

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD1124/2018  
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v  
AMP FINANCIAL PLANNING PTY LTD ACN 051 208 327  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 27/06/2018 2:03:19 PM AEST

Registrar

### Important Information

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

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## Concise Statement

NSD of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### IN THE MATTER OF AMP FINANCIAL PLANNING PTY LTD (ACN 051 208 327)

#### Australian Securities and Investments Commission

Plaintiff

#### AMP Financial Planning Pty Ltd (ACN 051 208 327)

Defendant

#### Important facts giving rise to the claim

##### *AMPFP's business*

1. AMP Financial Planning Pty Limited (**AMPFP**) is part of the AMP Group (**AMP**) which includes AMP Life Limited (**AMP Life**). During the period from 1 July 2013 to 30 June 2015 (**the Relevant Period**), AMPFP held an Australian financial services licence granted pursuant to s 913B of the *Corporations Act 2001* (Cth) (**the Act**) and authorised persons (**Authorised Representatives**) to provide personal advice to retail clients on behalf of AMPFP. Division 2 of Part 7.7A of the Act (**the best interests obligations**) applied to the advice as of 1 July 2013.
2. The Authorised Representatives provided advice to clients in relation to insurance products (**AMP Life Products**) issued by AMP Life, including insurance products with death cover, total and permanent disablement cover, trauma cover and income protection cover.

##### *The Possibilities for Transfer and Rewriting of Insurance Cover*

3. AMP Life permitted clients who had insurance cover in the form of an existing AMP Life Product and who sought to obtain insurance cover in the form of a replacement AMP Life Product (a) to transfer their existing insurance cover to a replacement AMP Life Product subject to certain rules concerning transfer (**Transfer**), or (b) to cause their existing insurance cover to be cancelled or lapsed, and to be replaced by a new AMP Life Product subject to the requirements for underwriting (**Rewriting**).

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4. Subject to meeting certain requirements including as to age and minimum sum insured, Transfer was available if there was a “like for like” switch between the existing AMP Life Product and the replacement AMP Life Product in that there was no increase in the risk AMP Life was being asked to insure. AMP Life also permitted Transfer to occur where the client otherwise met the requirements for Transfer, but sought an increase in the sum insured, and in that situation (a) AMP Life permitted a partial Transfer to occur in relation to the existing sum insured, and (b) in respect of the amount of sum insured that was higher than the existing sum insured (**the Topped Up Amount**), AMP Life required the client to undergo underwriting.
5. When Rewriting occurred, insurance underwriting was required in respect of the replacement AMP Life Product. When a Transfer occurred, insurance underwriting was not required in respect of the replacement AMP Life Product issued to the client (except that, in the case of a partial Transfer, insurance underwriting was required in respect of the Topped Up Amount under the new AMP Life Product issued to the client).

#### *The Commission Model in relation to AMP Life Products*

6. The commission to which Authorised Representatives were entitled was structured such that an Authorised Representative would earn substantially higher commission if a client it advised, who wished to replace an existing AMP Life Product with another AMP Life Product, did so by Rewriting rather than Transfer. Authorised Representatives were entitled to be paid, in relation to the sale of AMP Life Products to clients that were facilitated by the Authorised Representative, both (a) an initial commission calculated as a percentage of the contracted premium for the first 12 months of the policy (**Initial Commission**), and (b) ongoing commission calculated as a percentage of all premiums paid in each 12 month period from the commencement date of the policy (**Ongoing Commission**). When Rewriting occurred, the commission payable was typically the full amount of the Initial Commission. When a Transfer occurred, the commission payable was substantially less than the commission payable if Rewriting occurred.

#### *Rewriting Risks*

7. A client who had insurance cover in the form of an existing AMP Life Product and who underwent Rewriting was exposed to detriment (**the Rewriting Risks**) which included (a) the risk of being left uninsured for a period of time, or of otherwise not being paid for an insurable event when prior to the Rewriting the client had existing cover for the insurable event, (b) the inconvenience of going through the insurance underwriting process in respect of the replacement AMP Life Product, and the risks of going through that process, (c) the risk that a 13 month exclusion period for suicide might recommence upon the commencement of the replacement AMP Life Product and (d) the risk that the three-year period for avoidance of an insurance policy by an insurer by reason of innocent misrepresentation by the insured (pursuant to s 29(3) of the *Insurance Contracts Act 1984* (Cth)) recommenced upon the commencement of the replacement AMP Life Product.

