

## CLASS ACTION FAQs

### What is a Class Action?

A class action is a special type of Court proceeding or litigation in which one person, or a very small group of people, bring a claim on behalf of a much larger group of people who have similar claims because they have all been affected in a similar way by conduct of the same party or parties. Generally, in order for a class action to be commenced in Court, all that is required is:

- (i) at least 7 people exist with claims against the same party;
- (ii) the claims of those 7 or more people arise out of the same, similar or related circumstances; and
- (iii) the claims of those 7 or more people give rise to at least one substantial common issue of law or fact.

The key feature of a class action is the *representative* nature of the Court proceeding. In a class action, one or a small number of persons, known as the “representative parties”, commence a Court proceeding against one or more Defendants.

While the representative party brings their claim in the interests of all members of the class, the class (known as ‘group members’) usually plays a passive role, at least until the common issues are resolved. In a class action, the representative party’s claim is used to resolve as many factual and legal issues *common* to the group members as possible, meaning that these issues don’t have to be determined individually for each group member. Each group member will be bound by the Court’s judgment on the common issues.

The Court manages the proceedings closely to ensure the common issues are dealt with in the most efficient and expeditious manner, and the Court will make a judgment about the common issues unless the claim is settled prior to this judgment.

There may be circumstances which relate to individual group members that are different and not determined by the common issues judgment, and these individual issues may need to be determined, or actions may need to be pursued, following resolution of the common issues.

### How do I know if I am eligible to participate as a group member of the Class Action?

Every class action will have a *group definition*, which will be set out in the Court documents that are filed when a case is started (usually called the ‘Statement of Claim’). The group definition will specify who is entitled to participate in the class action by describing the characteristics of the class, or group of people on whose behalf the claim is being brought.

If you have suffered a loss of the type that is being alleged in the class action, you should consider whether you wish to participate. If you are unsure as to whether you are a potential group member, you should contact the lawyers who are running the class action.

## **What are Open versus Closed class actions, and what does Opt In versus Opt Out mean?**

A class action may be commenced as an open class action or a closed class action.

In an **open class action** everyone who falls within the description of the class of people on whose behalf the claim is being brought are included in the class action automatically once it is filed, regardless of whether they are aware of the action or whether they have signed any agreement with the Lawyers or Litigation Funder. When this type of class action is commenced, the identity of each group member may not be known by the Lawyers and Litigation Funder. If you are a group member in an open class action, you will at some point in the litigation be given an opportunity to opt out of the action (see below) if you are capable of being identified.

By contrast, in a **closed class action** part of the class definition will include a requirement that each claimant within the class has signed an agreement with the Lawyers for the Lawyers to act for them in the Court proceeding and/or an agreement with the Litigation Funder to provide funding for the claim to be brought. All members of a closed class action should be known to the Lawyers and Litigation Funder (as they will need to sign an agreement with them), but their identities will typically not be known to the Defendant or Court until a point much later in the proceedings when this is necessary, such as for settlement or following a successful judgment.

The Australian class action regime is based on an 'opt-out' model, in which all claimants who meet the group definition automatically become members of the class when the claim is commenced in Court, regardless of whether they are aware the claim.

All claimants who fall within the group definition will be bound by the judgment of the Court or any Court-approved settlement unless they take positive action to remove themselves from the Court proceeding. This is called 'opting out' and during the proceedings, the Court will require that all class members are notified of their right to opt-out, and the process for doing so.

If a group member elects to opt-out, they will no longer be bound by the outcome of the proceedings (whether settlement or judgment) and will be able to pursue whatever claim they may have in separate proceedings, subject to any applicable limitation periods.

The Court will also typically ask group members who do not opt out, and who remain in the proceedings, to notify the Court that they want to receive compensation from any settlement or judgment. This is called 'registration' and it is usually by way of written notice to the Court.

