: The – yeah, it was - - -

C8: I'd have to look them all up.

C8: Between - - -

C8: I've got them somewhere.

CALLER: Oh, no, that's okay. No, it's all good. I just need an estimate.

C8: Does that sound right?

CALLER: Oh, you're asking me?

C8: Yeah.

C8: Yeah.

CALLER: Oh, look, I have no idea. Like, all I see is what fund it's coming from and the account number. I know – I know nothing about it.

C8: Oh - - -

C8: Oh, okay..

[...]

CALLER: It's all good. Well, just to recap I'll process the rollover in the next 10 minutes, you'll get a confirmation email, everything gets rolled over into your BT business super account in two or three weeks, so all your super's in the one spot and you start potentially saving on those fees. How does that sound?

[...]

**Customer 9 (caller CC)**

- 203 Caller CC called customer 9 on 16 June 2014.
- 204 Prior to the call, WSAL sent three relevant pieces of correspondence to customer 9.
- 205 The first, sent on 17 February 2014, was in the form of the “There's only one you” letter.
- 206 The second, sent on 30 July 2014, was an annual super statement letter.

207 The third, sent on about 11 August 2014, was a “Let us do the legwork” letter.

208 The following portions of the 16 June 2014 call are relevant:

CALLER: Hi, my name’s [caller CC]. I’m calling from BT Financial Group hoping to speak with [customer 9].

C9: Yes, speaking.

CALLER: How are you today?

C9: I’m good, thanks.

CALLER: That’s good. I was giving you a call in regards to your BT super account set up by your employer, Sportingbet Australia.

C9: Yes, yes.

CALLER: Is now a good time to speak with you about that?

C9: Yeah, that’s fine.

CALLER: Excellent. I’ve got to let you know the call’s recorded for training and quality purposes and anything discussed is general and doesn’t take into account your personal needs. Is that okay?

C9: Yeah, that’s fine.

CALLER: Excellent. Now – a product specialist here at BT and the purpose of the call was to help you understand and organise your super. Now, just so I can get an understanding of where you’re at with your super, do you mind if I ask you a few quick questions?

C9: Sure.

CALLER: Excellent. So what was your experience of super before BT?

C9: Not much.

CALLER: That’s fine. Did you have any other accounts before BT?

C9: My previous employer had one set up with Suncorp.

CALLER: Suncorp. And how have you gone in rolling in that other account into BT?

C9: I have been thinking about rolling it into the BT one for a while, but I’ve been too lazy to do it.

CALLER: No, that’s fine. The reason I ask is we actually do it for you electronically over the phone, so you don’t have to do any paperwork.

C9: Oh, good.

CALLER: Yeah. So for us to do that we need a tax file number and the member number of your other super. Do you have that on you at all?

[...]

CALLER: All right. What I'm going to do, I'm going to send you a consent email in the next half an hour. What you need to do is just copy and paste the bolded text and send it back to me, because that will give me the consent to do the rollover, and then the money will come across in three to four weeks. Does that all make sense?

C9: Yes.

CALLER: Excellent. So I'll do that now. Okay, all right. If I send it in to you in about half an hour, when do you reckon you'll be able to reply with your consent?

C9: Within about half an hour after receiving it.

CALLER: Half an hour, great. And what did you see as the benefit of combining your super into BT?

C9: Well, just fees, I guess.

CALLER: Yeah, look, a lot of the customers I speak to like the fact that by combining your super you could potentially save on fees, as you've just mentioned, and also the fact that, you know, it's a little easier to manage because you've got it all there in one account, especially you can log on to the online portal and check your - check your balance through there.

C9: Yeah, absolutely.

CALLER: Okay.

C9: Yeah. [...]

CALLER: No worries. I'll get that done now. If you have any questions you'll have my email but as I said, and just to summarise, you just need to copy and paste the bolded text, send it back to me, and then it will roll in within three to four weeks and then hopefully you could potentially save on some fees. Okay.

### **Customer 10 (caller AA)**

209 Caller AA called customer 10 on 29 October 2014.

210 Prior to the call, on 27 August 2014, WSAL sent customer 10 an annual super statement letter.

211 The following portions of the 29 October 2014 call are relevant:

CALLER: Hi, [customer 10], it's AA calling from BT Financial Group. How are you today?

C10: Yeah, not bad thanks.

CALLER: That's good to hear. Look, I was just calling today about your BT Business Super account - - -

C10: Yeah.

CALLER: - - - that you've got here with us, yeah. So it's just a quick courtesy call today to go through your superannuation search results and help to organise all your superannuations by bringing over all those accounts to you.

C10: Yeah.

CALLER: Great. Now, before we continue I will just let you know the call is being recorded for quality and training purposes and everything discussed today will be general in nature and won't take into account your personal financial needs. Is that okay?

C10: Yeah, that's cool.

CALLER: Great. And so we can best help you, do you mind if I start by asking a few quick questions, please.

C10: Yeah.

CALLER: All right. So what was the main reason you asked us to look for your supers?

C10: I just needed – wanted to get them all into the one account. Yours was the only one that was giving sort of an interest.

CALLER: Oh, I see. I see, fair enough. And how did you feel that combining all your supers together would help you in your future financial goals?

C10: Oh, just because, like I said, yours was the only sort of making money so I figured best to get it all into the one account.

CALLER: Right. So would it be fair to say that performance of the fund would be the most important thing for you?

C10: Yes.

CALLER: Definitely, definitely. And, look, I see a lot of our clients here combining for the very same reason, to have a bigger amount in the account and they are attracted also to the past performances that our accounts have been able to yield for our clients, so that's always a good thing. Now, what we can do for you today, we can go through your results and we can help you bring them all over to your account. We can do that all over the phone which means we can get your account all nice and organised and you can avoid doing those forms. How does that sound?

C10: Sounds good.

CALLER: Great, all right. So first of all we'll need to ask you for your full name, date of birth and address please so we can freely through your account.

[...]

CALLER: Right, okay. Would you happen to have access to the member numbers by any chance?

C10: I do. If you give me a sec I'll find the - - -

CALLER: Great.

C10: - - - paperwork for it.

CALLER: Sure thing. And with this account did you know roughly how much was in the Australian Super by any chance?

C10: The Australian Super?

CALLER: Yeah.

C10: I think that one had, like, three grand, four grand in it or something.

CALLER: Okay. And what about your AUSfund?

C10: I think it's only got, like, \$300.

[...]

CALLER: Great, all right. So just to recap for you, I'll process your request in the next 10 minutes or so and you'll get a confirmation email from us and everything gets rolled over to your BT account in the next two or three weeks so it's all in the one place for you and hopefully starts working hard for you for your retirement.

**Customer 11 (caller AA)**

212 Caller AA called customer 11 on 18 September 2014.

213 Prior to the call, WSAL had sent customer 11 five relevant pieces of correspondence.

214 The first was an email, sent on or about 18 February 2014, in similar terms to the "There's only one you" letter.

215 The second, sent on or about 30 April 2014, was a "Win \$20,000" email.

216 The third, sent on or about 29 July 2014, was a "Take your super out of the too hard basket" email.

217 The fourth, sent on or about 30 July 2014, was an annual super statement letter.

218 The fifth, sent on or about 14 August 2014, was a search results letter.

219 The following portions of the 18 September 2014 call are relevant:

CALLER: Hi there, it's AA calling from BT Financial Group, looking for [customer 11], please.

C11: Yeah, that's me, matey. [...]

CALLER: Look, [customer 11], I'm calling about your BT corporate superannuation account that was opened [...] for you by your employer..

C11: Yes.

CALLER: Now, the reason why we've called is to – just a quick courtesy call today to see how you're going with the account but also to go through your superannuation search result and help you bring them over to your BT account to potentially save you on fees.

C11: Mm'hm.

CALLER: Yes. So look, before we continue I do need to let you know the call's being recorded for quality and training purposes and everything discussed is general and won't take into account your personal needs. Is that okay?

C11: All good, man.

CALLER: Oh, right, no worries. Now, so I can get up to speed with your situation can I ask you a few quick questions, please?

C11: Yeah.

CALLER: All right. So what was the main reason you asked us to do the super search?

C11: I do have multiple accounts, like, super accounts from past employers and that sort of stuff, so ---

CALLER: Yes.

C11: --- was looking at getting them all consolidated into one.

CALLER: Right, right. And do you know roughly how much - how many you might have had?

C11: At last count I probably had about six different ones, I believe.

CALLER: Okay, fair enough. And personally what do you see as the main benefits of bringing them all together to the one place?

C11: The – basically that, having it all in the one spot and -.

CALLER: Mm.

C11: – not losing money in finance – in fees and that sort of stuff –

CALLER: Sure.

C11: – on accounts that aren't being added to.

CALLER: Yeah, for sure, for sure. It definitely makes sense. So basically manageability and saving on the fees?

C11: Mm.

CALLER: Yeah, fair enough. Look, that's probably the main reasons that most of our clients like to do that.

C11: Mm'hm.

CALLER: It's just a lot easier to manage it, you said, and also you're saving costs, and it is your retirement savings at the end of the day.

C11: Yes.

[...]

CALLER: Now, I can see here that we found four supers for you, so we have an Australian Super, Prime Super, AMP and Sun Super. So you said that you had six. Now, were those other two accounts maybe with employers that you were only with for a few months or-

C11: Not sure, mate, 'cause I – like I was on the Westpac site and I did – looking at the super transfer thing on there.

CALLER: Yes.

C11: And that search came back with - I'm pretty sure it was six –

CALLER: Right.

C11: – potential accounts. But I mean there could have been a couple that weren't mine, I'm not sure how it works. [...]

CALLER: Okay, fair enough. Well, look, we normally do a bi-annual search for our clients for their other supers, so if we do dig up anything we will let you know. But for now we can help you bring over the four supers that we found for you.

C11: Mm'hm.

CALLER: The only thing we'll need from you to do that so you can start potentially saving on those fees is your tax file number.[...] And just to let you know as well, any insurances on the other accounts will get cancelled once you bring them across to your BT account. Is that okay?

C11: Yeah, I don't think – the other accounts, mate, I don't think I've had anything in them for quite some time now, so it's just sort of dwindling away with fees and charges.

CALLER: No. Yeah, look, that's a pretty common story we hear from a lot of our clients. [...] So it's good that you're getting it all together. How much do you think you've got in those other accounts, by the way?

C11: I think if I added them all up it was about \$20,000.

[...]

CALLER: Well look, just to recap, I'll process your rollover in the next 10 minutes. You'll get a confirmation email and it will all get rolled over into your BT business super account but – yeah, sorry, in the next two or three weeks.[...] It will all be in the one spot, nice and manageable for you. Does that sound good?

### **Customer 12 (caller AA)**

220 Caller AA called customer 12 on 7 October 2014.

221 Prior to the call, WSAL had sent customer 12 five relevant pieces of correspondence.

222 The first and second were emails similar to the “There's only one you” letter, sent about 18 February 2014 and 30 April 2014, respectively.

223 The third, sent on or about 30 July 2014, was a “Take your super out of the too hard basket” email.

224 The fourth, sent on or about 27 August 2014, was an annual super statement letter.

225 The fifth, sent on or about 7 September 2014, was a “Last chance email” email.

226 The following portions of the 7 October 2014 call are relevant:

CALLER: Look, [customer 12], I’m calling today about your BT Business Superannuation that you have here with us.

C12: Yeah.

CALLER: Just a quick courtesy call today and also to go through your superannuation search results to potentially save you on fees by bringing them over to your account.

C12: Okay.

CALLER: All right, fantastic. Now, before we go on I do need to let you know the call’s being recorded and everything discussed today will be general in nature and won’t take into account your personal financial needs. Is that okay?

C12: Yeah, that’s fine.

CALLER: Fantastic. Now, before we get started do you mind if I grab – sorry, ask you a few quick questions so I can best help you today?

C12: Yeah, sure.

CALLER: Great. Now, what was the main reason you asked us to look for your supers?

C12: Well, I just need to consolidate - - -

CALLER: Right.

C12: - - - the accounts that I’ve got hanging around everywhere.

CALLER: Okay. And in terms of consolidating, what sort of benefits did you see for yourself in doing that?

C12: I just think that I’m not gaining any interest by having accounts in other – having money in other accounts sitting there and stuff.

CALLER: So you’re really for potentially better performance. That’s the main thing for you?

C12: That’s right.

CALLER: Right, not a problem at all. Look, that is one of the main reasons that our clients say they like to consolidate and also obviously it’s a lot more manageable when it’s in the one place as well. Now, what we can do for you is we [c]an actually go through your superannuation search

results today and help you bring them all over to your account verbally over the phone - - -

C12: Right.

CALLER: - - - so you start to potentially get that performance that you're after. Is that something we can do for you?

C12: It is but I'm just working now and I probably can't for another probably two hours or so if that's okay with you.

[...]

CALLER: Not a problem at all. Now, did you know roughly how much might be in those other accounts just as a rough estimate?

C12: 12 grand, 15 grand.

CALLER: 2 to 15, thanks for that.

C12: Yeah.

### **Customer 13 (caller AA)**

227 Caller AA also called customer 13 on 7 October 2014.

228 Prior to the call, WSAL sent two relevant pieces of correspondence to customer 13: on 27 August 2014 (an annual super statement letter) and 24 September 2014 (a search results letter).

229 The following portions of the 7 October 2014 call are relevant:

CALLER: Hi there, it's [caller AA] calling from BT Financial Group. I'm looking for [customer 13], please.

C13: Yes, that's me. [...]

CALLER: Look, [customer 13], I'm calling you today about your BT Business Superannuation account that you have here with us.

C13: Yes, yep.

CALLER: Yep, just a quick courtesy call today to go through your superannuation search results and potentially save you on fees by bringing them to your account.

C13: Right.

CALLER: All right, perfect. Now, look, before we continue I will need to let you know that the call is being recorded and everything discussed today will be general in nature and won't take into account your personal financial needs. Is that okay?