#### *Rewriting Conduct and the Best Interests Obligations*

8. As of 1 July 2013, when providing personal advice to a retail client, an Authorised Representative was required:
  - (a) pursuant to s 961B of the Act, to act in the best interests of the client in relation to the advice;
  - (b) pursuant to s 961G of the Act, to provide personal advice to the client only if it would be reasonable to conclude that the advice was appropriate to the client had the provider satisfied the duty under s 961B to act in the best interests of the client;

- (c) pursuant to s 961J of the Act, if the Authorised Representative knew, or ought reasonably to have known, that there was a conflict between the interests of the client and his or her interests to give priority to the client's interests when giving the advice.
9. When an Authorised Representative provided advice to a client in circumstances where (i) the client had insurance cover in the form of an existing AMP Life Product (**the existing cover**), (ii) the client replaced or sought to replace the existing cover by applying for insurance cover in the form of a replacement AMP Life Product, (iii) there was a requirement for underwriting in respect of the replacement AMP Life Product, (iv) either (A) the existing cover was cancelled or lapsed or (B) the existing cover was ultimately neither cancelled nor lapsed but it was recommended that the client replace or seek to replace the existing cover and (v) the Authorised Representative failed to advise the client to undergo Transfer in circumstances where Transfer was available (**Rewriting Conduct**), there was non-compliance (or, in the alternative, a significant risk of non-compliance) by the Authorised Representative with each of ss 961B, 961G and 961J of the Act. That was because, having regard to the Rewriting Risks to which Rewriting exposed clients and the availability of the Transfer option which, if taken, avoided the Rewriting Risks:
- (a) Rewriting rather than Transfer was not in the client's best interests;
- (b) advice to the client to undergo Rewriting rather than Transfer (or failing to advise the client to undergo Transfer) was not advice that was appropriate to the client; and
- (c) further, having regard also to the incentive for the Authorised Representative to seek to influence the client to undergo Rewriting rather than Transfer because of the commission model described above (**the Commission Model**), in providing advice to a retail client who had existing cover and was permitted a Transfer of that cover, the Authorised Representative knew or ought reasonably to have known that there was a conflict between his or her interests and the interests of the client and by engaging in Rewriting Conduct the Authorised Representative was not giving priority to the client's interests when giving the advice.

#### *AMPFP's Knowledge of Rewriting and the Rewriting Risks*

10. In around February 2013, employees engaged to perform services in AMP's "Planner Supervision" group were informed that one of AMPFP's Authorised Representatives, Mr Rommel Panganiban, had engaged in Rewriting Conduct. That incident prompted some consideration within AMPFP of, among other things, Mr Panganiban's conduct, how common or widespread Rewriting Conduct was and whether AMPFP had any policy which prohibited Rewriting Conduct.
11. By 1 July 2013, AMPFP knew or ought reasonably to have known, of (a) the risks of non-compliance by Authorised Representatives with ss 961B, 961G and 961J of the Act, (b) that since around December 2012, at least one of AMPFP's Authorised Representatives, Mr Panganiban, had engaged in Rewriting Conduct on a significant number of occasions, (c) that Mr Panganiban had received substantially greater commission by engaging in Rewriting Conduct compared to what he would have received if his clients had undergone Transfer, (d) that there was reason to believe that Rewriting Conduct was widespread, and not limited to Mr Panganiban and (e) the Commission Model provided an incentive for AMPFP's Authorised Representatives to engage in Rewriting Conduct.

#### *Failure by Mr Panganiban to Comply with ss 961B, 961G and 961J of the Act*

12. During the Relevant Period, Mr Panganiban engaged in Rewriting Conduct in relation to the provision of advice to at least 30 clients and failed to comply with ss 961B, 961G and 961J of the Act (**the Panganiban Rewriting Conduct**).

*Failure by Other Authorised Representatives to Comply with ss 961B, 961G and 961J of the Act*

13. During the Relevant Period, at least 5 Authorised Representatives other than Mr Panganiban engaged in Rewriting Conduct in relation to the provision of advice to 10 clients and failed to comply with ss 961B, 961G and 961J of the Act (**the Other Authorised Representative Rewriting Conduct**).

