

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33  
File Number: VID498/2020  
File Title: EQUITY FINANCIAL PLANNERS PTY LTD v AMP FINANCIAL PLANNING PTY LTD  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 26/10/2021 8:34:56 AM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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## Amended Reply

No. VID 498 of 2020

Federal Court of Australia  
District Registry: Victoria  
Division: Commercial

### **Equity Financial Planners Pty Limited**

Applicant

### **AMP Financial Planning Pty Limited**

Respondent

The applicant makes the following reply to the defence filed ~~7 October 2020~~ 22 September 2021 (**Defence**), adopting the terms defined in the amended statement of claim.

1. As to paragraphs 28A(b), 30(b), 33, 42, 46(c) of the Defence – if (which is denied) any of the 8 August 2019 Changes took effect from 8 September 2020, then:
  - (a) Those group members pleaded in paragraphs 35 and 46 of the statement of claim whose exercise dates were between 8 August 2019 and 7 September 2020 (inclusive) are entitled to damages for breach of contract as pleaded in paragraphs 36 and 45 of the amended statement of claim.
  - (b) Further, on 8 August 2019, AMPFP represented to group members that the 8 August 2019 Changes took effect from 8 August 2019.

### **Particulars**

The representation was expressed and was conveyed by:

- (1) The BOLR Policy dated 8 August 2019 published by AMPFP.
- (2) The document titled “AMP Financial Planning – Aligned advice strategy – Questions and answers – 8 August 2019” published by AMPFP.

Filed on behalf of	Equity Financial Planners Pty Ltd, the applicant
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- (c) AMPFP's conduct in making the representation in (b) above was conduct in trade or commerce.
- (d) In the premises, the representation in (b) above was misleading or deceptive, or likely to mislead or deceive.
- (e) By making the representation pleaded in (b) above, AMPFP engaged in conduct in contravention of s. 18 of the Australian Consumer Law.
- (f) Some group members have suffered, or are likely to suffer, loss or damage caused by AMPFP's conduct in making the representation in (b) above.

### Particulars

Prior to 8 August 2019, some group members had lodged applications to access the buyer of last resort facility and had received exercise dates in the period 8 August 2019 to 7 September 2020 (inclusive). In reliance on the representation in (b) above, some group members withdrew those applications or decided not to proceed with those applications. As a result, each of those group members has suffered loss, being the difference between: **(1)** the amount it would have received for its register rights under a ~~BOLR Licensee~~ Buy-Back Agreement at a multiple of 4x entered into on or around the exercise date it had received; and **(2)** the current value (if any) of its register rights (or, in the case of a group member who has received a buyer of last resort payment, the amount actually received by that group member). Alternatively, each of those group members is likely to suffer loss by receiving a buyer of last resort payment calculated based on the 8 August 2019 Changes if and when they lodge a fresh application to access the buyer of last resort facility before 31 December 2021, or if they do not do lodge a fresh application to exercise the buyer of last resort facility by that date, is likely to suffer loss when the BOLR Policy is terminated (subject to transitional provisions) on 31 December 2021.

Further, but for AMPFP's conduct in making the representation in (b) above, some other group members would have lodged an application to invoke the buyer of last resort facility within 1 month of 8 August 2019. Those group members would have received an exercise date that fell due before the 8 August 2019 Changes took effect (in the premises, on 8 September 2020) and would have received, or become entitled to receive, a buyer of last resort payment calculated using a 4x BOLR Multiple. Each of those group members has suffered loss caused by AMPFP's conduct, being the difference between:

- (1) the amount that group member would have received for its register rights under a ~~BOLR Licensee~~ Buy-Back Agreement containing a buyer of last resort payment calculated using a 4x BOLR Multiple; and
- (2) the current value (if any) of that group member's register rights (or, in the case of a group member who has received a buyer of last resort payment, the amount actually received by that group member).

Alternatively, each of those group members is likely to suffer loss by receiving a buyer of last resort payment calculated based on the 8 August 2019 Changes if and when they lodge a fresh application to access the buyer of last resort facility before 31 December 2021, or if they do not do lodge a fresh application to exercise the buyer of last resort facility by that date, when the BOLR Policy is terminated (subject to transitional provisions) on 31 December 2021.

Further, if (which is not admitted) the releases pleaded at paragraph 36(b) of the Defence are effective to release the claims pleaded at paragraph 36 of the statement of claim, AMPFP's conduct in making the representation in (b) above was a cause of some group members entering into the ~~BOLR Licensee~~ Buy-Back Agreements that contained those releases. In the premises, those group members have suffered loss, being the loss of the value of the released claim.

