

NOTICE OF FILING

Details of Filing

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File Title: EQUITY FINANCIAL PLANNERS PTY LTD v AMP FINANCIAL
PLANNING PTY LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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.

The date of the filing of the document is determined pursuant to the Court's Rules.



Second-Third Further Amended Statement of claim

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

This is a representative proceeding brought on behalf of AMP financial planners against AMP Financial Planning Pty Limited (**AMPFP**). AMPFP entered into a contract with each of the financial planners, which provided those planners with a buyer of last resort facility, under which they were, on 12 months' notice (or less in some cases), able to sell back their practices to AMPFP at a multiple of 4x annual ongoing revenue. The terms of the contract between AMPFP and each financial planner permitted AMPFP to change the valuation methodology on 13 months' notice. On 8 August 2019, with no notice to financial planners, AMPFP purported to reduce the multiple to 2.5x (for revenue other than grandfathered commissions), with immediate effect. In so doing, AMPFP purported to rely on a power to amend the buyer of last resort facility in circumstances where an "economic change" had rendered the terms of the facility "inappropriate". In this proceeding, the applicant says that AMPFP's purported exercise of power to reduce the multiple from 4x to 2.5x without notice was ineffective or, alternatively, was a breach of the contract between AMPFP and each financial planner, or alternatively, was unconscionable.

The applicant pleads its case as follows.

1. The applicant is a company registered under the *Corporations Act 2001* (Cth).

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[Form approved 01/08/2011]

2. The applicant brings this proceeding as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on its own behalf and on behalf of all persons who, as at 8 August 2019:
 - a. were a party to an Authorised Representative Agreement (as defined below) with the respondent and were named as the Practice in that Authorised Representative Agreement; and
 - b. had not received a confirmed exercise date (for the purpose of respondent's BOLR Policy (as defined below)) of 8 August 2019 or earlier.
3. There are more than 7 group members.
4. The respondent (**AMPFP**) is a company registered under the *Corporations Act 2001*.

Authorised Representative Agreements

5. AMPFP holds an Australian financial services licence granted under the *Corporations Act 2001*, which permits it to carry on a financial services business.
6. Between January 2004 and 8 August 2019, AMPFP entered into agreements (**Authorised Representative Agreements**) with persons (referred to as **Practices**) wishing to carry on business as financial planners as authorised representatives of AMPFP.

Particulars

There was a different form of Authorised Representative Agreement for corporate entities and sole traders.

Corporate entities

The best particulars the applicant can currently provide are that:

- (1) Between June 2016 and 8 August 2019, the Authorised Representative Agreements were substantially in the form of a document titled "Authorised Representative Agreement (Corporate Practice) - Version 1.4".
- (2) Between June 2015 and May 2016, the Authorised Representative Agreements were substantially in the form of a document titled "Authorised Representative Deed of Agreement (Corporate Practice) - Version 1.3".

- (3) Between April 2010 and May 2015, the Authorised Representative Agreements were substantially in the form of a document titled "Authorised Representative Deed of Agreement (Corporate Practice) – Version 1.2".
- (4) Prior to April 2010, the Authorised Representative Agreements were substantially in the form of a document (Version 1.1), a copy of which is not currently held by the applicant, but the existence of which is referred to in subsequent versions of the Authorised Representative Agreement.

Sole traders

The best particulars the applicant can currently provide are that:

- (5) Between June 2016 and 8 August 2019, the Authorised Representative Agreements were substantially in the form of a document titled "Authorised Representative Agreement (Sole Trader Practice) - Version 1.4".
- (6) Between June 2015 and May 2016, the Authorised Representative Agreements were substantially in the form of a document (Version 1.3), a copy of which is not currently held by the applicant, but the existence of which is referred to in Version 1.4 of the Authorised Representative Agreement.
- (7) Between April 2010 and May 2015, the Authorised Representative Agreements were substantially in the form of a document (Version 1.2), a copy of which is not currently held by the applicant, but the existence of which is referred to in Version 1.4 of the Authorised Representative Agreement.
- (8) Prior to April 2010, the Authorised Representative Agreements were substantially in the form of a document (Version 1.1), a copy of which is not currently held by the applicant, but the existence of which is referred to in Version 1.4 of the Authorised Representative Agreement.

The Authorised Representative Agreements incorporated by reference the terms of other documents, as pleaded in the following paragraphs of this statement of claim.

Further particulars may be provided following discovery.

7. In or around September 2011, the applicant entered into an Authorised Representative Agreement with AMPFP naming the applicant as the Practice.
8. On or prior to 8 August 2019, each group member entered into an Authorised Representative Agreement with AMPFP naming the group member as the Practice.
9. It was a term of each Authorised Representative Agreement that the Master Terms (as defined in the particulars below) formed part of the agreement between the Practice and AMPFP.

Particulars

The best particulars that the applicant can currently provide are that the Master Terms were incorporated by:

- (1) Clause 4.1 in Version 1.4 of the Authorised Representative Agreement (Corporate Practice).
- (2) Clause 4.1 in Version 1.4 of the Authorised Representative Agreement (Sole Trader).
- (3) Clause 3.1 in Version 1.3 of the Authorised Representative Agreement (Corporate Practice).
- (4) Clause 3.1 in Version 1.2 of the Authorised Representative Agreement (Corporate Practice).

Further particulars will be provided following discovery.

The **Master Terms** are the document entitled “Authorised Representative Deed of Agreement – Master Terms” (or similar) maintained by AMPFP and:

- (5) between June 2015 and 8 August 2019, the Master Terms were in the form of a document titled “Authorised Representative Deed of Agreement – Master Terms - Version 1.3”;
- (6) between April 2010 and May 2015, the Master Terms were in the form of a document titled “Authorised Representative Deed of Agreement – Master Terms - Version 1.2”;

- (7) between January 2004 and March 2010, the Master Terms were in the form of an earlier document, a copy of which is not currently held by the applicant, but the existence of which is referred to in Version 1.2 of the Master Terms.

Further particulars may be provided following discovery.

10. It was a term of the Master Terms that they (and thereby each Authorised Representative Agreement) incorporated by reference the terms of the Practice Documents referred to in the Master Terms.

Particulars

- (1) In Version 1.2 of the Master Terms – definition of “Agreement”; definition of “Master Terms”; clause 2.1.
- (2) In Version 1.3 of the Master Terms – definition of “Agreement”; definition of “Master Terms”; clause 2.2(c).

Further particulars may be provided following discovery.

11. At all material times after January 2004, one of the Practice Documents referred to in the Master Terms (and thereby incorporated into the terms of each Authorised Representative Agreement) was the Register and Buyer of Last Resort Policy, as published by AMPFP, or otherwise notified by AMPFP to Practices, from time to time (**BOLR Policy**).

Particulars

The best particulars that the applicant can currently provide as to the documents that set out the terms of the BOLR Policy from time to time prior to 8 August 2019 are:

- (1) Register and Buyer of Last Resort (BOLR) Policy effective date 7 January 2009
- (2) Register and Buyer of Last Resort (BOLR) Policy effective date 1 February 2010
- (3) Register and Buyer of Last Resort (BOLR) Policy effective date 1 July 2010
- (4) Register and Buyer of Last Resort (BOLR) Policy effective date 23 September 2010

- (5) Register and Buyer of Last Resort (BOLR) Policy effective date 1 July 2012
- (6) Register and Buyer of Last Resort (BOLR) Policy effective 1 June 2017

Further particulars may be provided following discovery.

12. The following were terms of each Authorised Representative Agreement:
- a. AMPFP would give the Practice an authorisation to provide financial services as an authorised representative of AMPFP.
 - b. AMPFP would create a client register for the Practice.
 - c. The client register for the Practice would record the name and address of each client of AMPFP for which AMPFP considered the Practice to be the servicing practice of that client.
 - d. AMPFP would retain the relationship with those clients that were introduced to, and serviced by, the Practice while being an authorised representative of AMPFP.
 - e. AMPFP granted the Practice certain rights (**register rights**) in respect of clients of AMPFP who were listed on the client register for that Practice, including:
 - i. the right to contact and provide advice and other financial services to the client;
 - ii. the right to access the client's files and records for the purpose of contacting and providing that advice or those financial services;
 - iii. the right to receive payments, such as fees for service or commissions, in accordance with the Authorised Representative Agreement, in return for providing that advice or those financial services.
 - f. The Practice was able to realise the value of its register rights by:
 - i. completing a practice-to-practice transfer (where the Practice would seek AMPFP's approval to surrender its register rights and transfer some or all of the clients on its client register to another practice and for AMPFP to appoint the other practice as the servicing

practice for those clients, in return for a payment from that other practice); or

- ii. applying to AMPFP for a buyer of last resort benefit under the BOLR Policy.

Particulars

Authorised Representative Agreement (Corporate Practice) – Version 1.4, clause 3.1; Authorised Representative Agreement (Sole Trader) – Version 1.4, clause 3.1. BOLR Policy effective 1 June 2017, pages 3-4. Earlier iterations of the Authorised Representative Agreements and the BOLR Policy contained terms to the same effect.

13. In and from June 2015, the following were terms of the Master Terms (and therefore were also terms of each Authorised Representative Agreement):
- a. **(clause 3.2(b))** AMPFP had the power to change, update or issue new provisions of the Practice Documents, including the BOLR Policy, from time to time.
 - b. **(clause 3.2(c))** Prior to making any change to any Practice Document (including the BOLR Policy) that, in the reasonable opinion of AMPFP, would have an adverse financial or other significant effect on the Practice, AMPFP was required to consult with the AMP Financial Planners Association Incorporated (**ampfpa**).
 - c. **(clause 1.4)** The requirement to consult in clause 3.2(c) did not impose any obligation on AMPFP to reach any agreement with **ampfpa** but AMPFP was required to:
 - i. give **ampfpa** reasonable prior notice about the proposed change having regard to the urgency with which the change must be made;
 - ii. advise **ampfpa** about the proposed timetable for when the change would come into effect;
 - iii. explain why AMPFP considered that the change was required and its implications for Practices as a whole; and
 - iv. consider (in good faith), but not necessarily accept, any responses, options or alternatives offered by **ampfpa** about the change, provided always that such responses, options or alternatives were

provided to AMPFP promptly having regard to AMPFP's timetable for when the change would come into effect.

