



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD1908/2016

**GAVIN SMITH** and others named in the schedule  
Applicants

**COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)**  
Respondent

### ORDER

**JUDGE:** JUSTICE LEE

**DATE OF ORDER:** 11 April 2019

**WHERE MADE:** Sydney

#### THE COURT ORDERS THAT:

- 1 Pursuant to ss 33X(1)(a), 33X(5) and 33Y(2) of the *Federal Court of Australia Act 1976* (Cth) (FCAA), the form and content of the notice set out in Annexure A (**Notice**) be approved.
- 2 Pursuant to ss 33X(1)(a), 33X(5) and 33Y(3) of the FCAA, the Notice be given to Group Members on or before 12 April 2019 (**Notice Date**), through the following procedures:
  - (a) IMF Bentham Ltd will send the Notice and covering letter (in the form of **Annexure B**) to each Group Member by email along with a covering email to the email address specified by them in their funding agreement or otherwise provided to IMF Bentham Ltd, or by prepaid ordinary post in the event that they have not specified an email address;
  - (b) IMF Bentham shall cause the Notice to be published on the website maintained by IMF Bentham in relation to these proceedings (<https://www.imf.com.au/cases/register/williamtown-overview>); and
  - (c) the District Registrar of the New South Wales District Registry of the Federal Court of Australia shall cause the Notice to be posted on the Federal Court of Australia website, and made available for inspection at the District Registry of the Federal Court of Australia in Melbourne, Sydney, Canberra, Brisbane, Adelaide, Perth, Hobart and Darwin.



- 3 The costs of, and incidental to, the procedure set out in Order 2 above and of this Order are costs in the cause. For the avoidance of doubt, answering inquiries by Group Members and members of the public in relation to the Notice is work incidental to Order 2 above.
- 4 Pursuant to s 33J(1) of the FCAA, the day 12 weeks after the Notice Date, being 5 July 2019 (**Opt Out Date**) be fixed as the date by which Group Members may opt out of this proceeding.
- 5 If, on or before the Opt Out Date, the solicitor for any party receives a notice purporting to be an opt out notice referable to this proceeding, the solicitors must file that notice with the Federal Court of Australia, NSW District Registry, within three (3) days of receipt of the notice by the solicitors, and the notice shall be treated as an opt out notice received by the Court at the time it was received by the solicitors.
- 6 The solicitors for the parties be granted leave to inspect the Court file from time to time and to copy any opt out notices filed.

Date that entry is stamped: 11 April 2019

  
Registrar



**Schedule**

No: NSD1908/2016

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

Second Applicant	KIM SMITH
Third Applicant	ANN AND LINDSAY CLOUT SMSF PTY LTD ACN 154 516 006
Fourth Applicant	ANN CLOUT
Fifth Applicant	LINDSAY CLOUT
Sixth Applicant	JOHN ARTHUR HEWITT
<del>Seventh Applicant</del>	<del>CHANTEL WALKER</del>
Eighth Applicant	MARSHALLS TRANSPORT PTY LTD
Ninth Applicant	NICHOLAS MARSHALL
Tenth Applicant	MELISSA MARSHALL



**Annexure A**  
**(Group Member Notice)**

## **WILLIAMTOWN CONTAMINATION CLASS ACTION**

**NSD 1908 / 2016 (Smith & Ors v Commonwealth of Australia)**

### **1. Why is this notice important?**

A class action has been commenced in the Federal Court of Australia by nine individuals and businesses (**Applicants**) against the Commonwealth of Australia (Department of Defence) (**Commonwealth**). The class action was commenced on 2 November 2016.

The class action claims compensation for loss and damage relating to property and business values as a result of, and inconvenience, distress and vexation caused by, the contamination of groundwater, surface water, soil and biota in Williamtown by per- and polyfluoroalkyl substances (**PFAS**) from the use of Aqueous Film Forming Foam (**AFFF**) by the Commonwealth at the RAAF Base Williamtown in New South Wales (**RAAF Base**).

The Applicants' lawyers are Dentons, and they are helping them run the case. A company called IMF Bentham Ltd (**IMF Bentham**) is funding the case.

An important step is going to take place in this litigation, with the hearing of the class action scheduled to commence in August 2019. The Federal Court has ordered that this notice be published to alert Group Members that they must decide by 5 July 2019 whether they wish to opt out of these proceedings. Information relating to opting out of the proceedings is explained in more detail below.

There are various factors which may inform your decision in relation to the above matters, including whether you wish to pursue any claim you may have separately to this litigation. The main options available to you are set out in Section 6 below.

**You should read this notice carefully, as it concerns your rights. If there is anything in it that you do not understand, you should seek independent legal advice.**

**THE OPT OUT DATE IS 5 JULY 2019**

### **2. What is a class action?**

A class action is an action that is brought by one or a small number of people (in this case, a group of nine individuals and businesses) on behalf of a class of people (**Group Members** – this may include you) against another person (**Respondent** – in this case the Commonwealth) in circumstances in which the Applicants and the Group Members have the same or similar claims against the Respondent.

