



Annexure 1
OPT OUT NOTICE
FEDERAL COURT OF AUSTRALIA

Hassan El-Banna El-Zein and others v Barton Nine Pty Ltd as trustee for the Barton Nine Settlement and another, NSD 1555 of 2018

Summary of this notice

This notice has been sent to you because you may be a class member in a class action in the Federal Court of Australia.

The class action relates to the sale of new residential apartments in Stage 1 of the Governor Place development at 30 & 32 Blackall Street, Barton ACT 2600.

The purpose of this notice is to alert you to the right of class members to **opt out** of the class action.

If you believe you are a class member and wish to **opt out**, you must do so by 23 April 2019.

This notice contains:

- an explanation of this class action, and class actions generally;
- information about how this class action is funded;
- an explanation of what “opt out” means;
- the criteria for being a “class member”;
- an explanation of some of the consequences of not opting out;
- information about what class members need to do in response to this notice; and
- information about how to obtain relevant documents.

At the end of this notice is a form you may use to provide your contact details to IMF Bentham Limited, the funder of this class action. Doing so will ensure that, if you are a class member, you will receive any future Court ordered notices in relation to the proceeding.

1 Why is this notice important?

A class action has been commenced in the Federal Court of Australia by Hassan and Deborah El-Zein and Glenn and Atsuko Eppelstun against Barton Nine Pty Ltd as trustee for the Barton Nine Settlement and 13.9 Barton Pty Ltd as trustee for the 13.9 Barton Commercial Property Trust (the **Barton Companies**).

The Barton Companies were the developers of the Governor Place apartments in Barton, ACT.

Mr and Mrs El-Zein, and Mr and Mrs Eppelstun, purchased a new residential apartment from the Barton Companies. They allege that, according to their contracts for sale, the purchase price included Goods and Services Tax (**GST**).

This class action seeks to recover:



- (a) the amounts that Mr and Mrs El-Zein and Mr and Mrs Eppelstun allege they and class members paid to the Barton Companies that were referable to GST; and/or
- (b) compensation for loss caused by the Barton Companies' alleged breaches of contract and legislation.

The Federal Court has ordered that this notice be published for the information of persons who might be members of the class on whose behalf the action is brought, and may be affected by the action. You have been identified as a potential class member. **You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the Court.** If there is anything in it that you do not understand, you should seek legal advice.

2 What is a class action?

A class action is an action that is brought by one or more persons (“**Applicants**”) on their own behalf and on behalf of a class of people (“**class members**”) against one or more other persons (“**Respondents**”), where the Applicants and class members have similar claims against the Respondents.

In a class action, an applicant is responsible for legal costs associated with bringing the claim. Class members in a class action **are not** individually responsible for these costs, other than in certain circumstances described in item 7 below.

Class members are “bound” by the outcome in the class action, which will determine issues common to the group, unless they have opted out of the proceeding. A binding result can happen in two ways: either a *judgment* following a trial, or a *settlement* at any time. If there is a judgment or a settlement of a class action, class members *will not* be able to pursue the same claims and *may not* be able to pursue similar or related claims against the respondents in other legal proceedings. Class members should note that:

- (a) in a *judgment* following trial, the Court will decide various factual and legal issues in respect of the claims made by the Applicants and class members. Unless those decisions are successfully appealed they bind the Applicants, class members and the Respondents. Importantly, if there are other proceedings between a class member and a Respondent, it is likely that neither of them will be permitted to raise arguments in that proceeding which are inconsistent with a factual or legal issue decided in the class action.
- (b) in a *settlement* of a class action, where the settlement provides for compensation to class members it may extinguish *all* rights to compensation which a class member might have against the Respondents arising in any way out of the events or transactions which are the subject-matter of the class action. A settlement would not occur without group members being given notice of it, and without the court giving its approval to the proposed terms of settlement.

