Westpac case and the digital fix for SOA mess

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It's Hotel California time for institutionally-owned advice businesses.

Having invested billions in buying and building advice businesses over the past 25 years, banks are only now realising that they can't run them both compliantly and profitably. But post-Hayne, divestment plans are in disarray due to impaired values.

While disgorging advice businesses might feel like a welcome short-term solution, banks are still left with legions of customers with unserved financial needs. With their wealth of consumer data, banks are in pole position to identify those needs, devise solutions and connect with customers at appropriate lifecycle points.

Confusion between 'personal' advice and 'general' advice

If as is claimed, the cost of human-delivered advice is prohibitive, automated advice technologies are clearly the solution for lower balance customers. So it is curious that banks appear to be delaying their introduction.

This is currently manifesting in calls for more clarity around the dividing line between 'personal' and 'general' advice, being one of the reasons for Westpac's appeal against Gleeson J's December 2018 decision in *ASIC v Westpac (see AFR article by James Eyers and Elouise Fowler Future of Advice: boutiques for some, robo-plans for the rest, 20 March 2019).* It's an odd rationale for the appeal, given that the court found that all the information Westpac provided to customers during its super consolidation campaign was either factual information or general advice.

I would have called that a win for Westpac on the general advice front.

Still, Westpac is not alone in its concern about 'general advice'. The Productivity Commissionconsiders it a misleading term, requiring consumers to intuitively understand that general advice is like marketing. It takes a hard line, recommending that 'advice' only be used in association with 'personal advice', i.e. advice that takes personal circumstances into consideration, and that only professional advisers should deliver it.

ASIC agrees that 'no advice' and 'general advice' models are problematic, particularly if product complexity makes personal advice more appropriate, or other factors in the sales process may negatively affect consumer decision making (see ASIC's submission to the Productivity Commission, para 47). The new design and distribution obligations may assist to ensure that products are only distributed to people for whom they are appropriate; but will not provide a complete answer.

Is this really about disclosure obligations?

The debate may be more about semantics if you take the view, **first**, that the function of the 'no' 'general' and 'personal' advice labels are to enable allocation of disclosure obligations, rather than identify the standard of advice required. (Only 'personal advice' attracts the stringent fiduciary duty to prioritise clients' interests and provide appropriate advice.)

And, **second**, regardless of the advice model employed, financial services providers have an all-encompassing obligation to provide their services honestly, efficiently and fairly and cannot engage in misleading or deceptive conduct or make misleading or false representations.

What happened at BT and Westpac?

In *ASIC v Westpac*, BT's call centre staff were drilled in recommending BT's rollover service without explaining that a prudent customer consolidating their superannuation would consider issues such as termination fees, loss of insurance benefits and the feasibility of employer contributions before making a decision.

Instead, Westpac liberally employed 'social proofing', where staff were trained to tell customers that people like them believed that it was better to have their superannuation all in one place to 'potentially' save on fees. Because this was not a sound basis for deciding to rollover superannuation, Gleeson J found that its use by Westpac to provide assurance to customers about the rollover service was not honest, efficient or fair.

The case puts to rest any view that '*caveat emptor*' (buyer beware) applies to 'no' and 'general' advice service models, even though those models do not attract a best interests duty. Businesses employing these models will need to profoundly reconsider their sales strategy and techniques.

You may ask why businesses use these models, when the duty of care is so high? Simply, because they don't have to prepare statements of advice which have historically been perceived as too expensive for simple advice.

Digital technologies will change advice

This is all set to change. Digital technologies can now readily collect and analyse customer information, produce suitable strategic and product recommendations and auto-generate a compliant statement of advice (SoA) in a matter of seconds. While the algorithms to undertake complex holistic advice are a little way off, for the relatively simple scaled advice that is generally provided in ‘no’ or ‘general’ advice scenarios, current technologies are more than adequate.

Indeed, they arguably provide greater protection due to their compliant-by-design approach which meet the following requirements from the outset:

- Identify information as factual, general or personal advice
- Appropriately label and provide appropriate warnings for factual information and general advice
- Clearly scope personal advice and collect sufficient information to form a reliable basis for it
- Record and explain why strategy and product recommendations are suitable for the client.

Longer term these technologies are likely to see a shift to personal advice, making the no / general /personal advice semantics largely irrelevant. In the meantime, financial services providers who adopt them can be more confident of meeting the central obligations of honesty, efficiency and fairness post-Royal Commission, at low incremental cost and minimal reputation risk.

ASIC’s timid response to fixing SOA mess

With all this promise, it is unfortunate that structural impediments persist. The financial advice legal framework was conceived well before 2002 and has barely been updated to accommodate technology developments, let alone, consumer preferences. ASIC’s timid guidance on electronic delivery of financial services falls short and its insistence that the laws are technologically neutral don’t stand up under scrutiny.

Two examples of sorely needed change include flexibility in the provision of Financial Services Guide content and permitting consumers to elect when they require a downloadable confirmation of advice during an online advice session. Currently, a separate SoA is required each time a consumer changes their data. Imagine the confusion for a consumer testing a range of scenarios before arriving at a desired outcome!

The Productivity Commission’s welcome and long overdue call for increased competition in Australia’s Financial System identified regulators as a key component (see page 37). According to them, core regulatory competencies must include the ability to anticipate that financial product design and delivery will change with technology and consumer preferences, and willingness and ability to change regulation accordingly.

One thing is clear. With human advisers reportedly unwilling or unable to cost-effectively service clients with balances lower than c$500,000, increased trust, collaboration and creativity between regulators, technology companies, advice providers and consumer groups will be required to close the increasing advice gap.

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