

SUPREME COURT OF VICTORIA



ESSSUPER CLASS ACTION

IMPORTANT NOTICE

ELWYN GONSALVEZ & ORS V EMERGENCY SERVICES SUPERANNUATION BOARD

(S ECI 2024 01683)

1. What is this Notice about?

The Supreme Court of Victoria has ordered that this notice be published for the information of persons who might be group members of the group on whose behalf the Proceeding is brought and may be affected. If you are receiving this notice by email or post, you have been identified as a potential group member.

You should read this notice carefully as the matters set out in this Notice may affect your legal rights. If there is anything in it that you do not understand, you should seek independent legal advice.

Who is responsible for the Proceeding? The Proceeding was filed with the Court on 11 April 2024. The claim is brought by Elwyn Gonsalvez, Sebastiano Ferraro and Basil Seventis (the **Plaintiffs**), on their own behalf and on behalf of all persons who are “Group Members” as defined in the Proceeding. The meaning of “Group Members” is explained in Section 2. The Plaintiffs’ solicitors are Gordon Legal.

What is the Proceeding about? The Proceeding relates to the superannuation benefits of certain members of the Transport Superannuation Scheme (the **Transport Scheme**) who perform and/or performed ‘shift work’ (as detailed in Section 4 below). The Transport Scheme has been administered by the Board since 1 December 2005 and has been closed to new members since 31 December 1993. The Proceeding is explained in more detail in Section 3 below.

Who is covered by the Proceeding? The claim brought by the Plaintiffs covers certain former members of the Transport Scheme (including some who have retired, resigned or were retrenched) (**Former Members**) and certain current members of the Transport Scheme (including some who are still working) (**Current Members**).

To be clear, the fact that you have received this notice does not mean that you are a Group Member. Rather, this notice has been sent to those persons who may possibly be Group Members. To be a Group Member, you must satisfy the criteria in category (a) or (b) in Section 4 below.

2. What is a group proceeding?

A group proceeding, also known as a class action, is a proceeding brought by the plaintiff/s on their own behalf and on behalf of group members against the defendant/s, where the plaintiffs and the group members have similar claims against the defendant/s.

Group members are bound by any judgment or settlement entered into in the group proceeding unless they choose not to participate by “opting out” of the proceeding. This means that:

- (a) if the group proceeding is successful or settles through mediation or alternative dispute resolution, group members may be eligible for a share of any court awarded damages or settlement monies;
- (b) if the group proceeding is unsuccessful, group members are bound by that result; and
- (c) regardless of the outcome of the group proceeding, group members will not be able to pursue their claims against the defendant in separate legal proceedings unless they have opted out.

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

If you consider that you have claims against the Board which are based on your individual circumstances or otherwise additional to the claims described in the group action, then it is important that you seek independent legal advice about the potential binding effects of the group action **before** the deadline for opting out (see section 7 below).

3. What is this group proceeding about?

This group proceeding is brought by the Plaintiffs on their own behalf and on behalf of all persons who are “group members” as defined in the Proceeding.

In summary, the Plaintiffs have alleged that the ESSSuper Board has breached certain of its duties to former members of the Transport Fund by failing to include shift penalty allowances in the calculation of former members’ superannuation benefits.

Specifically, and by way of further explanation, the Plaintiffs allege that:

- (a) The Board is a trustee of the Transport Scheme and thereby owes (and owed) certain equitable obligations to Group Members, including the following three duties.
 - (i) A duty to calculate a Transport Scheme member’s superannuation benefit entitlement accurately and in accordance with *Transport Superannuation Act 1988* (VIC) (the **TS Act**) (the **Benefit Calculation Duty**).

The Plaintiffs allege that this duty includes, in respect of certain terminating members who received regular shift allowances from their employer in their final two years of membership of the Transport Scheme, a duty to approve and publish in the Government Gazette a schedule of shift allowances, and calculate the members’ defined benefit in a way that accounts for those shift allowances.
 - (ii) A duty to ensure that the Board possesses, including by exercising powers under the TS Act to require third party employers to furnish information to it, all

information that is necessary to perform the Benefit Calculation Duty (the **Information Gathering Duty**).

- (iii) A duty to pay to certain Transport Scheme members who are exiting the Transport Scheme (whether because the person is retiring or otherwise) a superannuation benefit that has been calculated in accordance with the Benefit Calculation Duty (the **Benefit Payment Duty**).
- (b) The Board has breached the Benefit Calculation Duty, the Information Gathering Duty, and the Benefit Payment Duty it owed to certain Former Members (including the Plaintiffs and any Group Members who are Former Members), because the superannuation benefits of certain members have been calculated in a way that does not take into account shift allowances paid by employers to the members in accordance with their employment arrangements.
- (c) The Board owes the Benefit Calculation Duty, the Information Gathering Duty, and the Benefit Payment Duty to Current Members.

