

**OPT OUT AND COMMON FUND NOTICE**  
**SWANN INSURANCE CLASS ACTION**  
**FEDERAL COURT OF AUSTRALIA (PROCEEDING NO. NSD**  
**544/2019)**

**A. WHY ARE YOU RECEIVING THIS NOTICE?**

A class action has been commenced in the Federal Court of Australia by Mr Jones Asirifi-Otchere against Swann Insurance (Aust) Pty Ltd (ACN 000 886 680) (**Swann**) and Insurance Australia Limited (ACN 000 016 722) (**IAL**). The action arises out of the sale of particular “add- on” insurance products issued by Swann (**Add-On Insurance Products**) which were presented and sold in motor vehicle dealerships to persons (including businesses) who purchased motor vehicles and motor cycles between 1 January 2008 and 1 August 2017 inclusive (**Relevant Period**) (**Swann Insurance Class Action**).

Mr Asirifi-Otchere has commenced the Swann Insurance Class Action on his own behalf and on behalf of all people and businesses described in Section D below.

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 Swann Insurance Class Action. **You are receiving this notice because you have been identified as a potential group member with the potential to receive compensation for any loss you may have suffered.**

This Notice provides important information about:

- (a) the orders made by the Court in respect of how group members will contribute to the costs of the litigation if the Swann Insurance Class Action is successfully resolved;
- (b) what you need to do to remove yourself from participating in the Swann Insurance Class Action (namely, **opt out** of the class action) before 15 November 2019; and
- (c) how your rights are affected if you do not opt out before 15 November 2019.

**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.**

**B. WHAT IS A CLASS ACTION?**

A class action is an action that is brought by one person (the “**Applicant**”, which in this case is Mr Asirifi-Otchere) on his or her own behalf and on behalf of a class of people (**group members**) against another person or people (the “**Respondents**”, who in this case are Swann and IAL). Class actions are commenced in circumstances where the Applicant and other persons have similar claims.

Group members in a class action **are not** individually responsible for the legal costs associated with bringing the class action. In a class action, only the Applicant is responsible for the costs.

Group members are “bound” by the outcome in the class action, unless they have opted out of the proceeding. A binding result can happen in two ways, being either a *judgment* following a trial, or a *settlement* at any time.

If there is a judgment or a settlement of the Swann Insurance Class Action, group members will not be able pursue the same claims against Swann or IAL in other legal proceedings, and may not be able to pursue similar or related claims against Swann or IAL in other legal proceedings. Group members should note that:

- (a) in a *judgment* following trial, the Court will decide certain factual and legal issues in respect of the claims that are common to the Applicant and group members. Unless those decisions are successfully appealed they bind the applicant, group members and the Respondents. Importantly, if there are other proceedings between a group member and the Respondents, it may be 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; and
- (b) in a *settlement* of a class action, where the settlement provides for compensation to group members it may extinguish *all* rights to compensation which a group member might have against one or both Respondents which arise in any way out of the events or transactions which are the subject matter of the class action.

If you consider that you have claims against the Respondent(s) which are based on your individual circumstances or 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).

The Applicant in a class action does not need to seek the consent of group members to commence a class action on their behalf or to identify a specific group member. However, group members can cease to be group members by opting out of the class action. An explanation of how group members are able to opt out is found below in the section headed “Opting Out of the Class Action”.

### **C. WHAT IS THE SWANN INSURANCE CLASS ACTION?**

The Swann Insurance Class Action is brought by the Applicant on his own behalf and on behalf of all persons who are “Group Members” as defined in the proceeding (see the section headed “Are you a Group Member?” below).

The Respondents to the class action are Swann and IAL. The Applicant alleges that, in summary:

- (a) Swann, in relation to the way that Add-On Insurance Products were presented and sold in motor vehicle dealerships to persons (including businesses) who purchased motor vehicles and motor cycles, engaged in unconscionable conduct and/or misleading or deceptive conduct;
- (b) purchasers of the Add-On Insurance Products were not informed of the alleged facts:
  - i. the products had no or no material financial value;

- ii. were optional to purchase;
  - iii. the Authorised Representatives were incentivised and/or encouraged by Swann to sell to prospective purchasers of Add On Insurance Products as many insurance products as possible; and
  - iv. the Add On Insurance Products may not be suitable for the Applicant or Group Members.
- (b) Swann's alleged conduct was in contravention of the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth); and
  - (c) as a consequence of Swann's alleged conduct, purchasers of Add-On Insurance Products within the Relevant Period suffered loss or damage, namely the premiums paid to Swann for the Add-On Insurance Products together with the interest and costs (such as GST and stamp duty) incurred in respect of the Add-On Insurance Products.

Swann and IAL deny the allegations and are defending the class action.

The detailed allegations are set out in the Applicant's Amended Statement of Claim. Copies of the Amended Statement of Claim and Swann and IAL's Defence to the Amended Statement of Claim are available to be viewed on the website referred to in section G below. The Federal Court has ordered that mediation between the parties be conducted no later than 30 November 2019.