If you consider that you have claims against a Respondent which are based on your individual circumstances or are otherwise additional to the claims described in the class action, then it is important that you seek independent legal advice about the potential binding effects of the class action **before** the deadline for opting out (see below).



3 What is this class action?

This class action, the Governor Place class action, is brought by the Applicants, Hassan and Deborah El-Zein and Glenn and Atsuko Eppelstun, on their own behalf and on behalf of all persons who are “class members” as defined in the proceeding. Item 6 below describes who is a class member.

The class action arises from the sale of residential apartments in Stage 1 of the Governor Place development by the Barton Companies, from 2013 onwards.

The class members bought apartments from the Barton Companies under contracts of sale on which certain boxes relating to GST were ticked, on page two of the contract, as pictured below:

Option 1 – Taxable Supply

- GST**
- Not applicable
 - Input taxed supply of residential premises
 - Taxable supply (including new residential premises)
 - GST-free supply of going concern
 - Buyer and Seller agree to apply margin scheme

Option 2 – Taxable Supply and Margin Scheme

- GST**
- Not applicable
 - Input taxed supply of residential premises
 - Taxable supply (including new residential premises)
 - GST-free supply of going concern
 - Buyer and Seller agree to apply margin scheme

The class members’ contracts also contained other terms relating to GST. These terms are discussed at item 6 below.

The Applicants allege that the Barton Companies’ conduct means that:

- (a) the amounts that the Applicants and the class members paid by way of GST should be returned to them; and/or
- (b) the Barton Companies must pay the Applicants and class members compensation because:
 - (i) the Barton Companies breached the contracts for sale; and/or
 - (ii) the Barton Companies engaged in unconscionable conduct or misleading or deceptive conduct, contrary to the Australian Consumer Law and other equivalent legislation.

On top of these amounts, the Applicants seek interest, and payment of their legal costs.

The Barton Companies do not admit the allegations and are defending the class action.

4 How is this class action funded?

The Applicants and some class members have entered into funding agreements with IMF Bentham Limited (**IMF Bentham**).

Under the funding agreements:

- (a) IMF Bentham has undertaken work investigating the claims available to the Applicants and class members and is project managing the conduct of the litigation;
- (b) IMF Bentham pays the Applicants’ solicitors (Corrs Chambers Westgarth), provides security for costs, and is responsible for paying any adverse costs orders; and
- (c) in return, if the class action is resolved by way of a successful settlement or judgment, IMF Bentham is entitled to recover from the resolution sum certain of its costs (including legal fees it has paid the Applicants’ solicitors), a project management fee, and a percentage of the resolution sum.



This is only a summary of some of the main terms of the funding agreement. Class members who have already signed a funding agreement may consult the full terms of that agreement. Class members who have not signed the funding agreement may obtain a confidential copy of the standard agreement by contacting IMF Bentham, and may wish to consider entering into an agreement with IMF Bentham.

At the moment, the litigation funding arrangements mean that those class members who have signed funding agreements will be responsible for paying IMF Bentham’s entitlements out of their portions of the resolution sum, if the class action is successful. The Applicants intend to seek orders at a later stage to ensure that the costs of funding the proceeding are shared equitably among all class members who recover money from the class action, whether they have signed a funding agreement or not.

5 What is “opting out”?

Applicants in a class action do not need to seek the consent of class members to commence a class action on their behalf. However, class members can cease to be a part of the class by “opting out” of the class action. The purpose of this notice is to inform class members of their right to opt out, and the deadline for doing so. An explanation of the process for opting out is at item 9(b) below.

If you have signed a funding agreement with IMF Bentham, you should be aware that if you opt out, and you receive a resolution sum in relation to your claim either at the time of opt out or at a later time, you could still remain liable for paying some of IMF Bentham’s entitlements under the agreement. If you have any questions about the funding agreement, you should speak to IMF Bentham, or obtain legal advice, before opting out.