C13: Yeah, no worries.

CALLER: Great. And before we get started, do you mind if I ask you a few quick questions so I can best help you today.

C13: Yeah.

CALLER: Sure. So, [customer 1], what was the main reason you asked us to look for your supers?

C13: Yes, yeah, I did.

CALLER: And what was the main reason for that?

C13: Well, I'm aware that I've got super – different supers from previous employments.[...]

CALLER: And what did you personally see as the main benefits of bringing all your supers together?

C13: Well, put them all in one large – or one larger sum and get a better return from them, I suppose.

CALLER: Oh, okay. So it sounds like performance is the main thing for you. Is that right?

C13: Yes, yeah, that's right.

CALLER: Fair enough. Well, look, yeah, that is one of the main reasons that our clients like to consolidate their supers, along with the fact that obviously it's a lot more manageable when it's in one place, you're not chasing it everywhere.

C13: Yeah, that's right.

CALLER: And potentially you are saving on fees, depending on if you are paying fees on the other accounts so -.

C13: Yeah.

CALLER: What we can do, we'll go through your super results and we can actually help you bring them together over the phone today using a verbal request.

C13: Okay.

CALLER: And that way you've got all your accounts in one place so you can potentially start getting better performing on that. How does that sound for you?

C13: Yeah, good. [...]

CALLER: So I see here that we've found only one account for you. It's a REST account. Does that sound familiar?

C13: Yes, that is.

CALLER: Right. You mentioned that you had at least two.

C13: Well, yeah, I might - I think I might have had one Hostplus [...]

CALLER: Oh, I see and was it just for, like, a part-time or casual job?

C13: Yes.

CALLER: Yeah. Potentially that could have been eaten up by fees but if it is still around we do a bi-annual search of our client's super accounts.

[...]

CALLER: Now, did you know roughly how much you might be bringing over from your REST account?

C13: No, I've got no idea really.

CALLER: Okay, not a problem at all. Do you know how long you were working for the employers that was using that account?

C13: Yeah, about four years, I think.

CALLER: Four years. And was that full-time?

C13: Yes.

CALLER: Okay, not a problem at all. And roughly what was the salary that you had back then?

C13: Would have been, like, 35,000, I think.

CALLER: 35 over four years, okay, so it's about 10 to 12 thousand dollars I would say in that account.

C13: Yeah, hopefully.

CALLER: Potentially any performance on top minus any fees.

C13: Yeah.

[...]

CALLER: Well, just to recap, I'll process your rollover in the next 10 minutes and you'll get a confirmation email from us and everything gets rolled over in the next two or three weeks so it's all in the one spot, it's nice and organised potentially getting that performance you want.

#### **Customer 14 (caller CC)**

230 Caller CC called customer 14 on 29 August 2014.

231 Prior to the call, WSAL sent three relevant pieces of correspondence to customer 14.

232 The first, sent on or about 17 February 2014, was a "There's only one you" letter.

233 The second, sent on or about 30 July 2014, was an annual super statement letter.

234 The third, sent on or about 11 August 2014, was a "Let us do the legwork" letter.

235 The following portions of the 29 August 2014 call are relevant:

CALLER: Hi, my name is [caller CC]. I'm calling from BT Financial Group. I was looking to speak with [customer 14]?

- C14: That's me. [...]
- CALLER: I was giving you a call in regards to your BT Super account set up by your employer, Castle Trading Corporation.
- C14: Yeah, okay. [...]
- CALLER: I've just got to let you know, the call is recorded for training and quality purposes and anything discussed is general and doesn't take into account your personal needs. Is that okay?
- C14: Yeah, sure.
- CALLER: Excellent. Now, the purpose of the call was to see how you're going with understanding and organising your BT account. Now, just so we can make the most out of our time, [customer 14], do you mind if I ask you a few quick questions?
- C14: Sure.
- CALLER: Excellent. So before BT, what was your experience with superannuation?
- C14: Not too sure, to be completely honest I don't really understand too much of it. [...] It's whatever my, you know, employee would – whatever they recommended, that was it, you know.
- CALLER: Sure, and [customer 14], how many other super accounts do you think you have out there?
- C14: I know I definitely have another one and I'm trying to get that sorted out now but I know there's definitely one more out there.
- CALLER: Okay, well, look we can actually help you consolidate your super, [customer 14], if that's what you want to do and we actually do it over the phone so it's quite easy and it saves you time doing the paperwork. Now, what did you see as the benefit of combining your super into one account?
- C14: Yeah, I would definitely want to merge it, yeah, definitely.  
[...]
- CALLER: Now, I mean what did you see as the benefit though of putting your accounts together rather than having two?
- C14: It's easier to keep track of it I guess, you know, like, the – you know, you see those ads on TV all the time about lost super and all this sort of stuff and I think it eventually just goes to the government or something, so I wouldn't want that to happen.
- CALLER: Okay, great, not a problem. Yeah, look a lot of the customers I speak to like the fact, you know, as you said, by combining your account it's a little easier to manage. You'll get one statement and [...] you'll know exactly where your money is and how much you've got. Also the fact that you could potentially save on fees, so say if you had three accounts out there, you could potentially pay multiple sets of fees rather than just the one there.
- C14: Yeah.

CALLER: Yeah, is saving fees important to you, [customer 14]?

C14: Yeah, definitely, yeah.

CALLER: Excellent.

C14: I mean, you're paying for nothing basically if you got multiple accounts kind of out there, yeah.

CALLER: Yeah, look that's completely fine. Look, what I need from you to do the rollover though is the ANZ member number and a tax file number. Now, when do you think I'll be able to contact you again and we can do the rollover? It'll take five minutes.

[...]

CALLER: How much do you reckon you've got on your ANZ account, do you have a rough idea?

C14: I have no idea to be completely honest.

CALLER: Well, how long have you been working for, would you say? How many years?

C14: I've been working for, you know, over 10 years, yeah.

CALLER: Okay, not a problem. You could potentially have a fair amount out there, so look, more than happy to help you roll it all in and help and then you could potentially save on some fees and it'll be a little easier to manage, as you mentioned before.

C14: Yeah, for sure. [...]

CALLER: Well, as I said, I'll call you Monday, I'll just grab the tax file number and the member of ANZ. We'll roll it all in, it'll take three to four weeks to come across and then, as I said, potentially save on some fees there.

**Customer 15 (callers DD and EE)**

236 Customer 15 received two calls from the Super Activation Team: on 23 June 2014, from caller DD, and on 15 October 2014, from caller EE.

237 The calls were preceded by a "There's only one you" letter, sent by WSAL to customer 15 in about February 2014.

238 The following portions of the 23 June 2014 call are relevant:

CALLER: Hi, my name is [caller DD]. I'm calling from BT Financial Group. May I please speak to [customer 15]?

C15: Speaking. [...]

CALLER: [Customer 15], the reason for my call today is pretty much to see how you are going with your super account and to see whether I can potentially help you save on some fees by combining any other super that you've got out there.

- C15: Yeah, yeah, that's what I – actually, I'd like you to do that, but the problem is I don't know where my super is. You know, I've changed that many jobs over the last few years.
- CALLER: Okay, sure. [customer 15], before we do go ahead with the call, I do need to let you know that this call is recorded for training and quality purposes and anything discussed today is general in nature and does not take into account your personal circumstances. Is that okay?
- C15: Yeah.
- CALLER: Okay, great. So, [customer 15], what I can do is I can have a look whether we've had any super match details for you, but before I do that I do need to identify you.
- [...]
- C15: So, [customer 15], is it okay if I ask you a few questions just so that you can get a better understanding of your account so I can better help you?
- CALLER: Yeah.
- C15: Fantastic, thank you. [customer 15] what was your experience with super like before this account was opened for you?
- CALLER: What was it - what, sorry?
- C15: What was your experience with super like before this account was opened for you?
- CALLER: With super?
- C15: Yeah.
- CALLER: What, the other places I've been with?
- C15: Yeah. You were saying that you've had quite a few. Is that right?
- CALLER: There's a few out there, yeah, yeah.
- C15: Mm'hm.
- [...]
- CALLER: And how long was that that you were self- employed for and you didn't pay in your super?
- C15: 17 years.
- CALLER: [...] And how long have you been employed and that super has been paid for you?
- C15: Since 2002, maybe something before, not sure. There would have been, yeah, there would have been the odd couple of jobs before that actually.
- CALLER: Okay. And how much approximately do you think you would probably have had in your super?
- C15: I've got no idea.

CALLER: Considering it's nine per cent - sorry, 9.25 per cent of super going into it at the moment.

C15: I've got no idea, no idea.

CALLER: Okay.

C15: Could be up to 10,000 or more, I don't know. I really don't know.

CALLER: Okay. Well, [customer 15], we can definitely - I can definitely help you out with that. Do you have a pen and paper at all? [...] Okay. So what you will need to do is you will need to call the ATO on 13 10 20 [...] with your tax file number handy, and what they will be able to do is they will be able to do a super search for you. They will provide you with the fund name and member number, and once you obtain those details I can actually give you a call back and complete the rollover for you so that, you know, you can have all your super in one place.

C15: Okay then, great.

CALLER: What do you see as the benefit of combining all your super?

C15: Well, I'm not losing money anywhere else.

CALLER: Yeah.

C15: And plus I can roll it over into (indistinct) wanted to get an increase in my money taken out. I don't know if I can do that or not, you know, add more super to myself.

[...]

CALLER: Okay. [Customer 15], well, I'll be giving you a call tomorrow at 5.00, and if you do like to consolidate the other separate accounts that you do find with the Australian Tax Office, I'll be able to help you with that.

C15: Yeah, I will.

CALLER: Ok.

C15: I will for sure.

239 The following portions of the 15 October 2014 call are relevant:

CALLER: Good afternoon. Once again it's [caller EE] from BT Financial Group Superannuation. Am I speaking to [customer 15]?

C15: Yes, you are.

CALLER: And first of all, I just need to let you know the call is recorded for training and quality purposes. Is that okay? And any advice or information discussed with you is of a general nature and does not take into account your own personal goals, needs or objectives there. So, yeah, [customer 15], yeah, so basically, do you – just to make the most of your time there, if I could just ask you a couple of questions. Now, did you request some time ago with us to try and find your super? Is that right?

C15: Yes.

CALLER: Yep, okay then, sure. So at BT here, we've gone and we've got a report here now to let you know what we've actually found in terms of other super.

[...]

CALLER: And what do you see the benefits yourself in combining them into one fund rather than having multiple super funds?

C15: Well, I'm not getting any money by leaving them somewhere else. They're just taking money off me so I may as well put it all in one.

CALLER: So from a fee point of view, important there.

C15: Sorry?

CALLER: From a – potentially, you know, the fees side of it.

C15: Yeah, the fees, yeah, that's right.

CALLER: Yeah. So that's what many of my clients mention, yes, having the one super potentially can save on those fees. But, [customer 15], I can check that report now and just check to see what we've found for you when we've done a search.

[...]

C15: Now, I've actually found - just having a look now at your account, when we did the search we only found three other super funds that you had.

[...]

CALLER: But what we do is we can look at closing those down or you, we'd cancel any insurance cover that may be in existence with those two funds. Sometimes they have an insurance where premiums come out. We just close them down, shut them down altogether and get them rolled. We just deal directly with those super funds and within one to four weeks we can get those rolled over for you and then potentially save on those fees that you mentioned were important. [...]

[...]

CALLER: I can help you with these three, get these rolled over for you.

[...]

CALLER: Okay then. [customer 15], so are you happy for me to close those three supers and roll them to BT?

C15: Yeah, that's fine.

## **“RECOMMENDATIONS” AND “STATEMENTS OF OPINION”**

### **Significance of contextual written correspondence**

240 ASIC alleged that “recommendations” or “statements of opinion” were made either in the course of the various customer calls or in various calls “in addition to” the

correspondence sent to the customers prior to the calls. The latter submission was not developed, except in relation to the alleged implied “statement of opinion”, said to have been made to each of the 15 customers, to the effect that by rolling over external accounts into the customer’s BT account, the customer may or would have “a more efficient and efficacious set up of [their] superannuation and therefore greater returns”. ASIC acknowledged that there was no express mention of “greater returns” but contended that the alleged statement is implied from the various calls, particularly in the context of correspondence which referred to the notion that saving on administrative fees will “make sure your super is working for you”.

241 For its part, Westpac also sought to rely on the written correspondence as contextual material by arguing that it indicated that the customer calls occurred in a marketing environment.

242 Almost all of the consumers had made a request for a super search prior to receiving a call from the Super Activation Team, and thus, at least received one piece of the relevant correspondence and understood it sufficiently to request the search. I also note that customer 5 referred to a letter “[t]o do with some superannuation payments that have been transferred into my account managed by Westpac MasterTrust.”

243 However I do not agree that the individual conversations were to be construed in the context of the earlier correspondence, or on a broad assumption that the relevant customers had received, read and understood the contextual correspondence without evidence directed to those matters. As Westpac itself emphasised, those materials were marketing materials. Even assuming that they were received (and at least one must have been received to instigate the request for a super search), it is far from obvious that any particular message in the contextual correspondence would have been absorbed by any given customer or remembered at the time of receipt of an unsolicited telephone call, when the customer was almost certainly doing something that did not involve thinking about their superannuation or Westpac’s marketing material.

244 In particular, there is no reason to assume that customers receiving an unsolicited telephone call would have recognised that the messaging of the call was the same as messaging they had received in prior written communications.

245 Similarly, I would not agree that the state of mind of an individual caller, which they may have expressed explicitly or impliedly, was affected by the contextual correspondence in the absence of evidence that the caller had read and understood that material.

### **Alleged recommendations**

#### ***Customer should roll over their external accounts into their BT Lifetime Account or BT Business Account Fund***

246 ASIC alleged that a recommendation to the effect that the relevant customer should roll over their external accounts into their BT Lifetime Account or BT Business Account Fund was made to each of the 15 customers. In substance, this is a recommendation that the customer should accept the rollover service.