#### **D. ARE YOU A GROUP MEMBER?**

You are a group member in this class action if:

- (a) during the period 1 January 2008 to 1 August 2017 inclusive (the **Relevant Period**) you and/or the business named in the letter enclosing this Notice purchased one or more of the following Swann Add-on Insurance Products:
  - (i) Loan Protection Insurance;
  - (ii) Walkaway Insurance;
  - (iii) Protection Plus Insurance;
  - (iv) Gapcover Insurance, which was also known as Purchase Price Protection Insurance;
  - (v) Motor Vehicle Mechanical Breakdown Insurance, also known as "WarrantyASSIST" Insurance or Motor Vehicle Extended Warranty Insurance; or
  - (vi) Tyre and Rim Insurance;
 at or around the time you purchased a motor vehicle or motor cycle;
- (b) you were a policyholder under one or more of the Add-On Insurance Products referred to above;

- (c) you suffered loss or damage by reason of the alleged contravening conduct of Swann and IAL as pleaded in the Amended Statement of Claim filed in these proceedings; and
- (d) you were not during the Relevant Period, and were not as at 9 April 2019 (the date of the filing of the proceeding):
  - (i) a director, officer, or close associate of Swann or IAL; or
  - (ii) a judge or Chief Justice of the Federal Court of Australia or a Justice or the Chief Justice of the High Court of Australia.

In addition to the above requirements, for natural persons who purchased Add-On Insurance Products prior to 10 April 2013, and for entities who purchased Add-On Insurance Products prior to 14 August 2013, you are a group member if your claim falls within the exception to the statutory limitation period applicable to your claim.

You have been sent this Notice because you have been identified as someone who may be a group member in the Swann Insurance Class Action.

If you do not fit the above description, you may disregard this Notice. **If you fit the above description, you should read this Notice carefully as it will affect your rights.**

If you are unsure whether or not you are a group member, you should contact the Swann Class Action Hotline on 02 8001 6224, email [swannclassaction@jws.com.au](mailto:swannclassaction@jws.com.au) or seek your own legal advice without delay.

Further information is also available at [www.swannclassaction.com.au](http://www.swannclassaction.com.au).

## **E. WILL YOU BE LIABLE FOR LEGAL COSTS?**

In litigation, the Court will typically order the losing party to pay a proportion of the legal costs of the successful party (an **adverse costs order**).

In a class action, it is only the Applicant that faces the risk of an adverse costs order if the action fails. **As a group member, an adverse costs order will not be made against you.**

### ***Funding of the class action***

The Swann Insurance Class Action is funded by Balance REV Ltd (**Balance**) a company that funds litigation in Australia and the UK and is managed by Balance Legal Capital LLP. This means that Balance entered into a Funding Agreement with the Applicant under which Balance

agreed to pay the costs of running the Swann Insurance Class Action. In exchange for funding the litigation and for assuming the financial risks associated with doing so, the Applicant agreed to pay Balance a percentage of any money he receives from any order, judgment or settlement in the Swann Insurance Class Action.

### ***Common Fund Orders***

On 25 September 2019, Balance gave an undertaking to the Court to:

- (a) pay the Applicant's legal costs and out of pocket expenses (**disbursements**),
- (b) indemnify the Applicant in respect of any adverse costs orders which may be made against the Applicant (that is, any amount the Applicant has to pay Swann and IAL if the class action is lost); and
- (c) provide any security for adverse costs in the action.

On 23 September 2019 the Court made a "Costs Reimbursement Order". The effect of that order is that all group members who do not opt out of the proceeding will be required to pay their pro-rata share of the legal costs and expenses incurred by the Applicant in prosecuting claims on behalf of the group members against the Respondents. However, those costs will be deducted from each of the group members' respective share of any payment to which they become entitled through a judgment or settlement. As explained further below, if there is no judgment or settlement resulting in group members being entitled to a payment of money, Balance will not recover legal costs and expenses. The amount Balance is entitled to receive cannot exceed the amount of money paid by the Respondents pursuant to any judgment or settlement.

The Court will assess the legal costs and disbursements incurred by the Applicant in prosecuting the proceeding and only make a costs reimbursement order in favour of Balance for an amount the Court determines is reasonable, based on its consideration of the opinion of an expert on legal costs.

On 23 September 2019 the Court also made a "Common Fund Order". This order provides that in exchange for funding the Applicant's legal costs and expenses in the proceeding, Balance is to be compensated for its role in funding the litigation. This is known as a funding commission. The commission is to be paid from any sum of money paid by the Respondents pursuant to any judgment or settlement. There are different methods for determining the commission amount, depending on the amount of the judgment or settlement sum. It may be determined as a percentage of the judgment or settlement sum or as a multiple of the amount spent by Balance in funding the case. The methodology for determining the commission and the amount of the commission will be determined by the Court after judgment is given or a settlement is reached which is approved by the Court. The Court will determine a funding commission that is fair and reasonable, having regard to various factors, including the amount spent by Balance in funding the case, the risks of the case and the amount of the judgment or settlement sum. The terms of the Common Fund Order record that the commission Balance may seek at the end of the case will be **no more than 25% of the settlement or judgment sum**. Again, the commission will be deducted from each of the group members' respective share of any payment to which they become entitled through a judgment or settlement.

