

**Petersen Superannuation Fund Pty Ltd v Bank of Queensland &
Anor NSD 362/2016**

AMENDED NOTICE OF PROPOSED SETTLEMENT

This notice contains important information about the proposed settlement of the Petersen Superannuation Fund Pty Ltd v Bank of Queensland Class Action. You should read this notice carefully. If there is anything in it that you do not understand, you should seek legal advice. **A new paragraph 13(f) has been inserted into the notice you recently received in respect of the Class Action and the notice otherwise remains unchanged.**

- 1 The Federal Court of Australia has ordered that this notice be published for the information of group members in the Federal Court of Australia proceeding *Petersen Superannuation Fund Pty Ltd v Bank of Queensland & Anor* NSD 362 of 2016 (**Proceeding**).
- 2 You have received this notice because you may be a group member in the Proceeding. The outcome of the Proceeding directly affects your rights against Bank of Queensland Limited ABN 32 009 656 740 (**BOQ**) and DDH Graham Limited ABN 28 010 639 219 (**DDH**).
- 3 The parties to the Proceeding have agreed to terms for the settlement of the Proceeding as described at paragraphs 10 to 13 of this Notice. The settlement will not take effect unless and until it has been approved by the Federal Court. **If you do not oppose the settlement, no action is required by you. If you wish to oppose the settlement you must take the steps outlined in paragraph 19 of this Notice.**

Who is affected?

- 4 The Proceeding is brought by Petersen Superannuation Fund Pty Ltd ACN 136 059 562 (**Applicant** or **Petersen**) on their own behalf and on behalf of persons who invested money in a BOQ financial product, namely the “Money Market Deposit Account” (**MMDA**). The Proceeding is funded by a litigation funder, Vannin Capital Operations Limited (**the Funder**).
- 5 The Applicant is represented by Gilbert + Tobin. The former solicitors for the Applicant, Quinn Emanuel, ceased to act for the Applicant on 27 March 2018. Gilbert + Tobin’s contact details are set out in paragraph 20 below.

Claims against BOQ and DDH

- 6 Petersen, together with other persons in the class (**group members**), were advised by Sherwin Financial Planners Pty Ltd (**SFP**) and/or other persons and companies associated with SFP (collectively **Sherwin**) to deposit funds into a BOQ MMDA for the purpose of investment.
- 7 Petersen alleges that Sherwin acted without authority and fraudulently in respect of the funds invested in Petersen’s BOQ MMDA (the **Petersen MMDA**).
- 8 Petersen contends that BOQ and DDH, as operators and administrators of the Petersen MMDA, ought to have been on notice of any suspicious activity taking place, including any indicia of fraud, on the Petersen MMDA by Sherwin, pursuant to the obligations owed by BOQ and DDH to Petersen under the terms of the MMDA (the

Petersen Contract).

- 9 BOQ and DDH deny Petersen's allegations. Further to this, BOQ has filed a cross claim against Petersen. In effect, the cross claim alleges that if BOQ is found to have breached the Petersen Contract and the breach (or breaches) are found to have caused loss or damage to Petersen, that being the loss of Petersen's investment funds, then Petersen is liable to indemnify BOQ under the terms of the Petersen Contract for its financial loss. Petersen denies BOQ's allegations.

The Terms of the Proposed Settlement

- 10 The Applicant, BOQ and DDH have agreed to terms for the settlement of the Proceeding without any admission of liability, subject to the approval of the Federal Court.

The settlement amount

- 11 The terms of the proposed settlement provide that the claims of the Applicant and group members are settled for an amount of ██████████ (**Settlement Sum**) inclusive of the Applicant's legal costs and disbursements (comprising a payment of ██████████ from DDH and a payment of ██████████ from BOQ). ***Please note the settlement agreement requires the Settlement Sum to be kept confidential – please contact Gilbert + Tobin on (02) 9263 4632 or by email apailthorpe@gtlaw.com.au for disclosure of the Settlement Sum.***

Some group members are to be bound by the settlement but excluded from sharing in the Settlement Sum

- 12 The proposed settlement is to be binding upon all group members in the Proceeding. It provides that all group members release the respondents from liability and are precluded from bringing any further action against the respondents in relation to the subject matter of the Proceeding. However:
 - (a) those group members who did not complete and submit a Class Member Registration Form to Quinn Emanuel by 4.00pm AEST on 14 December 2017 are **not** permitted to share in the Settlement Sum. Only those group members who completed and submitted that form by that date are so entitled; and
 - (b) because of time limits said to apply in relation to group member's claim, those group members who suffered loss or losses by reason of transactions on the group member's MMDA which occurred on or before 10 March 2010 are **not** permitted to share in the Settlement Sum with respect to losses suffered by reason of such transactions.

Deductions from the Settlement Sum before distribution to group members

- 13 The Settlement Sum is proposed to be distributed as provided in the Settlement Distribution Scheme which will be prepared prior to the Court hearing the application for settlement approval. The following amounts are proposed to be deducted from the Settlement Sum before the balance is distributed to those group members who are entitled to share in the settlement monies:
 - (a) a litigation funding commission payable to the Funder. The Applicant and some group members (**funded group members**) have entered into litigation

funding agreements with the Funder (**funding agreements**). Under the funding agreements, the Funder is entitled to be paid a 25% commission of the funded group members' share of the Settlement Sum, plus reimbursement of costs or disbursements it has paid, or will pay.