The Applicants in a class action do not need to seek the consent of Group Members to commence a class action on their behalf. Anyone who falls within the group definition is



automatically included. However, persons can cease to be Group Members by “opting out” of the class action. This is done by filling out a form. It does not matter that a Group Member has signed a litigation funding agreement; they can still opt out.

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: judgment following a trial, or a settlement at any time. If there is a judgment or a settlement of a class action, Group Members will not be able pursue the same claims and may not be able to pursue similar or related claims against the Respondent in other legal proceedings. Group Members should note that:

- a) in a *judgment* following trial, the Court will decide various common factual and legal issues in respect of the claims made by the Applicants and Group Members. Group Members will be bound by those findings, whether or not they are favourable to them (unless they are appealed – IMF Bentham is not required to fund any appeal). Importantly, if there are other proceedings between a Group Member and the Respondent, neither of them will be permitted to raise arguments in that proceeding which are inconsistent with a factual or legal issue decided in the trial of common issues in the class action. This means that if the issues are resolved against the Applicants, Group Members will be unable to pursue claims they have which are the same as the Applicants' claims, and will not be able to pursue other claims which are dependent upon common issues which have been resolved against the Applicants in any other Court proceeding; and
- b) in a *settlement* of a class action, where the settlement provides for compensation to Group Members it is likely to extinguish all rights to compensation which a Group Member might have against the Respondent 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 Commonwealth which are based on your individual circumstances or otherwise additional to the claims described in the class action (for example you have suffered different kinds of loss), then it is important that you seek independent legal advice about the potential binding effects of this class action in advance of the opt-out date. If you stay in this proceeding and it is determined by a judge then you may not be able to issue separate proceedings on different, but related, grounds later on.

### **3. What is this class action?**

This class action is brought by the Applicants on behalf of all persons who are Group Members (see Section 4 below).

The Applicants allege that from at least 1976 onwards, the Commonwealth discharged large quantities of AFFF at the RAAF Base, containing PFAS chemicals which are potentially damaging to the environment and potentially causative of adverse health effects in humans. The Applicants allege that the Commonwealth's negligent use of and failure to contain AFFF has resulted in the contamination of areas surrounding the Base, including contamination of soil, groundwater, surface water and biota in the area. The Applicants also allege that the Commonwealth failed to inform actual and potential property owners, occupiers and business owners, of the contamination at any time prior to 3 September 2015, notwithstanding what it knew or ought to have known of the potential properties of AFFF, and the contamination. The Applicants claim that the Commonwealth's conduct created a nuisance, was negligent, was in breach of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and caused loss and damage giving rise to a right of compensation under the *Defence Force Regulations 1952* (Cth).



The Applicants allege that the Commonwealth's conduct has caused adverse impacts to the health of land and businesses in and surrounding the RAAF Base, including the areas inside and outside the 'Management Area' as shown on the map annexed to this notice as Attachment A (Relevant Area). The Applicants do not claim that the Commonwealth's conduct has caused personal injuries to them, and do not seek compensation from the Commonwealth in this regard.

The Commonwealth denies that it is liable to the Applicants and Group Members, and is defending the class action.

#### **4. Are you a Group Member?**

You are a Group Member in the Williamstown Contamination Class Action if you have signed a Funding Agreement with IMF Bentham and:

- a) owned land located in whole or in part within the Relevant Area (that is, if you were registered as the legal owner of that land) as at 3 September 2015; or
- b) occupied land located in whole or in part within the Relevant Area (for example, if you lived in property on the land but you were not registered as the legal owner of that land); or
- c) operated a business situated on land located in whole or in part within the Relevant Area as at 3 September 2015.

If you are unsure whether or not you are a Group Member, you should contact Dentons, or IMF Bentham (via the details set out in Section 7 below) or seek your own independent legal advice without delay.

#### **5. How is the class action being funded?**

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 Applicants are responsible for the costs.

In this class action, the Applicants and all Group Members have entered into Funding Agreements with IMF Bentham which provide for IMF Bentham to pay the Applicants' legal costs of the action, to indemnify the Applicants in respect of any adverse costs orders which may be made against the Applicants in the action, and to provide any security for adverse costs in the action (that is, any amount the Applicants have to pay the Commonwealth if the class action is lost). In exchange for IMF Bentham providing funding, the Applicants and Group Members have agreed that in the event that there is a successful outcome to the proceedings:

- (1) IMF Bentham may recover amounts which are deemed "Project Costs" on page 7 of your Funding Agreement (plus GST), including legal expenses, project investigation fees, project management fees, adverse cost orders, out of pocket expenses and other fees. These may include amounts incurred prior to your entry into the Funding Agreement; and
- (2) IMF Bentham will be paid a commission from any amount they recover from the Commonwealth. The commission which the Group Members have agreed to pay IMF Bentham is set out in the Funding Agreement you have signed at clause 12.1.3 (page 18) and in Schedule 5.