14. As at 8 August 2019, it was a term of the BOLR Policy (and thereby a term of each Authorised Representative Agreement) that:
- a. Unless a shorter period of notice was agreed to by ampfp, AMPFP would give 13 months' notice of a change to the valuation methodology for registers and any other change to the BOLR Policy having a materially adverse financial or other significant effect on a Practice.
 - b. Subject to (a) above, AMPFP could make any other changes to the BOLR Policy following consultation with ampfp.
 - c. If legislation, economic or product changes occurred that rendered any part of the BOLR Policy inappropriate, then AMPFP could make any change to the BOLR Policy that was reasonably necessary to make the BOLR Policy appropriate in the light of those changes, provided AMPFP first consulted with ampfp in good faith about the change (but without the need to give 13 months' notice).

(BOLR Amendment Term)

14A. It was a term of the BOLR Policy (and thereby a term of each Authorised Representative Agreement) that, in exercising its rights and performing its obligations under the BOLR Policy, AMPFP was required to act in good faith and reasonably, including in exercising the BOLR Amendment Term.

Particulars

The obligation on AMPFP to act in good faith and reasonably arises:

- (a) as an express term of the BOLR Policy effective 1 June 2017;
alternatively
- (b) as an implied term.

Primary contractual claim

15. As at 8 August 2019, on their proper construction, each Authorised Representative Agreement empowered AMPFP to make a change to the BOLR Policy which would, in AMPFP's reasonable opinion, have an adverse or other significant effect on the applicant's practice (including any change to the valuation methodology for registers) *only if*:

- a. AMPFP had first *consulted* with amfpfa about the proposed change (within the meaning of the expression as set out in clause 1.4 of the Master Terms); and
- b. after such consultation, AMPFP had given to the Practices (or amfpfa, on their behalf) 13 months' notice of the proposed change, *except* where the change was required because legislation, economic or product changes had rendered part of the BOLR Policy inappropriate (**LEP Exception**), in which case AMPFP could make the change without notice to the Practices (or amfpfa, on their behalf), provided that AMPFP had first *consulted* with amfpfa about the proposed change.

16. As at 8 August 2019⁷:

a. on the proper construction of the express terms of the BOLR Policy and/or the Master Terms; alternatively

b. it was an implied term of the BOLR Policy (and therefore a term of each Authorised Representative Agreement) that,

in order validly to exercise the power to amend described in paragraph [15] above by invoking the LEP Exception, AMPFP was required to identify to Practices or, further or in the alternative, was required to identify to amfpfa, the legislation, economic or product changes in response to which the power was being exercised.

Particulars

~~This~~ Insofar as the term is implied, it is implied in fact and/or by law to give the agreement business efficacy. Insofar as the terms is express, it arises on the proper construction of the words of the BOLR Policy and/or clause 1.4(c) of the Master Terms, or alternatively, as an incident of the term referred to in paragraph [14(a)] above.

17. As at 8 August 2019, the following were terms of the BOLR Policy (and therefore were also terms of each Authorised Representative Agreement):

- a. AMPFP would provide the Practice with a buyer of last resort facility on the terms outlined in the BOLR Policy.

Particulars

BOLR Policy effective 1 June 2017, page 6.

- b. The Practice could invoke the buyer of last resort facility by lodging an application with AMPFP.

Particulars

BOLR Policy effective 1 June 2017, page 4, page 9.

- c. If the Practice lodged an application to invoke the buyer of last resort facility and the Practice was eligible, AMPFP would confirm an exercise date. Absent special circumstances, the exercise date would be no more than 12 months from the date on which the application was lodged.

Particulars

BOLR Policy effective 1 June 2017, page 4, page 7, page 9, page 10.

- d. The Practice would only be eligible to receive a buyer of last resort payment if:
 - i. the Practice satisfied the Eligibility Criteria set out on pages 6-7 of the BOLR Policy effective 1 June 2017; and
 - ii. at the time of termination of the Authorised Representative Agreement, the practice had been an authorised representative of AMPFP for at least 4 years.

Particulars

BOLR Policy effective 1 June 2017, page 4, pages 6-7.

- e. Subject to the other terms of the BOLR Policy, the buyer of last resort payment made by AMPFP to the Practice would be a sum equal to a multiple (**BOLR Multiple**) of the annual ongoing revenue received by the Practice in the 12 months preceding the exercise date. The BOLR Multiple was 4x.

Particulars

BOLR Policy effective 1 June 2017, pages 8-9.

- f. AMPFP had the right to apply a discretionary discount to the amount of the buyer of last resort payment if, in AMPFP's reasonable opinion, it was reasonable to do so.

Particulars

BOLR Policy effective 1 June 2017, page 5.

- g. Subject to the Practice's eligibility, AMPFP would:
- i. prior to the exercise date, on the exercise date, or within a reasonable time thereafter (and in any event before the offer made pursuant to ii below) provide the Practice with a register valuation for the purpose of calculating the payment to be made under the buyer of last resort facility, which valuation would be calculated based on a BOLR Multiple of 4x; and
 - ii. on or soon after the exercise date, (and in any event within a reasonable time after the exercise date), AMPFP would offer to enter into a BOLR Licensee Buy-Back Agreement with the Practice and each equity holder in the Practice, under which:
 1. the Practice would agree to surrender its register rights to AMPFP in exchange for the payment to be made by AMPFP under the buyer of last resort facility;
 2. AMPFP would agree to pay the buyer of last resort payment to the Practice calculated by AMPFP using a register valuation with a BOLR Multiple of 4x (which register valuation the Practice had accepted), subject to (amongst other things) the termination of the Authorised Representative Agreement;
 3. AMPFP would agree to pay the buyer of last resort payment by way of two payments – an Initial Payment (being either 80% or 50% of the buyer of last resort payment) and a Deferred Payment (being either 20% or 50%);
 4. the Initial Payment would be paid by AMPFP on or shortly after the exercise date;
 5. the Deferred Payment would be paid by AMPFP either 6 or 12 months after the exercise date.

Particulars

BOLR Policy effective 1 June 2017, page 4, page 6, page 8, page 11 and page 15; form of Buyer of Last Resort Licensee Buy-Back Agreement published by AMPFP.

BOLR Process effective 1 June 2017, pages 12-13;
alternatively BOLR Process effective 8 August 2019,
page 13.

- h. In exercising their rights and performing their obligations under the buyer of last resort facility, AMPFP and the Practice would act in good faith.

Particulars

BOLR Policy effective 1 June 2017, page 3.

18. On 30 May 2019, the applicant lodged an application to invoke the buyer of last resort facility.
19. On 14 June 2019, AMPFP confirmed an exercise date of 1 December 2019 in respect of the application pleaded in the previous paragraph.

8 August 2019 Changes

20. On 8 August 2019, in purported exercise of the power described in paragraph [15] above, AMPFP purported to amend the BOLR Policy with immediate effect by (amongst other things):
- a. Reducing the BOLR Multiple from 4x to 1.42x insofar as it applies to grandfathered commission revenue earned by the Practice.
(**Grandfathered commission revenue** is any monetary benefit which would otherwise be banned under the *Corporations Act 2001* as conflicted remuneration but for the fact that it is paid pursuant to an arrangement grandfathered under Subdivision 5 of Division 4 of Part 7.7A of the Corporations Regulations 2001.)
 - b. Providing for further reductions in the BOLR Multiple, insofar as it applies to grandfathered commission revenue earned by the Practice, from 1.42x to 0x over the period 1 September 2019 to 1 December 2020.
 - c. Otherwise reducing the BOLR Multiple from 4x to 2.5x.

(8 August 2019 Changes).

21. Each of the 8 August 2019 Changes was, in AMPFP's reasonable opinion:
- a. a change to the valuation methodology for registers as referred to in the BOLR Policy; and/or
 - b. a change having a materially adverse financial effect on, or otherwise having a significant effect on, Practices.

The 8 August 2019 Changes were ineffective because AMPFP failed to consult

22. Prior to 8 August 2019, AMPFP had the following dealings with amfpfa in relation to a possible change in the BOLR Multiple:
- a. On 8 February 2019, Mr Michael Paff (the managing director of AMPFP) sent an email and attached a paper to Mr Neil Macdonald and Mr Damien Jordan (both of amfpfa) which proposed changes to the BOLR Multiple, being changes different from the 8 August 2019 Changes (and relating only to a change to the multiple applicable to grandfathered commissions), and requested feedback by no later than 4 PM on 13 February 2019.
 - b. On 14 February 2019, Johnson Winter & Slattery, on behalf of amfpfa, sent a letter to Mr David Cullen (General Counsel of AMP Limited), rejecting the proposed changes.
 - c. In or around the week beginning 18 February 2019, representatives of AMPFP and amfpfa participated in a without prejudice meeting.
 - d. On 25 July 2019, representatives of AMPFP and amfpfa met at AMP's offices in Sydney. No materials were provided by AMPFP prior to the meeting, other than drafts of a nondisclosure agreement, which were provided on the preceding night.
 - e. At the meeting on 25 July 2019, AMPFP gave a PowerPoint presentation that outlined the proposed 8 August 2019 Changes, save that a range of 2.0-2.5x appeared in lieu of the BOLR Multiple of 2.5x that ultimately formed part of the 8 August 2019 Changes. The amfpfa representatives requested a copy of the PowerPoint presentation, but none was provided.
 - f. On 26 July 2019, after the close of business (at around 6pm), AMPFP provided Mr Neil Macdonald, Mr Damien Jordan and Mr Scott Weeks with a memorandum from Mr David Akers (Managing Director, Business Partnerships for AMPFP) that outlined the proposed 8 August 2019

Changes, save that a range of 2.0-2.5x appeared in lieu of the BOLR Multiple of 2.5x that ultimately formed part of the 8 August 2019 Changes (**Akers Memorandum**).

