



NOTICE OF SETTLEMENT AND OPT OUT PROCESS
FEDERAL COURT OF AUSTRALIA

Notice to group members

Jacob Cornelius Bywater v Appco Group Australia Pty Ltd

NSD 1857/2016

This is an important notice approved by the Federal Court of Australia because:

- **you are a group member of the Appco Class Action; and**
- **the parties in this legal case want to settle the case out of Court.**

You should read this notice carefully because your legal rights may be affected by this class action.

As explained below, you may do the following things in response to this notice:

1. **Opt out** of the class action by 4pm on 6 October 2020 and lose a right to get any money compensation out of the class action (but keep your right to try to get some money compensation from an action you may start yourself against Appco Group, its directors, officers, employees or related entities).
2. **File a notice of settlement objection** by 4pm on 6 October 2020 to stay a part of the class action but let the Court know you oppose the settlement.
3. **Do nothing.**

This notice is not legal advice. You should also read the separate confidential advice on settlement available from Adero Law on request subject to a confidentiality agreement.

If any of the information in this notice is not clear to you, even after you have read the confidential advice provided by Adero Law referred to above, you should seek further advice, and bearing in mind the time limit for filing notices stated above.



1. THE APPCO CLASS ACTION AND THIS NOTICE

Why am I receiving this notice?

You are receiving this notice because you have entered into:

1. a Retainer Agreement with Adero Pty Ltd (**Adero Law**) and/or with Chamberlains Law Firm Pty Ltd (**Chamberlains Law Firm**); and
2. a Funding Agreement with Harbour Fund III L.P. (**Harbour**), to participate as a group member in the class action commenced in the Federal Court of Australia by Jacob Cornelius Bywater against Appco Group Australia Pty Ltd (**Appco Group**).

In addition to the Retainer Agreement and Funding Agreement, you have also previously received a Relationship Agreement between Adero Law and Harbour (attached as Schedule 4 to the Funding Agreement) as amended by the letter of amendment dated 30 May 2017 and then the Deed of Novation pursuant to which Mr Bywater's legal representative ceased to be Chamberlains Law Firm and commenced to be Adero Law.

It is important that you read each of these documents carefully as they set out your rights and obligations.

What is the Appco Class Action about?

A class action is also called a "representative proceeding". It is a case started in Court by one person for a group of people who have the same problem with something that has happened to them. This group of people are called "group members".

The Appco Class Action was commenced on 20 October 2016 in the New South Wales registry of the Federal Court against Appco Group Australia Pty Ltd (**Appco Group**). Mr Bywater brought the Appco Class Action on behalf of himself and all persons who:

- (a) undertook face to face selling in the Appco Business in the period from 20 October 2010 to now;
- (b) on the basis of 'Individual Contractor Agreements' or as a Managing Director of their own marketing company as referred to in paragraph 5 of the Further Amended Statement of Claim filed 14 December 2018; and
- (c) have entered into a Retainer Agreement and/or Funding Agreements with Chamberlains Law Firm and Harbour.

These are the "**Group Members**" in the Appco Class Action.

Mr Bywater claims that group members who worked for Appco Group as independent contractors were in fact employees and were therefore entitled to benefits usually provided to employees under the General Retail Award 2010, including wage rates for ordinary and overtime, annual leave, superannuation, and reimbursements for out of pocket expenses. He claims that they did not receive some of those benefits, and as a result Appco Group owes them money.



Appco Group denies that it owes Mr Bywater and the group members any money. It says the group members were all operating their own businesses undertaking marketing work for clients of Appco Group.

2. THE SETTLEMENT

Mr Bywater and Appco Group have agreed to resolve the class action out of Court. This means they won't ask the Judge to decide who should win the case. This is called a "**settlement**".

Adero Law has recommended the settlement to Mr Bywater and regards it as fair and reasonable and in the interests of Group Members.

Adero Law has prepared a confidential advice which explains why it considers that the settlement is fair and reasonable and in the interests of Group Members. The confidential advice can be provided by Adero Law (subject to a confidentiality agreement).

The Judge still needs to approve the settlement. The Judge will need to say it is fair and reasonable and in the interests of all Group Members.

Your legal rights may be affected by the settlement unless you "**opt out**" of the Appco Class Action. More information about what this means and how to opt out is set out below.