Under the Funding Agreement, IMF Bentham is not obligated to fund the litigation until it is finalised. If IMF Bentham chooses to terminate the Funding Agreement it will not be responsible for any costs of the litigation after it makes its decision.



## 6. What do you need to do?

If you are a Group Member in this proceeding, you have two options:

Option	Deadline	More Information
1. Stay in the class action (do nothing)	5 July 2019	Section 6(a) below
2. Opt out of the class action	5 July 2019	Section 6(b) below

### (a) OPTION 1: If you want to be part of this class action

You do not need to do anything to stay as a Group Member in this class action.

If you stay as a Group Member you will be bound by the outcome of the class action, as described in Section 2 above. If it is successful, you will be eligible to benefit from any favourable outcome that is reached in the class action and may need to provide evidence to substantiate your claim as a Group Member. You will also be bound by any orders that the Court makes in relation to the payment of costs, including legal fees and the funding commission payable to IMF Bentham. These will prevail over the litigation funding agreement you have signed to the extent of any inconsistency.

### (b) OPTION 2: If you do not want to be part of this class action

If you do not wish to be a Group Member in this class action you should opt out. If you opt out you will not be bound by the outcome of the class action, as described in Section 2 above. If you opt out, you may:

- i. take no further action against the Commonwealth; or
- ii. commence your own proceedings against the Commonwealth. If you want any claim you have against the Commonwealth to be pursued you will need to take steps to bring it, and fund it, yourself, which you are free to do provided that you issue Court proceedings within the time limit applicable to your claim; or
- iii. make a financial claim against the Commonwealth in writing (for example, by using the claim form available at:  
<http://www.defence.gov.au/Environment/PFAS/FinancialClaims.asp>).

You should seek independent legal advice about your claim and the applicable time limit **prior to** opting out of this class action. Additionally, if you are opting out, you should seek specific legal advice about the effect of the litigation funding agreement you have already signed with IMF Bentham, including where you intend to pursue a claim against the Commonwealth, as it may bear upon your rights if you opt out.

If you do not wish to remain a Group Member you must opt out of this class action by completing an "Opt Out Notice" in the form shown at Attachment "B" to this notice, 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 no later than 4.00pm on 5 July 2019, otherwise it will not be effective and you will not be able to opt out of the proceeding.



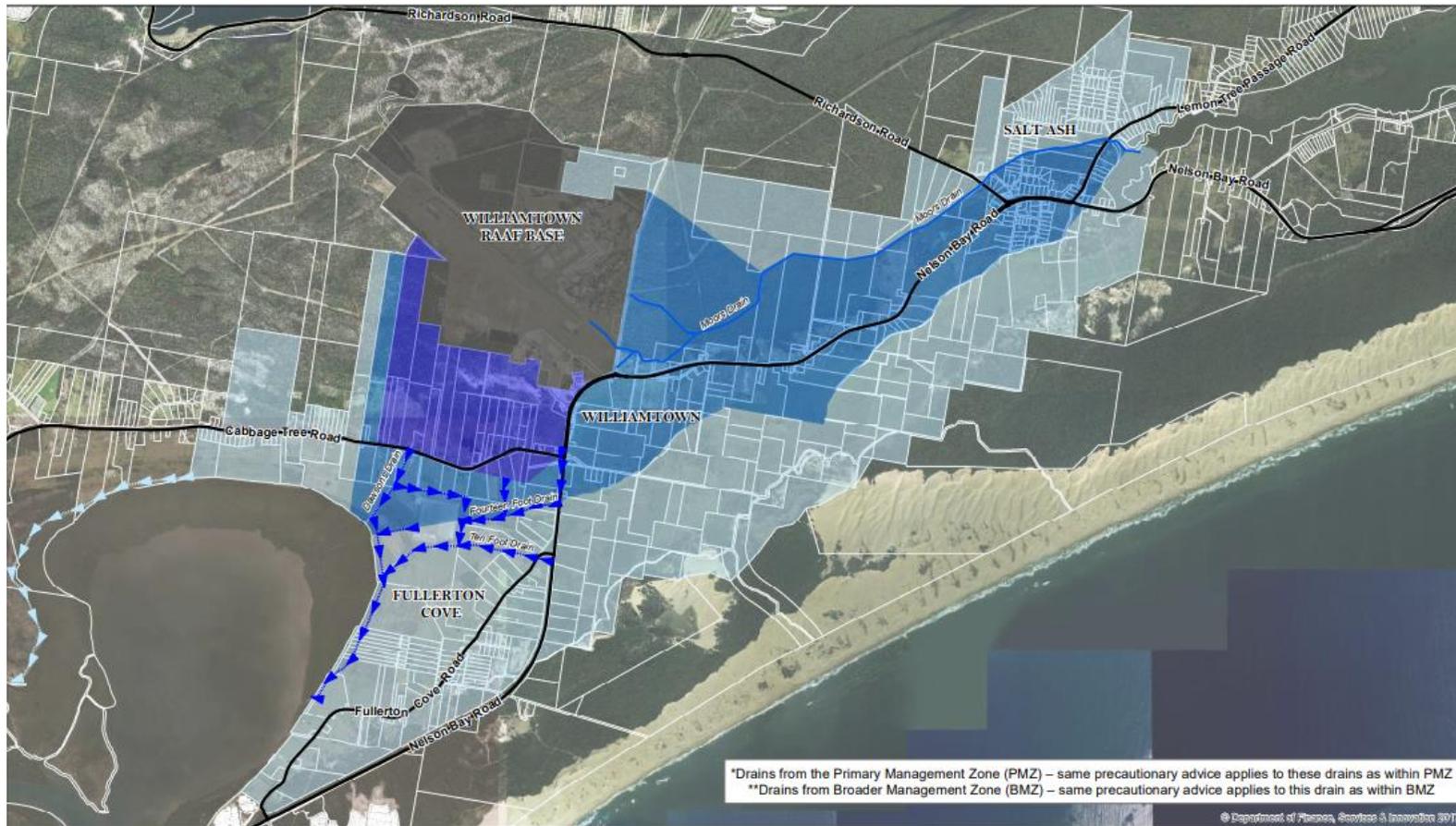
## 7. Where can you obtain copies of relevant documents?