- g. The Akers Memorandum (amongst other things):
 - i. Stated that AMPFP proposed to announce changes to the BOLR Multiple (with immediate effect) as a matter of urgency on 8 August 2019.
 - ii. Imposed a deadline for any feedback from ampfp of noon on Tuesday, 6 August 2019.
 - h. On 28 July 2019, Mr Damien Jordan (of ampfp) sent Mr Akers an email in which he said, amongst other things, that ampfp needed more time in order to provide feedback on the proposed changes.
 - i. On 30 July 2019, Mr Akers responded to Mr Jordan and said, amongst other things, that AMPFP intended to announce the proposed changes to the BOLR Multiple as a matter of urgency on 8 August 2019 and intended to do so even if ampfp did not respond to the materials in the Akers Memorandum.
23. The deadline for feedback imposed by the Akers Memorandum did not afford ampfp a reasonable time within which to obtain advice on, consider, and respond to AMPFP's proposal to change the BOLR Multiple.
24. A reasonable period for ampfp to obtain advice on, consider, and respond to AMPFP's proposal to change the BOLR Multiple was no less than 12 weeks from the provision of the Akers Memorandum on 26 July 2019.
25. The deadline for feedback imposed by the Akers Memorandum:
- a. was imposed for the purposes of allowing AMP Limited:
 - i. to announce the changes to the BOLR Multiple when AMP Limited released its half-yearly results on 8 August 2019;
 - ii. to reduce the provisions and impairments in its financial statements in time to announce an institutional share placement and share purchase plan on 8 August 2019;
 - b. was not imposed by AMPFP by reference to a circumstance created by the purported economic change pleaded at paragraph [32.a] below;

- c. was not based on a genuine estimate by AMPFP of the time that would reasonably be required by ampfp to obtain advice on, consider, and respond to the proposed changes.
26. Throughout the period from 25 July 2019 to 8 August 2019, AMPFP intended to proceed with the proposed changes to the BOLR Multiple irrespective of any feedback provided by ampfp.

Particulars

The best particulars the applicant can currently provide are that that state of mind on the part of AMPFP is to be inferred from the following matters:

- (1) The fact that AMPFP did not afford ampfp a reasonable time to obtain advice on, consider, and respond to the proposed changes.
- (2) Mr Akers' refusal to allow ampfp more time to respond to the proposed changes.
- (3) AMPFP's statements that it intended to announce the proposed changes as a matter of urgency on 8 August 2019.
- (4) Reducing the BOLR Multiple was one of the major strategic initiatives announced by AMP Limited on 8 August 2019: see page 33 of the presentation given by Mr Francesco de Ferrari (CEO) and Mr Gordon Lefevre (CFO) and released to the ASX prior to 8 am on 8 August 2019. It may be inferred that that major strategic initiative had been resolved upon by AMP Limited and AMPFP substantially in advance of 8 August 2019.
- (5) AMP Limited released its 1H19 results and half-yearly report prior to 8 am on 8 August 2019. The financial report included a provision of \$93 million in respect of AMPFP's contingent liabilities under the BOLR Policy, which provision had been calculated in accordance with the 8 August 2019 Changes to the BOLR Multiple. It may be inferred that AMPFP had informed AMP Limited of the changes substantially in advance of 8 August 2019. Further, it may be inferred that AMPFP and/or AMP Limited had informed AMP Limited's auditors (Ernst & Young) of the changes substantially in advance of 8 August 2019.

- (6) On 8 August 2019, AMP Limited announced a fully underwritten \$650 million institutional share placement and a non-underwritten share purchase plan. The institutional share placement was underwritten by Credit Suisse and UBS. It may be inferred that AMP Limited had been planning the institutional share placement and share purchase plan since substantially before 8 August 2019 and, further, that in the course of preparing the institutional share placement and share purchase plan and in the course of preparing information to be provided to prospective underwriters had made decisions concerning changes to the BOLR Multiple, as those changes would affect the provisions and impairments in financial information to be provided to prospective underwriters and to be released in connection with the institutional share placement and share purchase plan.
- (7) The Akers Memorandum falsely asserted that AMPFP had been consulting with ampfpa in relation to the proposed changes since February 2019 when, in fact, no substantive consultation had occurred regarding the proposed 8 August 2019 Changes between around late February 2019 and 25 July 2019.

Further particulars will be provided following discovery.

27. By virtue of the matters pleaded at paragraphs [22]-[26] above, AMPFP did not consult with ampfpa within the meaning of the expression as set out in clause 1.4 of the Master Terms, or in accordance with the term referred to in paragraph [14(a)] above, in good faith about the 8 August 2019 Changes.
28. In the premises, AMPFP's purported exercise of the power described in paragraph [15] above was ineffective to amend the BOLR Policy to introduce the 8 August 2019 Changes.
29. AMPFP will, unless restrained, purport to give effect to the 8 August 2019 Changes in its dealings with Practices.

The 8 August 2019 Changes were ineffective in any event because other conditions for the exercise of the power to amend had not been satisfied

30. AMPFP did not give Practices 13 months' notice of any of the 8 August 2019 Changes.

31. AMPFP did not identify to Practices the economic change in response to which the power to amend described in paragraph [15] was being exercised.

Particulars

The relevant passage of AMPFP's communication to Practices on 8 August 2019 said:

8. Why are the changes to Buyer of last resort valuations happening?

We have an ongoing responsibility to our clients and our shareholders to build a sustainable advice model that works for advice practices and for AMPFP.

There has been an economic change which has resulted in a quantifiable decrease in the market value of register rights linked to ongoing revenue, including in respect of grandfathered commissions. This change has meant that it is inappropriate for AMPFP to continue to pay 4x valuation on ongoing revenue as AMPFP is unable to sell register rights at this rate.

Accordingly, it is not economically viable to continue to value ongoing revenue at a multiple of 4x.

That communication did not identify the economic change relied on.

32. Further or in the alternative to paragraph [31] above:
- a. The purported economic change in response to which AMPFP purported to exercise the power to amend described in paragraph [15] above, and which AMPFP communicated to Practices, was a quantifiable decrease in the market value of register rights linked to ongoing revenue.
 - b. On the proper construction of each Authorised Representative Agreement, a quantifiable decrease in the market value of register rights linked to ongoing revenue:
 - i. was not an "economic change" for the purpose of the BOLR Amendment Term; and/or
 - ii. was not an economic change that rendered any part of the BOLR Policy "inappropriate" for the purpose of the BOLR Amendment Term.

c. The 8 August 2019 Changes were not reasonably necessary to be made in order to render the BOLR Policy appropriate in the light of a quantifiable decrease in the market value of register rights linked to ongoing revenue.

d. If, which is denied, AMPFP is able to rely on the alleged alternative material change in the supply of and demand for financial advice services and practices as the economic change which entitled it to exercise the power to amend described in paragraph [15] above, that alleged change, on the proper construction of each Authorised Representative Agreement:

i. was not an “economic change” for the purpose of the BOLR Amendment Term; and/or

ii. was not an economic change that rendered any part of the BOLR Policy “inappropriate” for the purpose of the BOLR Amendment Term; and/or

e. the 8 August 2019 Changes were not reasonably necessary to be made in order to render the BOLR Policy appropriate in light of a material change in the supply of and demand for financial advice services and practices.

33. In the premises, even if AMPFP had discharged its obligation to consult with AMPFP in relation to the 8 August 2019 Changes (which is denied), AMPFP’s purported exercise of the power described in paragraph [15] above was ineffective to amend the BOLR Policy to introduce the 8 August 2019 Changes.

34. AMPFP will, unless restrained, purport to give effect to the 8 August 2019 Changes in its dealings with Practices.

AMPFP failed to act in good faith and reasonably in purporting to exercise the power in the BOLR Amendment Term

34A. The purpose of the LEP Exception was to enable AMPFP to make immediate changes:

a. to the BOLR Policy should legislative, economic or policy changes render any part of the BOLR Policy inappropriate, following consultation with ampfa;

b. that were reasonably necessary to render the BOLR Policy appropriate;

c. alternatively to b, responsive to the inappropriateness.

34B. Further or alternatively to [36], [38], [45] and/or [48], AMPFP made the 8 August 2019 Changes without 13 months' notice in purported reliance on the LEP Exception in furtherance of some or all of the following purposes:

- a. the reshaping of AMP's advice business towards:
 - i. the direct servicing of clients on AMPFP registers rather than on-selling those client registers;
 - ii. a substantially smaller network of financial planners; and
 - iii. the subsequent removal of institutional ownership and the BOLR Policy;
- b. removing the premium to the external market value of register rights that was payable by AMPFP under the BOLR Policy;
- c. reducing AMPFP's capital exposure or actual or contingent liabilities under, or in connection with, the BOLR Policy and avoiding, or seeking to minimise, any impairment to the carrying value of register rights held by AMPFP;
- d. reducing the value of AMPFP's buy-back obligations to Practices that had already submitted a BOLR application and/or who were likely to submit BOLR applications if the 8 August 2019 Changes were introduced on 13 months' notice;
- e. reducing the cost of exiting certain Practices that AMPFP did not wish to retain in the network and controlling the selection of Practices which AMPFP did wish to retain in the network; and/or,
- f. achieving some or all of the purposes in (a) to (e) above, while avoiding a 'run' on BOLR in which Practices sought to exit the AMPFP network with a payment calculated at a multiple of 4x (before deductions applied by AMPFP).

34C. Each of the purposes in paragraph 34B above was improper in that it was ulterior to the purpose of the LEP Exception for dispensing with 13 months' notice.

34D. In the premises:

- a. AMPFP failed to act in good faith and reasonably in purporting to exercise the BOLR Amendment Term; and

b. accordingly, the 8 August 2019 Changes were ineffective.

34E. Alternatively to paragraph [34D], in the premises:

a. AMPFP breached the term referred to in paragraph [14A] above by making the 8 August 2019 Changes; and

b. the Applicant and some group members have suffered loss and damage.

Particulars

The applicant refers to and repeats the particulars to paragraph 46 below.

Group members who lodged a BOLR application and subsequently received a BOLR payment calculated based on the 8 August 2019 Changes

35. Some group members:

- a. lodged an application to access the buyer of last resort facility; and
- b. received an exercise date after 8 August 2019; and
- c. received an offer from AMPFP to enter into an agreement that provided for a buyer of last resort payment in exchange for the surrender of the group member's register rights (**Buy-Back Agreement**) with a buyer of last resort payment that was calculated based on the 8 August 2019 Changes or otherwise calculated based on a multiple of less than 4x; and
- d. proceeded to enter into a Buy-Back Agreement on those terms; and
- e. surrendered their register rights in return for a buyer of last resort payment that was calculated based on the 8 August 2019 Changes.

Particulars

Particulars of those group members will be provided following the initial hearing.