## **What is the role of the Representative Party?**

The Representative Party will be named as the Plaintiff or Applicant in the Class Action and will carry on the litigation in their own name. Other parties may be named as representative parties from time to time, if the Lawyers think that is appropriate or necessary for the litigation. All other group members will be affected by the decisions made by the Representative Party.

The Representative Party has the right and obligation to give certain instructions to the Lawyers who are conducting the litigation however, at the same time, they have obligations to the broader group of group members that they represent, to ensure that their instructions are in the interests of all group



members in the case. The instructions provided by the Representative Party will include settlement offers or negotiating to resolve a claim.

From a practical perspective, it is not possible for all group members to give ongoing instructions to the Lawyers in respect of the conduct of the Class Action, which is why the Representative Party is given the right to give these instructions.

If you are the Representative Party, the Lawyers will assist you to perform your role in the Class Action and you will have a more active role in the proceedings than the other group members who you are representing. Whilst the Representative Party may be ordered to pay the Defendant's costs if the Class Action is unsuccessful, they will typically be indemnified by the Litigation Funder, who will pay those costs on their behalf.

If you are not the Representative Party, the instructions you may be asked to give to the Lawyers may be limited to instructing them to include you as a claimant in the Class Action and the extent of the losses that you have suffered.

### **Do I get a say in whether the Class Action settles and for how much?**

Much thought and analysis go into whether a class action settles and, if so, on what basis and for what amount (if any).

Any settlement must be agreed between the parties to the Class Action, being the Representative Party on the one hand (under the guidance and advice of their Lawyers), and the Defendant on the other hand.

If the Class Action is being funded by a commercial Litigation Funder then, in recognition of the Litigation Funder's investment in the Class Action, the Litigation Funder also has a right to say what it thinks is an appropriate settlement. If there is a difference of opinion between the Representative Party and the Litigation Funder regarding any potential settlement, the difference of opinion will usually be resolved by a senior barrister.

If you are a claimant, but not the Representative Party, you are not entitled to participate in any settlement discussions. However, if you are unhappy with the settlement reached, you will be entitled to lodge an objection (at your own cost) at a settlement approval hearing to let the Court know that you disagree, and the reasons why you disagree, with the settlement.

The Court ultimately decides whether a settlement is fair and reasonable for the claimants overall and as between them, and therefore whether it should be approved. The Court also decides what deductions should be made from the settlement funds, to pay any fees and costs which may be claimed by the Lawyers or the Litigation Funder.

### **How long does a Class Action take to resolve and what happens at the end?**

The length of time a Class Action takes to resolve depends on a number of factors, including the complexity of the issues, the amount of evidence required to determine the claim and the actions or strategy adopted by the Defendant in defending the proceedings.



If the Class Action is unsuccessful, you will pay nothing and you will receive nothing. The Representative Party may be ordered to pay the Defendant's costs, however the Litigation Funder will have agreed to pay for those costs, unless the funding agreement has been terminated.

If the Class Action is successful (either by way of a judgment or a Court-approved settlement), a distribution scheme is typically established to distribute the claim proceeds as required by the Court judgment and/or any settlement. Typically, an administrator of the distribution scheme is appointed by the Court, and this may be the Lawyer, or an independent third-party such as a major accounting firm. The administrator will distribute to the Litigation Funder and the Lawyer what the Court has ordered be paid to them and the remainder of the claim proceeds will be distributed amongst the group members who have registered to receive compensation.

Each claimant's share of the claim proceeds will depend on the merits of each of their claims in the class action and the Court will have typically agreed a process for the administrator to work out what each claimant is entitled to receive. The Lawyer and the Litigation Funder are not responsible for determining the value of each claimant's share of the claim proceeds as the calculations and methodology are set and approved by the Court.

### **What will it cost me to participate in a Class Action?**

Typically, all the costs of running the Class Action will be met by the Litigation Funder or the Lawyers. You will not have to pay anything upfront if you are eligible and remain as a group member of the Class Action.