The Funder has no contractual entitlement to require group members who did not enter into a funding agreement (**unfunded group members**) to pay litigation funding charges. However, it is usual for the Court to make orders that have the result that all group members have amounts deducted from their share of the Settlement Sum, so that all group members that are entitled to share in a settlement receive the same pro rata share of the settlement 'in hand'.

- (b) the legal costs and some disbursements (**Costs**) charged by the former solicitors for the Applicant, Quinn Emanuel, estimated at \$4.16 million plus GST. The amount of the Costs to be deducted is a matter for Court approval following an inquiry and report as to the reasonableness of the Costs by an independent Court-appointed referee;
- (c) certain costs and disbursements incurred on behalf of the applicant and group members, that the Funder has paid, or will pay, and which are to be reimbursed to it (**Funder Costs**). Vannin has been invoiced approximately \$3 million in Funder Costs, as at 24 April 2018, and estimates a further \$280,000 will be incurred before the completion of the class action. Again, these deductions will be reviewed by the Court, which will decide the reasonable amounts permitted to be charged;
- (d) the costs and disbursements of administering the Settlement Distribution Scheme (**Scheme Administration Costs**), estimated at \$61,000 plus GST;
And
- (e) an amount of \$25,000 to reimburse the Applicant for the loss and expense it suffered in prosecuting the Proceeding for the benefit of group members; **and**
- (e)(f) an amount of \$1,065,900 amount owing to AmTrust for an after the event insurance policy taken out in connection with the Proceeding in respect of adverse costs orders. Whether this deduction should be allowed is a matter for Court approval. The Applicant intends to submit to the Court that all amounts paid or owing to AmTrust for the insurance policy should be deducted from the Funder Costs or alternatively any funding commission Vannin is entitled to recover.

Common Fund Order or a Funding Equalisation Order?

- 14 The Funder has applied to the Court for orders that unfunded group members be bound by similar litigation funding terms as if they had entered into a funding agreement (**Common Fund Order**). If a Common Fund Order is made all group members will be required to pay the Funder a funding commission at a reasonable Court-approved percentage rate, no more than 25% of the Settlement Sum of [REDACTED]. **Please note the settlement agreement requires the Settlement Sum to be kept confidential – please contact Gilbert + Tobin on (02) 9263 4632 or by email apailthorpe@gtlaw.com.au for disclosure of the Settlement Sum.**
- 15 The Applicant opposes the Common Fund Order the Funder seeks. It seeks what is

known as a “funding equalisation order”, under which unfunded group members who receive monies through the settlement will have an amount deducted from their share of the settlement as if they had entered into a funding agreement. The deducted amounts will be distributed pro rata across the class as a whole. The Funder will receive no more in total than it is entitled to receive from funded group members.

Court approval

- 16 The settlement will not take effect unless and until it has been approved by the Federal Court. The Applicant will seek this approval at a hearing **at 10.15 am on 25 May 2018** in the Federal Court located in the Law Courts Building, Queens Square, Sydney. Group members may attend this hearing.
- 17 If approved, the settlement will bind all group members (other than those who have previously opted out of the Proceeding). If Court approval is granted no group member will be able to take further action against BOQ or DDH in relation to the subject matter of the Proceeding.
- 18 If the Court does not approve the settlement the Proceeding will return to Court where it will continue to be litigated by the Applicant and defended by BOQ and DDH.

If you wish to oppose the settlement

- 19 If you wish to make submissions as to why the Federal Court should not approve the proposed settlement, or the Settlement Distribution Scheme including the proposed deductions from the Settlement Sum you must file with the Court and serve on Gilbert + Tobin the attached Notice of Objection to Settlement Form, by no later than 18 May 2018, together with any evidence and submissions on which you wish to rely. Further, you or your legal representative may attend the Court hearing on 25 May 2018 to further explain why you consider the proposed settlement should not be approved.

Contact details

- 20 The address for the Applicant’s solicitors, Gilbert + Tobin is:

Gilbert + Tobin
Att: Crispian Lynch / Alice Pailthorpe
Level 35, Tower Two
200 Barangaroo Avenue
Barangaroo
NSW 2000

- 21 The address for the Federal Court is:

Petersen Superannuation Fund Pty Ltd v Bank of Queensland & Anor NSD
362/2016
Federal Court of Australia
NSW District Registry
Law Courts Building
Queens Square
NSW 2000

Further Information

- 22 Please consider the above matters carefully. If there is anything of which you are unsure, you can contact Gilbert + Tobin on (02) 9263 4632 or by email apailthorpe@gtlaw.com.au, or seek your own legal advice.

Notice of Objection to Settlement Form

No. NSD 362 of 2016

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

PETERSEN SUPERANNUATION FUND PTY LTD
Applicant

BANK OF QUEENSLAND and another named in the schedule
Respondents

To: Gilbert + Tobin
Att: Crispian Lynch / Alice Pailthorpe
Level 35, Tower Two
200 Barangaroo Avenue
Barangaroo NSW 2000

The group member identified below gives notice that an objection is made to the proposed settlement of the above-named representative proceeding. The group member's written reasons for the objection are attached to this notice.

Name of group member:	
Person completing this form (print):	
Authority of person completing this form (eg., company director, lawyer)	
Telephone contact:	
Postal address	

The Group Member does * / does not * intend to appear at the hearing of the application for approval of the Settlement.

***strike out whichever is not applicable**

Date:

.....
Signed by: [Name]

Capacity (e.g. group member or lawyer for group member):

(Note: the written reasons for the objection must be attached to this notice.)