247 I accept that, in the calls to customer 1, caller AA (and Westpac) impliedly recommended that customer 1 should roll over her external accounts into her BT account. The main purpose of the call was to achieve that outcome, including by engaging in an exercise of marketing including “social proofing”. The calls were each expressed as an exercise in helping the customer to roll over their external accounts. For example, caller AA said: “...we’d like to help you bring them over to your account to potentially save you on fees” and, later, “we can actually help you bring them altogether over the phone now”. This language conveyed the message that the caller was offering to assist with an action that was likely to benefit the customer by improving the manageability of her superannuation and by creating the possibility that she would save on fees. By that language, the caller (and Westpac) implicitly recommended a rollover of the external accounts into customer 1’s BT account. The question “what did you see as the main benefits of bringing them altogether to the one place?” reinforced the idea that consolidation was beneficial, as did the social proofing statement that “they are the two main reasons our clients do like to bring their supers together, it does make a lot more sense from a management point of view, for sure.” The concluding language of the second call: “everything gets rolled over in two or three weeks, so it’s all in the one spot and nice and organised for you. How does that sound?” conveys the message that the rollover service has provided a benefit to the customer.

248 I note that customer 1 identified a desire to consolidate his super accounts early in the conversation; however, I do not consider that this altered the fact that caller AA was impliedly recommending to customer 1 that he should proceed to roll over his accounts into the BT account.

249 Westpac argued that communications of this kind did not involve a “recommendation” to the effect alleged, by reference to the case of customer 2, because:

(1) It occurred in a context of the earlier “marketing” correspondence and the customer’s request for a super search, that not being a context in which the customer would expect to get advice because no advice had been sought. Further, that context did not provide a basis for the customer to understand that they would receive advice based on their objectives, financial situation or needs.

(2) It is hard to imply a “recommendation” in the context of the short form “general advice warning” given by the caller.

(3) The customer identified that he wanted to roll over his external accounts early in the call.

(4) The customer did not seek advice at any point in the call.

(5) Even if the call involved the giving of advice, it was not advice which on any view took into account anything personal at all.

(6) Nothing in the call comes within the statutory concept of “objectives, financial situation and needs”.

250 Generally, these submissions rely on a narrower construction of “recommendation” than that which I have identified. The question is not whether the communication contained “advice” or was a recommendation “in the nature of advice”: it is whether it contained a “recommendation”. Even if I were to accept that the calls took place in a recognisably “marketing” context, I would not accept that this context would make a message of the kind alleged less recognisable as a “recommendation”. In particular, I do not accept that the description of a call as a “courtesy call” affected the substantive message of any call or that it would necessarily indicate to a customer that the caller was acting in Westpac’s interests, beyond seeking to demonstrate that its goodwill towards its customers and, as the callers repeatedly said, to help its customers. In saying that, I accept Mr McHugh SC’s submission that the words “courtesy call” do not obviously presage a piece of personal financial advice within the ordinary meaning of those words.

251 Nor do distinctions relevant to the difference between general and personal advice affect the nature of the message as a “recommendation”. Nor is the absence of a request for advice or a customer’s stated desire to roll over accounts a matter that affects the content of caller AA’s message.

252 Westpac also submitted that the caller made an offer of a service, as distinct from anything that had the character of advice. As explained above, I do not construe “recommendation” in s 766B(1) as confined to recommendations having the character of advice. Accepting that the caller did offer to provide the rollover service, in my view, that finding does not detract from my finding that the caller also recommended the rollover service by the following language:

- (1) by stating that the service would potentially save the customer on fees.
- (2) by asking what the customer saw as the main benefits of consolidating super funds (and thereby implying that there were multiple benefits).
- (3) by offering to assist the customer to “potentially save on fees” by rolling over their accounts.
- (4) by affirming the customer’s reasons through the social proofing language: “Most of our customers say the same thing. It does make a lot more sense to pay, you know, only one set of fees, potentially, and – rather than multiple”.
- (5) by stating that the caller could “actually help” the customer effect a rollover over the phone, with the stated benefit that the customer could “start potentially saving on those fees”.

253 Westpac noted that, in the case of customer 3, the caller simply stated the purpose of her first call as “to see if I can assist you in combining those [external accounts] into your BT super account today”. Unlike the caller to customers 1 and 2, there was no introductory proposition that the service would “potentially save” the customer “on fees”. Westpac also noted that the customer stated very early in the call his desire to roll over his external accounts into this BT account. Westpac submitted, and I accept, that the calls to customer 3 did not involve any recommendation. Rather, the caller offered the rollover service which the customer immediately accepted. Thereafter, the caller addressed various issues relevant to the rollover in a manner which did not involve an effort to influence the customer to maintain his decision to effect the rollover.

254 In the case of customer 4, Westpac submitted that there was no social proof and no recommendation. In fact, the caller made two statements that suggested that the rollover service was worthy of accepting. The first was at the beginning of the call: “I’m ringing to see if we can combine it all for you----and possibly save you on time and fees”. The second was at the end of the call: “organise everything combined for you and hopefully will make it a bit easier for you to manage and you’ll save on things like fees as well”. As to the social

proof, the caller asked customer 4 why he had wanted to find his other superannuation accounts, summarised his answer, “You wanted to save on fees and also be able to see what you’ve got as well and manage better?”, and commented “That’s okay, that’s fine” but did not suggest that his reasons were commonly held. Given these matters, I do not accept Westpac’s submission. The first statement above conveyed the sense that the customer would be placing himself in a better position by accepting the rollover service and amounted to a “recommendation” within the meaning of s 766B(1). By asking the customer’s reasons for wanting to search for his funds, the caller elicited a statement about his desire to save on fees and to manage his superannuation better which, in the absence of any contradiction, tended to affirm the idea, apparently held by the customer, that the rollover would enable him to achieve those aims and thus was a recommended service.

255 Similarly, the calls to customers 5 and 6 conveyed an implied recommendation of the rollover service.

256 The call to customer 7 was, as Mr McHugh SC said, very similar to the call to customer 2. I therefore find that it also conveyed an implied recommendation of the rollover service. The call to customer 8 also includes the kinds of statements that I have identified above as conveying that implied recommendation.

257 In the case of customer 9, the call was not preceded by a request for a super search. The caller asks a question, which assumes that the customer seeks the rollover service: “How have you gone in rolling in that other account into BT?” Customer 9 then affirms the assumption, saying that “he had been thinking about doing that but had been too lazy”. The caller then offered the rollover service. In this case, the implied recommendation of the rollover service was principally made by the social proofing in which the caller referred to customers who:

... like the fact that by combining your super you could potentially save on fees, as you’ve just mentioned, and also the fact that, you know, it’s a little easier to manage because you’ve got it all there in one account, especially you can log on to the online portal and check your – check your balance through there.

258 In the cases of customers 10 and 14, the implied recommendation was also principally made by the social proofing in the relevant call.

259 As Mr McHugh SC conceded, the call to customer 11 is not materially different to other calls by caller AA and, accordingly, I find that it also conveyed the implied recommendation of the rollover service. The calls by caller AA to customers 12 and 13 are

likewise not materially different. Nor are the calls to customer 15 materially different. Again, I therefore find that they conveyed the implied recommendation of the rollover service.

260 In summary, I accept that each customer except customer 3 received a “recommendation” that they should roll over their external accounts into their BT account or, in other words, they should accept the rollover service.

***Customer should take steps to roll over their external accounts into their BT Lifetime Account or BT Business Account Fund on the phone immediately***

261 ASIC further alleged that a recommendation to the effect that the relevant customer should take steps to roll over their external accounts into their BT Lifetime Account or BT Business Account Fund on the phone immediately was made to each of the 15 customers.

262 In the case of Customer 1, the caller indicated that the customer could take steps to roll over on the phone immediately and that he was available to help her with that. I do not accept that the call conveyed the further recommendation that customer 1 should do so immediately. ASIC did not point to any language conveying a sense of urgency or communicate benefits accruing from rolling over on the phone, that were different from the benefits that would accrue from rolling over generally.

263 None of the calls to any of the other customers was materially different. Accordingly, I do not accept that any customer received a recommendation from Westpac to this effect.

**Alleged statements of opinion**

***Rolling over the customer’s external accounts into their BT account may or would lead the customer to having a more efficient and efficacious set up of his or her superannuation and therefore greater returns***

264 ASIC alleged that a statement of opinion to the effect that rolling over the customer’s external accounts into their BT account may or would lead the customer to having a more efficient and efficacious set up of his or her superannuation and therefore greater returns was impliedly made to each of the 15 customers.

265 The alleged statement involves several elements: most significantly, it involves an opinion as to the prospect that the customer would achieve “greater returns” as a result of a rollover. The alleged opinion is that the prospect of “greater returns” is causally related to the improved (“more efficient and efficacious”) set up of the customer’s superannuation.

266 None of the calls expressly referred to “greater returns”, or to the idea of a “more efficient and more efficacious set up” of a customer’s superannuation arrangements. Except in the case of customer 7, there was no discussion of “returns” on the customer’s superannuation. In a few cases, there was reference to the “performance” of the customer’s superannuation.

267 In most cases, there were references to the prospect of saving fees as a result of a rollover. However, generally, I do not accept that these references imply an opinion that improved returns may or would be achieved, even assuming that there was otherwise an implication that a rollover may or would produce “a more efficient and efficacious set up” of the customer’s superannuation. The prospect of saving fees by a rollover implies that the consolidated fund will not be diminished by fees that would otherwise have been incurred but, without more, this implication does not entail any opinion as to the relative returns that would be achieved by a customer who has consolidated his or her superannuation into a BT account rather than leaving the superannuation unconsolidated.

268 As I have mentioned above, I do not accept that the evidence supports a conclusion that correspondence from Westpac containing statements such as “make sure your super is working for you” affects the meaning of statements made by the callers to the customers in their various conversations, and whether those statements constituted particular “statements of opinion”.

269 Accordingly, generally I do not accept that there was an implied statement to the effect alleged in any case and, consequently, I do not accept that there was a “statement of opinion” to the effect alleged in any case. I will give further consideration below to the position for customers 7, 10, 12 and 13 in which cases there was explicit discussion referring to returns or performance.

***A rollover would lead the customer to save on fees***

270 For several customers, ASIC alleged that there was a “statement of opinion” that rolling over the customer’s external account to their BT account would lead to the customer saving on fees. Except in the case of customers 8 and 11, I do not accept that there is evidence of such a statement in any case, and accordingly, find that there was no “statement of opinion” to this effect.

***References to what other customers said***

271 The alleged statements were formulated in different ways. Some describe statements made by other customers in connection with their decision to consolidate their super. Others explicitly endorse statements made by other customers, for example, by reference to them as “facts”. Generally, I accept that a statement which reported the reasoning of other customers also implied that the reason was valid in the opinion of the caller and may entail a “statement of opinion” to the effect of the reasoning attributed to the other customer. However, that latter implied statement does not render the former a “statement of opinion”.

***By rolling over her external accounts into her BT account, the customer would potentially save on fees***

272 This is a statement that the action of rolling over external accounts into the customer’s BT account would possibly (although not probably) produce a benefit for the customer. Statements to this effect were made to 12 of the 15 customers, by five of the callers. The statements were consistent with messages contained in correspondence from Westpac. For example, “if you combine your super into one account, you could save on administrative fees”. This indicates that the statements were not mere speculation by the individual callers, but were a message endorsed by officers of Westpac with authority to convey such a message.

273 Although Westpac argued that a statement to this effect is not a “statement of opinion”, it did not do so by reference to evidence about the underlying justification for the statement. Rather, it contended that the tone and context of the statements suggested a “self-interested promotional exercise”. Mr McHugh SC contended the statement does not involve any element of judgement and is nothing more than a logical possibility. However, Westpac did not suggest that it had given no consideration to the truth of the statement.

274 Although the message concerns a possibility rather than a probability, it was expressed by the various callers in positive terms, rather than as a question about whether the customer would save on fees, or an observation that the customer might or might not save on fees, or a doubt as to whether or not the customer would save on fees, or as a caution that the customer should not assume that they would save on fees because that was a mere possibility. Taking those matters into account, in my view, a statement to this effect reflected an inference by Westpac from other facts and is a “statement of opinion” within the meaning of s 766B(1).

***Saving on fees and manageability were the two main reasons why clients like to combine their superannuation***

275 This statement was made by caller AA to Customers 1 and 6.

276 By referring to the statements made by other customers, the caller conveyed the view that the reasons were valid reasons. However, as formulated in ASIC's "Particulars of Claim", the alleged statement is a summary of the caller's experience of statements made by other customers. In those circumstances, it is a statement of fact, ostensibly based on the observations of the relevant caller, and not a "statement of opinion".

**Customer 1**

***Combining superannuation accounts made a lot more sense from a management point of view***

277 This statement was made by caller AA. It expresses a view as to the merit of combining superannuation accounts. The statement appears to reflect a message contained in Westpac's correspondence that "if you combine your super into the one account, you could ... enjoy the convenience of having all your super in one place". As a central message in Westpac's correspondence, I infer that the message is not the product of mere speculation and it was not suggested that the message was not based on any underlying facts.

278 Accordingly, I find that this statement is a "statement of opinion" within the meaning of s 766B(1).

***One of customer 1's other accounts may have no funds in it due to potentially having been swallowed up by fees***

279 In context, this is speculation on the part of caller AA. There is no basis for concluding that it involved any definite inference as to the identified possibility.

280 Accordingly, this statement was not a "statement of opinion" within the meaning of s 766B(1).

***Rolling over her external accounts into her BT Lifetime Account may or would lead customer 1 to saving on fees and achieving a greater level of manageability***

281 This alleged implied statement rolls up several propositions and to some extent overlaps with the statements considered above.