- (g) Pursuant to s. 236 of the Australian Consumer Law, AMPFP is liable to each of the group members in (f) above for the amount of that loss or damage.
  - (h) Alternatively, pursuant to s. 237 or s. 238 of the Australian Consumer Law, AMPFP should be restrained from enforcing the 8 August 2019 Changes against the group members in (f) above for a period of 13 months from the making of orders consequent upon determination of the common questions in this proceeding (or such other period as the Court thinks fit).
2. ~~[Not used] As to paragraph 36(b) of the Defence — if (which is not admitted) the BOLR Licensee Buy-Back Agreements contain the release particularised, then:~~
- ~~(a) The condition precedent to the release (being payment by AMPFP of the BOLR Benefit) has not occurred in circumstances where the amount paid by AMPFP has been calculated having regard to the 8 August 2019 Changes.~~
  - ~~(b) The question of whether the release, on its proper construction, having regard to the equitable principles identified in *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, extends to a release of that group member's claims as pleaded in the~~

~~statement of claim is a question individual to each group member referred to in paragraph 35 of the statement of claim and must be determined at a separate hearing of that group member's claim (if the breach of contract pleaded at paragraph 36(a) of the statement of claim is established).~~

~~(c) The questions of whether that group member is entitled to resist AMPFP's enforcement of the release in respect of that claim on the basis of unconscionable conduct on the part of AMPFP (whether at general law or under s. 21 of the Australian Consumer Law) or under the *Contracts Review Act 1980* (NSW) are questions individual to each group member referred to in paragraph 35 of the statement of claim and must ultimately be determined at a separate hearing of that group member's claim (if the breach of contract pleaded at paragraph 36(a) of the statement of claim is established), but the following matters are relevant to the determination of these questions in the case of some or all such group members:~~

~~(i) AMPFP had no contractual right to require a group member to provide a release of the claims made on its behalf in this proceeding as the price of receiving payment under the buyer of last resort facility;~~

~~(ii) AMPFP did not believe that it possessed such a contractual right;~~

~~(iii) AMPFP adopted a procedure under which AMPFP would not pay a benefit under the buyer of last resort facility unless the group member released AMPFP from the claims made on that group member's behalf in this proceeding.~~

~~Each of the matters in (i)-(iii) is a common question that should be determined at the initial hearing.~~

~~(d) The question of whether that group member is entitled to resist AMPFP's enforcement of the release in respect of that claim on the basis that the release is void as an unfair contract term under s. 23 of the Australian Consumer Law (**ACL**) is a question individual to each group member referred to in paragraph 35 of the statement of claim and must ultimately be determined at a separate hearing of that group member's claim (if the breach of contract pleaded at paragraph 36(a) of the statement of claim is established), but the following matters are relevant to the determination of that question in the case of some or all such group members:~~

~~(i) Each BOLR Licensee Buy-Back Agreement pleaded at paragraph 36(b) of the Defence:~~

- ~~(A) is a standard form contract within the meaning of s. 23(1)(b) of the ACL;~~
- ~~(B) is a contract for a supply of services within the meaning of s. 23(4)(a) of the ACL;~~
- ~~(C) has a duration of more than 12 months within the meaning of s. 23(4)(c)(ii) of the ACL;~~

~~(ii) The release pleaded at paragraph 36(b) of the Defence was not reasonably necessary to protect the legitimate interests of AMPFP.~~

~~Each of the matters in (i)-(ii) is a common question that should be determined at the initial hearing.~~

~~(e) The question of whether AMPFP's misleading and deceptive conduct pleaded at paragraphs 52-56 of the statement of claim or paragraph 1 of this reply was a cause of that group member entering into the BOLR Licensee Buy-Back Agreement containing the release and, if so, whether that group member is thereby entitled to resist AMPFP's enforcement of the release in respect of that claim is a question individual to each group member referred to in paragraph 35 of the statement of claim and must be determined at a separate hearing of that group member's claim (if the breach of contract pleaded at paragraph 36(a) of the statement of claim is established).~~

3. The applicant otherwise joins issue with the Defence.

Date amended: 22 October 2021



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Signed by Chris Pagent  
Lawyer for the Applicant

This pleading was prepared by Chris Pagent, lawyer, and settled by Stuart Lawrance SC and Kate Lindeman of counsel.

**Certificate of lawyer**

I Chris Pagent certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 22 October 2021



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Signed by Chris Pagent  
Lawyer for the Applicant