

FEDERAL COURT OF AUSTRALIA

OPT OUT NOTICE AND CLASS ACTION NOTICE

Federal Court of Australia Proceedings VID 180 of 2018

**Davaria Pty Limited v 7-Eleven Stores Pty Limited, 7-Eleven Inc
and Australia and New Zealand Banking Group Limited**

1. Why is this notice important?

A class action has been commenced in the Federal Court of Australia by **Davaria** Pty Limited against **7-Eleven** Stores Pty Limited, 7-Eleven Inc. (the American Master Franchisor) and Australia and New Zealand Banking Group Ltd (**ANZ**). 7-Eleven Inc. has not been served with the documents commencing these proceedings, and as such, no claims are actively pursued against it.

If you were a 7-Eleven Franchisee at any time between 20 February 2012 and 19 February 2018, you should read this notice carefully.

This Notice contains important information about:

- (a) the class action against 7-Eleven and ANZ. Section [2] below explains what a class action is. Section [3] below explains what this class action is about and how to tell whether you are a group member represented in this class action. Sections [4 and 5] below explain whether you will be responsible for paying for the class action and how it is funded.
- (b) your right to 'opt out' of the class action. Section [6] below explains what opt out is. Section [7] below explains how you can opt out of this class action.

Davaria and ANZ have agreed to settle the class action against ANZ on the key terms set out at section [8] below (the ANZ **Settlement**). The ANZ Settlement will mean that Davaria can continue to pursue its claims against 7-Eleven without prejudice to its rights to decide later if it still wishes to sue ANZ. The ANZ Settlement remains subject to ANZ's decision not to exercise its right to terminate the Settlement if 7 or more group members opt out in the circumstances described at section [8] below and the approval of the Court. If the ANZ Settlement is not terminated and you have not opted out, you will receive a separate notice regarding ANZ Settlement and will have the right to object to it.

The Federal Court has ordered that this notice be published. Any questions you have concerning the matters contained in this notice should not be directed to the Court. If there is anything in the notice that you do not understand, you should seek legal advice (see further at Section [3] below).

This notice relates to proceeding VID180 of 2018. You may also receive a notice in respect of proceeding VID182 of 2018. A separate Notice of opting out must be lodged for each proceeding in respect of which you wish to opt out.

In summary, proceeding VID180 concerns claims made by franchisees. Proceeding VID/182 concerns claims to be made by persons who during the period 20 February 2012 to 19 February 2018 were either nominated directors of a franchisee or provided indemnities, guarantees, mortgages or other securities in respect of a franchisee's obligations under a franchise agreement or a bank loan contract (being an agreement between ANZ and a franchisee who borrowed money from ANZ to buy a 7-Eleven franchise).

2. What is a class action?

A class action is a legal proceeding that is brought by an Applicant on their own behalf and on behalf of a group of people (**group members**) against the Respondents. The Applicant and group members must have similar claims against the Respondents.

Group members are bound by any judgment or settlement in the class action unless they have **opted out** of the proceeding. This means that *unless* you opt out:

- (a) you may be able to share in any settlement or Court-awarded damages if the class action is successful;
- (b) you will be bound by the dismissal of the case if the class action fails; and
- (c) you will not be able to sue about the matters that are the subject of the class action in separate legal proceedings.

3. What is this class action?

This class action is brought by Davaria, on its own behalf and on behalf of all persons who are group members. The First Respondent is 7-Eleven. The other Respondents are 7-Eleven Inc. and ANZ.

Are you a Group Member?

You are a group member if you:

- (a) at any time between 20 February 2012 and 19 February 2018 were or commenced being a franchisee under a standard-form franchise agreement with 7-Eleven; and
- (b) had not entered into a release as at 20 February 2018 of all of your claims against both 7-Eleven and ANZ arising out of the conduct of 7-Eleven and ANZ described in the further amended statement of claim (**Release**).

You do not need to have borrowed money from ANZ to be a group member. If you are unsure whether or not you are a group member, you should contact Levitt Robinson Solicitors on 02 9286 3133 or email 711@levittrobinson.com or seek your own legal advice without delay. If you are not represented by a lawyer and you are unsure of whether you are a group member or unsure about the opt out process, should you wish to seek legal advice from a lawyer other than Levitt Robinson, 7-Eleven will pay the first \$1,000 incurred towards your legal costs to obtain such advice if you send a copy of the invoice (with your store number included) for your legal costs to 7-Eleven at cainvoice@7eleven.com.au.

Group members may only lodge one invoice for legal costs (of up to \$1,000) per store, or for those stores which are operated by a franchisee with multiple stores, one invoice per franchisee. This is irrespective of whether that store or franchisee may have multiple group members, including guarantors.

What are the claims?