282 I have found above that there was a statement of opinion made to customer 1 that rolling over may lead customer 1 to saving on fees. The evidence does not support a

conclusion that there was a statement of opinion that rolling over *would* lead customer 1 to save on fees. In particular, although the caller extracted from the customer a statement that “fees” was one of the main benefits of rolling over, and regurgitated that statement as “the saving on the fees, potentially”, I do not accept that the conversation included a statement that rolling over would lead to saving on fees.

283 I have found above that there was a statement of opinion that combining superannuation accounts made a lot more sense from a management point of view. In my view, this statement is substantially the same as the alleged statement of opinion that rolling over may or would lead customer 1 to achieving a greater level of manageability.

284 Accordingly, I do not find any additional “statement of opinion” based on this alleged implied statement.

## **Customer 2**

***By rolling over his external accounts into her BT account, customer 2 would potentially save on fees***

285 I accept this statement was made to customer 2 by Caller AA. Based on my reasons at [0] to [0], it was a “statement of opinion”.

***It makes a lot more sense for customer 2 to pay only one set of fees, potentially, rather than multiple sets of fees***

286 I accept this statement was made by caller AA and that it was a “statement of opinion”, for the reasons set out in relation to customer 1 and the statement that “combining superannuation accounts made a lot more sense from a management point of view”.

***Many BT customers say that they want to consolidate their superannuation funds to save fees***

287 I accept this statement was made by caller AA but, as formulated by ASIC, it is not a “statement of opinion”, for the reasons set out in relation to customer 1 and the statement that “saving on fees and manageability were the two main reasons why clients like to combine their superannuation.”

***What caller AA could do for customer 2 was to help customer 2 roll over his external accounts into his BT Lifetime Account that day over the phone and that this would save customer 2 from having to complete any forms and potentially save customer 2 on fees***

288 I accept that caller AA made a statement to this effect but, except for the reference to potentially saving the customer on fees, it was a statement of fact as to caller AA's capabilities and caller AA's knowledge of a fact that steps taken by him would obviate the need for customer 2 to complete forms. As to the reference to potentially saving the customer on fees, this was a repetition of the "statement of opinion" identified at [0] above. Otherwise, the statement was not a "statement of opinion".

***Once Customer 2's external accounts were rolled over into his BT Lifetime Account he would start potentially saving on fees***

289 I accept that Caller AA made a statement to this effect. In substance, it was a repetition of the "statement of opinion" identified at [0] above.

***Customer 2 rolling over his external accounts into his BT Lifetime Account may or would lead to him saving on fees***

290 In this case, as for customer 1, caller AA elicited a statement of the word "fees" in answer to a question about the main benefits of rolling over. Again, caller AA amplified the reference to fees by saying "So saving on those fees and – that'd be the most important factor for you?" In the context of the call, caller AA was not expressing an opinion that saving on fees was likely but rather was seeking to confirm his understanding of the benefits identified by customer 2. Accordingly, I do not accept that there was an implied statement of opinion to the effect that, by rolling over, customer 2 would save on fees. Otherwise, the alleged statement is a repetition of the "statement of opinion" identified at [0] above.

### **Customer 3**

***While some funds may charge an exit fee for leaving the fund, most of BT's clients prefer to pay the one-off exit fee rather than paying ongoing other fees***

291 I accept that caller BB made a statement to this effect. It is relevantly similar to the statements made to customers 1 and 2 about the reasoning of other consumers. There is no reason to think that it is other than a statement of fact made by caller BB, which does not involve any inference or judgment.

292 Accordingly, it is not a "statement of opinion".

***Caller was seeking to put customer 3 in a better position than he was in presently through having a fund with MLC***

293 I accept that caller BB made a statement to this effect. It is a statement of the caller's motivations which is a statement of fact and not a "statement of opinion".

***Customer 3 did not have to keep his total and permanent disablement ("TPD") cover***

294 The alleged "statement of opinion" was "the express and/or implied statement of opinion in the course of completing an insurance form for customer 3 that he did not have to keep his TPD cover if he did not want to, and that he did not have salary continuance insurance cover with MLC, thereby implying that he may not require such insurance with his BT Business Account".

295 I am not satisfied that the caller made an express statement to this effect. The caller said that "if you held any insurances ... they would be cancelled". She also told customer 3 that he had \$60,000 of TPD cover, and asked him what he would like to do with his insurance. Later in the call, the customer asked whether it was possible to "bring my level of insurance up to where it was with MLC as well". Nothing was said about salary continuance cover. Nor was there any implied statement that the customer may not require insurance.

296 The conversation was based on an implied statement to the effect that customer 3 could cancel his TPD cover, implied because the caller asked whether the customer wanted to do so. On its face, this is unlikely to have been a "statement of opinion". Rather, it appears to have been an implied assumption as to a fact, namely, that customer 3 was free to change his cover. On this basis, I am not satisfied that the implied statement was a "statement of opinion".

***Customer 3 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees at the same time as providing an adequate level of insurance cover***

297 The caller did not say anything that could reasonably be understood as an implied statement that a rollover may or would either lead customer 3 to saving on fees or would provide him with an "adequate level of insurance" cover. Accordingly, I do not accept that there was a "statement of opinion" to the effect alleged.

#### **Customer 4**

***The caller could potentially consolidate customer 4's superannuation accounts to potentially save him on fees***

298 The relevant statement by the caller appears to have been "...I'm ringing to see if we can combine it all for you [...] and possibly save you some fees." At the end of the call, the caller said "...hopefully will make it a bit easier for you to manage and you'll save on things like fees as well."

299 Based on the reasoning for similar statements to other customers, above, I accept that there was a "statement of opinion" to the effect that rolling over the customer's external accounts could possibly save him some fees.

***Customer 4 consolidating his external accounts into his BT Business account may or would help him cut down on fees and lead to a greater level of manageability by having all his accounts all in the one place***

300 I accept that caller FF made a statement to this effect, except to the extent that it includes the proposition that the rolling over "would" help the customer cut down on fees. In relation to manageability, the relevant statement by the caller was to the effect that the rollover "hopefully will make it a bit easier for you to manage". Based on the reasoning above, and in the absence of any relevantly different communication between the caller and customer 4, I accept that there was a "statement of opinion" to the effect that customer 4 consolidating his external accounts into his BT Business account may help him cut down on fees and may lead to a greater level of manageability by having all his accounts all in the one place.

#### **Customer 5**

***The caller may be able to help Customer 5, through the super search that had been initiated, to potentially save on fees***

301 I accept that caller DD made a statement to this effect and, for the reasons given above in relation to similar statements, that it was a "statement of opinion".

***The caller could definitely help customer 5 increase the manageability of his superannuation by consolidating his superannuation and that all she needed to do so was his tax file number***

302 I accept that caller DD made a statement to this effect and, for the reasons given above in relation to similar statements concerning the prospect of improving manageability by a rollover, that it was a “statement of opinion”.

***Once customer 5’s external accounts were rolled over into his BT Business Account, he would achieve easier management***

303 The relevant language was a statement by the caller, at the end of the call that “All your super is going to come into the one place from the next two to four weeks, for easy management for you”. The alleged statement is not materially different from the statement that I have addressed immediately above. I do not accept that the caller expressed two different statements of opinion: rather she expressed the same opinion in two different ways. The essence of the opinion was that the rollover would improve the manageability of the customer’s superannuation. Accordingly, I do not find a separate “statement of opinion” based on these words.

***Customer 5 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees and lead to a greater level of manageability***

304 The alleged statement is a repetition of the “statements of opinion” I have identified above except to the extent that it includes the proposition that the rolling over “would” lead the customer to save on fees. I do not accept that there was any implied statement to the latter effect.

## **Customer 6**

***The caller may be able to potentially save customer 6 on fees by bringing her external accounts over to her BT Lifetime Account***

305 Caller AA made this statement impliedly, if not expressly. It is to the same effect as statements discussed above and, accordingly, I find that it is a “statement of opinion”.

***Potentially saving on fees and having easier manageability were probably the two main reasons that BT clients liked to consolidate their superannuation***

306 I accept that caller AA made a statement to this effect. However, as formulated by ASIC, this is a statement of fact as to the reasons of other clients and is not a “statement of opinion”.

***Consolidating superannuation accounts definitely makes sense from a logical standpoint***

307 I accept that caller AA made a statement to this effect. However, I do not find that it was a “statement of opinion”. In the context in which it was said, it is an affirmation of the “logic” of the reasons why customer 6 had expressed a wish to put her superannuation funds together. There is nothing to indicate that the statement is an inference based on other facts.

***Caller AA could go through customer 6’s superannuation on the call and bring them all over to her BT Lifetime Account so that she could start reaping the benefits of consolidation***

308 This statement is similar to the statement made by caller AA to customer 2, addressed at [0] above.

309 Thus, I accept that caller AA made a statement to this effect but, except for the reference to “reaping the benefits of consolidation”, it was a statement of fact as to caller AA’s capabilities and caller AA’s knowledge of a fact that steps taken by him would obviate the need for customer 2 to complete forms.

310 As to the reference to “reaping the benefits of consolidation”, I accept that this language conveyed a “statement of opinion” that Customer 6 would reap benefits by consolidating her superannuation.

***A separate account customer 6 had might not have had much money in it as it may potentially have been eaten up by fees***

311 Caller AA made a statement to this effect. It is similar to a statement made by caller AA to customer 1, addressed at [0] to [0] above and, for the same reasons, was not a “statement of opinion”.

***Once customer 6’s external accounts were rolled over into her BT Lifetime Account, her accounts would be organised and she would potentially start saving on fees***

312 I accept that a statement to this effect was made by caller AA at the end of his call to customer 6. It is partly a repetition of the “statement of opinion” that customer 6 could save on fees by the rollover. As to the statement that the accounts would be organised, the statement was to the effect that, once the rollover had been processed, customer 6’s superannuation would “all be in the one spot, nice and organised”. In context, this is an affirmation of the customer’s decision, and there is nothing to indicate that it is an inference based on other facts.

***Customer 6 rolling over her external accounts into her BT Lifetime Account may or would lead to her saving on fees and obtain a greater level of manageability***

313 The alleged statement is partly a repetition of the “statement of opinion” that customer 6 could save on fees by the rollover.

314 To the extent that the statement concerns obtaining a greater level of manageability, I accept it was impliedly made and that it was a “statement of opinion”, for the reasons set out in relation to customer 1 and the statement that “combining superannuation accounts made a lot more sense from a management point of view”.

315 There was no statement to the effect that customer 6 would save on fees as a result of a rollover.

**Customer 7**

***Caller AA may be able to help customer 7 organise his superannuation by combining them into his BT Lifetime Account***

316 I accept that caller AA made a statement to this effect but it was a statement of fact, based on caller AA’s knowledge of his capabilities and not a “statement of opinion”.

***Creating a bigger pool of money to potentially get a better performance and paying one set of fees and avoiding multiple sets of fees were some of the main reasons that clients liked to consolidate their superannuation***

317 I accept that caller AA made a statement to this effect. It is relevantly similar to the statement made by caller AA to customers 1 and 6, addressed at [0] and [0] above and, for the same reasons, as formulated by ASIC it is not a “statement of opinion”.

***Caller AA could help customer 7 consolidate his superannuation into his BT Lifetime Account that day so that he could pay just one set of fees and potentially have a larger pool of money which he could potentially get a better return from***

318 I accept that caller AA made a statement to this effect. Based on my reasoning above, I accept that it was a “statement of opinion” to the extent that it identified potential benefits to customer 7 of a rollover.

***Once customer 7's accounts were consolidated into his BT Lifetime Account, he would have a larger pool of money in his account to potentially get him better returns in the future and save him on fees***

319 The alleged statement substantially duplicates the statement addressed immediately above. I accept that there was a further implied statement, which is a “statement of opinion” to the effect that by rolling over, customer 7 would potentially save on fees.

***Customer 7 rolling over his external accounts into his BT Lifetime Account would or may lead to a more efficient and efficacious set up of his superannuation and therefore greater returns***

320 The call to customer 7 is the single instance in which there was mention of “better returns”. However, the transcript of the conversation does not provide a basis for finding an implied statement to the alleged effect. Alternatively, to the extent that there was such an implied statement, the relevant “statement of opinion” did not extend beyond the statements of opinion that I have already found to have been made.

#### **Customer 8**

***Caller AA could potentially save customer 8 fees by rolling over any external accounts into his BT Business Account***

321 I accept caller AA made this statement and that it was a “statement of opinion” of the kind made to customer 1, considered at [0] to [0] above.

***A lot of BT's clients say that they are concerned that they are losing money on fees***

322 I accept that caller AA made a statement to this effect. It is a statement of fact about what clients say and not a “statement of opinion”.

***Customer 8 was potentially paying multiple sets of fees so it definitely made sense from a logical standpoint for Customer 8 to consolidate his accounts***

323 I accept that caller AA made a statement to this effect. As for the statement made to customer 6 considered at [0] above, in context, this statement was an affirmation of the “logic” of the reasons why customer 8 had expressed a wish to roll over his funds into one account. There is nothing to indicate that the statement is an inference based on other facts. Accordingly, it is not a “statement of opinion”.

***Caller AA could actually help customer 8 consolidate his external accounts into his BT Business Account over the phone and that would save him from having to fill out multiple forms***

324 This statement is similar, in part, to the statement made by caller AA to customer 2, addressed at [0] above. However, unlike the composite statement made to customer 2, caller AA's statement to customer 8 is entirely a statement of fact as to caller AA's capabilities and caller AA's knowledge of a fact that steps taken by him would save customer 8 from filling out multiple forms. Accordingly, the statement was not a "statement of opinion".

***Customer 8 could substantially save on fees once he consolidated his external accounts into his BT business account***

325 I accept caller AA made this statement and that it was a "statement of opinion", essentially repeating the statement referred to at [0] above.

***In two or three weeks customer 8's external accounts would be rolled over into his BT Business Account and he would start potentially saving on fees***

326 I accept that caller AA made a statement to this effect. To the extent that it concerned when the rollover would be completed, the evidence does not indicate that it is based on facts other than caller AA's knowledge concerning the rollover process. To the extent that it referred to saving on fees, it is a repetition of the "statement of opinion" referred to at [0] above.

