



Federal Court of Australia  
District Registry: Victoria  
Division: General

No: VID176/2022

**STUART MCCULLAGH** and another named in the schedule  
Applicant

**CUDECO LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 000 317 251** and others named in the schedule  
Respondent

### **ORDER**

**JUDGE:** JUSTICE MURPHY

**DATE OF ORDER:** 21 December 2023

**WHERE MADE:** Melbourne

#### **THE COURT ORDERS BY CONSENT THAT:**

##### **Lead Applicant**

1. Pursuant to ss 23 and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (the Act), the First Applicant be removed as a party to these proceedings.
2. Pursuant to ss 23 and 33ZF of the Act, and subject to further order of the Court:
  - (a) any liability for costs of any other party that the First Applicant may have incurred shall be assumed by the Second Applicant;
  - (b) any order for costs in favour of the First Applicant shall accrue to the benefit of the Second Applicant; and
  - (c) the estate of the First Applicant shall not be liable for any costs in these proceedings.
3. Pursuant to ss 23 and 33ZF of the Act, until further order of the Court, the Second Applicant is not required to file a further originating application or an amended statement of claim solely for the purpose of giving effect to Order 1.
4. Pursuant to ss 23 and 33ZF of the Act, the Estate of the Mr Stuart McCullagh shall remain a group member in the proceeding.



5. Pursuant to ss 23 and 33ZF of the Act, the title of the proceeding be amended to “*Leo Toner v CuDeco Limited (Receivers and Manager Appointed) (In Liquidation) ACN 000 317 251 & Ors*”.

### **Insurer Joinder Application**

6. The hearing of the Applicant’s interlocutory application dated 8 September 2023 (**Insurer Joinder Application**) fixed for 7 February 2024 be vacated.
7. Pursuant to r 9.05 of the *Federal Court Rules 2011* (the Rules), each of DUAL Australia Pty Ltd (ACN 107 553 257) (**Dual**) on behalf of certain underwriters at Lloyd’s, AAI Limited ACN 005 297 807) (**AAI**) and Berkshire Hathaway Specialty Insurance Company (ABN 84 600 643 034) (**Berkshire Hathaway**) (together, the **Insurer Respondents**) be joined as Respondents to the proceeding as the Fifth, Sixth and Seventh Respondents respectively.
8. Pursuant to r 1.32 of the Rules, unless the Insurer Respondents elect, the obligation of the Insurer Respondents to take any step in the proceedings, including pleading or responding to a pleading or giving any discovery, is suspended until the conclusion of the initial trial or further order of the Court.
9. Pursuant to r 16.53(1) of the Rules, leave be granted to the Applicant to file and serve:
  - (a) an amended statement of claim in the form that appears at page 132 of Exhibit EDS-5 to the affidavit of Elliott Darryl William Smith affirmed on 8 September 2023 (**Fifth Smith Affidavit**); and
  - (b) a further amended originating application in the form that appears at page 143 of Exhibit EDS-5 to the Fifth Smith Affidavit.
10. There shall be no order as to costs in respect of the Insurer Joinder Application.

### **KPMG’s Application for Security of Costs**

11. By 4:00 pm on 2 February 2024, the Applicant file and serve any evidence in response to the Fourth Respondent's interlocutory application dated 8 November 2023 (**SFC Application**).
12. By 4:00 pm on 16 February 2024, the Fourth Respondent file and serve any evidence in reply.



13. By 4:00 pm on 1 March 2024, the Applicant and the Fourth Respondent file and serve written outlines of submissions, not exceeding eight (8) pages in length, in relation to the SFC Application.
14. The SFC Application be listed for hearing on 20 March 2024 at 10:15 am AEDT.

### **Opt Out Notice**

15. Pursuant to ss 33J and 33ZF of the Act, 4.00 pm AEST on 2 February 2024 (**Opt Out Deadline**) be fixed as the date by which a Group Member (as defined in the Statement of Claim) may opt out of the Proceeding in accordance with these orders.
16. Pursuant to ss 33X(1)(a), 33X(5) and 33Y of the Act, the form and content of the notice to Group Members at **Annexure A** to these orders (**Opt Out Notice**) is approved.
17. Pursuant to ss 33X(1)(a), 33X(5) and 33Y of the Act, the Opt Out Notice is to be given to all Group Members on or before 31 December 2023 according to the following procedure:
  - (a) the Applicant shall cause, through his solicitors, a copy of the Opt Out Notice to be sent to all Group Members recorded as having purchased shares during the Relevant Period (as defined in the Statement of Claim), according to the First Respondent's share register;
  - (b) the District Registrar of the Victorian District Registry of the Federal Court of Australia shall cause the Opt Out Notice and the Statement of Claim to be:
    - (i) posted on the Federal Court of Australia website; and
    - (ii) made available for inspection at each District Registry of the Federal Court of Australia in Melbourne, Sydney, Canberra, Brisbane, Adelaide, Perth, Hobart and Darwin.
18. If, on or before the Opt Out Deadline, the solicitors for any party receive a notice purporting to be an Opt Out Notice referable to this Proceeding, the solicitors must file that notice with the Court, within three (3) days of receipt of the notice by the solicitors and the notice will be deemed to be an Opt Out Notice received by the Court at the time it was received by the solicitors.