The Plaintiffs seek different kinds of relief on behalf of themselves and Group Members, including:

- (a) a declaration that since 1 December 2005, the Board has been and is subject to the Benefit Calculation Duty, the Information Gathering Duty, and the Benefit Payment Duty;
- (b) an order directing the Board to approve a schedule of allowances and publish that schedule in the Government Gazette; and
- (c) an order directing the Board to pay Former Members an amount as a result of the alleged breach of the Benefit Payment Duty allegedly owed to Former Members.

The Board denies the claims made against it and is defending the Proceeding. In summary the Board responds to the allegations as follows:

- (a) the TS Act includes a mechanism for resolving disputes about entitlements which has not been followed in this case;
- (b) the claims brought on behalf of the Group Members are subject to a statutory limitation period, such that claims arising before 11 April 2018 are time-barred;
- (c) the Board is not a trustee of the Transport Scheme and does not owe equitable obligations to Group Members. Rather, the Board is a public entity with statutory duties and functions;
- (d) in those circumstances, the Board does not owe, and has not breached, the three duties alleged by the Plaintiffs;
- (e) the Board relies on information provided to it by participating employers for the purpose of administering the Transport Scheme; and
- (f) it is not possible for the Court to order much of the relief sought by the Plaintiffs.

Complete details of the Plaintiffs' claims and the Board's responses are set out in the Statement of Claim and the Board's Defence.

4. Are you a Group Member?

You may be a Group Member if:

- (a) you are a member of the Transport Scheme and you:
 - (i) perform regular shift work;
 - (ii) receive a regular shift penalty allowance for that shift work;

- (iii) the Board has not approved a schedule of allowances in respect of the shift penalty allowances you receive and published that schedule in the Government Gazette;

OR

- (b) you have been a member of the Transport Scheme and you:
 - (i) performed recognised service within the last two years of your membership of the Transport Scheme;
 - (ii) performed regular shift work in the last two years of your membership of the Transport Scheme;
 - (iii) received a regular shift penalty allowance from your employer for shift work in the last two years of your membership of the Transport Scheme; and
 - (iv) received or became entitled to receive a retirement benefit from the Transport Scheme.

If you do wish to participate in the Proceeding, you will likely be required to formally register your claim at a future time.

As noted above, the fact that you have received this notice does not mean that you are a Group Member. Rather, this notice has been sent to those persons who may possibly be Group Members. To be a Group Member, you must satisfy the criteria in category (a) or (b) above.

5. What is ‘Opting Out’?

The Plaintiffs in a group proceeding do not need to seek the consent of group members to commence a group proceeding on their behalf or to identify a specific group member. However, group members can cease to be a group member by “opting out” of the group proceeding.

If you opt out of the Proceeding:

- (a) you will not be bound by any order, judgment or settlement in the Proceeding; and
- (b) you will not be entitled to any share in the benefit of any successful outcome in the Proceeding such as receiving compensation.

An explanation of how group members are able to opt out is found below in the section 7 headed “What should you do?”

6. Will you be liable for legal costs if you remain a group member?

If the Proceeding is unsuccessful, you will not be required to pay any costs out of your own pocket.

However, if the Proceeding is successful (that is, amounts are recovered for the Group Members), the litigation funder (see below) and Gordon Legal will be entitled to recover certain legal costs, disbursements and other litigation expenses out of the total amount recovered for Group Members. These payments are described below.

Funding of the Class Action

The Proceeding is partly funded by Omni Bridgeway (Fund 5) Australian Inv. Pty Ltd (the **Funder**), with the balance funded by Gordon Legal on a ‘No- win, No-Fee’ basis. This means

that the Plaintiffs and potentially some Group Members (known as Funded Group Members) have entered into a Litigation Funding Agreement (**Funding Agreement**) with the Funder. Group Members who have not entered into a Funding Agreement with the Funder are known as unfunded group members (**Unfunded Group Members**). The Plaintiffs and potentially some Funded Group Members have also entered into a Costs Agreement with Gordon Legal.

The Funding Agreement provides that the Funder will be reimbursed for the costs it has paid, and paid a funding commission out of any settlement or court awarded compensation in the event of a successful outcome. The amounts payable to the Funder will be deducted from the settlement or judgment sum (in addition to the reimbursement of reasonable costs incurred) before the balance is distributed to Group Members.

The amount of the funding commission depends on how long the class action takes to be resolved from 12 May 2024. The funding commission starts at 15% and increases every 6 months to 25% after two years. If the class action takes longer than 2 years to resolve, the previous applicable funding commission is increased 10.47% each year.

The table below sets out each applicable funding commission over a period of 6 years from 12 May 2024:

Time since 12 May 2024	Funding commission
Up to 0.5 years	15%
0.5 years to 1 year	17.5%
1 year to 1.5 years	20%
1.5 years to 2 years	22.5%
2 years to 3 years	25%
3 years to 4 years	27.62%
4 years to 5 years	30.51%
5 years to 6 years	33.71%
... + 1 year	... $\times 1.1047$

In the event of a funded appeal from a final judgment, the funding commission is increased by 5 percentage points in respect of each appeal, up to a maximum of 10 percentage points.