The claims against 7-Eleven and ANZ are set out in the further amended statement of claim, a copy of which can be obtained from Levitt Robinson or via the websites referred to in section 10 below. In summary:

Davaria alleges that 7-Eleven:

- a. misled group members before they entered into franchise agreements about:

- i. the business opportunity afforded by operating a 7-Eleven store;
 - ii. the profitability of the stores;
 - iii. the accuracy of the labour costs in the financial records supplied to franchisees;
 - iv. the average wages that a 7-Eleven Franchisee would have to pay to operate their store in compliance with employment awards;
 - v. the need for franchisees and their family members to work for nothing or at rates below employment awards for an unreasonable and unsociable number of hours per week;
 - vi. the negotiation of rebates from vendors and their allocation to marketing; and
 - vii. the choice available to franchisees of suppliers and merchandise from which they could choose product lines to offer at their stores;
- b. breached its contract with group members, including by only letting group members purchase stock from C-Store. This occurred in circumstances where 7-Eleven had negotiated with C-Store prices higher than either the prices for which group members would have been able to buy stock in similar quantities from alternative suppliers, or the lowest prices reasonably obtainable by 7-Eleven had it used its best endeavours; and
 - c. engaged in unconscionable conduct, including by enticing group members to enter into franchise agreements even though 7-Eleven knew that those franchises could only be profitable if franchisees underpaid staff or worked unreasonable hours.

Davaria alleges that ANZ:

- a. breached its contract with group members, including by deciding to lend money to group members without taking into account, among other things, the number of labour hours required to operate a 7-Eleven store, the award rates payable for such labour and the accuracy or reliability of the historical or forecasted payroll expenses for any such store; and
- b. engaged in unconscionable conduct, including by lending money to group members when it knew or ought to have known, among other things, that the franchises could only be profitable if the franchisees underpaid staff or worked unreasonable hours.

7-Eleven and ANZ deny the allegations and are defending the proceeding. The proceeding is set down for a trial for 6 weeks commencing on 14 September 2020. If the matter does not settle at the mediation with 7-Eleven ordered by the Court to be held by 30 June 2020, this trial will be a hearing of Davaria's case as well as certain common questions that affect all group members. The claims of other individual franchisees will not be determined at this initial trial. No orders for compensation for other individual franchisees will be made at this point. If the outcome of the initial trial warrants the consideration of the claims of individual franchisees and their claims are not settled at a further mediation with 7-Eleven, there may be a second stage trial or some other process for the assessment of the claims of individual franchisees. That would probably occur some time after judgment on the first trial.

4. Will you be liable for legal costs?

Group members are not individually responsible for the legal costs of the determination of the common questions in the class action. Only the Applicant (Davaria) is responsible for those costs. However:

- (a) your personal claim may require work to be done in relation to issues that are specific to you. You can ask Levitt Robinson Solicitors or other lawyers to do that work for you. A copy of the terms on which Levitt Robinson Solicitors are acting in the class action may be obtained from them by calling 02 9286 3133 or emailing 711@levittrobinson.com; and
- (b) 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 reducing the compensation payable to you in order to equitably distribute the funding costs of the class action between group members. The nature of such an order is discussed at Section [5] below.

5. How is the class action being funded?

Galactic Seven Eleven Litigation Holdings LLC has agreed with some group members to pay the legal costs of the class action in exchange for a share of any settlement or judgment that those group members receive. Those group members have signed a funding agreement with Galactic. Under that funding agreement, Galactic is broadly entitled to receive the repayment of the legal costs paid by it in funding the class action, plus 35% of the benefit of any settlement or judgment monies payable to funded group members (those who have signed the funding agreement), subject to the precise funding agreement terms.

You should be aware that courts commonly make orders to reduce the compensation payable to unfunded group members (those who have not signed the funding agreement) by an amount equivalent to that paid by funded group members to the litigation funder. The costs of litigation is then borne equitably between all group members. Such orders are referred to as “funding equalisation orders”.

Funding equalisation orders adjust the returns to funded group members and unfunded group members to equalise their contributions to the costs and returns payable to the funder. Courts have made these orders in the past in recognition that fairness requires that class members receive the same rate of return, whether they have signed a funding agreement or not.

If the Court makes orders requiring class members to make a contribution from any compensation that they receive to the legal or funding costs of the proceeding, this will not exceed the amount of compensation received and you will not be left out of pocket as a result.

6. What is ‘Opt Out’?

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 just below.

7. How can you opt out of the class action and what will happen if you do?

If you opt out:

- (a) you will be able to bring your own claim against 7-Eleven and ANZ (**Respondents**), 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 legal costs involved and the applicable time limit prior to opting out; and

- (b) you will not be bound by, or entitled to share in any benefit of, any order, judgment or settlement in the class action.

If you do not wish to remain a group member you must opt out of the class action.

If you wish to opt out of the class action you **must** do so by completing a “**Notice of opting out by group member**” in the form attached to this notice and marked "A", then returning it to the Registrar of the Federal Court of Australia at the address on the form or by email to vicreg@fedcourt.gov.au. **IMPORTANT: the Notice must reach the Registrar by no later than 4 p.m. on 20 March 2020**, otherwise it will not be effective.