Copies of relevant documents, including the current pleadings may be obtained by:

- a) contacting Dentons for a copy by emailing [WilliamtownClassAction@dentons.com](mailto:WilliamtownClassAction@dentons.com); or
- b) inspecting them between 9am and 5pm at one of the offices of Dentons by prior appointment to be made by emailing [WilliamtownClassAction@dentons.com](mailto:WilliamtownClassAction@dentons.com). The nearest office of Dentons to you is likely to be Sydney.

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact Dentons ([WilliamtownClassAction@dentons.com](mailto:WilliamtownClassAction@dentons.com)), IMF Bentham ([402987@imf.com](mailto:402987@imf.com); or telephone 1800 016 464), or seek your own legal advice.

**“Attachment A to Notice”  
Relevant Area**





**“Attachment B to Notice”**

Form 21  
Rule 9.34

**Opt out notice**

No. 1908 of 2016

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

**Gavin Smith and Ors**  
Applicants

**The Commonwealth of Australia (Department of Defence)**  
Respondent

To: The Registrar  
Federal Court of Australia  
New South Wales District Registry  
Locked Bag A6000  
Sydney South NSW 1235

....., a group member in this representative proceeding on the basis  
[Name of group member]

that they own or occupy land or own a business at  
....., gives notice under  
[insert land or business]

section 33J of the *Federal Court of Australia Act 1976*, that ..... is opting  
[Name of group member]  
out of the representative proceeding.

Date: .....  
[DD Month YYYY]

Signed by .....  
[Name]

Capacity: .....  
[e.g. Group Member/ Lawyer for the group member]

Filed on behalf of (name & role of party) .....  
Prepared by (name of person/lawyer) .....  
Law firm (if applicable) .....  
Tel ..... Fax .....  
Email .....  
**Address for service**  
(include state and postcode) .....



**Annexure B**  
**(Group Member Cover Letter)**

Dear Client

**Williamtown Class Action (NSD1908/2016 – Smith & Ors v The Commonwealth of Australia (Department of Defence))**

A class action has been commenced against the Commonwealth seeking compensation for damages to property and business values as a result of contamination of groundwater, surface water, soil and biota in Williamtown by per- and polyfluoroalkyl substances (PFAS) from the use of Aqueous Film Forming Foam (AFFF) by the Commonwealth at the RAAF Base Williamtown.

You are receiving this letter because you are a group member in the Williamtown Class Action, and you have already signed a funding agreement with IMF Bentham and retainer with Dentons in respect of the Williamtown Class Action.

Please see enclosed a notice which the Court has approved and directed be sent to all group members in the Williamtown Class Action. It is important that you read the enclosed notice carefully as it relates to your ongoing participation in the class action and sets out the steps you need to take if you do not want to be bound by the outcome of the class action. **The date to take action by is 5 July 2019.**

If there is anything of which you are unsure, you should contact IMF Bentham by email at [402987@imf.com](mailto:402987@imf.com) or telephone on 1800 016 464, or seek your own independent legal advice.

Kind regards

Dentons