AMPFP entered into different versions of the Buy-Back Agreement with different group members. The best particulars the applicant can currently give are that:

- (1) Some group members entered into an agreement titled "Licensee Buy Back Agreement"; and
- (2) Some group members entered into an agreement titled "Buyback and Cooperation Deed".

36. In the case of each group member referred to in the previous paragraph:
- a. AMPFP, by offering to enter into a Buy-Back Agreement with a buyer of last resort payment calculated based on the 8 August 2019 Changes (and/or failing to offer to enter into a Buy-Back Agreement with a buyer of last resort payment calculated using a multiple of 4x) breached the term of the Authorised Representative Agreement pleaded at [17.g] above; and/or the term pleaded at paragraph [14A] above; and
 - b. in the case of some of those group members, but for that breach of contract by AMPFP, that group member would have entered into a Buy-Back Agreement with a buyer of last resort payment calculated using a multiple of 4x;
 - c. as a result, that group member has suffered loss caused by AMPFP's breach of contract.

Group members who lodged a BOLR application but decided not to enter into a Buy-Back Agreement because of the 8 August 2019 Changes

37. The applicant and ~~S~~some group members:
- a. lodged an application to access the buyer of last resort facility; and
 - b. received an exercise date after 8 August 2019; and
 - ba. received a register valuation from AMPFP which was not calculated based on a multiple or 4x, but rather based on a lower multiple or multiples, and decided not to accept it;
 - bb. further or alternatively to (ba), received a register valuation from AMPFP more than a reasonable period after their exercise date, and decided not to accept it;
 - c. received an offer from AMPFP to enter into a Buy-Back Agreement with a buyer of last resort payment that was calculated based on the 8 August 2019 Changes, and decided not to accept it; and
 - ca. further or alternatively to (c), received an offer to enter into a Buy-Back Agreement more than a reasonable time after the exercise date, and decided not to accept it;
 - d. ~~decided not to enter into a Buy-Back Agreement on those terms~~ alternatively to (ba) to (ca), never received;

- i. a register valuation from AMPFP, despite a reasonable period after their exercise date having elapsed; alternatively
 - ii. an offer to enter into a Buy-Back Agreement from AMPFP, despite a reasonable period after their exercise date having elapsed; and
- e. would have:
- i. accepted a register valuation had it been based on a multiple of 4x and provided to them by AMPFP before, on or within a reasonable period after the exercise date; and
 - ii. entered into a Buy-Back Agreement had it been offered to them by AMPFP before, on or within a reasonable time after, the exercise date and on terms where the buyer of last resort payment was calculated based on a multiple of 4x; and
- f. ~~have experienced a decline in revenue as against the 12 months preceding the exercise date referred to in (b) above.~~

Particulars

Applicant

- i. On 19 November 2019, AMPFP provided to the applicant a register valuation for the purposes of calculating the payment to be made to the applicant under the buyer of last resort facility, which was not calculated based on a BOLR Multiple of 4x, but rather on the basis that the 8 August Changes were effective. [AMP.5800.0054.1327 and AMP.5800.0054.1328]
- ii. On 11 August 2020, AMPFP provided to the applicant a register valuation for the purposes of calculating the payment to be made under the buyer of last resort facility, which was not calculated based on a BOLR Multiple of 4x, but rather on the basis that the 8 August Changes were effective. AMP.5800.0101.1514 and AMP.5800.0101.1515]
- iii. For the purposes of the applicant's BOLR application, a reasonable period of time after the applicant's exercise date for AMPFP to comply with the term pleaded at paragraph 17(g)(i) expired no later than 17 August 2020. AMPFP failed to provide to the applicant on or before 17 August 2020 a register valuation for the purposes of calculating the payment to be made

to the applicant under the buyer of last resort facility which was calculated based on on a BOLR Multiple of 4x.

- iv. For the purposes of the applicant's BOLR application, a reasonable period of time after the applicant's exercise date for AMPFP to comply with the term pleaded at paragraph 17(g)(ii) expired no later than 31 August 2020. AMPFP failed to provide to the applicant on or before 31 August 2020 an offer to enter into a Buy-Back Agreement on terms where the buyer of last resort payment to be made to the applicant had been calculated based on a BOLR Multiple of 4x.

Group Members

Particulars of those group members will be provided following the initial hearing.

38. In the case of the applicant and each group member referred to in the previous paragraph:
- a. AMPFP, by:
- i. offering the applicant and some group members a register valuation for the purposes of calculating the payment to be made under the buyer of last resort facility, which was not calculated based on a BOLR Multiple of 4x, but rather based on a lower multiple or multiples; and/or
- ii. failing to offer to the applicant and some group members before, on, or within a reasonable period after, their exercise date, a register valuation for the purposes of calculating the payment to be made under the buyer of last resort facility, which was calculated based on a BOLR Multiple of 4x;
- iii. offering to enter into a Buy-Back Agreement-with a buyer of last resort payment calculated based on the 8 August 2019 Changes; {and/or
- iv. failing to offer to enter into a Buy-Back Agreement with a buyer of last resort payment calculated using a multiple of 4x} before, on or a reasonable time after their exercise date,

breached the term of the Authorised Representative Agreement pleaded at [17.g] above and/or the term pleaded at paragraph [14A] above;

- b. but for ~~that breach~~ those breaches of contract by AMPFP, ~~that the applicant and each of those~~ group members would have entered into a Buy-Back Agreement with a buyer of last resort payment calculated using a multiple of 4x;
- c. as a result, ~~that the applicant and each of those~~ group members ~~has~~ have suffered loss caused by AMPFP's breach of contract, being the difference between: **(1)** the amount it would have received for its register rights under a Buy-Back Agreement at a multiple of 4x entered into on or around the exercise date referred to at [37.b] above; and **(2)** the current value of its register rights.

First alternative contractual claim

- 39. In the alternative to paragraph [15] above, if, as at 8 August 2019, on their proper construction, the Authorised Representative Agreements, by clause 3.2(b) of the Master Terms, empowered AMPFP to make a change to the BOLR Policy which would, in AMPFP's reasonable opinion, have an adverse or other significant effect on the Practices, *provided that* AMPFP first consulted with amfpfa about the change, but *regardless* of whether the conditions in the BOLR Amendment Term had been satisfied, then, on the proper construction of each Authorised Representative Agreement, the BOLR Amendment Term and/or the term pleaded in paragraph [14A] above constituted a promise by AMPFP to each Practice as to the manner in which AMPFP would exercise its power to amend when making amendments to the BOLR Policy.
- 40. Each of the 8 August 2019 Changes was a change to the BOLR Policy that, in the reasonable opinion of AMPFP, would have an adverse financial effect on Practices or would have a significant effect on Practices.

The 8 August 2019 Changes were ineffective because AMPFP failed to consult

- 41. By virtue of the matters pleaded at paragraphs [22]-[26] above, AMPFP failed to consult with amfpfa about the 8 August 2019 Changes as required by clause 3.2(c) of the Master Terms.
- 42. In the premises, AMPFP's purported exercise of power was ineffective under clause 3.2(b) of the Master Terms to amend the BOLR Policy to introduce the 8 August 2019 Changes.

43. AMPFP will, unless restrained, purport to give effect to the 8 August 2019 Changes in its dealings with Practices.

44. The applicant repeats paragraphs [35] to [38] above.

If the 8 August 2019 Changes are effective, then AMPFP breached the Authorised Representative Agreements in making them

45. In the alternative to paragraphs [15] and [39] above, if AMPFP discharged its obligation to consult with ampfp (which is denied), and if therefore the introduction of the 8 August 2019 Changes was a valid exercise of power by AMPFP under clause 3.2(b) of the Master Terms, then, by making the 8 August 2019 Changes without giving 13 months' notice to Practices, AMPFP breached the BOLR Amendment Term by virtue of the matters set out in paragraphs [31] to [32] above.

46. The applicant has, and some group members have, suffered loss as a result of AMPFP's breach of contract pleaded in paragraph [45] above.

Particulars

Part I: The applicant

AMPFP and the applicant have not entered into a Buy-Back Agreement.

AMPFP has refused, and refuses, to offer to enter into a Buy-Back Agreement with the applicant containing a buyer of last resort payment based on a 4x BOLR Multiple.

If AMPFP had given 13 months' notice of the 8 August 2019 Changes, then the applicant's exercise date of 1 December 2019 would have fallen due before the 8 August 2019 Changes took effect and AMPFP ~~would~~ should have offered to enter into a Buy-Back Agreement with the applicant containing a buyer of last resort payment based on a 4x BOLR Multiple. The applicant has suffered loss caused by AMPFP's breach of contract, being the difference between:

- (a) the amount that the applicant would have received for its register rights under a Buy-Back Agreement containing a buyer of last resort payment based on a 4x BOLR Multiple; and
- (b) the amount that the applicant is entitled to receive (under the BOLR Policy as amended by the 8 August 2019 Changes) in return for its

register rights (alternatively, the current value of the applicant's register rights).

Part II: Group members who, prior to 8 August 2019, had lodged a BOLR application

As regards group members who, prior to 8 August 2019, had lodged an application to invoke the buyer of last resort facility – if AMPFP had given 13 months' notice of the 8 August 2019 Changes, then those group members' exercise dates would have fallen due before the 8 August 2019 Changes took effect and AMPFP would have offered to enter into Buy-Back Agreements with those group members containing buyer of last resort payments based on a 4x BOLR Multiple. Each of those group members has suffered loss caused by AMPFP's breach of contract, being the difference between:

- (a) the amount that that group member would have received for its register rights under a Buy-Back Agreement containing a buyer of last resort payment based on a 4x BOLR Multiple; and
- (b) the amount that that group member has received or is entitled to receive (under the BOLR Policy as amended by the 8 August 2019 Changes) in return for its register rights (alternatively, the current value of that group member's register rights).

Part III: Group members who, prior to 8 August 2019, had not lodged a BOLR application

As regards group members who, prior to 8 August 2019, had not lodged an application to invoke the buyer of last resort facility – if AMPFP had given 13 months' notice of the 8 August 2019 Changes, then:

- (a) some of those group members would have lodged an application to invoke the buyer of last resort facility within 1 month of AMPFP's giving that notice;
- (b) those group members in (a) above would have received an exercise date that fell due before the 8 August 2019 Changes would take effect and would have received, or become entitled to receive, a buyer of last resort payment calculated using a 4x BOLR Multiple;

Each of the group members in (a) above has suffered loss caused by AMPFP's breach of contract, being the difference between:

- (i) the amount that group member would have received for its register rights under a Buy-Back Agreement containing a buyer of last resort payment calculated using a 4x BOLR Multiple; and
- (ii) the current value 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).

