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CLOSING THE CLASS: WHEN CAN CERTAINTY FOR A CLASS ACTION SETTLEMENT BE ACHIEVED IN AUSTRALIA?

The Federal Court of Australia has power to "close the class", or require group members to identify themselves and their claims, so as to facilitate the settlement of a class action. However, the court must be convinced that it is appropriate to exercise the power in the particular circumstances. In *Winterford v Pfizer Australia Pty Limited* [2012] FCA 1199, the court was not convinced as a settlement had not been reached, only steps towards a settlement had been undertaken. For the court to close the class, it will usually need to be the case that a settlement has been agreed so that the closing of the class is clearly needed to allow for the proceedings to be finalized. Uncertainty about the size of the class and quantum of claims can be addressed through the settlement agreement.

INTRODUCTION

The opt-out class action employed in Australia contains a conflict between the lofty aspirations of extending access to justice to as many injured people as possible with the practical reality of bringing the class action to a conclusion. The conflict is usually resolved through the closing of the class[1] which involves group members registering their participation. However, at what point in the litigation should class closure be permitted?

THE CONUNDRUM

When the Federal Court class action was enacted, the then Federal Attorney General noted that the government had chosen an opt-out procedure on the basis of grounds of both efficiency and equity:[2]

> It ensures that people, particularly those who are poor or less educated, can obtain redress when they may be unable to take the positive step of having themselves included in a proceedings.

This can be contrasted with the observations of Justice Stone in the *Aristocrat Leisure* shareholder

class action, where her Honour observed that when an opt-out group definition is used, it will eventually be necessary to close the class because:[3]

> Until the class of participating group members is closed and the members of the closed class identified, there can be no final settlement and no distribution of settlement monies to members of the class.

The opt-out class action seeks to make the justice system accessible to all and is therefore structured so that any entity that falls within the group definition would be included in the proceedings. However, for the proceedings to be able to be resolved, those group members must come forward at some point and identify themselves.

WHEN TO CLOSE THE CLASS

In *Winterford v Pfizer Australia Pty Limited* [2012] FCA 1199, Justice Bromberg was asked to make orders that would have the effect of requiring group members who had not opted out of the proceedings to register with the solicitors of the applicant. In addition, an order was sought that those persons who neither opted out nor completed a registration notice would be bound by any judgment in the proceedings but would not be entitled to share in the benefit of any order or judgment in favour of the applicant and group members.

Justice Bromberg accepted that the court had power to close the class and make the orders requested as had occurred in earlier proceedings.[4] But before such orders would be made, there needed to be "a compelling reason" before group members would be required to take a positive step and come forward and register their interest so that the class action could be closed. His Honour observed that such a compelling reason would be to give finality to the proceeding.[5] However, it did not include where a respondent stated that it was not willing to enter into settlement negotiations because of uncertainty as to the quantum of potential group members' claims.

His Honour went on to explain the current status of the two sets of class actions. In the first matter, pleadings were not yet closed, common questions were yet to be settled, let alone determined, opt-out notices were about to be advertised, and no settlement discussions had been undertaken. In the second matter, settlement discussions had commenced and a sampling process had begun in which the respondent would assess the claims of some group members. Although the *Pfizer* matter was more advanced in terms of a resolution, it was still found that a sufficiently compelling reason had not been put forward to justify group members being required to opt in to the proceedings or otherwise lose their right to compensation.[6]

When *Winterford v Pfizer Pty Limited* is looked at from a group member's perspective, it is easy to see why a court would be reluctant to make orders closing the class at an early stage. The access to justice objective of the class action would be undermined as group members facing socioeconomic or educational disadvantages may be excluded. Not only would they be unable to participate in the settlement but they would also have their claim extinguished in return for no compensation. While the practical reality is that they must take the positive step of participation at some point, that may be facilitated if the terms of the settlement are known.

It should also be added that notice plays an important role in communicating the terms of the settlement, the steps the group member must undertake, and the ramifications of not taking those steps.

STEPS TO REDUCE UNCERTAINTY IN SETTLEMENTS

From a respondent's perspective, while it is always desirable to be able to reduce the uncertainty associated with the liability in a class action, it is the nature of class action proceedings that the number of group members and the size of their claims are difficult to assess.[7] As a result, respondents who wish to settle a matter but are faced with that uncertainty should seek to build safeguards into the settlement agreement.

Where a respondent is prepared to settle only where it can minimise its liability to a certain sum, but otherwise would be prepared to litigate the matter to finality because of the quantum that is at stake, the settlement agreement can be drafted accordingly. The settlement agreement could specify that the settlement is conditional upon the final amount being a certain dollar amount. If the settlement is greater than that, then the settlement agreement can terminate. This approach was used in the *Aristocrat Leisure* shareholder class action.[8]

Equally, a respondent may not wish to settle a proceeding if too few group members take part in the settlement because it leaves a substantial number of claims still to be resolved. As a result, the settlement agreement can be drafted so that a certain percentage or number of group members must participate or the settlement agreement terminates.

Closing the class so that the number of claims becomes certain is obviously desirable, but there are ways to use the settlement agreement to assist in obtaining certainty.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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ENDNOTES

1 The closing of the class is a step that occurs in an open class. The process is to be compared with a closed class, where the group is defined from the outset in a manner that limits the group to ascertainable persons. *See Matthews v SPI Electricity (Ruling No. 13)* [2013] VSC 17 at [18]–[24].

2 Second Reading Speech by the Attorney-General, Australia, House of Representatives, Parliamentary Debates (Hansard), 14 November 1991 at p 3177.

3 *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2008) 67 ACSR 569 at [13].

4 *Winterford v Pfizer Australia Pty Limited* [2012] FCA 1199 at [3].

5 *Winterford v Pfizer Australia Pty Limited* [2012] FCA 1199 at [5]–[6].

6 *Winterford v Pfizer Australia Pty Limited* [2012] FCA 1199 at [9]–[10].

7 *See P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd* (No 2) [2010] FCA 176 at [31] and *Thomas v Powercor Australia Ltd* (No 1) [2010] VSC 489 at [38].

8 *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2008) 67 ACSR 569 at [3].