In deciding whether the settlement is fair and reasonable and in the interests of all group members, the Judge will consider information provided by any Group Members who do not agree with the settlement and provide an "**objection notice**". More information about what this means and how to send an objection notice is set out below.

What does the settlement mean for me?

As part of the settlement, Mr Bywater has agreed to the following things:

- (a) Appco Group will pay **\$1,900,000** to the Applicant and Group Members (**the settlement sum**). The settlement sum includes money which will need to be paid to Harbour in accordance with the terms of the Funding Agreement you signed;
- (b) Mr Bywater, Group Members, Adero and Harbour have agreed to release Appco Group and the following **Third Parties**:
 - i. The directors, officers and employees of Appco Group (including Mr Christos Niarchos);
 - ii. Appco Group's related companies (including their directors, officers and



employees); and
iii. Appco Group's insurer, Chubb Insurance,
from any claims you might have against them in relation to:

- a. the claims in the Appco Class Action;
- b. alleged contraventions of the sham contracting provisions of the *Fair Work Act 2009* (Cth) concerning the status of independent contractors; and
- c. any similar claims arising from the factual matrix of (a) and (b) above under other legislation including the *Australian Consumer Law* (both in Australia and overseas).

(the Third-Party Releases).

Some factors that you might wish to consider when deciding what to do are:

1. Adero has made a preliminary estimate of the total value of Group Members' claims in the Appco Class Action, which is approximately \$65million (although the Court may have ordered that they pay a lower amount by the operation of a discretion granted to it pursuant to sections 545 and 550 of the *Fair Work Act 2009* (Cth)). The settlement sum, being \$1.9million, is much smaller than the amount claimed by Mr Bywater on behalf of the Group Members. This means each Group Member will receive a very limited proportion of any underpayment;
2. Individuals in some circumstances may have claims against Third Parties for a larger sum of money than they are likely to receive as part of this settlement. Those circumstances are set out in below in the section headed "Circumstances of particular Group Members". Any such claim would need to be pursued on an individual basis. However, due to the effect of the Third-Party Releases you will not be able to pursue these claims if you remain a Group Member.
3. The settlement sum comprises the vast majority of the assets of Appco Group. Despite having conducted a range of investigations, Mr Bywater and Adero are not aware of any other recoverable assets.
4. The settlement does not cover any employment claims which may exist between you and a Marketing Company. These claims do not form part of the current proceedings or the Third-Party Releases and are able to be pursued on an individual basis, regardless of whether you remain a Group Member.

Circumstances of particular Group Members

You may have particular circumstances regarding your time with Appco Group that may mean that exercising a right of opt out will place you in a considerably more favourable position than the proposed settlement distribution. You should carefully consider the following:



- (a) Whether you were engaged in the Appco business for a period longer than 12 months or reached a position within the Appco career structure of Owner, Managing Director or higher;
- (b) Whether you incurred substantial net out of pocket costs (as distinct from underpayment of wages or income) as a result of your involvement in the Appco business;
- (c) Whether moneys were withheld from you via a bond account or other arrangement by Appco Group or a marketing company and such an amount was significantly more than the identified settlement distribution amount which applies to you (this amount is set out below); or
- (d) Whether you had direct day to day contact with Mr Niarchos or other directors or officers of the Respondent, and relied to your detriment on representations made by such individuals in relation to your marketing business resulting in loss or damage.

If your answer to any of those questions is “yes”, we strongly recommend that you read the confidential advice which will be provided by Adero Law subsequent to you signing a confidentiality agreement, and seek independent legal advice as to the appropriateness of opting out of the proceeding or objecting to the settlement.

The agreement between Mr Bywater and Appco Group is contained in a document called the “Deed of Settlement”. You can see the Deed of Settlement and the court documents for this case at <https://www.fedcourt.gov.au/> and <https://www.aderolaw.com.au/>.

Am I liable for any costs and charges?

You are not, and will not be, liable for any “out of pocket” legal costs by participating in this class action because you have signed a Funding Agreement with Harbour. The costs of the Appco Class Action are being borne in the first instance by Harbour, to be distributed upon the resolution of this proceeding as set out below.