***Customer 8 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees***

327 I accept that caller AA made a statement to the effect that Customer 8 may, but not would, be led to save on fees. To that extent, it repeats statements already addressed in relation to customer 8 above.

## **Customer 9**

***A lot of the customers that caller CC spoke to like the fact that they could potentially save on fees by combining their super and also mentioned the fact that it was a little easier to manage***

328 Caller CC made a statement to this effect. To the extent that the statement endorses the beliefs of other customers by referring to them as "facts", it expresses two different "statements of opinion", namely, that customers could potentially save on fees by combining their super and that consolidated super was a little easier to manage. However, as formulated

by ASIC, it is a statement of fact about what was said to caller CC, and not a “statement of opinion”.

***Once customer 9’s external accounts were rolled over into his BT Business Account he would hopefully potentially save on fees***

329 A statement to this effect was not made. The relevant statement was “...then it will roll in within three to four weeks and then hopefully you could potentially save on some fees”.

***Customer 9 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees***

330 A statement to this effect was not made, except to the following limited extent. Caller CC elicited the answer “just fees” in response to a question about the perceived benefit of combining the customer’s super into BT. In response, Caller CC stated that “a lot of customers I speak to like the fact that by combining your super you could potentially save on fees, as you’ve just mentioned.”

331 I accept that the latter statement involves an implied “statement of opinion” that Customer 9 may save on fees by rolling over his external accounts into his BT business account.

**Customer 10**

***Caller AA could help customer 10 organise his superannuation by bringing all his external accounts to his BT Business Account***

332 Caller AA made a statement to this effect. It was a statement of fact as to caller AA’s capabilities and not a “statement of opinion”.

***A lot of BT’s clients are combining their superannuation accounts into their BT fund so that they have a larger amount in their account and because they were attracted to the past performance that BT accounts have been able to yield for its clients***

333 Caller AA made a statement to this effect. The statement is preceded by the words “I see”. Although it goes further than a statement as to the reasons given by BT’s clients, there is no evidence that the statement was anything other than a summary of caller A’s observations of other customers. In those circumstances, I am not satisfied that it is a “statement of opinion”.

***Having a larger amount of money in a person's account and in a performing fund like BT was always a good thing***

334 Caller AA made a statement to this effect. In form, it contains two opinions but, in context, the former (that having a larger amount of money in a person's account is always a good thing) appears to be nothing more than a statement of logic, premised on the assumption that the customer would always prefer to have more money than less in an account. I accept that the latter, that having money in a performing fund like BT is always a good thing, involves a "statement of opinion".

***Caller AA could help customer 10 consolidate his external accounts into his BT Business Account over the phone and get his account all nice and organised and avoid customer 10 having to do any forms***

335 Caller AA made a statement to this effect. It was a statement of fact as to caller AA's capabilities and not a "statement of opinion".

***In two or three weeks customer 10's external accounts would be rolled over into his BT Business Account and it would all be in the one place for customer 10 and hopefully starting to work hard for his retirement***

336 Caller AA made a statement to this effect. It comprises a statement of fact as to what would occur and an expression of a very general hope, that the rolled over accounts would "start working hard" for the customer's retirement. It does not communicate any clear judgment or belief and, accordingly, I do not accept that this statement involves any "statement of opinion".

***Customer 10 rolling over his external accounts into his BT Business Account may or would lead to him having a bigger amount in his account in a fund with attractive past performances***

337 I accept that caller AA made an implied statement to this effect. I also accept that it entails an implied "statement of opinion" that the sum of two or more accounts will exceed any individual account when combined in a fund with attractive past performances

***Customer 10 rolling over his external accounts into his BT Business Account would or may lead to a more efficient and efficacious set up of his superannuation and therefore greater returns***

338 The call did not refer to "greater returns". On the evidence, I do not accept that there was an implied statement as to the prospect that the customer would achieve greater returns by a rollover. To the contrary, the caller was very vague about the future prospects, saying

only that the customer would “hopefully” find that his consolidated super would start “working hard”.

### **Customer 11**

***Caller AA could help bring customer 11’s external accounts over to his BT Business Account to potentially save him on fees***

339 Caller AA made a statement to this effect. The statement conveys the implied “statement of opinion” that a rollover to his BT Business Account could save customer 11 on fees.

***Rolling over superannuation to have it all in the one spot and not lose money in finance and fees on accounts to which customer 11 was not making contributions definitely made sense***

340 I accept that caller AA made a statement to this effect by affirming the customer’s identification of the main benefits of consolidating his super accounts. As for the statement considered at [0] above, I do not find that it was a “statement of opinion”. In the context in which it was said, there is nothing to indicate that the statement is an inference based on anything other than the good sense of the customer’s rationale.

***Rolling over superannuation on the basis of manageability and saving on fees were probably the main reasons that most of BT’s clients liked to roll over their superannuation***

341 Caller A made a statement to this effect. It is relevantly similar to the statement considered at [0] above. There is no evidence that it is other than a statement of fact and, accordingly, is not a “statement of opinion”. While I accept that it implies two “statements of opinion”, being that manageability and the prospect of saving on fees provide valid reasons for a rollover, those statements are different from the statement alleged by ASIC.

***Rolling over superannuation made superannuation a lot easier to manage and saved on costs and, that after all it was customer 11’s retirement savings at the end of the day***

342 Caller AA made a statement to this effect. The statement contains a “statement of opinion” that rolling over superannuation made it a lot easier to manage and saved on costs. The words from “after all” convey nothing more than a statement of fact.

***Caller AA could help bring customer 11's superannuation over to his BT Business Account on the phone so that customer 11 could start potentially saving on fees and that the only thing he needed was customer 11's tax file number***

343 Caller AA made a statement to this effect. It repeats the "statement of opinion" identified at [0] above and is otherwise not a statement of opinion.

***Customer 11's comment that the amounts in his other funds were dwindling away with fees and charges was a pretty common story that BT hear from a lot of their clients and that it was a good thing customer 11 was consolidating his superannuation***

344 Caller AA made a statement to this effect. I accept that it contained a "statement of opinion" that customer 11's decision to consolidate his accounts was a good thing.

***Customer 11 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees and improving the manageability of his superannuation***

345 In my view, the alleged statement goes no further than the statements set out at [0] and [342] above.

## **Customer 12**

***AA could potentially save customer 12 on fees by rolling over any external accounts into this BT Business Account***

346 Caller AA made a statement to this effect. As for similar statements set out above, this was a "statement of opinion".

***Having potentially better performance is one of the main reasons that BT's clients say they like to consolidate their external accounts into their BT account***

347 Caller AA made a statement to this effect. As for similar statements set out above, I find that this was a statement of fact and not a "statement of opinion".

***Obviously superannuation was a lot more manageable when it is all in the one place***

348 Caller AA made a statement to this effect, which (as for the statement considered at [0] above), I accept was a "statement of opinion".

***Caller AA would actually help customer 12 bring his external accounts over to his BT Business Account verbally over the phone so that customer 12 would start to potentially get the performance he was after***

349 I accept that caller AA made a statement to this effect. I also accept that it conveyed a "statement of opinion" that, by the proposed rollover, customer 12 could start to get "the performance he was after".

***Customer 12 rolling over his external accounts into his BT Business Account may or would lead to him having better performing superannuation***

350 I accept that Caller AA implied that the rollover may result in Customer 12 having better performing superannuation, but not that it would have that result. The implied statement is a “statement of opinion”.

***Customer 12 rolling over his external accounts into his BT Business Account would or may lead to a more efficient and efficacious set up of his superannuation and therefore greater returns***

351 Although there was discussion about “performance”, there was no suggestion by the caller that the rollover would lead Customer 12 to improved returns on his superannuation. Except to the extent of the finding at [349] above, there was no “statement of opinion” to this effect.

**Customer 13**

***AA could potentially save customer 13 on fees by rolling over any external accounts into his BT Business Account***

352 I accept this statement was made by caller AA. Based on my reasons at [0] to [0], it was a “statement of opinion”.

***Achieving a better performance out of a customer’s superannuation is one of the main reasons that BT’s clients like to consolidate their superannuation, along with the fact that it is more manageable when it is in one place***

353 I accept that caller AA made a statement to this effect. Applying my reasoning above, it is not a “statement of opinion” although it implies opinions that the reasons given by the clients are valid.

***By consolidating his superannuation, customer 13 would be potentially saving on fees, depending on if he is paying fees on other accounts***

354 Caller AA made a statement to this effect. It did not convey any “statement of opinion” additional to the one that I have identified at [0] above.

***Caller AA could go through customer 13's super results and actually help him consolidate his external accounts into his BT Business Account over the phone that day using a verbal request and that we would have all his accounts in one place so he could potentially start getting better performance from his superannuation***

355 Caller AA made a statement to this effect. I accept that it conveys a "statement of opinion" that, by rolling over his external accounts into his BT account, Customer 13 could get better performance from his superannuation.

***In two or three weeks customer 13's external accounts would be rolled over into his BT Business Account and would be all nice and organised and he would be potentially getting the performance that he wanted***

356 Caller AA made a statement to this effect. It is relevantly similar to the statement addressed at [0] above and, by parity of reasoning, I accept that it conveyed a "statement of opinion" that, by the proposed rollover, customer 12 could start to get "the performance he wanted".

***Customer 13 rolling over his external accounts into his BT Business Account may or would lead to him having better performance from his superannuation***

357 Caller AA stated that getting a better return was one of the main reasons clients liked to consolidate their super and statement that, following a rollover the customer would have all his accounts in the one place so that he would "potentially start getting better performance on that". At the end of the call, caller AA summarised the effect of the rollover to be that the customer's super would be "all in the one spot, it's nice and organised potentially getting that performance you want".

358 I accept that these statements implied that a better return was an outcome that the customer could achieve by a rollover into his BT Business Account. This was a "statement of opinion". By using the word "potentially" twice, caller AA indicated clearly that he did not hold an opinion that the customer would obtain better performance as a result of the rollover.

***Customer 13 rolling over his external accounts into his BT Business Account would or may lead to a more efficient and efficacious set up of his superannuation and therefore greater returns***

359 Similarly to the position of Customer 12, except to the extent of the finding at [0] above, there was no "statement of opinion" to this effect.

#### **Customer 14**

*A lot of customers caller CC speaks to like the fact that by combining their superannuation accounts it is a little easier to manage and that you can potentially save on fees*

360 Caller CC made this statement. Applying my reasoning above, it is not a “statement of opinion” although it implies opinions that the matters identified by the relevant group of customers are “facts”.

*Customer 14 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees and achieving a greater level of manageability*

361 I accept that caller CC made a statement to the effect that a rollover may lead to customer 14 saving on fees and would lead to him achieving a greater level of manageability. This was a “statement of opinion”.

#### **Customer 15**

*Caller DD could potentially help customer 15 save on fees by consolidating any external accounts into his BT Business Account*

362 Caller DD made a statement to this effect, which is a “statement of opinion”.

*Consolidation had the benefit of putting all Customer 15’s superannuation in the one place*

363 I accept that caller DD made a statement to this effect, which is a “statement of opinion”.

*Customer 15’s stated reasons for rolling over his superannuation accounts into his BT Business Account so as to not lose money anywhere else and to get an increase in his superannuation funds overall were understandable*

364 I do not accept that caller DD made a statement to this effect.

*Customer 15 rolling over his external accounts into his BT Business Account may or would lead to him saving on fees, lead to a greater level of manageability and reduce the risk that he was losing money in other accounts while also allowing him to enter into a salary sacrifice arrangement through his employer*

365 I do not accept that the caller expressed any opinion as to the prospects of either a greater level of manageability or reduction of the risk of losing money. Accordingly, I do not accept that a statement to this effect was made.

#### **Summary of findings of “statements of opinion”**

366 In summary, the “statements of opinion” made during the 15 calls fall into the following categories:

- (1) Statements to the effect that, by rolling over external accounts into the customer's BT account, the customer could or may (but not would, except in the case of customer 11) save on fees.
- (2) Statements to the effect that, by rolling over external accounts into the customer's BT account, the customer would improve the "manageability" of their superannuation.
- (3) Statements to the effect that a rollover into the customer's BT account would be beneficial to the customer because, for example, it would be beneficial to pay only one set of fees or because there would be unspecified benefits.
- (4) Statements to the effect that, by rolling over external accounts into the customer's BT account, the customer could get a better return on their superannuation or could improve the performance of their superannuation.

367 Summarised in this way, it is obvious that the "statements of opinion" each support the implied recommendation to accept the rollover service and, therefore, the callers' intentions in making the recommendations and the statements of opinions were relevantly similar.

368 Further, for each customer, the "recommendations" and "statements of opinion" were given in the same circumstances for the purposes of determining whether s 766B(3) applies. Accordingly, even if the "recommendations" and "statements of opinion" comprised separate pieces of "financial product advice", there is no need to give separate consideration to whether the "statements of opinion" were "personal advice".

## **INTENTION TO INFLUENCE**

369 The onus of proof of intention falls on ASIC. Further, Mr McHugh SC was at pains to note that Westpac did not concede that there was a relevant intention to influence the customer in respect of everything relied upon by ASIC to support findings of "recommendations" and "statements of opinion". However, Westpac ultimately did not put any submission that there was no relevant intention to influence (except for customer 3) in relation to the matters upon which ASIC relied. Rather, Westpac sought to argue that there was no relevant recommendation or statement of opinion.

370 I am comfortably satisfied that each of the "recommendations" and "statements of opinion" that I have found were made was intended by the relevant caller to influence the customer in making a decision to accept the rollover service. That intention can be inferred

from the context of the “recommendations” and “statements of opinion”, being a campaign to encourage to encourage customers to roll over their external accounts into their BT account, from the evidence of how Mr Cannon coached callers to “make [the customer] want to do the consolidation more” and from the nature of the “recommendations” and “statements of opinion” themselves.