6 Are you a class member?

You are a class member if all of the following four criteria apply to you:

<p>1. <i>You bought an apartment in Stage 1 of the Governor Place development from Barton Nine Pty Ltd and 13.9 Barton Pty Ltd.</i></p>	<p><i>The Governor Place development is located at 30 & 32 Blackall Street, Barton ACT 2600.</i></p>												
<p>2. <i>Page one of your contract for sale stated that the sale price was “GST inclusive unless otherwise specified”:</i></p> <table border="1" data-bbox="284 1659 1008 1727"> <tr> <td>Price</td> <td>\$</td> <td></td> <td>(GST inclusive unless otherwise specified)</td> </tr> <tr> <td>Less Deposit</td> <td>\$</td> <td></td> <td>(10% of Price)</td> </tr> <tr> <td>Balance</td> <td>\$</td> <td></td> <td></td> </tr> </table>	Price	\$		(GST inclusive unless otherwise specified)	Less Deposit	\$		(10% of Price)	Balance	\$			<p><i>This is part of the ACT Law Society’s standard contract for sale of land.</i></p>
Price	\$		(GST inclusive unless otherwise specified)										
Less Deposit	\$		(10% of Price)										
Balance	\$												
<p>3. <i>Either (a), the following criteria apply to your contract for sale:</i></p> <p>(i) <i>Page two of your contract for sale had the following box ticked:</i></p>	<p><i>Please check page two of your contract for sale.</i></p>												



GST

- Not applicable
- Input taxed supply of residential premises
- Taxable supply (including new residential premises)
- GST-free supply of going concern
- Buyer and Seller agree to apply margin scheme

and (ii) your contract contained the following term:

24.6 If this Contract says the sale is a taxable supply, does not say the margin scheme applies to the sale of the Property, and the sale is in fact not a taxable supply, then the Seller must pay the Buyer on Completion an amount of one-eleventh of the Price.

This is part of the ACT Law Society's standard contract for sale of land.

and (iii) your contract contained the following term:

24.7 On Completion the Seller must give the Buyer a tax invoice for any taxable supply by the Seller by or under this Contract.

This is part of the ACT Law Society's standard contract for sale of land.

Or (b), the following criteria apply to your contract for sale:

(i) Page two of your contract for sale had the following boxes ticked:

Please check page two of your contract for sale.

GST

- Not applicable
- Input taxed supply of residential premises
- Taxable supply (including new residential premises)
- GST-free supply of going concern
- Buyer and Seller agree to apply margin scheme

and (ii) your contract included the following term:

PRICE INCLUSIVE OF GST

Price inclusive

The Price payable in accordance with this Contract is inclusive of GST (within the meaning of the *A New Tax System (Goods & Services Tax) Act 1999 (Cth)* as amended from time to time.)

Margin Scheme

The Buyer and the Seller agree that any GST that the Seller is liable to pay on the supply of the Unit to the Buyer under this Contract is to be calculated under Division 75 of the *A New Tax System (Goods & Services Tax) Act 1999 (Cth)* ie. the Margin Scheme.

These terms are found under different clause numbers in each contract for sale, for example clause 32.

and (iii) your contract included the following term:

24.5 If this Contract says the Buyer and Seller agree that the margin scheme applies to the supply of the Property, the Seller warrants that it can use the margin scheme and promises that it will.

This is part of the ACT Law Society's standard contract for sale of land.

4. Your contract did not otherwise say that the sale price was exclusive of GST.



If you are unsure whether or not you are a class member, you should send a copy of your Contract for Sale to IMF Bentham using the contact information listed in item 10(a), or seek legal advice without delay.

7 Will you be liable for legal costs if you remain a class member?

You will **not become liable for any legal costs** simply by remaining as a class member for the determination of the common questions. However:

- (a) if the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage Corrs Chambers Westgarth or other solicitors to do that work for you at your own cost. A copy of the terms on which Corrs Chambers Westgarth are acting in the class action may be obtained from IMF Bentham using the contact information listed in item 10(a);
- (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, and you have not signed a funding agreement with IMF Bentham, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Applicants in running the class action.