Part IV: Group members who lodged a BOLR application on or after 8 August 2019 but in time to receive an exercise date before 8 September 2020

Group members who lodged a BOLR application on or after 8 August 2019 but in time to receive an exercise date before 8 September 2020 have suffered the same loss as the group members in Part II above.

Second alternative contractual claim

47. In the alternative to paragraphs [15], [39] and [45] above, if, as at 8 August 2019, on their proper construction, the Authorised Representative Agreements empowered AMPFP to make a change to the BOLR Policy which would, in AMPFP's reasonable opinion, have an adverse or other significant effect on the Practices, *regardless* of whether the obligation to consult in clause 3.2(c) of the Master Terms had been satisfied, and *also regardless* of whether the conditions in the BOLR Amendment Term had been satisfied, then, on the proper construction of each Authorised Representative Agreement:

- a. the obligation to consult imposed by clause 3.2(c) of the Master Terms; and
- b. the BOLR Amendment Term

each constituted promises by AMPFP to each Practice as to the manner in which AMPFP would exercise its power to amend when making amendments to the BOLR Policy.

48. By virtue of the matters pleaded at paragraphs [22]-[26] above, AMPFP breached the obligation to consult with amfpfa about the 8 August 2019 Changes under clause 3.2(c) of the Master Terms.
49. Some group members have suffered loss as a result of AMPFP's breach of contract pleaded in paragraph [48] above.

Particulars

Group members who, prior to 8 August 2019, had lodged a BOLR application and who would have received a confirmed exercise date before the 8 August 2019 Changes became effective had AMPFP allowed amfpfa a reasonable period for consultation

As regards group members who, prior to 8 August 2019, had lodged an application to invoke the buyer of last resort facility and who would have received a confirmed exercise date before the 8 August 2019 Changes became effective had AMPFP allowed amfpfa a reasonable period of at least 12 weeks for consultation – if amfpfa had been afforded at least 12 weeks from the date of the Akers Memorandum to obtain advice on, consider, and respond to the proposed changes, then the 8 August 2019 Changes would not have taken effect until on or after 18 October 2019. Group members in this sub-group have suffered loss caused by AMPFP's breach of contract, being the difference between:

- (a) the amount that that group member would have received for its register rights under a BOLR Licensee Buy-Back Agreement containing a buyer of last resort payment based on a 4x BOLR Multiple; and
 - (b) the amount that that group member received, or is entitled to receive (under the BOLR Policy as amended by the 8 August 2019 Changes), in return for its register rights (alternatively, the current value of that group member's register rights).
50. By virtue of the matters pleaded at paragraphs [22]-[26], [30], [31] and/or [32] above, AMPFP breached the BOLR Amendment Term.
51. The applicant has, and some group members have, suffered loss and damage as a result of AMPFP's breach of contract pleaded in paragraph [50] above.

Particulars

The applicant repeats the particulars subjoined to paragraph [46] above.

Unconscionable conduct by AMPFP in relation to the 8 August 2019 Changes

51A. The applicant repeats the allegations in paragraphs [20]–[27], [30]–[32] and [34A]–[50] above.

51B. At the time it introduced the 8 August 2019 Changes without notice, AMPFP knew or ought to have known that:

- a. the value at which register rights were bought and sold in the AMPFP planning network before 8 August 2019 was at a premium to the external market value of comparable register rights;
- b. the premium to the external market applicable under the BOLR Policy was the quid pro quo of institutional client ownership by AMPFP;
- c. Practices had acquired register rights at a price calculated by reference to a 4x multiple and some Practices had financed the acquisition of register rights through loans provided by AMP Bank secured by the value of the register rights calculated by reference to a 4x multiple;
- d. Practices would be adversely affected and would experience significant cashflow and capital loss and debt serviceability challenges, including potential insolvency, if the 8 August 2019 Changes were made without notice;
- e. Practices who wished to complete BOLR transactions after 8 August 2019 would be forced to accept the discount to the BOLR multiple by reason of the terms and conditions of the BOLR Policy;
- f. some Practices had already submitted a BOLR application on the basis of the BOLR multiple as stated in the BOLR Policy then in force and would be unable to withdraw their BOLR application without AMPFP's permission following the purported introduction of the 8 August 2019 Changes;
- g. the substantial loss in capital value that would result from the 8 August 2019 Changes would place many Practices in a vulnerable financial position and increase the LVR of Practice loans;
- h. there would be an associated shortfall in the ability of some Practices to repay AMP Bank upon exiting the AMPFP network, such that:

- i. some Practices would face bankruptcy and/or insolvency; and
 - ii. some Practice principals who were guarantors of practice loans would face bankruptcy;
- i. the 8 August 2019 Changes did not properly address, or otherwise mitigate, the consequences for many Practices identified in sub-paragraphs (a) to (h) above;
 - j. the objective purpose of the 13 month notice requirement in the BOLR Amendment Term in respect of a change to the valuation methodology of registers or any other change having a materially adverse financial or other significant effect on a Practice was to enable Practices to submit a BOLR application and have that application assessed on the basis of the terms in the existing BOLR Policy, including the valuation methodology, before the changes took effect;
 - k. the 8 August 2019 Changes would have the effect of forcing a material structural change upon Practices without notice; and
 - l. the mental health and wellbeing of some Practices and/or their principals would be adversely affected.

51C. Making the 8 August 2019 Changes without 13 months' notice was not reasonably necessary for the protection of AMPFP's legitimate interests.

51D. The terms of each Authorised Representative Agreement created a significant power imbalance between AMPFP as the stronger party and the applicant and group members as the weaker party.

51E. AMPFP exploited its superior bargaining power to promote its commercial purposes set out in paragraph 34A above.

51F. In the alternative to paragraphs [28] and [33] above, by reason of the matters pleaded in paragraphs [27] and/or [51A]–[51E] above, AMPFP engaged in conduct that was:

- a. in trade or commerce;
- b. in connection with the supply or possible supply of services, namely the supply of an authorisation, alternatively of register rights, alternatively of the BOLR facility by AMPFP; and

- c. in all the circumstances, unconscionable; and
- d. in contravention of s 21 of the Australian Consumer Law (ACL).

51G. The applicant and group members referred to in paragraphs [35], [37], [46] and [49] above are entitled to:

- a. an order pursuant to s 237 of the ACL declaring the 8 August 2019 Changes void and of no effect; further or alternatively
- b. damages pursuant to s 236 of the ACL; alternatively
- c. compensation pursuant to s 237 of the ACL.

Misleading and deceptive conduct

52. On 8 August 2019, AMPFP represented to the applicant and to group members that:

- a. an economic change had occurred that had rendered the BOLR Policy inappropriate;
- b. AMPFP had a contractual right to change the terms of each Authorised Representative Agreement by introducing the 8 August 2019 Changes without providing 13 months' notice;
- c. the 8 August 2019 Changes were effective from 8 August 2019.

Particulars

The representations were made in a document titled "AMP Financial Planning – Aligned advice strategy – Questions and answers – 8 August 2019" that was provided by AMPFP to the applicant and group members on 8 August 2019. The representations were conveyed by the following parts of that document, read in the context of the document as a whole:

1. What are the changes to Buyer of last resort policy taking effect from 8 August 2019?

AMP Financial Planning (AMPFP) has reviewed the Buyer of last resort policy and the following changes take effect from 8 August 2019:

- a) reduction of the valuation multiple for grandfathered commission revenue;

b) introduction of a glide path for the valuation of grandfathered commission revenue; and

c) reduction of the valuation multiple for all other ongoing revenues.

2. What is the valuation change for grandfathered commission revenue?

...

- Effective from 8 August 2019, the Buyer of last resort multiple for all grandfathered commission revenue will be reduced from 4 times ongoing revenue to 1.42 times ongoing revenue paid to the practice in the preceding 12 months

And:

7. What is the valuation change for all other ongoing revenues?

Effective from 8 August 2019, the Buyer of last resort multiple for all ongoing revenues (except grandfathered commission revenue) will be reduced from 4 times ongoing revenue to 2.5 times the ongoing revenue paid to the practice in the prior 12 months.

8. Why are the changes to Buyer of last resort valuations happening?

We have an ongoing responsibility to our clients and our shareholders to build a sustainable advice model that works for advice practices and for AMPFP.

There has been an economic change which has resulted in a quantifiable decrease in the market value of register rights linked to ongoing revenue, including in respect of grandfathered commissions. This change has meant that it is inappropriate for AMPFP to continue to pay 4x valuation on ongoing revenue as AMPFP is unable to sell register rights at this rate.

Accordingly, it is not economically viable to continue to value ongoing revenue at a multiple of 4x.

And:

9. Why aren't the Buyer of last resort valuation changes on a 13-month notice period?

As per the Buyer of last resort policy, AMPFP has the right to make any change to this policy should legislation, economic or product changes render any part of this policy inappropriate following consultation with the ampfp. This right does not require that AMPFP provide 13 months' notice.

- 52A. Alternatively, if one or more of the representations pleaded in paragraph 52 was a representation of opinion only, then, on 8 August 2019, AMPFP represented it had reasonable grounds for making that representation.
- 52B. Each representation pleaded in paragraphs 52 and 52A was, at all material times, a continuing representation.
53. AMPFP's conduct in making the representations pleaded in paragraphs 52 and 52A above was conduct in trade or commerce.
54. The representation pleaded at paragraph [52.a] above was misleading or deceptive, or likely to mislead or deceive, because, as at 8 August 2019, no economic change had occurred that rendered the BOLR Policy inappropriate.
55. The representation pleaded at paragraph [52.b] above was misleading or deceptive, or likely to mislead or deceive, because, for the reasons pleaded at paragraphs [21]-[27] and paragraphs [30]-~~[33]~~[34D] above, AMPFP had no contractual right to change the terms of each Authorised Representative Agreement by introducing the 8 August 2019 Changes without providing 13 months' notice.
- 55A. The representation pleaded at paragraph [52.c] above was misleading or deceptive, or likely to mislead or deceive, because, for the reasons pleaded at paragraphs [21] to ~~[33]~~[34D] above, the 8 August 2019 Changes did not, in fact, take effect from 8 August 2019.
- 55B. Alternatively, the representation pleaded at paragraph [52A] above was misleading or deceptive, or likely to mislead or deceive, because, in light of the matters pleaded at paragraphs [21] to [27] and [30]-~~[33]~~[34D] above AMPFP did not have reasonable grounds for making that representation.