Usually the Litigation Funder will pay all or part of the Lawyer's professional fees (depending on what has been agreed with the Lawyers), the costs of the barristers, any experts or other expenses related to the case, and the Court costs. The Litigation Funder will also provide an indemnity to the Representative Party so that if the claim is unsuccessful, the Litigation Funder will pay the costs of the Defendant if those costs are ordered to be paid by the Representative Party.

All of the costs paid by the Litigation Funder will only be payable by group members if the claim is successful (either by way of settlement or judgment) and the Court approves that payment to the Litigation Funder. The Litigation Funder will also seek a fee to compensate it for funding the costs of the Class Action, and that fee will only be payable if the Court approves it.

### **What are the risks of participating in a Class Action?**

**- The claim may be unsuccessful, the Litigation Funder might cease funding or you might receive nothing**

Litigation is risky and outcomes are often not as expected. The claim may be unsuccessful which means that you will have lost the time and effort you put into the litigation. This is mainly a risk for the Representative Party more than the other group members, who typically are passive and are not required to take an active role in the proceedings.

Litigation can take a number of years to conclude and be subject to multiple levels of appeal. The costs, including legal expenses, to fund the proceedings may exceed any monetary award or judgment, in which case you may not receive any proceeds from the judgment or any settlement ultimately achieved.

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Even if the claim is successful, the Defendant may be unable to pay the entire, or part of, the settlement or judgment sum.

The Litigation Funder may in its absolute discretion decide to terminate its funding of the claim, if it considers that the claim is no longer commercially viable. If the claim is unsuccessful, the Litigation Funder may determine not to provide funding in respect of any appeals, in which case it will be necessary to appoint a replacement Litigation Funder for any such appeals.

The Litigation Funder agrees to pay the costs along the way but may become insolvent or otherwise unable to meet its payment obligations.

If the Litigation Funder terminates its funding or becomes unable to pay the ongoing costs of the proceedings, and no replacement Litigation Funder is available, the claim may not proceed.

## **- Conflicts of interest may arise**

Whilst the Lawyers and Litigation Funder are obliged to disclose any conflicts of interest that arise, and to manage any such conflicts in the best interests of group members, there is the potential for conflicts to arise in class actions for a number of different reasons:

### *Pre-existing relationships and potential future arrangements*

There may be a pre-existing legal or commercial relationship between the Litigation Funder, the Lawyer, one or more claimants and one or more Defendants.

The Lawyer may see the Litigation Funder as a source of future work for the Lawyer, to be paid for by the Litigation Funder.

### *Interests of the Parties*

The interests of the Litigation Funder are not necessarily the same as claimants and although you may have certain rights to provide a direct instruction to the Lawyer, there is a risk that the Litigation Funder gives instructions that are not instructions the claimants would provide.

The Lawyer may be entitled to cease acting on the Class Action and the Funder may be entitled to cease funding the Class Action in certain circumstances. Either of these events would potentially cause significant disruption to the Class Action.

### *Providing instructions to the Lawyer*

Usually the Litigation Funder is entitled to provide instructions to the Lawyer in connection with the day- to-day carriage of the Class Action. Those instructions might differ from the instructions individual claimants might otherwise give.

### *Differences in individual claim merits*

Potential conflicts may arise where:

- (i) some claimants have stronger claims than other claimants which may result in issues in relation to the allocation of claim proceeds or claimants with stronger claims bearing a share of the costs of the weaker claims; and
- (ii) adding additional claimants may not be in the interests of existing claimants.

## Differing views on settlement

Some claimants may want to settle the claim and the Litigation Funder may not, or vice versa. This may happen for many reasons, including:

- (i) differing views on the prospects of success;
- (ii) the Litigation Funder is financially exposed if the claim is lost (because the Litigation Funder has paid the legal costs) whilst claimants, other than the Representative Party, in Class Actions are not;
- (iii) the Litigation Funder wants to make a certain return on the time and money it has invested in the claim;
- (iv) a claimant may consider his/her potential entitlement to a portion of the claim proceeds to be too low; or
- (vi) potentially higher funding fees may be payable if the claim resolves later than earlier.