If the class action is settled, you may be able to claim from the settlement amount without retaining a lawyer.

If you have signed a funding agreement, and compensation becomes payable to you, as noted above at item 4(c) IMF Bentham is entitled to recover certain of its costs (including legal fees it has paid the Applicants' solicitors), a project management fee, and a percentage of the resolution sum.

8 What will happen if you choose to remain a class member?

Unless you opt out, you will be bound by any settlement or judgment of the class action. If the class action is successful you will be entitled to share in the benefit of any order, judgment or settlement in favour of the Applicants and class members, although you may have to satisfy certain conditions before your entitlement arises. If the action is unsuccessful or is not as successful as you might have wished, you will not be able to pursue the same claims and may not be able to pursue related claims against the Respondents in other legal proceedings.

9 What do class members need to do?

(a) How can you remain a class member?

If you **wish to remain a class member**, there is nothing you need to do at this time. The Applicants will continue to bring the proceeding on your behalf up to the point of a settlement, or where the Court determines those questions that are common to the claims of the Applicants and the class members.

If you wish to remain a class member, it is open to you (but not necessary) to register your details with IMF Bentham. Registering will mean that future Court ordered notices about the class action can be sent to your preferred address. You can register by completing the form attached to the end of this notice, and sending it to IMF Bentham



using the contact details provided on that form. Registering in this way does not involve you entering a funding agreement. If you **have** already entered into a funding agreement with IMF, you are already registered, and don't need to take any further steps at this time.

(b) How can you opt out of the class action?

If you **wish to cease being a class member**, you must opt out of the class action. If you opt out you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the class action, but you will be at liberty to bring your own claim against the Respondents, if you so wish, provided that you issue Court proceedings within the time limit applicable to your claim. If you wish to bring your own claim against the Respondents, you should seek your own legal advice about your claim and the applicable time limit **prior** to opting out. Once you opt out, you cannot opt back in without a further order of the Court.

If you **wish to opt out** of the class action, you must do so by completing a '**Opt out notice**' in the form shown below (Form 21 of the Federal Court of Australia's approved forms), and returning it to the Registrar of the Federal Court of Australia at the address on the form.

IMPORTANT: the notice must reach the Registrar by not later than 23 April 2019, otherwise it will not be effective.

If you wish to send an opt out notice by post, you should leave sufficient time for it to reach the Court's Registry.

If you wish to submit your notice in person, you can do so by attending the ACT Registry of the Federal Court of Australia, located at the Nigel Bowen Commonwealth Law Courts Building, Childers Street, Canberra City ACT 2601, between 9.00 am and 4.30 pm weekdays, or alternatively by attending a Federal Court Registry in any other state or territory during that Registry's opening hours.

You should submit the Opt out notice if:

- (i) you qualify as a class member and you wish to opt out of the class action; or
- (ii) you believe that you have been incorrectly identified as a class member because you do not meet the criteria set out in item 6 above.

Each class member seeking to opt out should fill out a separate form. If you are opting out on behalf of a company or business please provide your name, the name of the company or business and your position within the company or business (e.g. director or partner).

If you wish to opt out and you purchased your apartment as a joint tenant with another person, you and that person should try and reach a common position as to whether or not to opt out.

10 Where can you obtain copies of relevant documents?

Copies of relevant documents, including the application, the statement of claim, and the defence, may be obtained by:

- (a)** contacting IMF Bentham on 1800 016 464 or by email to 402944@imf.com.au; or
- (b)** contacting a District Registry of the Federal Court (contact details are available at www.fedcourt.gov.au) and paying the appropriate inspection fee.



Please consider the above matters carefully. If there is anything of which you are unsure, you should contact IMF Bentham or seek your own legal advice. You should not delay in making your decision.