56. By making each of the representations pleaded at paragraph [52] above or, alternatively, [52A] above, AMPFP engaged in conduct in contravention of s. 18 of the ACL Australian Consumer Law.
57. Some group members are likely to suffer loss or damage caused by AMPFP's conduct in:

- a. making the representations pleaded at paragraph [52] above or, alternatively, [52A] above; and/or
- b. engaging in the unconscionable conduct pleaded at paragraph 51F above.

Particulars

AMPFP's conduct in making the representations and/or engaging in the unconscionable conduct caused some group members, who:

- (a) would otherwise have lodged applications to invoke the buyer of last resort facility, not to lodge those applications, or
- (b) had lodged applications to invoke the buyer of last resort facility, to withdraw them.

Those group members have suffered loss or damage equal to the difference between: (1) the amount they should have received for surrendering their register rights had they lodged their applications, or had they not withdrawn them (being a BOLR payment calculated at a BOLR Multiple of 4x); and (2) –

- (a) in the case of group members who subsequently realised those register rights, the amount they received for those rights; or
- (b) in the case of group members who did not subsequently realise those rights, the current value (if any) of those rights.

Alternatively:

- (a) those group members who would have lodged applications to invoke the buyer of last resort facility, but did not do so by reason of the representations and/or unconscionable conduct, lost the opportunity to apply for a BOLR payment calculated at a BOLR Multiple of 4x; and

(b) those group members who would not have withdrawn their applications to invoke the buyer of last resort facility, but did so by reason of the representations **and/or unconscionable conduct**, lost the opportunity to complete their application for a BOLR payment calculated at a BOLR Multiple of 4x.

Particulars of those group members will be provided following the initial hearing.

Group Members who executed a BOLR Licensee Buy-Back Deed

58. Some group members entered into a form of Buy-Back Agreement with AMPFP titled "Buyer of Last Resort Licensee Buy-Back Agreement" (**BOLR Licensee Buy-Back Deed**).
59. Pursuant to each BOLR Licensee Buy-Back Deed, AMPFP agreed to pay a "BOLR Benefit" to the group member who signed it, on the terms and conditions stated therein.
60. Each BOLR Licensee Buy-Back Deed defines "BOLR Benefit" to mean "\$[X], being the Register Value calculated by AMPFP".
61. Each BOLR Licensee Buy-Back Deed defines "Register Value" to mean "The value of the Register Rights calculated in accordance with the buyer of last resort valuation methodology as set out in the BOLR Policy (as amended from time to time) and as determined by AMPFP to be applicable to the Practice and in this regard, the determination by AMPFP shall be final in the absence of manifest error."
62. Each BOLR Licensee Buy-Back Deed contains a purported release in the following terms: "On payment by AMPFP of the BOLR Benefit to the Practice, each of the Relevant Parties hereby releases AMPFP from all and any present or future claims, proceedings, suits and Liabilities arising out of or in connection with the facts or circumstances giving rise to the BOLR Benefit."
63. In the case of each BOLR Licensee Buy-Back Deed, AMPFP determined to use a buyer of last resort valuation methodology that included an assumption that, or had as its foundation an assumption that, the 8 August 2019 Changes were effective for the purpose of calculating the value of the Register Rights.
64. AMPFP's purported determination in paragraph 63 was affected by manifest error because the 8 August 2019 Changes are invalid and of no effect.

65. In the case of each BOLR Licensee Buy-Back Deed, AMPFP has not made a valid determination of the valuation methodology to be used for the purpose of calculating the value of that group member's Register Rights.
66. In the case of each BOLR Licensee Buy-Back Deed, AMPFP calculated the value of that group member's Register Rights in accordance with a valuation methodology that included, or had as its foundation, the assumed effectiveness of the 8 August 2019 Changes.
67. AMPFP's calculation in paragraph 66 above:
- a. was not made in accordance with the buyer of last resort valuation methodology set out in the BOLR Policy;
 - b. was not made in accordance with a buyer of last resort valuation methodology validly determined by AMPFP;
 - c. was itself a determination by AMPFP that was affected by manifest error, because the 8 August 2019 Changes are invalid and of no effect;
 - d. was not a calculation or determination made in accordance with the terms of the BOLR Licensee Buy-Back Deed.
68. In the case of each BOLR Licensee Buy-Back Deed, the amount paid by AMPFP to that group member as the BOLR Benefit under the Deed was:
- a. no more than the amount calculated by AMPFP as pleaded at paragraph 66 above;
 - b. less than the value of that group member's Register Rights properly calculated in accordance with the valuation methodology set out in the BOLR Policy (which does not include the 8 August 2019 Changes).
69. By reason of the matters pleaded in paragraphs 59 to 68 above, in the case of each BOLR Licensee Buy-Back Deed:
- a. AMPFP has not made a valid determination of the valuation methodology to be applied for the purpose of calculating the value of that group member's Register Rights;
 - b. AMPFP has not made a valid calculation or determination of the value of that group member's Register Rights;

- c. AMPFP has not paid that group member a BOLR Benefit in accordance with the terms of that Deed;
 - d. AMPFP has not satisfied the condition for the operation of the release in that Deed (namely, payment of the BOLR Benefit);
 - e. the release does not operate to release AMPFP from the claims advanced on behalf of that group member in this proceeding.
70. By reason of the matters pleaded above, a group member who entered into a BOLR Licensee Buy-Back Deed is entitled to:
- a. a declaration that AMPFP has not validly determined the methodology to be used for calculating the value of that group member's Register Rights in accordance with the terms of that Deed;
 - b. a declaration that AMPFP has not validly calculated the value of that group member's Register Rights in accordance with the terms of that Deed;
 - c. a declaration that AMPFP has not paid that group member the full amount of the BOLR Benefit under that Deed;
 - d. an order that AMPFP specifically perform its obligations under the BOLR Licensee Buy-Back Deed;
 - e. alternatively, damages in lieu of an order for specific performance.

Other Buy-Back Agreements with payments based on Register Value

71. Some group members, who are not group members referred to in paragraph 58 above, entered into a form of Buy-Back Agreement with AMPFP, the terms of which include those pleaded at paragraphs 72 to 76 below (**Other Deeds**).
72. Pursuant to each Other Deed, AMPFP agreed to pay an amount (**Payment Amount**) to the group member who signed it, on the terms and conditions stated therein.
73. In each Other Deed, the Payment Amount was described as:
- a. the Register Value; or
 - b. a dollar sum, "being" an amount which was, or the calculation of which required regard to be had to, the "Register Value".
74. Each Other Deed defines "Register Value" to mean either:

- a. “The value of the Register Rights calculated in accordance with the buyer of last resort valuation methodology as set out in the BOLR Policy (as amended from time to time) and as determined by AMPFP to be applicable to the Practice and in this regard, the determination by AMPFP shall be final in the absence of manifest error”; or
 - b. A dollar amount (in some cases expressed to be exclusive of GST), “being the value of the Register Rights calculated in accordance with the buyer of last resort valuation methodology as set out in the BOLR Policy (as amended from time to time) and as determined by AMPFP to be applicable to the Practice and in this regard, the determination by AMPFP shall be final in the absence of manifest error”; or
 - c. A variation on the wording in paragraph a. or b. above, wherein:
 - i. the words “calculated in accordance with the buyer of last resort valuation methodology as set out in the BOLR Policy (as amended from time to time) and” are omitted; and/or
 - ii. the “determination” by AMPFP is expressed to be a determination as at a particular date; and/or
 - iii. the words “in accordance with the AR Agreements” are inserted before the words “the determination by AMPFP shall be final in the absence of manifest error”.
75. Each Other Deed contains a Purported Release (within the meaning of paragraph 88 below) which is said to take effect on:
- a. the payment of the Payment Amount, or a component of it; or
 - b. the “Completion Date”.
76. In the case of each Other Deed whose Purported Release is said to take effect on the Completion Date:
- a. the Purported Release is expressed not to apply to a claim or action for breach or enforcement of the Other Deed;
 - b. on the proper construction of the deed, the reference to the Completion Date in the release is a reference to the date on which Completion takes place.

77. In the case of each Other Deed, AMPFP determined to use a buyer of last resort valuation methodology that included the 8 August 2019 Changes for the purpose of calculating the value of the Register Rights.
78. AMPFP's purported determination in paragraph 77 was affected by manifest error because the 8 August 2019 Changes are invalid and of no effect.
79. In the case of each Other Deed, AMPFP has not made a valid determination of the valuation methodology to be used for the purpose of calculating the value of that group member's Register Rights.
80. In the case of each Other Deed, AMPFP calculated the value of that group member's Register Rights in accordance with a valuation methodology that included the 8 August 2019 Changes.
81. AMPFP's calculation in paragraph 80 above:
 - a. was not made in accordance with the buyer of last resort valuation methodology set out in the BOLR Policy;
 - b. was not made in accordance with a buyer of last resort valuation methodology validly determined by AMPFP;
 - c. was itself a determination by AMPFP that was affected by manifest error, because the 8 August 2019 Changes are invalid and of no effect;
 - d. was not a calculation or determination made in accordance with the terms of the Other Deed.
82. In the case of each Other Deed, the amount paid by AMPFP to that group member as the Payment Amount under the Deed was:
 - a. no more than the amount calculated by AMPFP as pleaded at paragraph 80 above;
 - b. less than that group member's Payment Amount properly calculated in accordance with the valuation methodology set out in the BOLR Policy (which does not include the 8 August 2019 Changes).