You should submit the **Notice of opting out by group member** if you qualify as a group member and you wish to opt out of the class action.

Each group 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).

You are totally free to make up your own mind whether to give an Opt-Out Notice or do nothing. You can also take advice about your options and the information contained in this Notice. Further information can be obtained by contacting Levitt Robinson as set out below or any other lawyer of your choice as discussed at section [3] above.

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

Unless you opt out:

- (a) you will be bound by the outcome of the class action against 7-Eleven and ANZ; and
- (b) you will also be bound by the ANZ Settlement if it is approved by the Court, unless it is terminated by ANZ as described in sub-paragraph (f) below or is not approved by the Court.

If the class action against 7-Eleven is successful, you will be entitled to share in the benefit of any order, judgment or settlement in favour of Davaria and group members. If the court makes the orders in section [5] above and you have not signed the funding agreement then the compensation paid to you would be reduced down to ensure that all group members bear the amounts payable to the funder equally.

If the action against 7-Eleven is unsuccessful or is not as successful as you might have wished, you will not be able to sue 7-Eleven on the same claim in any other proceedings. If the ANZ Settlement proceeds and is approved, you will still be able to be part of any later class action, which is brought against ANZ regardless of the outcome in the class action against 7-Eleven.

In deciding whether or not to opt out of the class action, you should know that the main terms of the ANZ Settlement are:

- (a) Davaria discontinues its claims against ANZ;
- (b) ANZ agrees to suspend the limitation periods for the case against it. This means that ANZ will not count the time that passes until the suspension is terminated towards working out whether any claim you want to bring against it is too late. This suspension will be terminated either 6 weeks after the Court delivers its reasons for decision following the trial of the common issues in

the proceedings against 7-Eleven, or by 6 months' written notice by either party, whichever comes first;

- (c) Davaria and/or current group members may commence a new class action against ANZ once the suspension of the limitation period is terminated. However, the parties to the new proceeding must consent to orders that the costs incurred by ANZ and Davaria in the current proceeding are costs of the new proceeding;
- (d) the current security for ANZ's costs paid by the litigation funder is to be returned to the funder. If a new class action is commenced against ANZ by Davaria or another group member then the lead applicant in the new class action will have to provide the same security for ANZ's costs;
- (e) ANZ and Davaria will otherwise bear their own costs of the current proceeding against ANZ;
- (f) group members have an opportunity to opt-out of the proceeding, in which case they will not be bound by the Settlement. However, if 7 or more group members opt out who have claims against ANZ and have not signed a Release in the period from the commencement of the class action up to and including 12 March 2019, then ANZ has the right to terminate the deeds of Settlement;
- (g) if ANZ commences an enforcement action in relation to a loan that ANZ provided to any group member for their 7-Eleven Franchise, that group member can still defend that enforcement action, including by bringing a counterclaim against ANZ; and
- (h) ANZ will participate in any Court-ordered mediation of the proceedings against 7-Eleven.

9. How can you remain a group member?

If you wish to remain a group member then you should **NOT** complete the form which is attached and marked "A" and headed "OPT OUT NOTICE". Davaria 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 Davaria and the group members. However, you are invited to contact Davaria's lawyers, Levitt Robinson Solicitors, on the number/email address below so that future notices about the class action can be sent to your preferred address.

10. Where can you obtain copies of relevant documents?

Copies of relevant documents, including the further amended application, the further amended statement of claim and the defences filed by 7-Eleven and ANZ, may be obtained by:

- (a) downloading them from www.levittrobinson.com;
- (b) inspecting them between 9am and 5pm at the offices of Levitt Robinson Solicitors, contact details for which are available from www.levittrobinson.com or by e-mailing 711@levittrobinson.com and requesting copies;
- (c) by contacting a District Registry of the Federal Court (contact details are available at www.fedcourt.gov.au) and paying the appropriate inspection fee; or
- (d) inspecting them on the Federal Court website at <http://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions>.

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact Levitt Robinson Solicitors on 02 9286 3133 or 711@levittrobinson.com or seek your own legal advice. **You should not delay in making your decision.**

“A”

Complete and return this form ONLY if you do NOT want to be a part of the class action

Form 21
Rule 9.34

OPT OUT NOTICE

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 180 of 2018

Davaria Pty Limited

Applicant

7-Eleven Stores Pty Ltd and others named in the schedule

Respondents

To: The Registrar
Federal Court of Australia
Victorian District Registry
Owen Dixon Commonwealth Law Courts Building
305 William Street
MELBOURNE VIC 3000

Or by email to vicreg@fedcourt.gov.au

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* (Cth), that the group member is opting out of the representative proceeding.

Name of group member:	
ACN/ABN (if a company or a trustee):	

Date:

Signed:

.....
Name (please print):

Capacity (tick as appropriate):

group member

director of group member

company secretary of group member

legal representative of group member