371 I accept, on the basis of what was said in the call to customer 3, that ASIC has not established a relevant intention to influence customer 3.

372 It follows that each of the “recommendations” and “statements of opinion” that I have found were made constituted “financial product advice” within the meaning of s 766B(1) of the Act.

### **CIRCUMSTANCES IN WHICH “FINANCIAL PRODUCT ADVICE” WAS GIVEN OR DIRECTED TO THE CUSTOMERS**

373 ASIC’s “Particulars of Claim” did not identify the “circumstances” upon which it relied to support its case that the relevant advice was “personal advice” within the meaning of s 766B(3). In submissions, it identified the fact that the calls were mostly made where a customer had requested a super search but had not taken the step of accepting Westpac’s rollover service. I accept that this is a relevant circumstance.

374 Other circumstances, of particular relevance to whether a reasonable person might expect Westpac or its callers to have considered one or more of the person’s objectives, financial situation and needs are:

- (1) The “financial product advice” was not sought by the customer. Rather, it was offered by Westpac to, mostly following a request for a super search and the identification of one or more external accounts.
- (2) The “financial product advice” was not accompanied by a fee. It was provided free of charge.
- (3) The “financial product advice” was given by a caller with no previous relationship to the customer, who was not known or understood by the customer as their adviser.
- (4) The content and tone of each call including, in particular:
  - (c) the “general advice warning”;
  - (d) the extent to which the caller revealed a lack of knowledge of details of the customer’s financial situation; and

(e) the point, if any, at which the customer indicated an intention to accept the rollover service regardless of the caller's attempt to influence that outcome.

(5) The nature of the rollover service and the potential consequences of accepting the service.

### **CUSTOMERS' OBJECTIVES, FINANCIAL SITUATION AND NEEDS**

375 ASIC identified several matters as "objectives" (which ASIC variously classified as "stated" or "implied" objectives) a "financial situation", or "needs" of the various customers.

#### **Financial situation**

376 Accepting that a financial situation comprises a combination of circumstances, I accept that each of the 15 customers was in the financial situation of having multiple superannuation accounts. Having made that finding, it is unnecessary to consider the alternative financial situation alleged by ASIC, being the customer's ownership of multiple superannuation accounts together with their particular objectives.

377 ASIC identified the following other matters as constituting a financial situation for the relevant customer:

(1) That customer 2 was retiring.

(2) That customer 3 had another superannuation account with MLC in respect of which there were no exit fees payable, the balance on that account was \$49,312.27 and he had insurance benefits of \$224,597 in death cover and \$216,732 in TPD cover which would close down if he withdrew all his money from his MLC account.

(3) That customer 5 had been told by someone at BT that he had an unusually low amount of superannuation for a person of his age.

378 I accept that (1) and (2) are matters that fall within the "financial situation" of customers 2 and 3, respectively. I do not accept that (3) is such a matter: it is merely a statement made to customer 5 concerning another's assessment his financial situation, an assessment that may or may not be correct.

#### **Needs**

379 I am not satisfied that there is evidence of any matters that were "needs" of the customers for the purposes of s 766B(3).

## **Objectives**

380 In several cases, the customers expressed a desire to “save on fees” by rolling over their superannuation or to consolidate their superannuation into the one account “for better manageability”. I accept that these are “objectives” of those customers within the meaning of s 766B(3) because they are ends to which the customers were directing their efforts, by requesting the super searches and participating in the customer calls made to them by Westpac.

381 In several cases, ASIC alleged that the customer has an objective “to ensure that [the customer] adopted an efficient and efficacious setup of [their] superannuation to ensure [they are] receiving the greatest possible returns” On the evidence, I do not accept that any customer expressed such an objective, or could be taken to have had such an objective.

382 ASIC alleged that the customers had numerous other objectives, as evidenced by their statements during the customer calls. Applying the reasoning above, I accept that the following are “objectives” of the relevant customers:

- (1) To not lose money because her superannuation was in different places (customer 1).
- (2) To organise his superannuation in a manner that was most appropriate to the fact that he was retiring (customer 2).
- (3) To ensure that his level of insurance with BT was at the same level as it was with MLC (customer 3).
- (4) To appropriately consider any exit fees that would be payable for leaving any external accounts (customer 3).
- (5) To ensure that his insurance coverage was appropriate for his particular circumstances, including that he did not have time to complete the relevant forms to increase his insurance and that he had been a type 2 diabetic for nine years but that that did not stop him from playing golf, engaging in normal activities or affect his work (customer 3).
- (6) To remedy or ameliorate any issues with his superannuation fund that would mean that he was not achieving the returns that he should or could achieve (customer 5).
- (7) To earn a greater return by creating one bigger pool of funds in his account (customer 7).
- (8) To not lose money from his superannuation account (customer 8).

- (9) To ensure that he was in the best performing fund or the best performing fund in respect of which he was a member (customer 10).
- (10) To have all his superannuation in the one spot to ensure that he was not losing money in finance and fees (customer 11).
- (11) To ensure that he was maximising the amount of interest he was receiving (customer 12).
- (12) To achieve better performance on his superannuation (customer 12).
- (13) To ensure that he was maximising the principal sum in his superannuation account and thereby obtain a better return (customer 13).
- (14) To achieve a greater level of performance on his superannuation (customer 14).
- (15) To ensure that he was not losing superannuation by having multiple superannuation accounts (customers 14 and 15).
- (16) To ensure that he was not losing superannuation by having multiple superannuation accounts (customer 15).
- (17) To increase his superannuation funds overall (customer 15).

#### **WESTPAC'S "CONSIDERATION"**

383 ASIC's case was that, for each call, the caller had "considered" the customer's "financial situation" as a person with one or more superannuation accounts when the call commenced.

384 The first basis for that conclusion was said to be that the caller knew that each customer had more than one superannuation account at the time that the call was made; in all but two cases, the caller knew that the customer had requested a superannuation search and, consequently, knew information about other funds held by the customer. ASIC argued that the calls were clearly considering each of those matters in seeking to influence the customers to accept the rollover service.

385 ASIC also contended that the evidence that callers engaged with the customers in accordance with the QM Framework "whether they listened very carefully or not", demonstrated their consideration of the customers' various statements about their objectives, financial situation and needs.

386 I do not accept either of these propositions. Mere knowledge of facts about customers, particularly that they held multiple superannuation accounts, and an intention to persuade the customer to accept the rollover service does not support an inference that the caller engaged in any reflection upon the customer's position that amounted to "consideration". Active listening does not evidence an intellectual engagement with the information provided by a customer, such as would permit a finding that the caller had "considered" that information: it simply demonstrates that the information has been heard. The use of facts, apparently identified as matters that might be used to influence the customer in the course of the call does not, without more, indicate the caller "considered" those facts.

387 Accepting that each of the 15 calls was conducted in accordance with the QM Framework, I do not infer from that fact that the callers "considered" any "objective" or "financial situation" that was identified by a customer during the course of the call. To the contrary, the QM Framework did not require or encourage consideration of those matters. To the extent that such information is elicited, the QM Framework encouraged the callers to use it to "drive an outcome", as ASIC put it. That outcome was the customer's rollover of their external superannuation accounts into their BT account.

388 In particular, the QM Framework required the callers to make a disclaimer, early in each call, to the effect that the call was being recorded and that everything discussed would be general in nature and would not take into account the customer's personal financial needs. That requirement is inconsistent with an inference from the QM Framework that callers applying the Framework "considered" the customers objectives, financial situation and needs.

389 In the case of each of the 15 customers, ASIC relied on the fact that the caller called to speak to the customer personally about the consolidation of the customer's superannuation accounts to prove that the relevant caller had "considered" one or more of the customer's objectives, financial situation and needs. In the context of the campaigns pursuant to which the calls were made, I do not accept that this fact evidences that there was any relevant consideration. To the contrary, the context suggests that the callers were not engaging in a process of consideration, but instead were engaged in a highly structured marketing activity requiring them to call customers directly to seek consolidation of their superannuation account.

390 In each case, ASIC also relied on particular statements by the caller. For example, for customer 1, it relied on that fact that caller AA:

(1) asked customer 1 for the main reason that customer 1 asked BTFM to look into her superannuation and customer 1 responded that she wanted to roll it all into one;

(2) asked customer 1 what she saw as the main benefits of combining her superannuation and customer 1 responded that it was to save on fees and that she was losing money because her superannuation was in different places; and/or

(3) clarified in response to customer 1's answers, that her personal motivations were to improve manageability of her accounts and to save on fees.

391 None of these elements of the conversation reveal any consideration of any of customer 1's objectives or her financial situation (I have found that she did not identify any relevant needs). They reveal no more than that the caller elicited from customer 1 certain objectives and that the caller heard what customer 1 said to him.

392 None of the other calls is materially different.

393 Accordingly, I reject ASIC's contention that any of the callers "considered" any of the objectives of any of the customers who were called, or the financial situation of any of those customers.

#### **WHAT A REASONABLE PERSON MIGHT EXPECT THE CALLERS TO HAVE CONSIDERED IN THE CIRCUMSTANCES**

394 In order to determine what a reasonable person might expect in particular circumstances, it is necessary to consider those circumstances. In my view, the following circumstances would suggest to a reasonable person that the caller who provided the "financial product advice" did not consider any of the customer's objectives and financial situation that I have identified above:

(1) The call containing the "financial product advice" was not preceded by the provision of information from the customer to Westpac about their objectives, financial situation and needs.

(2) The "financial product advice" was offered proactively by members of the Super Activation Team, who had no previous relationship to the customer, and was not known or understood by the customer as their adviser so that they were not obviously in a position to consider one or more of the customer's objectives and financial situation.

(3) The callers did not present themselves as making statements on the basis of their consideration of the customer's objectives or financial situation. To the contrary, they

presented themselves as offering the rollover service on the basis that the calls would not take into account the customer's individual situation. In my view, this would strongly suggest to the reasonable person that, regardless of whether the callers should consider the customer's objectives and financial situation, they were not doing so.

(4) The "financial product advice" was provided free of charge. This fact would raise a doubt in the mind of the reasonable person as to whether the advice provider had considered one or more of the customer's objectives and financial situation.

(5) To the extent that the customers identified "objectives", it occurred during the course of the calls so that the callers did not have an opportunity to consider those objectives prior to making the calls.

(6) In some cases, the callers revealed a lack of knowledge about the customer's situation that was inconsistent with a capacity to consider or have considered one or more of the customer's objectives and financial situation;

(7) The "social proofing" technique emphasises a comparison between the customer's reasons and the reasons of others, which is not a comparison involving a consideration of the customer's particular circumstances.

395 There are matters which, in my view, might lead a reasonable person to think that the "financial product advice" should have been given in circumstances where one or more of the customer's objectives and financial situation was considered. Examples are:

(1) The fact that, in Westpac's view, a customer's request for advice as to whether to accept the rollover service was a request for personal advice, requiring consideration of matters personal to the customer.

(2) Westpac's knowledge that acceptance of the "financial product advice", particularly by accepting the recommendation to rollover external accounts into a BT account, would be in its interests, because it would increase its FUM, and its further knowledge that it did not know all matters relevant to whether it was in the customers' best interests to accept the recommendation. As a corollary, it did not know whether its recommendation was in the customers' best interests.

(3) Westpac did not know whether the customers that it called had considered all significant issues relevant to whether it was in their best interests to roll over external accounts into their BT account, or even whether they were cognisant of those issues.

(4) By making the recommendation in an unsolicited call, using an informal style and a structure likely to be perceived as generic, and where consolidation of super accounts had obvious benefits, and by offering to effect a rollover on the telephone, Westpac conveyed the impression to the customers that the recommendation was an obvious and uncontroversial course of action for the particular customer. That impression was arguably reinforced by the “social proofing” content of the calls.

(5) The callers’ attitude of helpfulness to be genuine, which reinforced the impression that the recommendation was appropriate for the particular customer.

396 However, in my view, those matters would not lead a reasonable person to have expected the callers to have considered one or more of the customers’ objectives and financial situation. A reasonable person would not expect consideration on the basis that the person could identify reasons that might have motivated Westpac to engage in such consideration in the face of strong indicators that the consideration was unlikely to have occurred.

397 The circumstance that the calls were expressly made in relation to particular accounts is a matter that would tend to suggest consideration of one or more of the customer’s objectives and financial situation. However, that is a weak factor in the face of the other circumstances identified above which point in the opposite direction.

398 Accordingly, I conclude that none of the “financial product advice” was given in circumstances where a reasonable person might expect the provider of the advice to have considered one or more of the person’s objectives, financial situation and needs within the meaning of s 766B(3).

#### **CONCLUSIONS REGARDING “PERSONAL ADVICE”**

399 Having concluded that Westpac did not give “personal advice” within the meaning of 766B(3), there was no requirement to comply with either s 946A or s 961K(2) of the Act. Further, there was no breach of conditions of the relevant AFSLs by providing personal financial product advice in contravention of s 912A(1)(b).

**FAILURE TO ENSURE SERVICES PROVIDED “EFFICIENTLY, HONESTLY AND FAIRLY”**

400 Section 912A(1)(a) provides that financial services licensees must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.

401 ASIC’s case was that Westpac failed to do all things necessary to ensure that the financial services provided by them through the Super Activation Team, comprising the provision of “financial product advice”, were provided “honestly, efficiently and fairly” within the meaning of s 912A(1), by adopting and implementing the QM Framework, through training, encouraging and directing Super Activation staff to follow the QM Framework in their calls with customers generally and in the Q2 and Q4 campaigns.