If the settlement is approved, the Court will be asked to distribute the legal and funding costs from the money recovered fairly among all persons who have benefited from the class action.

If the settlement is not approved, the Appco Class Action will continue to proceed (subject to Harbour continuing to fund it).

Payment of settlement sum to Group Members

If the Court approves the settlement, once the funder has received its share of the Settlement Sum, the rest will be split amongst all Group Members who register to be part of the settlement distribution.



Harbour has indicated that it will not seek to enforce the terms of the Funding Agreement which ordinarily would have resulted in a full return of the settlement sum to Harbour on account of the legal fees and disbursements it has paid to date.

Mr Bywater, through his legal representatives, has requested that 25% of the settlement sum be paid to Harbour and 75% to Group Members. Harbour may seek a higher amount be paid to them. The final amount will be determined by the Court as part of the settlement approval process.

The amount of the settlement sum paid to Harbour (**Funder Settlement Sum**) and Group Members (**Group Member Settlement Sum**) is subject to the approval of the Court.

Given the limited amount of the settlement sum compared to the estimated total value of Group Member claims, Mr Bywater has agreed that the Group Member Settlement Sum be divided amongst Group Members in accordance with a tiered system, in order to minimise distribution costs. Under this system, the amount to be received by each individual would be based upon the time they spent working within the Appco business.

Mr Bywater will propose to the Court that the following tiered system should apply:

- (a) Group Members who worked with Appco Group for less than 6 months will receive a share of the settlement sum estimated at approximately \$770.
- (b) Group Members who worked with Appco Group for between 6 months and 12 months will receive a share of the settlement sum estimated at approximately \$1,545.
- (c) Group Members who worked with Appco Group for more than 12 months will receive a share of the settlement sum estimated at approximately \$2,320.

The dollar values provided above are estimates based on the start and end dates of involvement with Appco provided by Group Members to Adero Law and Chamberlains Law Firm. The actual amounts received may vary.

Nature of the payment to be made to each Group Member

Payments will be treated as a payment to an independent contractor, without GST withheld. In order to receive the payment, you will need to hold a valid Australian Business Number (**ABN**). No payment will be made if you do not provide a valid ABN as part of the registration process.

If you no longer hold an ABN you will need to register for one. It does not need to be the same ABN you held when you worked with the Appco business.

You may need to obtain independent advice in relation to the tax treatment of the



payment in relation to your ABN status.

Registration to receive a payment as part of settlement distribution

All Group Members who do not opt out can register and apply to receive a payment as part of the settlement distribution by going to <https://www.aderolaw.com.au/> and providing the information requested there.

As part of the registration process you will need to:

- (a) provide a valid ABN; and
- (b) complete a statutory declaration or other sworn statement used in your jurisdiction stating how long you worked for Appco Group. Adero Law will provide you with a suggested form of statement.

The hearing to decide whether the settlement should be approved

The Judge will hold a hearing to decide whether the settlement is fair, reasonable and in the interests of all group members.

The hearing will be on 9 October 2020 at 10:15am.

The hearing will be held by the Court via Microsoft Teams.

You can request a link to observe the hearing by emailing the Judge's Associate 24 hours before the hearing at associate.leej@fedcourt.gov.au.

Lawyers for Mr Bywater and Appco Group will be at the hearing.

You can attend the hearing if you want to. But you do not have to attend the hearing.

If you sent an objection notice to the Court, you can ask to address the Judge at the hearing about why you think the settlement should not be approved.

If you did not send an objection notice to the Court by 4pm on 6 October 2020, you can still seek permission to address the Judge about the settlement. It will then be up to the Judge to decide whether you can speak.

3. WHAT GROUP MEMBERS NEED TO DO

Group Members have three options, depending on whether they wish to remain part of the class and, if so, whether they wish to oppose the settlement. These options are set out below.

Option 1 – opt out and cease to be a Group Member



Group Members who opt out:

- (a) will not be a part of the Appco Class Action and will not receive any money from the settlement if it is approved by the Court; and
- (b) may be able to make a claim against Appco Group, its directors, officers, employees, related companies and/or a marketing company in the future, subject to any limitation defence which may be available to a potential defendant and to the merit of the potential claim itself.