11 How can you ensure that you receive future Court ordered notices in relation to the proceeding?

If you believe you are a class member and wish to ensure that you receive any future Court ordered notices in relation to this proceeding, you may fill out the Class Member Registration Form over page and return it to IMF Bentham using the details on that Form.



HASSAN EL-BANNA EL-ZEIN AND OTHERS V BARTON NINE PTY LTD ACN 143 616 693 ATF THE BARTON NINE SETTLEMENT AND ANOTHER NSD 1555/2018

“GOVERNOR PLACE CLASS ACTION” CLASS MEMBER REGISTRATION FORM

1. CONTACT DETAILS

PLEASE PRINT IN CAPITAL LETTERS

Note: This is the party to whom all correspondence will be sent, including any cheques.

Contact Name: [] (TITLE) (FIRST NAME) (SURNAME)

Postal Address: []

Suburb/Town: []

State: [] Postcode: [] Country: []

Contact Email: []

Note: Our preferred method of correspondence is by email. Please keep IMF informed of your current email address.

Phone: () [] Mobile: []

2. CLASS MEMBER DETAILS

PLEASE PRINT IN CAPITAL LETTERS

Note: The Class Member is the person(s), company or other entity that purchased the property in question and paid GST on that transaction. For example, if you purchased your property as joint tenants, the Class Member will be both joint owners together; or if you purchased your property through a company, the Class Member will be that company. Note that if you purchased as tenants in common, each tenant in common will be a separate Class Member and will need to complete a separate Class Member Registration Form.

Full Name of Class Member: []

If Class Member is a company insert ABN/ACN/ Registration No. (if overseas company): []

Street Address: (not PO Box) []

Suburb/Town: []

State: [] Postcode: [] Country: []



3. PROPERTY DETAILS

PLEASE PRINT IN CAPITAL LETTERS

Note: Please provide the address of the property you purchased and in respect of which you paid GST. If you purchased more than one property, please fill in the additional property boxes.

Unit Number:	<input type="text"/>	Street Number:	<input type="text"/>
Street Name:	BLACKALL STREET		
Suburb/Town:	BARTON		
State:	ACT	Postcode:	2600

ADDITIONAL PROPERTY DETAILS (IF APPLICABLE)

Unit Number:	<input type="text"/>	Street Number:	<input type="text"/>
Street Name:	BLACKALL STREET		
Suburb/Town:	BARTON		
State:	ACT	Postcode:	2600

4. SIGNING BY THE CLASS MEMBER

By signing below, I confirm that the information I have provided in this form is true and complete.

.....
SIGNATURE	SIGNATURE
.....
PRINT NAME	PRINT NAME
DATE: / /	DATE: / /

Note: If there is not sufficient space on the first two pages to include all of your relevant information, please copy and attach additional pages.

PLEASE RETURN THE WHOLE OF THIS CLASS MEMBER REGISTRATION FORM AND ANY ADDITIONAL ATTACHED PAGES OR ANNEXURES TO 402944@imf.com.au OR POST TO:

**IMF BENTHAM LIMITED
PO Box 5106
St Georges Terrace, Perth, WA 6831**

OR FAX TO: 08 9225 2399

Please keep a copy of this Class Member Registration Form for your records.



Form 21
Rule 9.34

Opt out notice

No. NSD 1555 of 2018

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

Hassan El-Banna El-Zein and others

Applicants

Barton Nine Pty Ltd ACN 143 616 693 atf the Barton Nine Settlement and another

Respondents

To: The Registrar
Federal Court of Australia
NSW District Registry
Level 17, Law Courts Building, 184 Phillip Street, Sydney NSW 2000

[Name of group member],
a group member in this representative proceeding, gives notice under section 33J of the *Federal Court of Australia Act 1976*, that
_____ is opting out of the representative proceeding.

[Name of group member]

Date: _____

Signed by: _____

Capacity: _____
[E.g. group member / Lawyer for the group member]

Filed on behalf of _____
Prepared by _____
Law firm _____
Tel _____ Fax _____
Email _____
Address for service _____