402 In particular, ASIC alleged that by adopting and implementing the QM Framework “through training, encouraging and directing Super Activation staff to follow the QM Framework in their calls with customers generally” and in the Q2 and Q4 campaigns specifically, Westpac:

- (1) adopted and implemented a structure and approach to calls with customers in the Q2 and Q4 campaigns that was liable to lead to the Super Activation staff:
  - (a) providing personal advice to customers to rollover their external accounts into their BT account; and/or
  - (b) doing so without taking the following types of steps:
    - (i) Failed to adequately identify the objectives, financial situation and needs of the customer that would reasonably be considered as relevant to advice on rolling over superannuation accounts, before recommending that the customer roll over any external accounts into their BT account;
    - (ii) Failed to conduct a reasonable investigation into the financial products that might achieve the customer’s objectives;
    - (iii) Failed to consider the merits of the customer rolling their superannuation account into an existing external account or a superannuation product in which they did not have an account, rather than their BT account;
    - (iv) Failed to consider or compare the respective features and benefits of the superannuation accounts that were the subject of the rollover;
    - (v) Failed to make reasonable inquiries to obtain complete and

accurate information where information was incomplete, including as to the insurance needs and existing insurance coverage of the customer;

- (vi) Failed to assess whether they had the necessary expertise to provide the advice and decline to provide the advice.
- (2) Adopted and implemented that structure and approach:
- (a) Regardless of the appropriateness of the BT account to the customer, including whether that step involved them rolling out of one or more external accounts which were better suited to the customer than their BT account; and
  - (b) Without having any or sufficient details of the customer's external accounts;
- (3) Adopted and implemented that structure and approach for the primary purpose and objective of generating an increase in FUM for WSAL, BTFM and or the Westpac Group and, in doing so prefer their own interests and the interests of WSAL, BTFM and or the Westpac Group in generating FUM to the interests of their customers.

403 Westpac contended that the evidence showed staff were specifically trained about the significance of the distinction between personal advice and general advice; the QM Framework explicitly recognised that distinction and recognised the need to abide by it as a “compliance” requirement; and Westpac’s compliance monitoring was directed at, inter alia, identifying infractions of the prohibition against giving personal advice. If, despite these safeguards, personal advice was in fact given because the QM Framework was followed, it was despite Westpac’s well-intentioned efforts to avoid that outcome. Westpac argued that this facts hardly connoted the serious conduct that would display a lack of sound ethical values and judgment of the kind referred to in *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (In Liq)* [2012] FCA 414; (2012) 88 ACSR 206 (“*Camelot*”).

### **Findings of fact**

404 The QM Framework was used by Westpac over an extended period, including the period April to December 2014. It was used to train members of the Super Activation team, as well as to monitor the quality of calls and compliance by the Super Activation Team as part of Westpac’s campaign to increase FUM by rollovers of external accounts held by existing customers into their BT accounts. The callers to the 15 customers were coached to structure their calls based on the QM Framework and the transcripts of the calls broadly reflect that coaching although, as Mr McHugh SC observed, the “social proofing” element of the QM Framework was not used in every instance.

405 Having regard to my findings above concerning the lack of consideration given by callers to the objectives or financial situation of the relevant customers, I do not accept that this system was liable to lead Super Activation Team to provide “personal advice” to customers to accept the rollover service. In particular, as I have found earlier, the QM Framework did not require or encourage consideration of those matters. Further, having found that the circumstances of the calls the subject of this proceeding would not lead a reasonable person to expect that there was consideration of such matters, and accepting that those calls appear broadly to have followed the QM Framework, I do not accept that the system was liable to lead the Super Activation Team to provide “personal advice” within the meaning of s 766B(3)(b) of the Act.

406 There is no dispute that the implementation of the QM Framework was inconsistent with the Super Activation Team taking steps designed to determine whether the rollover service was in the best interests of the customers. The premise of Westpac’s defence was that those types of steps were not necessary in the context of the particular campaign and, in particular, the features that were said to render it a naked exercise in marketing, so that no reasonable consumer could have been led to think that Westpac was recommending the rollover service on the basis that it was in the customers’ best interests.

407 Similarly, there is no dispute that Westpac’s approach involved encouraging its customers to accept the rollover service on the basis of the particular “selling points” of manageability and potentially saving on fees. Except to that extent, Westpac did not have regard to the appropriateness of the BT account for the individual customers, including whether the rollover service might cause them to roll out of one or more external accounts which were, as a matter of fact, better suited to the customer than the BT account.

408 ASIC’s “Particulars of Claim” did not identify the details of customers’ external accounts that Westpac was said to have lacked. Accordingly, I do not find that Westpac’s system was implemented without having any or sufficient details of the customers’ external accounts.

409 Finally, it was not disputed that the QM Framework was adopted and implemented with the objective of generating an increase in FUM.

410 Westpac contended that its objective of increasing FUM was both obvious and irrelevant, saying:

Westpac's consultants never held themselves out as financial advisors purporting to act in customers' best interests; nor did its consultants give any impression that they were aware of, or wished to understand, the customer's relevant personal circumstances. The overwhelming impression one gets from reading the correspondence and reviewing the telephone calls is that a marketing message is being conveyed; that is, favourable aspects of the rollover service offers by Westpac are emphasised and reinforced. No customer could have been under any illusion that Westpac was anything other than self-interested in offering that service.

411 Based on this contention I infer that, in implementing the QM Framework, Westpac focussed on its own interests and did not seek to act in the best interests of its customers.

### **Legal framework**

412 Westpac did not take issue with ASIC's explanation of the legal framework. The following explanation is based on ASIC's submissions.

413 Section 912A(1)(a) was introduced by the *Financial Services Reform Act 2001* (Cth) with the introduction of the Act. Under the original draft of the *Financial Services Reform Bill 2001* (Cth), the provision required only that financial services be provided "competently and honestly". This wording was replaced with the wording "efficiently, honestly and fairly" in order to reflect the equivalent provision in the predecessor to the Act, the *Corporations Law* (Cth). The Supplementary Memorandum to the *Financial Services Reform Bill 2001* (Cth) stated as follows (at [3.74]):

Paragraph 912A(a) currently obliges licensees to provide services 'competently and honestly'. It is proposed to amend this paragraph to require licensees to provide services 'efficiently, honestly and fairly' (in line with the wording of the licensing obligations in Parts 7.3 and 8.3 of the current *Corporations Law*) (see proposed item 64).

414 Part 7.3 of the *Corporations Law* (headed "Participants in the Securities Industry") used the term "efficiently, honestly and fairly" as a basis for ASIC to refuse to grant a licence, revoke a licence or ban a person from holding a licence. In particular:

(a) sections 783(2)(e) and 784(2)(d) provided that ASIC could grant a licence provided, inter alia, that "it had no reason to believe that the [person/applicant] will not perform those duties efficiently, honestly and fairly";

(b) section 826(1)(j) provided that ASIC may revoke a licence if the commission "has reason to believe that the licensee has not performed efficiently, honestly and fairly the duties of a holder of a dealers licence or an investment advisers licence, as the case requires";  
and

(c) sections 829(f) and (g) provided that ASIC may make a banning order against a person if ASIC “has reason to believe that he or she [has not performed or will not perform] efficiently, honestly and fairly the duties of (i) a representative of a dealer; or (ii) a representative of an investment advisor”.

415 Part 8.3 of the *Corporations Law* provided similar provisions for futures brokers and futures advisors.

416 The term in the *Corporations Law* appears to have had its origin in s 60 of the *Security Industry (New South Wales) Code* (“NSW Code”). Section 60 enabled the National Companies and Securities Commission to revoke a dealer’s licence if the Commission had reason to believe a licence holder “has not performed the duties of a holder of such a licence efficiently, honestly and fairly”.

417 In *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 (“*Story*”), Young J considered the meaning of the phrase “efficiently, honestly and fairly” in the context of the NSW Code. Story was a stockbroker who had started following the activities of a company called Claremont Petroleum NL. In a memorandum to a prospective purchaser of the company, Story represented that there was a new issue in the works and stated that there was “[a]nother active bidder in the wings” when in fact there was not.

418 Young J held, at 670 – 671, that the term was introduced deliberately to replace its predecessor – a “fit and proper person” test – and so should not be construed in the same way as a fit and proper purpose test. His Honour held that there were three “clues” to interpreting the term:

- (1) the provision is obviously designed to protect the public;
- (2) the conduct being looked to is something that goes to the performance of the duties of the licence holder; and
- (3) the fact that the Commission could have regard to a contravention under s 65A(1), meant that, in appropriate cases, it may be that one serious offence would warrant a conclusion that a licensee had not performed his duties efficiently, honestly and fairly (i.e., in contrast to many disciplinary matters where there is an isolated departure from proper professional standards).

419 His Honour concluded, at 672, that the term:

...must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

420 On the facts of the case, at 684 Young J found that there was no other active bidder at the time, and Story would have known this. On those facts, at 685, Young J found that the misrepresentation that there was another active bidder fell short of the level of efficiency reasonably expected of a dealer in carrying out his functions under the Act.

421 In *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* [1989] SASC 1941; (1989) 1 ACSR 93 (“*R J Elrington*”), the Supreme Court of South Australia considered the equivalent provision under the *Companies Code (SA)*. The defendant breached the conditions of its licence by giving investment advice in relation to securities of an associated company. The defendant did so “carelessly” acting on advice from another director that he could give such advice if he did so in his private capacity.

422 At 110, Bollen J decided that “the word ‘honestly’ may comprehend conduct which is not criminal but which is morally wrong in the commercial sense” and that “[i]t comprehends conduct which is not straightforward” and “may comprehend such conduct viewed objectively”. Despite there being no dishonesty, Bollen J concluded that the conduct amounted to “a very serious breach of the conditions of the licence and of the statutory obligation to behave ‘efficiently, honestly and fairly’”.

423 In *Camelot* at [69]-[70], Foster J accepted the following propositions concerning the meaning of s 912A(1)(a), based on authorities including *Story* and *R J Elrington*:

(1) The words “efficiently, honestly and fairly” must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

(2) The words “efficiently, honestly and fairly” connote a requirement of competence in providing advice and in complying with relevant statutory obligations. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client’s affairs.

(3) The word “efficient” refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate. Inefficiency may be established by demonstrating that the performance of a

licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect.

(4) It is not necessary to establish dishonesty in the criminal sense. The word "honestly" may comprehend conduct which is not criminal but which is morally wrong in the commercial sense.

(5) The word "honestly" when used in conjunction with the word "fairly" tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound.

424 In *Camelot*, a breach was established by the respondent inducing clients to trade in options in an endeavour to secure excessive brokerage commissions (at [71]-[74]). The breach was established even though ASIC did not allege fraud or even a reckless disregard of the client's rights; it was sufficient that Camelot Derivatives Pty Ltd was at least aware of the likely and actual impact that the commissions would have had on the clients' trading outcomes (at [72]).

425 In *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; (2016) 336 ALR 209 at [673]-[674], Edelman J stated:

Although ASIC has not proved that the services were not provided honestly, the contraventions ... were sufficiently serious departures from reasonable standards of performance of advice that they involved a failure to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly.

This approach to "efficiently, honestly and fairly", which treats the expression as including an assessment of reasonable expectations of performance and reasonable standards of performance, is consistent with the decision in [*Camelot*].

426 In *Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liq)* [2017] FCA 497 at [191], Beach J stated:

The "efficiently, honestly and fairly" standard is applied as a single, composite concept, rather than three discrete behavioural norms. The following principles are not in doubt (see [*Camelot*] at [69] and [70] per Foster J). First, the words "efficiently, honestly and fairly" entail that a person must go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty. Second, the phrase connotes a requirement of competency in providing advice and in complying with relevant statutory obligations. Third, the word "efficient" entails that the person is adequate in performance and is competent. Fourth, the concept of honesty is looked at through the lens of commercial morality rather than through the lens of the criminal law.

427 Finally, ASIC referred to the Administrative Appeals Tribunal decision in *Re Hres and Australian Securities and Investments Commission* [2008] AATA 707; (2008) 105 ALD 124. Mr Hres was a financial securities advisor for AMP Financial Planning Pty Ltd. An associate of Mr Hres, Robert Orehek, was the principal director and shareholder of a property development company, Norton Investments Pty Ltd. Mr Orehek offered to pay Mr Hres a 3% commission on loan funds provided by any lenders referred by Mr Hres. Despite Mr Hres being precluded from advising about competing products in his role for AMP, between 2000 and 2002, Mr Hres referred around 36 lenders to Orehek with the resulting loans totalling \$2.64 million.

428 ASIC noted that the Tribunal rejected a defence that Mr Hres was not referring clients because he had expressly disclaimed such behaviour in the relevant conversations, reasoning as follows (at [239]):

There may be cases where a person who is a securities adviser acts exclusively in his personal capacity. But, as is shown by the circumstances addressed in *RJ Elrington and Foster*; that hypothetical possibility is likely to be readily confounded where the adviser deals with persons with whom he has an established relationship as an adviser. Where that relationship exists, it would confound the effect of the statutory licensing requirements and conditions, no less than the requirement to have a reasonable basis for recommendations, if the adviser could merely, and with impunity, “refer” clients directly to the investment target. The confounding involved is patent in the present case. Mr Hres recognised that his proper authority precluded him from providing any clients with explicit advice about the Orehek loans. As a matter of form, he disclaimed any advice but, as a matter of substance, he nevertheless encouraged people who had consulted him to go and deal directly with Mr Orehek. Even if, as Mr Hres contended, he sometimes referred clients to other developers in addition to Mr Orehek, the propriety of his conduct would have been no better. There is a risk of a fundamental and unacceptable contradiction between disclaiming advice in relation to dealings of a particular kind and, at the same time referring clients to the particular entities that are likely to promote those same kinds of dealings with the client. That risk can only really be safely and predictably avoided by confining referrals in connection with securities to other appropriately licensed and qualified advisers.

429 Westpac argued that the cases indicate that a level of seriousness must be demonstrated, such as “sufficiently serious departures from reasonable standards of performance of advice” (as in *Cassimatis*) or matters from which the Court could conclude an absence of competence or a lack of “sound ethical values”.