If you wish to opt out so that you can bring your own claim against Appco Group, we recommend that you seek legal advice about any potential claim and the applicable time limits within which you would have to bring that claim **prior** to opting out of this class action.

If you **no longer** wish to be a Group Member in the Appco Class Action, you can opt out by completing the “**Opt Out Notice**” which is **attachment one** and returning it to the Federal Court of Australia at the address on the form by no later than 4pm on 6 October 2020.

Option 2 – send a settlement objection notice

If you wish to remain a Group Member and continue to participate in the Appco Class Action, **DO NOT** fill out and return attachment one.

Having decided to remain in the Appco Class Action, if you oppose the terms of the settlement agreement reached by the parties, you can inform the Court by filling out the “**Settlement Objection Notice**” which is **attachment two** and returning it to the Federal Court of Australia at the address on the form by no later than 4pm on 6 October 2020.

If you want to send any other documents to the Court about why you oppose the settlement, you should attach them to your Settlement Objection Notice.

If the Court rejects your objection and approves the settlement, **you will be bound by its terms**. These terms may prevent you from bringing a future claim against Appco Group, its directors, officers, employees and related companies.

Option 3 – do nothing

If you wish to remain a Group Member and continue to participate in the Appco Class Action and do not wish to oppose the settlement, you need not do anything.

If the settlement is approved by the Court, you will be entitled to receive a share of the settlement sum and **you will be bound by the terms of settlement**.

In accordance with the terms of settlement, you will not be able to bring claims against Appco group, its directors, officers, employees, related companies and Chubb Insurance, in relation to:



- (a) the claims in the Appco Class Action;
- (b) any claims in relation to alleged contraventions of the sham contracting provisions of the *Fair Work Act 2009* (Cth) concerning the status of independent contractors; and
- (c) any similar claims arising from the factual matrix of (a) and (b) above under other legislation including the *Australian Consumer Law* (both in Australia and overseas).

If the settlement is not approved, the Appco Class Action will continue to proceed (subject to Harbour continuing to fund it). You may choose to seek legal advice about pursuing similar or other claims against Appco group, its directors, officers, employees, related companies and Chubb Insurance, or you may choose to do nothing further.

This notice is published pursuant to orders of the Federal Court of Australia made on 25 August 2020.



ATTACHMENT ONE

Form 21
Rule 9.34

OPT OUT NOTICE

No. NSD 1857 of 2016

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

Jacob Cornelius Bywater
Applicant

Appco Group Australia Pty Ltd
(ABN 49 092 605 671)
Respondent

To: The Registrar
Federal Court of Australia
NSW District Registry
143-147 Liverpool St
Sydney NSW 2000

The persons named below, as a group member in this representative proceeding, gives notice under section 33J of the *Federal Court of Australia Act 1976*, that the person is opting out of the representative proceeding.

Name of group member	
Postal address of group member	
Telephone contact	
Email address	



If you are signing as the solicitor or representative of the group member:

Person completing this form	
Authority of person completing	
Postal address of person completing	
Telephone contact	
Email address	

Date:

[SIGNATURE]

Signed by _____
[PRINT NAME]

Group member / Lawyer for group member / Group member representative



**ATTACHMENT TWO
NOTICE OBJECTING TO SETTLEMENT**

No. **NSD 1857 of 2016**

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

Jacob Cornelius Bywater
Applicant

Appco Group Australia Pty Ltd
(ABN 49 092 605 671)
Respondent

To: The Registrar
Federal Court of Australia
NSW District Registry
143-147 Liverpool St
Sydney NSW 2000

REMEMBER! – Only complete this form if you object to the settlement. Don't complete this form if you do NOT object to the settlement.

I, _____, of _____, a
[WRITE YOUR NAME] [WRITE YOUR ADDRESS]
group member in this representative proceeding, object to the proposed settlement.

REASONS WHY I OBJECT TO THE SETTLEMENT

[Write your reasons below. If you need more room, write your reasons on another piece of paper and staple it or attach it to this form.]



OTHER DOCUMENTS

If you want to include other documents about why you object to the settlement, attach them to this form.

REMEMBER! – Only sign and return this form if you object to the settlement. DON'T sign and return this form if you do NOT object to the settlement.

Date:

[SIGNATURE]

Signed by _____
[PRINT NAME]