**The relief sought from the Court**

14. As of 1 July 2013, AMPFP was required pursuant to s 961L of the Act, to take reasonable steps to ensure that Authorised Representatives complied with ss 961B, 961G and 961J of the Act. AMPFP was also subject to the obligations imposed on a financial services licensee by s 912A of the Act.
15. The plaintiff (**ASIC**) seeks declarations pursuant to s 1317E of the Act that, in contravention of s 961L of the Act, AMPFP:
  - (a) failed to take reasonable steps during the period 1 July 2013 to 31 August 2014 to ensure that Mr Panganiban complied with each of ss 961B, 961G and 961J of the Act;
  - (b) failed to take reasonable steps during the Relevant Period to ensure that Authorised Representatives other than Mr Panganiban complied with each of ss 961B, 961G and 961J of the Act.
16. ASIC also seeks declarations pursuant to s 21 of the *Federal Court of Australia Act 1976 (Cth)* that during the period 1 July 2013 to 30 June 2015:
  - (a) in contravention of s 912A(1)(a) of the Act, AMPFP failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly;
  - (b) in contravention of s 912A(1)(c) of the Act, AMPFP failed to comply with the financial services laws (being s 961L of the Act);
  - (c) in contravention of s 912A(1)(ca) of the Act, AMPFP failed to take reasonable steps to ensure that its representatives complied with the financial services laws (being ss 961B, 961G and 961J of the Act).
17. ASIC also seeks orders pursuant to s 1317G(1E) of the Act that AMPFP pay pecuniary penalties in respect of its contraventions of s 961L of the Act in such amount as the Court considers appropriate.

**The primary legal grounds for the relief sought**

18. During the Relevant Period prior to September 2014, in contravention of s 961L of the Act, AMPFP failed to take reasonable steps to ensure that Mr Panganiban complied with ss 961B, 961G and 961J of the Act by failing:
  - (a) to have in place and activate a process so that possible breaches of ss 961B, 961G and 961J of the Act were escalated to and dealt with at an appropriate level of seniority and responsibility within AMPFP;
  - (b) to take reasonable steps to ensure that Mr Panganiban did not engage in the Panganiban Rewriting Conduct such as by counselling or disciplining him, cancelling his authorisation, imposing restrictions on his practice, requiring him to attend training or subjecting him to additional supervision;

- (c) to adequately investigate, at an appropriate level of seniority and with an appropriate degree of urgency, the Rewriting Conduct engaged in by Mr Panganiban, including by way of a full file review;
  - (d) to adequately monitor Mr Panganiban's compliance with ss 961B, 961G and 961J of the Act;
  - (e) to conduct meetings or interviews with Mr Panganiban and his practice leader to adequately address and have Mr Panganiban commit to cease to engage in his Rewriting Conduct;
  - (f) to take reasonable steps to consider whether the Rewriting Conduct engaged in by Mr Panganiban had disclosed weaknesses in AMPFP's compliance systems that might be further exploited by Mr Panganiban.
19. During the Relevant Period, in contravention of s 961L of the Act, AMPFP failed to take reasonable steps to ensure that Authorised Representatives (other than Mr Panganiban) complied with ss 961B, 961G and 961J of the Act by failing to take reasonable steps:
- (a) to determine whether, among the Authorised Representatives who provided financial product advice to retail clients about AMP Life Products, there were others (in addition to Mr Panganiban) who had engaged, or were engaging, in Rewriting Conduct in contravention of ss 961B, 961G and 961J of the Act; and
  - (b) to determine how common or widespread any such conduct was and what reasonable steps should be taken in order to ensure that it ceased;
  - (c) to then take the steps identified in (b);
  - (d) to remove (or to request AMP Life remove) the incentive created by the Commission Model for Authorised Representatives to engage in Rewriting Conduct in contravention of ss 961B, 961G and 961J of the Act;
  - (e) to implement appropriate policies and procedures designed to ensure that Authorised Representatives did not engage in Rewriting Conduct in contravention of ss 961B, 961G and 961J of the Act;
  - (f) to consider whether the Rewriting Conduct engaged in by Mr Panganiban had disclosed weaknesses in AMPFP's compliance systems and to then take reasonable steps to remedy those weaknesses.
20. The conduct referred to in paragraphs 12, 13, 18 and 19 above also gives rise to the contraventions of ss 912A(1)(a), 912A(1)(c) and 912A(1)(ca) of the Act.

Date: 27 June 2018

.....*Nick Kelton*.....

**Nick Kelton**  
Solicitor for the Australian Securities & Investments Commission

**Certificate of lawyer**

I Nick Kelton certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 27 June 2018

*Nick Kelton*

Signed by Nick Kelton

Lawyer for the Plaintiff