430 Westpac contended that the level of seriousness necessary to establish a breach of s 912A(1)(a) is not established.

### **Application of legal framework**

431 ASIC identified four matters in support of a finding of contravention of s 912A(1)(a). Two of those matters were premised on the propositions, rejected earlier in these reasons, that use of the QM Framework was liable to lead Super Activation Team members to provide “personal advice” and that the Super Activation Team members did in fact provide “personal advice” in the implementation of the QM Framework.

432 The third matter was that, by the application of the QM Framework, customers were or may have been influenced and advised to accept the rollover service in a manner which took into account limited information about their personal circumstances and which gave no consideration as to whether there was another course of action better suited to the customer.

433 There is no serious doubt that the QM Framework encouraged the Super Activation Team to influence customers and advise them to accept the rollover service in a telephone conversation which involved limited identification of their personal circumstances and which did not involve consideration of whether there was another course of action better suited to the customer. There was no evidence of whether the customers took into account other information about their personal circumstances, except the calls themselves. For example, the transcript of the call to customer 8 showed that his acceptance of the rollover service was based in part on an earlier decision that the rollover should not include his MLC fund.

434 The fourth matter was that the implementation of the QM Framework was for the primary purpose and objective of generating an increase in FUM. As explained above, Westpac accepted that this was its objective.

435 I accept that the QM Framework had regard to the distinction between personal and general advice, and recognised the need to ensure that callers did not provide personal advice. I also accept that the implementation of the QM Framework involved significant compliance monitoring.

436 I also recognise that ASIC did not bring a case that customers were misled by the callers from the Super Activation Team, or that the implementation of the QM Framework involved misleading or deceptive conduct within the meaning of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (and related provisions). ASIC did not allege dishonesty or fraud in the implementation of the QM Framework.

437 Westpac noted that customers were not told that their fees would be lower or that the rollover service was appropriate for their particular circumstances. Westpac also noted that there was no suggestion that any of the 15 customers suffered any detriment because of the advice they received.

438 In particular, Westpac contended that the most obvious risk, loss of insurance, was unlikely to have come to pass given the clarity with which all customers were warned about this particular risk and the fact that such a warning is specifically required by the QM Framework.

439 Westpac again emphasised the marketing nature of its exercise and repeated the claim that no customer could have been under any illusion that Westpac was anything other than self-interested in offering the rollover service.

440 Westpac cautioned against treating the calls considered in this judgment as indicative of systematic wrongdoing of the kind that would amount to a contravention of s 912A(1)(a).

441 Finally, Westpac contended that, given its apparently well-intentioned efforts to avoid giving personal advice, if such advice was given, the facts hardly connoted the serious conduct that would display a lack of sound ethical values and judgment of the kind referred to in *Camelot*.

442 The implementation of the QM Framework should be understood in the context of Westpac's knowledge and beliefs concerning the campaign, namely:

(1) Westpac held the view that the Super Activation Team callers should not respond substantively to the customer's question whether the consultant would recommend the rollover service in their case, because the answer to that question would require personal advice and consideration of issues such as whether the customer would have to pay any termination fees moving from existing funds, whether the customer would lose any insurance benefits, whether the BT account has all the services wanted by the customer and whether the customer's employer could contribute to the BT fund.

(2) Thus, Westpac knew that there was an asymmetry between its approach in relation to a customer who asked the question "Should I accept the rollover service" and the customers to whom Westpac made the recommendation "You should accept the rollover service".

(3) In conducting the campaign, Westpac did not know and did not seek to know all matters relevant to whether it was in the customers' best interests to accept the

recommendation. As a corollary, Westpac did not know whether the recommendations were in the customers' best interests.

(4) Westpac did not know whether the customers that it called had considered all significant issues relevant to whether it was in their customer's best interests to roll over external accounts into their customer's BT account, or even whether they were cognisant of those issues.

443 Having considered the matters set out above, I am persuaded that the implementation of the QM Framework in the cases of the 15 customers the subject of the proceeding, and more generally in connection with its campaign to encourage customers to accept the rollover service, involved a failure on the part of Westpac to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly for the following reasons.

444 Notwithstanding the state of knowledge that I have identified above, by adopting the approach recorded in the QM Framework, Westpac provided "financial product advice" comprising the implied recommendation to accept the rollover service without explaining that a prudent customer may wish to consider matters of the kind that would be considered if the recommendation had been given as personal advice. Thus, Westpac made its recommendations without informing the customers about the possible relevant considerations for a prudent customer and without informing the customers that they could not make the recommendation if they the customer had directly asked for their advice.

445 The QM Framework also involved encouraging customers to accept the rollover service with the use of "social proofing" by which customers were told that their beliefs or reasons were commonly held. The fact that a customer's belief or rationale was commonly held was not a matter that would have provided a basis for the recommendation, if it had been given as personal advice. In my view, as it was not a sound basis for decision making, it should not have been used to provide assurance to customers, with a view to influencing them to accept the rollover service.

446 By making the recommendations in an unsolicited call, using an informal style and a structure likely to be perceived as generic, and where consolidation of super accounts had obvious benefits, and by offering to effect a rollover on the telephone, Westpac conveyed the impression to the customers that the recommendation was an obvious and uncontroversial course of action for the particular customer, when that may well not have been the case. The impression was arguably reinforced by the "social proofing" content of the calls. The callers'

attitude of helpfulness also reinforced the impression that the recommendation was appropriate for the particular customer and that there was no possible lack of alignment between the interests of the customers and Westpac.

447 Although Westpac asserted emphatically that the calls revealed its self-interest, Westpac did not explicitly identify its interest in influencing the customers to accept the rollover service. The QM Framework approach was admittedly self-interested and did not necessarily promote the best interests of the customers but the approach did not draw the customers' attention to either of those matters. Rather, it strongly conveyed the impression that Westpac was assisting the customer by its rollover service and, particularly by "social proofing", the impression that customers should feel comfortable in accepting the service without giving consideration to their particular circumstances. In fact, as Westpac knew, there were matters (of the kind that would be considered if the "financial product advice" was given as "personal advice") that, acceptance of the rollover service might have adverse consequences for the customer.

448 While not dishonest, in my view, the matters demonstrate the adoption and implementation of the QM Framework approach failed to ensure that the "financial product advice", being a financial service covered by Westpac's AFSLs, was provided "efficiently, honestly and fairly" in contravention of s 912A(1)(a) of the Act.

### **FAILURE TO ACT IN THE BEST INTERESTS OF THE CUSTOMER**

449 In case I am wrong in my finding that Westpac did not provide "personal advice" to the 15 customers, I have considered whether there was a contravention of s 961K(2) on the assumption that the "financial product advice" identified above was "personal advice".

450 Section 961B(1) provides that the advice provider must act in the best interests of the client in relation to the advice. Section 961B(2) provides that the provider satisfies the duty in s 961B(1) if the provider proves that it has done each of seven matters tending to demonstrate that the advice provider has acted in the client's best interests in the provision of the relevant advice.

451 Section 961K(2), which is a civil penalty provision provides, relevantly, that a financial services licensee contravenes s 961K(2) if a representative of the licensee contravenes s 961B and the licensee is the responsible licensee in relation to that contravention.

452 In *Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd* [2017] FCA 345; 122 ACSR 47, Moshinsky J noted, at [17], that s 961B(2) may be treated as providing a “safe harbour” for providers accused of breaching the best interest duty, so that, if the provider can prove that he or she has done each of the seven things in s 961B(2), he or she will have satisfied the best interests duty. However, his Honour noted, at [18], ASIC accepted that a person may be able to satisfy the best interests duty in s 961B(1) even though they do not fall within the “safe harbour” of s 961B(2).

453 Westpac did not attempt to invoke s 961B(2).

454 ASIC’s case was that there was a contravention of s 961B(1) because the customers did not receive that which they would have received from a personal adviser in relation to the advice, in that Westpac:

- (1) failed to adequately identify the objectives, financial situation and needs of the customer that would reasonably be considered as relevant to advice on rolling over superannuation accounts, before recommending that the customer roll over any external accounts into their BT account;
- (2) failed to conduct a reasonable investigation into the financial products that might achieve the customer’s objectives;
- (3) failed to consider the merits of the customer rolling their superannuation account into an existing external account or a superannuation product in which they did not have an account, rather than their BT account;
- (4) failed to consider or compare the respective features and benefits of the superannuation accounts that were the subject of the rollover;
- (5) failed to make reasonable inquiries to obtain complete and accurate information where information was incomplete, including as to the insurance needs and existing insurance coverage of the customer;
- (6) failed to assess whether they had the necessary expertise to provide the advice and decline to provide the advice; and
- (7) may well have advised the customer to roll out of external accounts which were better suited to the customer’s personal objectives, financial situation and needs than their BT accounts.

455 Westpac denied any breach of s 961B(1), on the following bases:

(1) ASIC did not alleged, or attempt to prove, that in any one of the 15 relevant instances, the customer would have been better served by not rolling over their superannuation into their BT account.

(2) The two particular risks of a rollover to which ASIC draws attention (that client might not save on fees, and insurances might be cancelled) are risks of which customers were made specifically aware before deciding to roll over their super.

(3) The particular selling points which were drawn to customers' attention in every case were manageability and potentially saving on fees. Those benefits were undoubtedly true and ASIC did not suggest that anything that was said to customers was either wrong or misleading.

(4) The substance of the interactions between the callers and the customers essentially involved Westpac offering to existing customers the rollover service, on the basis of the selling points of manageability and potentially saving on fees. Westpac did not purport to know all matters that might be relevant to the customer's personal situation. No other reasonable customer would think otherwise. The fact that Westpac was engaged in a marketing exercise is highly relevant to an assessment of the best interests of clients in relation to the advice. It does not follow that simply because s 961B(1) is engaged, Westpac was required to act as if it was taking potentially relevant features of the client's personal circumstances into account in determining what marketing message to convey when that is not what it purported to do.

456 In response, ASIC made the following arguments:

(1) To establish a contravention, ASIC is not required to establish that any of the customers have in fact suffered loss. It is sufficient that the Court can be comfortably satisfied that by having a rollover effected irrespective of whether it was in the customer's interests, some customers will have been worse off by effecting a rollover (for example by ending up paying more fees, or ending up in a more poorly performing fund, or by leaving the customer with less favourable terms). That customers may have lost important and irrecoverable benefits is not mere "idle supposition" but an inevitable possibility.

(2) In the absence of a proper identification of the customer's circumstances, recommendations or opinions to the effect that the customer "could potentially save on fees" and that "insurances might be cancelled" could have encouraged customers to act against

their own interests. The customer may, for example, lose benefits such as more favourable insurance or benefits under a defined benefits scheme.

(3) It may be correct to say that, at least in the abstract and speaking generally, having one superannuation account may be easier to manage and may lead to the payment of less fees than having multiple superannuation accounts. What may not be correct is to say that, in respect of a particular customer who, for example, has the personal objective of saving on fees, that the customer's objective will be best achieved by a rollover into a BT Account rather than some other account.

(4) Westpac again seeks to make a submission that is a variant on the argument that it was the case – and it would have been apparent to the customer – that the caller was not taking into account “the whole” of the customer's circumstances.

457 Broadly, I accept that where advice is “personal advice” within the meaning of the Act, there is likely to be a failure to act in the client's best interests in relation to the advice if the provider fails to comply with the Act's requirements for the provision of “personal advice”. ASIC did not demonstrate that the six activities said to have been omitted (items (1) to (6) at [0] above) would have been necessary to comply with those requirements. However, I accept that doing the things that were omitted would have placed Westpac in a position to give the customers fully informed advice about whether to accept the rollover service and would have involved acting in the customers' best interests in relation to the advice.

458 I also accept that Westpac may well have advised customers to roll out of external accounts which were better suited to the customer's personal objectives, financial situation and needs than their BT accounts. As Westpac noted, there was no evidence one way or another.

459 Contrary to Westpac's submissions, I do not accept that Westpac's use of the word “potentially” in relation to saving of fees can be characterised as an identification of a risk of a rollover. Rather, in my view, it is a statement of possibility. I also do not accept that, in the context of an unsolicited call, a customer can reasonably be expected to have been alive to the nuance that the caller was speaking about possible but not certain saving of fees. Another interpretation might have been that the word “potentially” was directed to the fact that fees would be saved in the future.

460 Further, I have no difficulty accepting ASIC's submission that the language of Westpac's callers, and particularly the references to "potentially saving on fees" could have encouraged customers to act against their own interests.

461 I accept Westpac's submission that the particular selling points that it identified were true benefits of the rollover service, and I acknowledge that ASIC did not suggest that anything that was said to customers was dishonest.

462 Westpac's final point assumes its entitlement to engage in a marketing exercise of the kind that it undertook. It also relies upon its asserted position, that its marketing exercise was nakedly self-interested, so that it acted in the customer's best interests without taking steps that would otherwise be required.

463 On the assumption that Westpac's "financial product advice" was "personal advice", I am satisfied that Westpac did not act in the best interests of the customers to whom it gave that advice because those interests could only be served by advice as to whether the rollover service was in their best interests. Westpac did not attempt to inform the customers to whom it gave the "financial product advice" whether it was in their best interests to accept the advice. This conclusion is supported by Westpac's view, recorded in the case study set out at [0] of what would be involved in providing proper personal advice to a customer who sought advice about whether to consolidate external funds into their BT account. There is no difference in the client's best interests that depends upon whether advice was volunteered in a marketing campaign, or the subject of an express request for advice.

464 Accordingly, if I had found that Westpac gave "personal advice", I would have concluded that it contravened s 961B(1) in giving that advice.

## **CONCLUSION**

465 I am satisfied that Westpac contravened s 912A(1)(a) of the Act. I will make declarations to that effect. Otherwise, ASIC has not made out its case.

466 I will direct the parties to file and serve short minutes of order to provide for the finalisation of the proceeding.

I certify that the preceding four hundred and sixty-six (466) numbered paragraphs are a true copy

of the Reasons for Judgment herein  
of the Honourable Justice Gleeson.

Associate:

Dated: 21 December 2018