The Court may be asked to make an order requiring all Funded and Unfunded Group Members to contribute to the costs of funding the proceeding on a fair basis and to pay the Funder a percentage of any compensation to which the Funded and Unfunded Group Members become entitled as commission for funding the Proceeding. These orders are called common fund orders. If the Court is minded to make a common fund order in this case, the Funder intends to submit that the funding commission that the Court should apply to the Unfunded Group Members be the same as the applicable funding commission in the Funding Agreement, having regard to the time from 12 May 2024 at which the common fund order is made.

If the Proceeding is successful, Gordon Legal will be entitled to recover the ‘No-Win-No-Fee’ fees which become payable from the settlement or judgment sum, under the terms of the Funding Agreement. Gordon Legal will also be entitled to recover the “Uplift fee” from the settlement or judgment under the terms of the agreements between Gordon Legal, the Plaintiffs, and the Funder, which amounts to a further 25% of the ‘No-Win-No-Fee’ fees. This means that Gordon Legal is accepting some of the risk of the Proceeding and will in effect waive 25% of its fees, and the total amount of the ‘Uplift fee’, unless there is a successful outcome. If approved, these legal costs would be deducted from the settlement or judgment sum prior to distribution to eligible Group Members.

Any payment of legal fees or commission must be first approved by the Court as fair and reasonable.

The Court must approve the payment of any legal fees or commission must be first approved by the Court as fair and reasonable.

7. What should you do?

If you are a Group Member, you have two options:

Option 1: Remain a group member – do nothing

If you wish to remain a Group Member there is nothing you need to do at the present time. The Plaintiffs will continue to conduct the Proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the Plaintiffs and the Group Members. However, you are invited to contact the Plaintiffs’ lawyers, Gordon Legal, at <https://gordonlegal.com.au/services/class-actions/esssuper-class-action/> and register so that future notices about the Proceeding can be sent to your preferred address.

If the Proceeding is successful, you may be entitled to share in the benefit of any order, judgment or settlement in favour of the Group Members, if you satisfy certain conditions.

Unless you opt out, you will be bound by any settlement or judgment of the Proceeding. This means that, if you remain a Group Member, you will not be able to pursue the same claim or related claims against the Board even if the Proceeding is not successful or not as successful as you might have wished.

If you consider that you have claims against the Board which are based on your individual circumstances, or are otherwise additional to the claims in the Proceeding, it is important that you seek independent legal advice about whether you should remain a Group Member before the deadline for opting out.

Option 2: Opt out of the Proceeding

If you do not wish to remain a Group Member, you must opt out of the Proceeding by no later than **4:00pm (AEST) on 12 September 2025**, by **either**:

- a) submitting the required information in the ‘Online Opt Out Notice’ through the Supreme Court of Victoria website at: <https://www.supremecourt.vic.gov.au/esssuper-class-action/opting-out> ; or

- b) completing the “Opt Out Notice” below and returning it to the Supreme Court of Victoria at either the email address or the postal address on the form. If you want to opt out, you must send your Opt Out Notice to the Supreme Court so that it arrives before **4:00pm (AEST) on 12 September 2025**, otherwise it may not be effective. Any Opt Out Notices received after this time will be invalid and, subject to further order, you will remain as a Group Member.

If you opt out:

- (a) you will not be bound by any order, judgment or settlement in the Proceeding; and
- (b) you will not be entitled to any share in the benefit of a successful outcome in the Proceeding

If you wish to bring your own claim against ESSSuper Board, you should seek your own legal advice about your claim and the applicable time limits that apply to bringing a claim before opting out.

You must decide what to do BEFORE 4:00pm (AEST) on 12 September 2025. If you want to opt out, you must send your Opt Out Notice to the Supreme Court so that it arrives before 4:00pm on 12 September 2025, otherwise it may not be effective.

8. Where can you obtain copies of relevant documents?

Copies of relevant documents, including the Plaintiffs’ statement of claim and the Board’s defence, may be obtained by:

- (a) downloading them from <https://gordonlegal.com.au/services/class-actions/esssuper-class-action/>;
- (b) inspecting them between 9:00am and 5:00pm at one of the offices of Gordon Legal, contact details for which are available from <https://gordonlegal.com.au/> or by calling 1300 59 95 17;
- (c) inspecting them by visiting the Registry of the Supreme Court of Victoria in Melbourne at 450 Little Bourke Street, Melbourne; or
- (d) on the Supreme Court website at <https://www.supremecourt.vic.gov.au/esssuper-class-action>

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact Gordon Legal on 03 9603 3000 or email esssuper@gordonlegal.com.au or seek your own independent legal advice. You should not delay in making your decision as the deadline for the opt out is 4:00pm on 12 September 2025.

This notice is published pursuant to Orders made by the Supreme Court on 1 July 2025.