83. By reason of the matters pleaded in paragraphs 72 to 82 above, in the case of each Other Deed:
- a. AMPFP has not made a valid determination of the valuation methodology to be applied for the purpose of calculating the value of that group member's Register Rights;
 - b. AMPFP has not made a valid calculation or determination of the value of that group member's Register Rights;
 - c. AMPFP has not paid that group member a Payment Amount, or component thereof, in accordance with the terms of that Other Deed.
84. In the case of each Other Deed whose Purported Release is said to take effect on payment of the Payment Amount, or a component of the Payment Amount, by reason of the matters pleaded in 72 to 83 above:
- a. AMPFP has not satisfied the condition for the operation of the release in that Other Deed; and
 - b. the release does not operate to release AMPFP from the claims advanced on behalf of that group member in this proceeding.
85. In the case of each Other Deed whose Purported Release is said to take effect on the Completion Date, the Purported Release does not prevent that group member obtaining the relief described in paragraph 86 below, by virtue of the matters pleaded in paragraph 76 above.
86. By reason of the matters pleaded above, a group member who entered into an Other Deed is entitled to:
- a. a declaration that AMPFP has not validly determined the methodology to be used for calculating the value of that group member's Register Rights in accordance with the terms of that Deed ;
 - b. a declaration that AMPFP has not validly calculated the value of that group member's Register Rights in accordance with the terms of that Deed ;
 - c. a declaration that AMPFP has not paid that group member the full amount of the Payment Amount under that Deed ;
 - d. an order that AMPFP specifically perform its obligations under the Other Deed;

- e. alternatively, damages in lieu of an order for specific performance.

The releases in the Buy-Back Agreements are void

87. Insofar as they relate to group members who entered into a BOLR Licensee Buy-Back Deed or Other Deed, paragraphs 88 to 100 below are pleaded in the alternative to paragraphs 58 to 86 above.
88. Each of the Buy-Back Agreements contains one or more of the following **(Purported Release)**:
- a. a release in favour of AMPFP;
 - b. an agreement that AMPFP may plead the Buy-Back Agreement in defence or bar to certain claims brought by the group member;
 - c. an acknowledgment and agreement that:
 - i. the Buy-Back Agreement implements the BOLR Policy;
 - ii. the 8 August 2019 Changes are effective;
 - iii. the group member is not entitled to any benefit beyond the purported buyer of last resort payment made under the Buyback Agreement;
 - d. an agreement not to commence or maintain certain actions against AMPFP;
 - e. an agreement to opt out of certain claims or actions against AMPFP;
 - f. an agreement to ensure that any person with whom the group member is associated in any way will not commence or maintain certain claims or actions against AMPFP;
 - g. an indemnity in favour of AMPFP against liability, loss or costs arising from breach of certain of the above terms;
 - h. all or any of the above in relation to the "AMP Group".
89. Each of the Buy-Back Agreements was a contract for the supply of services within the meaning of section 23(4)(a) of the ~~ACL Australian Consumer Law (ACL)~~.
90. Some of the Buy-Back Agreements were agreements:
- a. for which the upfront price payable was less than \$300,000; or

- b. for which the upfront price payable was less than \$1m, and which had a duration of more than 12 months,
within the meaning of section 23(4)(c) of the ACL.
91. Some of the group members who entered into a Buy-Back Agreement of the kind described in paragraph 90 above employed fewer than 20 persons at the time they entered the agreement, within the meaning of section 23(4)(b) of the ACL.
92. By reason of the matters pleaded in paragraphs 89 to 91 above, each of the Buy-Back Agreements entered into by the group members described in paragraph 91 above is a small business contract for the purposes of section 23 of the ACL.
93. The Buy-Back Agreements entered into by the group members described in paragraph 91 above, or some of them, were standard form contracts for the purposes of section 23 of the ACL and the applicant relies on section 27(1) of the ACL.
94. AMPFP has no right, under the Authorised Representative Agreements, to require a group member to give a Purported Release in order to receive a buyer of last resort payment to which the group member is entitled.
95. The Purported Release in each of the Buy-Back Agreements described in paragraph 93 above (**Relevant BBAs**) would cause a significant imbalance in the parties' rights and obligations arising under those contracts.

Particulars

In each Relevant BBA:

- (1) An effect of the Purported Release would be to give AMPFP greater rights under the Buy-Back Agreement than it is entitled to under the Authorised Representative Agreement, by reason of the matter in paragraph 94 above.
- (2) An effect of the Purported Release would be to give the group member lesser rights under the Buy-Back Agreement than it is entitled to under the Authorised Representative Agreement, because:
- (a) for the reasons in:
- (i) paragraph 36 above; or

(ii) alternatively, for some group members, the particulars to paragraph 46 above; or

(ii) alternatively, for some group members, the particulars to paragraph 49 above,

the group member suffered loss or damage because the group member has not received, under the Buy-Back Agreement, the measure of the buyer of last resort payment that the group member would have received had AMPFP performed the Authorised Representative Agreement without breach; and

(b) the Purported Release would prevent the group member obtaining compensation from AMPFP for that loss or damage (assuming that the Purported Release is not ineffective on some other basis).

(3) The Buy-Back Agreement contains no commensurate or reciprocal benefit to the group member.

96. The Purported Release in each of the Relevant BBAs would advantage AMPFP.

97. The Purported Release in each of the Relevant BBAs is not reasonably necessary in order to protect the legitimate interests of AMPFP and the applicant relies on the presumption in section 24(4) of the ACL.

98. The Purported Release in each of the Relevant BBAs would cause detriment to the relevant group member if relied upon by AMPFP.

99. In light of the matters pleaded in paragraphs 95 to 98 above, the Purported Release in each of the Relevant BBAs is an unfair term for the purposes of section 24(1) of the ACL.

100. In the light of the matters pleaded in paragraphs 92, 93, 94 and 99 above, the Purported Release in each of the Relevant BBAs is void.

Unconscionable conduct

BBA Release Group Members

101. In respect of the group members referred to in paragraph 35 above who entered into a Buy-Back Agreement containing a Purported Release (**BBA Release Group**

Members), paragraphs 102 to 107 below are pleaded further or alternatively to paragraphs 58 to 100 above.

102. At the time of entering into each Buy-Back Agreement containing a Purported Release, AMPFP knew or ought to have known (as was the case) that:
- a. Practices were likely to challenge, or had challenged, the legal validity of the 8 August 2019 Changes;
 - b. the release of claims related to the 8 August 2019 Changes was not reasonably necessary to protect AMPFP's legitimate commercial interests;
 - c. the Buy-Back Agreements entered into by the BBA Release Group Members, or some of them, were standard form contracts;
 - d. the matter pleaded at paragraph 94 above;
 - e. many of the BBA Release Group Members were in a vulnerable economic position;
 - f. the BBA Release Group Members were in an inferior bargaining position to AMPFP;
 - g. many of the BBA Release Group Members had no viable alternative, if they wished to receive (even part of) the BOLR Benefit to which they were entitled, but to enter into a Buy-Back Agreement containing a Purported Release;
 - h. in the case of some BBA Release Group Members:
 - i. that the group member had received a Termination Letter (as defined in paragraph 109 below); and
 - ii. the matters pleaded in sub-paragraphs 114(a)-(h) below;
 - i. in the case of some BBA Release Group Members, that:
 - i. AMPFP had informed the group member that, if the group member wished to access the Buyer of Last Resort Benefit, it must apply to do so by 31 December 2021; and
 - ii. that deadline did not provide sufficient time for the group member to await the outcome of the challenge to the validity of the 8 August 2019 Changes in this proceeding before entering into a Buy-Back Agreement containing a Purported Release.

Particulars

As to (a):

- (i) AMPFP knew that legal risk attended the 8 August 2019 Changes, which it was concerned to minimise (eg, AMP.4000.0023.7302; AMP.4000.0023.8250; AMP.5800.0155.3738).
- (ii) AMPFP specifically considered the prospect that the changes would be legally challenged (AMP.5800.0048.8657) and “expected” a legal challenge (AMP.5800.0048.8656).
- (iii) The ampfp media release of 9 August 2019 recorded the CEO, Neil MacDonald, stating: “AMP is contractually obliged to consult with us over changes to the terms and also give our members 13 months’ notice of any change that will have a detrimental effect on them. AMP has done neither”.
- (iv) This proceeding was commenced on 28 July 2020.

As to (b), AMPFP knew that it was obliged to make a payment to Practices who applied for BOLR in accordance with the BOLR policy. Further, it can be inferred that the releases were not necessary to protect AMPFP’s legitimate commercial interests because AMPFP did not insist on such a release in some cases where a lawyer acting for a group member insisted on the claims the subject of this proceeding being excluded from the release.

As to (c), AMPFP knew that the Buy-Back Agreement being offered to an individual Practice was the same or similar to the Buy-Back Agreement being offered to other Practices.

As to (d), the Authorised Representative Agreements were documents prepared by or on behalf of AMPFP and formed the contractual basis upon which it entered into a relationship with persons wishing to carry on business as financial planners as authorised representatives of AMPFP.

As to (e)-(g):

- (i) Prior to introducing the 8 August 2019 Changes, AMPFP had identified that “Most practices [were] facing cash flow issues

(15% - 40% loss in revenue)” and that “~60% of practices forecasted to be unsustainable and need to be managed out” (AMP.4000.0023.8250_0010).

- (ii) Practices had paid 4.0x recurring revenue to acquire the right to service an AMP client book, which was a price set by AMPFP.
- (iii) AMPFP knew that many practices had funded the purchase price through loans from AMP Bank or another tripartite banking arrangement, some at loan to value ratios (**LVR**) exceeding 80%, based on a BOLR multiple of 4.0x. AMPFP understood that the 8 August 2019 Changes would substantially diminish or destroy the equity value of these Practices, and leave approximately half of the Practices with a LVR above 90% (see AMP.5800.0144.7637). AMPFP knew, or ought to have known, that the only means through which many Practices could repay AMP Bank was through accepting the BOLR Benefit offered at the lower multiple.
- (iv) The ampfp media release of 9 August 2019 (EQU.100.001.9864) recorded the CEO, Neil MacDonald, stating, among things, that:
 1. “[R]epaying the loans will be extremely difficult for some advisers”;
 2. “Many advisers stand to lose their homes and some will face bankruptcy ... we are concerned about the potentially devastating flow-on effect of the financial loss in terms of the mental health of advisers, their families and their staff”.
- (v) AMPFP identified a “wellbeing” risk from accelerating the exit of Practices (AMP.4000.0023.8250_0036).