19. The solicitors for the parties have leave to inspect the Court file and to copy any Opt Out Notices filed in the proceeding.
20. The costs of and incidental to the procedure set out in Order 18 above, including the costs of addressing inquiries by Group Members and members of the public in relation to the Opt Out Notice, are to be paid by the Applicant, and such costs will be costs in the cause.

**AND THE COURT ORDERS BY CONSENT BETWEEN THE APPLICANT, THE SECOND RESPONDENT AND THE THIRD RESPONDENT:**

**Mediation**

21. The mediation to which the Applicant, the Second Respondent and the Third Respondent (**Mediating Parties**) have been referred pursuant to the Consent Orders dated 28 August 2023 (**Mediation**) shall occur on 7 February 2024 or such other date as agreed in writing by all the Mediating Parties.
22. Unless otherwise agreed in writing by all Mediating Parties:
  - (a) by no later than 4:00 pm on 30 January 2024, the Applicant is to provide to the Mediator and the other Mediating Parties its position paper in relation to the mediation; and
  - (b) by no later than 4:00 pm on 5 February 2024, the Second Respondent and the Third Respondent are to provide to the Mediator and the Applicant a position paper in relation to the mediation.

**AND THE COURT ORDERS:**

**General**

23. There be liberty to apply on three days' notice.

Date that entry is stamped: 21 December 2023

*Sia Lagos*  
Registrar



## Annexure A

### OPT OUT NOTICE

ISSUED BY ORDER OF THE FEDERAL COURT OF AUSTRALIA

### CuDeco Class Action

You are receiving this Notice because the shareholding records of CuDeco Limited (Receivers and Managers Appointed) (In Liquidation) ACN 000 317 251 (**CuDeco**) indicate that you acquired fully paid ordinary shares in CuDeco between 11 April 2016 and 13 March 2018 (**Relevant Period**), then retained them over a period while their trading price on the ASX declined.

Accordingly, the records suggest that you may be a person covered by the CuDeco Class Action that has been commenced in the Federal Court of Australia. Persons covered by the class action are called “**group members**”. If you think you might be a group member, you should read this notice carefully as it may affect your rights, including rights to money compensation.

### YOU HAVE TWO OPTIONS:

<b>OPTION 1: REMAIN A GROUP MEMBER OF THE CLASS ACTION</b>	<b>OPTION 2: OPT OUT OF THE CLASS ACTION</b>
<p>If you wish to remain a group member of the CuDeco Class Action, there is nothing you need to do at the present time. You are not required to respond to this notice.</p> <p>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.</p> <p>However, you are invited to register as a class member (as explained in Option 1), so that future notices about the class action can be sent to your preferred address. Those later notices might require you to register or take other steps at that time in order to receive compensation.</p>	<p>If you do not want to be represented in the CuDeco Class Action, you can “opt out” by filling in the opt out form attached to this notice, and returning it to the Registrar of the Federal Court at:</p> <p><a href="mailto:vicreg@fedcourt.gov.au">vicreg@fedcourt.gov.au</a> Federal Court (Victorian Registry) Owen Dixon Commonwealth Law Courts Building 305 William Street Melbourne VIC 3000</p> <p>If you have already registered with Banton Group but have changed your mind, you can still opt out.</p> <p>You will only get one chance to opt out and the deadline for doing so is 29 January 2024. If the opt out is not received by this date, it will not be effective.</p> <p>If you opt out you will not be entitled to share in any compensation recovered in the CuDeco Class Action. You may be able to bring your own court proceeding covering the same claims, but if that is something you think you might want to do, you should get your own legal advice.</p>

Please read the next page for more information about the CuDeco Class Action.



There is **no obligation** to be represented in the CuDeco Class Action. Right now, the question is whether you want to opt out of the CuDeco Class Action. To help you make that decision, some key points about the CuDeco Class Action are described below:

Who is running the claim?	The solicitors are <b>Banton Group</b>
What is alleged?	<p>The former shareholder who is the class representative in the CuDeco Class Action (the <b>Applicant</b>) alleges that:</p> <ol style="list-style-type: none"> <li>(1) CuDeco and two of its directors made misleading or deceptive statements to the market about the value and financial viability of CuDeco's Rocklands mining project;</li> <li>(2) CuDeco failed to disclose information to the market concerning the value and financial viability of its Rocklands mining project that was material to the price or value of CuDeco's shares (<b>Information</b>);</li> <li>(3) CuDeco's financial reports for FY2016 and FY2017 did not comply with the Australian Accounting Standards, and contained misrepresentations in relation to CuDeco's financial performance and position;</li> <li>(4) KPMG, CuDeco's external auditors, made misleading statements to the market with respect to the compliance of CuDeco's financial reports for FY2016 and FY2017 and the requirements of the <i>Corporations Act 2001</i> (Cth), and the adequacy of KPMG's audit of those financial reports;</li> <li>(5) the contraventions resulted in the prices at which CuDeco shares traded on the ASX being inflated above the price that would have existed if the contraventions had not occurred;</li> <li>(6) when CuDeco's true position was revealed to the market, from late 2017 onwards, the market reaction removed the inflation from the trading price of CuDeco's shares; and</li> <li>(7) shareholders who purchased shares in Relevant Period suffered financial losses because they purchased shares at an inflated price.</li> </ol> <p>The detailed allegations are set out in the Statement of Claim filed in the CuDeco Class Action. You can read a copy of the Statement of Claim at <a href="http://www.bantongroup.com">www.bantongroup.com</a></p>
Who is being sued?	<p>CuDeco, its former directors, Peter Hutchison and Dianmin Chen, and its auditors, KPMG.</p> <p>Because CuDeco is in liquidation, the Applicants have applied for leave to proceed against it.</p> <p>In addition, certain insurers, who the Applicant contends are liable to indemnify Mr Hutchison and Mr Chen up to the applicable policy limits, have been joined as respondents to the proceedings.</p>
Who are the group members?	<p>You can check the full definition of the 'group members' on the registration website at <a href="http://www.bantongroup.com">www.bantongroup.com</a>. If you think you might be a group member, you should check that full definition even if you decide not to register, or decide to opt out. Note, if you do <b>not</b> fit the full definition then you are not a group member, and your rights will not be affected by the outcome CuDeco Class Action, so there would be no need to opt out.</p>
Is the claim being defended?	Yes.
What happens in the event of a pre-trial settlement?	<p>A class action can only be settled with approval from the Court. If there is a proposed settlement, you will be given detailed information about it before the Court hears submissions as to whether to approve the settlement.</p>



<p>Will you be liable for legal costs if you remain a group member?</p>	<p>You will <b>not become liable for any legal costs</b> simply by remaining as a group member for the determination of the common questions.</p> <p>The Applicant is liable for the legal costs of the proceedings and has entered into a funding agreement with Equite Capital No 4 Pte Ltd (<b>Equite</b>) for the payment of these costs, including by paying the lawyers engaged by the Applicant as well as barristers and other experts. Equite has also taken on the financial risks of the proceeding, including by indemnifying the Applicant against adverse costs, and furnishing any security for costs ordered by the Court. Some group members have also entered into a funding agreement with Equite.</p> <p>However:</p> <ol style="list-style-type: none"><li>if the preparation or finalization of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage Banton Group or other lawyers to do that work for you. A copy of the terms on which Banton Group are acting in the class action may be obtained from them on the numbers shown below;</li><li>if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, 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 Applicant in running the class action but which are not able to be recovered from the Respondents (<b>Costs Equalisation Order</b>).</li><li>the Applicant may seek a common fund order that grants a percentage commission from the settlement, regardless of whether or not group members have entered into a funding agreement with Equite (<b>Common Fund Order</b>).</li><li>Alternatively, the Applicant may also seek an order that an amount is deducted from compensation payable to group members who have not signed a funding agreement, and distributed across all group members, to ensure that both funded and unfunded group members receive the same proportion of their compensation after the deduction of legal and funding costs (<b>Funding Equalisation Order</b>).</li></ol>
<p>How can you stay up to date in the proceeding?</p>	<p>If you want to register your details with the solicitors running the class action (Banton Group), you can register on their website at <a href="https://bantongroup.com/class-actions/">https://bantongroup.com/class-actions/</a> or by telephoning (02) 8076 8090.</p> <p>Registration means:</p> <ul style="list-style-type: none"><li>Banton Group will have your contact details for the purposes of future communications about the CuDeco Class Action</li><li>Banton Group's lawyers will assist you to calculate any compensation in your favour if the CuDeco Class Action is successful.</li></ul> <p>If you have already registered with Banton Group, you do not have to register again.</p>

For more information about the CuDeco Class Action, please visit the website at [www.bantongroup.com](http://www.bantongroup.com) or telephone (02) 8076 8090.



SCHEDULE 1

Form 21  
Rule 9.34

**OPT OUT NOTICE**

No. 176 of 2022

Federal Court of Australia  
District Registry: Victoria  
Division: General

**LEO TONER**

Applicant

**CUDECO LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 000 317 251) AND OTHERS**

Respondents

To: The Registrar  
Federal Court of Australia  
Victoria District Registry  
305 William Street, Melbourne VIC 3000

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

Date:

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Signed by [Name]

[Insert capacity eg group member / Lawyer for the group member]





**Schedule**

No: VID176/2022

Federal Court of Australia  
District Registry: Victoria  
Division: General

Second Applicant	LEO TONER
Second Respondent	PETER ROBERT HUTCHINSON
Third Respondent	DIANMIN CHEN
Fourth Respondent	KPMG (A FIRM) ABN 51 194 660 183