**Important Note:** Under the Costs Reimbursement Order and the Common Fund Order, no group member will be liable to pay any amount of money to Balance unless and until there is a successful outcome in the proceeding (by way of judgment or settlement). If a successful outcome is reached (subject to any other order the Court might make), the amounts payable to Balance in terms of costs reimbursement and a funding commission will be deducted from the settlement or judgment sum before the remaining amount is distributed to group members by the lawyers for the Applicant.

## F. 'OPTING OUT' OF THE CLASS ACTION

### ***What does 'opting out' of the class action mean?***

Group members can cease to be group members in the Swann Insurance Class Action by "opting out" of the class action.

### ***What will happen if you choose to 'opt out'?***

If you opt out of the class action, you will not be entitled to share in the benefit of any order, judgment or settlement in favour of the Applicant and group members in the Swann Insurance Class Action.

However, if you opt out of the class action, you may be at liberty to bring your own claim against Swann and/or IAL, provided that you file Court proceedings within the time limit applicable to your claim. **If you wish to bring your own claim against Swann and/or IAL, you should seek your own legal advice about your claim and any time limits prior to opting out.**

An explanation of how group members are able to opt out is found below in the section headed "How can you opt out of the proceeding?".

### ***What will happen if you do not 'opt out' of the class action?***

Unless you opt out, you will be bound by any settlement or judgment of the Swann Insurance Class Action. If the class action is successful you may be entitled to share in the benefit of any order, judgment or settlement in favour of the Applicant and group 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 Swann and IAL in other legal proceedings.

### ***What do you need to do?***

If you are a group member in this proceeding, you have two options:

1. remain in the class action (do nothing); or
2. opt-out of the class action by 15 November 2019.

### ***How can you remain a group member?***

If you wish to remain a group member there is nothing you need to do at the present time. The Applicant will continue to bring the proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the Applicant and the group members. However, you are invited to go to [www.swannclassaction.com.au](http://www.swannclassaction.com.au) or email [swannclassaction@jws.com.au](mailto:swannclassaction@jws.com.au) and update your details so that future court-approved notices about the Swann Insurance Class Action can be sent to your preferred address.

### ***How can you 'opt out' of the proceeding?***

If you qualify as a group member and do not wish to remain a group member in the Swann Insurance Class Action, you must opt out of the proceeding by completing an "Opt out notice" in the form shown at **Attachment A**, then 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 no later than 4pm on 15 November 2019, otherwise it will not be effective.**

As explained above, if you opt out of the Swann Insurance Class Action you:

- (a) will not be affected by any orders made in the Swann Insurance Class Action;
- (b) will not be permitted to participate in the distribution of any damages award or settlement outcome; and
- (c) may be entitled to commence separate legal proceedings against Swann and IAL in relation to the matters the subject of the Swann Insurance Class Action on your own behalf if you so wish.

Each group member seeking to opt out should fill out a separate form.

### **G. WHERE CAN YOU OBTAIN FURTHER INFORMATION?**

Copies of relevant documents, including the Amended Originating Application, the Amended Statement of Claim, the Defence to the Amended Statement of Claim and the common fund orders may be obtained by:

- (a) downloading them from [www.swannclassaction.com.au](http://www.swannclassaction.com.au);
- (b) requesting them by email to [swannclassaction@jws.com.au](mailto:swannclassaction@jws.com.au);
- (c) inspecting them at the Federal Court by visiting a District Registry of the Federal Court in Sydney, Canberra, Melbourne, Brisbane, Adelaide, Perth, Hobart or Darwin. The addresses for these registries are available at <http://www.fedcourt.gov.au> or by calling the New South Wales District Registry on (02) 9230 8567.

If there is anything you are unsure about, you can obtain further information about the class action by contacting the Swann Class Action Hotline on 02 8001 6224, email [swannclassaction@jws.com.au](mailto:swannclassaction@jws.com.au) or seek your own legal advice. You should not delay in making any decision to opt out or seek further advice.

The Federal Court cannot answer questions about the process or provide legal advice.

## Attachment A

Form 21  
Rule 9.34

### Opt out notice

Federal Court of Australia

No: NSD544/2019

District Registry: New South Wales  
Division: Commercial and Corporations

**Jones Asirifi-Otchere**

Applicant

**Swann Insurance (Aust) Pty Ltd (ACN 000 886 680)** and another  
Respondents

To: The Registrar  
Federal Court of Australia  
New South Wales District Registry  
Level 17, Law Courts Building  
184 Phillip St Queens Square  
Sydney NSW 2000

The person 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 Group Member is opting out of the representative proceeding.

Name of Group Member:	
Person completing this form (print):	
Authority of person completing this form, if not the Group Member (e.g.	
Telephone contact:	
Email address:	
Postal address:	

Date:

Signature:

Capacity (e.g. Group Member or lawyer for Group Member):