103. AMPFP adopted a procedure in respect of Buy-Back Agreements under which AMPFP:
- a. determined to use the valuation methodology referred to in paragraph 63 above; and
 - b. would not pay a benefit to a Practice under the buyer of last resort facility without the group member entering into a Buy-Back Agreement which contained, save for exceptional cases, a Purported Release.

Particulars

AMPFP did not insist on a Purported Release in some cases where a lawyer acting for a group member insisted on the claims the subject of this proceeding being excluded.

104. The procedure referred to in paragraph 103 above was designed by AMPFP to exploit its superior bargaining position *vis a vis* the BBA Release Group Members.

Particulars

In June 2018, AMPFP assessed its “BOLR liability” at \$1.2bn. Reducing that BOLR liability was identified as a necessary component of AMP’s strategy of establishing AMPFP as economically viable on a “standalone” basis (AMP.5800.0097.2306). By requiring that a Practice enter into a Buy-Back Agreement with a Purported Release in return for a BOLR payment at the reduced multiple, AMPFP sought to lock-in a reduced BOLR exposure in respect of that Practice. AMPFP sought to reduce its BOLR liability in respect of that Practice in the knowledge of the matters pleaded and particularised at paragraph 102.b and 102.e above.

104A. AMPFP engaged in the conduct in paragraphs [34A] to [34C], and/or [36(a)], and/or [38(a)], and/or [45], and/or [48], and/or [51B]–[51E] whilst asserting that the 8 August 2019 Changes were effective.

105. By reason of the matters pleaded in paragraphs 102 to 104A above, AMPFP engaged in conduct that was:
- a. in trade or commerce;
 - b. in connection with the supply or possible supply of services to the BBA Release Group Members;
 - c. in all the circumstances, unconscionable; and
 - d. in contravention of s 21 of the ACL (**BBA Unconscionable Conduct**).
106. The BBA Release Group Members will, in the event the Purported Release is otherwise effective to preclude them from recovering the loss referred to in this Second Further Amended Statement of Claim paragraph 36.c, 46 or 49 above, suffer loss or damage as a result of AMPFP’s **BBA Unconscionable Conduct**.

107. By reason of the matters pleaded in paragraphs 0 and 106 above, each BBA Release Group Member is entitled to:
- a. an order pursuant to s 237 of the ACL declaring the Purported Release in the group member's Buy Back Agreement void; alternatively
 - b. an order pursuant to s 237(2) and/or s 232(1) of the ACL restraining AMPFP from enforcing the Purported Release; alternatively
 - c. damages.

Termination Option Group Members

108. For Termination Option Group Members (as defined in paragraph 115) whose Termination Agreement (as defined in paragraph 116) was a Buy-Back Agreement, paragraphs 109 – 121 are pleaded further or alternatively to paragraphs 58 to 100 and 101 – 107 above.
109. Some group members received a letter from AMPFP (**Termination Letter**) stating, in effect:
- a. in the case of some group members, that AMPFP had reviewed its strategy in the advice business and determined that the group member's Practice did not align with that strategy;
 - b. that AMPFP had terminated the Practice's Authorised Representative Agreement and revoked the authorisation pleaded in paragraph 12(a) above (**Authorisation**) on notice;

Particulars

- The best particulars the applicant can currently provide are that some group members were provided with 90 days' notice and others with 180 days' notice.
- c. in the case of at least some group members, that AMPFP had terminated the Authorised Representative Agreement(s) and revoked the Authorisation(s) of the representative(s) working for the Practice;
 - d. in the case of some group members, that if the Practice took no action in response to the letter (including lodging an application to access the buyer of last resort facility, if eligible) then after the notice period stipulated in the letter:

- i. the Practice's register rights would lapse, and the Practice's client register would be dealt with by AMPFP at its discretion and without any regard to the Practice;
- ii. AMPFP would cease to pay remuneration to the Practice;
- iii. the Practice would be required to deliver its Authorisations, client register, client records and other materials to AMPFP or its nominee; and
- iv. the Practice would be forbidden from holding itself out as a representative of AMPFP and would be forbidden from using the AMPFP trade mark;

and those group members whose Termination Letter did not explicitly state the matters in paragraphs (i) – (iv) above understood them, at least in effect, as consequences of termination of their Authorised Representative Agreement and Authorisation under the Master Terms;

- e. that the Practice had certain options, or potential options, if it wished to avoid the circumstance described in paragraph (d) above.

Particulars

The best particulars the applicant can currently provide are that:

- a. some group members received three options, or potential options, as follows:
 - i. subject to meeting the eligibility requirements, the group member could apply to access the buyer of last resort facility (**Buy-Back Option**);
 - ii. if the group member could secure appointment as an authorised representative of another Australian financial services licensee, it could apply to AMPFP for release from AMPFP's client institutional ownership terms (**Institutional Release Option**), to permit the group member's clients to be transferred to a new AFS Licensee;
 - iii. if the group member was able to join or merge with another AMP group practice, or sell its register rights to another practice, it could do so, subject to AMPFP's approval; and

- b. some group members received the three options, or potential options, above, as well as an offer (described as a “One-Off Offer”) to enter into a Buy-Back Agreement, but with a shorter minimum notice period than the BOLR Policy provided for, and with no or different restraints on accepting employment within the financial planning industry or establishing a new advice business (**One-Off Offer Option**);
- c. some group members were only given the option of completing a buyer of last resort application that was already on foot.

Further particulars in respect of group members’ claims will be provided after the initial trial.

- 110. None of the options, or potential options, pleaded in paragraph 109(e) above involved the group member receiving a buyer of last resort payment calculated based on a 4x multiple.
- 111. Most or all of the options, or potential options, pleaded in paragraph 109(e) above involved the group member granting a Purported Release to AMPFP.

Particulars

AMPFP required most, if not all, Termination Option Group Members who took the Buy-Back Option, Institutional Release Option, One-Off Offer Option or option of completing a buyer of last resort application that was already on foot to enter into an agreement with AMPFP containing a Purported Release.

- 112. Some group members who received a Termination Letter were eligible to apply for and receive a buyer of last resort payment prior to or upon their termination.
- 113. The effect of the matters pleaded in paragraphs 110 and 111 was that at least some of the group members referred to in paragraph 112 were given no, or no viable option that would see them either:
 - a. receive the full buyer of last resort payment to which they were entitled (being a payment calculated based on a 4x multiple); or
 - b. retain (subject to paragraph 121 below) the right to sue AMPFP for any loss the group member was caused by AMPFP’s conduct in relation to the

8 August 2019 Changes (including the conduct pleaded in this Second Further Amended Statement of Claim).

114. At the time of sending each Termination Letter to a group member referred to in paragraph 112 above, AMPFP knew or ought to have known (as was the case):
- a. the matters pleaded in paragraphs 110 to 113 above;
 - b. the matters pleaded in paragraphs 102(a) and (b) above;
 - c. that the agreements offered, or to be offered, by AMPFP pursuant to the options pleaded in paragraph 109(e) above, or some of them, were standard form contracts;
 - d. the matter pleaded in paragraph 94 above;
 - e. that many of the group members were in a vulnerable economic position;
 - f. that the group members were in an inferior bargaining position to AMPFP;
 - g. that the deadline for avoiding the outcome pleaded in paragraph 109(d) placed pressure on the group members to choose among the options given, and did not provide time for the actual or likely challenge to the legal validity of the 8 August 2019 Changes to run its course; and
 - h. that, faced with the outcome pleaded in paragraph 109(d) if none of the options pleaded in paragraph 109(e) were taken by the stipulated deadline, many of the group members referred to in paragraph 112 had no viable alternative but to take one of those options, and in so doing enter into an agreement with AMPFP containing a Purported Release.
115. Some of the group members referred to in paragraph 112 above took one of the options pleaded in paragraph 109(e) above and as a result entered into an agreement with AMPFP containing a Purported Release (**Termination Option Group Members**).
116. Further or in the alternative to paragraph 114 above, at the time AMPFP entered into each agreement with a Termination Option Group Member containing a Purported Release (**Termination Agreement**), it knew or ought to have known (as was the case) the matters pleaded in paragraph 114(a)-(h) above.
117. In the premises, AMPFP adopted a procedure in respect of the Termination Option Group Members under which AMPFP:

- a. denied the Termination Option Group Members the opportunity to receive the full buyer of last resort payment to which they were entitled; and
- b. denied (subject to paragraph 121 below) the Termination Option Group Members the opportunity to recover compensation from AMPFP for loss caused to them by AMPFP's conduct in relation to the 8 August 2019 Changes by:
 - i. requiring the Termination Option Group Members to give a Purported Release to AMPFP; and
 - ii. preventing the Termination Option Group Members awaiting the outcome of the actual or likely challenge to the legal validity of the 8 August 2019 Changes, by the use of a contractual power (actual or purported) to terminate those group members on notice.

118. The procedure referred to in paragraph 117 above was designed by AMPFP to exploit its superior bargaining position vis a vis the BBA Release Group Members.

119. By reason of the matters pleaded in paragraphs 109 to 118 above, AMPFP engaged in conduct that was:

- a. in trade or commerce;
- b. in connection with the supply or possible supply of services to the Termination Option Group Members;
- c. in all the circumstances, unconscionable; and
- d. in contravention of s 21 of the ACL (**Termination Option Unconscionable Conduct**).

120. The Termination Option Group Members will, in the event the Purported Release is otherwise effective to preclude them from recovering the loss referred to in this Second Further Amended Statement of Claim, suffer loss or damage as a result of AMPFP's Termination Option Unconscionable Conduct.

121. By reason of the matters pleaded in paragraphs 119 and 120 above, each Termination Option Group Member is entitled to:

- a. an order pursuant to s 237 of the ACL declaring the Purported Release in the group member's Termination Agreement void; alternatively

b. an order pursuant to s 237(2) and/or s 232(1) of the ACL restraining AMPFP from enforcing the Purported Release; alternatively

c. damages.

Amended: 14 June 2022 ~~3 August 2022~~ 15 October 2022



Signed by Chris Pagent
Lawyer for the Applicant

This amended pleading was prepared by Robert Craig ~~Q~~KC, ~~and~~ Kane Loxley, Roman Rozenberg and Julia Nikolic of counsel.

Certificate of lawyer

I, Chris Pagent, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 14 June 2022 ~~3 August 2022~~ 15 October 2022



Signed by Chris Pagent
Lawyer for the Applicant