



Australian Court “Closes Class”

Dismisses Claims of Class Action Members Prior to Judgment or Settlement

Key Points

- In Australia, class actions operate by way of an opt-out model that does not require the consent or identification of class members at the time the proceedings are commenced. As such, there can be significant uncertainty in settlement negotiations as to which (and accordingly how many) members will ultimately register to share in any settlement amount. To conclude a class action in which the class members receive compensation or other personal benefit, it is necessary to identify the class members. This usually occurs through a class closure process by which class members must register their participation.
- In *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 (“*Lam (No 5)*”), opt-out notices and a class closure process had occurred, but 84 class members had neither opted out nor registered their participation in the class action. On the respondent’s application, the Supreme Court of New South Wales determined that it would dismiss, finally, the claims of those 84 class members. The decision is novel in terms of its timing—prior to any judgment or settlement.
- The decision in *Lam (No 5)* establishes a route for parties to achieve greater certainty in seeking to quantify a class action claim and reaching a settlement. However, the court must ensure that adequate notice is given to unregistered members who stand to lose their rights to compensation.

Background

On 4 November 2010, Qantas Flight 32 departed Changi Airport in Singapore with 469 passengers and crew on board, only to perform an emergency landing manoeuvre shortly after takeoff due to engine failure. A class action against the manufacturer of the plane’s engines, Rolls Royce PLC, was commenced in the Supreme Court of New South Wales on behalf of those who were onboard the flight and suffered a psychological injury.

By the time the application the subject of *Lam (No 5)* was heard, the class action was already at an advanced stage.

On 20 June 2014, the Court made orders for the sending of “opt-out” notices, and approximately 30 people opted out of the class action. In February 2015, the Court made orders to give effect to a “class closure” process. Class closure involves the court making

orders to require class members to identify themselves by a certain point in time as having an interest in any judgment or proposed settlement. If class members fail to identify themselves, although they remain part of the class action, their claim is extinguished and they forfeit the right to participate in any settlement or judgment in favour of the class.

The process operated differently in relation to those class members with foreign contact details and those with Australian contact details. The Court removed passengers with overseas contact details who did not register with the representative party's solicitors from the class.¹ This was done because "they may not receive notification of the existence of these proceedings, [there is] a likelihood that, even if they do, they are unfamiliar with the Australian legal system and [there is] a strong probability that there is no simple answer to a question about the effect of any binding settlement on their right to litigate in their home jurisdiction".² The Court also determined that those passengers with Australian contact details remained in the class but could not participate in any settlement or resolution without leave of the Court.³

Further orders were made in March 2015 that required class members to register with the representative party's solicitors by June 2015 and thereafter provide basic particulars of their claims. In light of class members' continuing entitlement to opt out of the class action, (further) opt-out notices were issued to class members containing relevantly the following passage:⁴

If you have a claim for psychological injury arising from the engine failure incident on Qantas Airbus flight QF32 on 4 November 2010 and you do not register your claim by the deadline or otherwise opt out of the proceedings, you will be bound by any settlement of the class action but will not, without otherwise obtaining the Court's permission, be entitled to claim a share of any settlement moneys. Also, if you do not register and a settlement is proposed, you will not be notified of this settlement proposal and will not have the opportunity to oppose the settlement. This means that you will lose the right to sue the defendant for any injury or loss suffered and will lose your rights to any compensation.

Subsequently, settlement negotiations progressed to a stage at which fault in workmanship was admitted by the defendant.

Each class member needed to establish that he or she had suffered a recognisable psychiatric illness as a result of the events consequent upon the engine failure and the level of damages he or she could recover.

In June 2016, orders were made establishing a regime for registered members to provide detailed particulars and some material in support of their claim. The orders also addressed class members who had not registered by the June 2016 deadline and provided that they could apply for leave of the Court to pursue any claim by August 2016. The representative party's solicitors were ordered to forward notices to nonregistered members advising of the effect of the orders. These notices also contained the following statement:⁵

If you do not apply for leave by 1 August 2016, or the Court does not grant you leave to make a claim for compensation, you will lose the right to claim compensation arising from the events of 4 November 2010 for the defendant, and the Court will dismiss the claim that you have against it.

After the August 2016 deadline had passed and none of the 84 unregistered class members had opted out or filed an application for leave, Rolls Royce PLC applied to the Court for orders dismissing the claims of the unregistered members. Rolls Royce PLC also sought an order confirming that the first-sought order "operates as a final determination" of the unregistered members' right to claim relief against it.⁶

Reasoning

Rolls Royce PLC argued that the Court had power to make the orders it sought under the Court's general power provision for class actions under the *Civil Procedure Act 2005* (NSW), s 183. That section provides:

183 General power of the Court to make orders

...

In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any

order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

Beech-Jones J noted the cases submitted on behalf of Rolls Royce PLC, where notices were sent to class members advising that if they neither registered their claims nor submitted material in support of their claims, their right to compensation would be extinguished.⁷ His Honour also noted *Matthews v SPI Electricity Pty Ltd* [2013] VSC 17; 39 VR 255 and the examples cited therein,⁸ where the orders on their face appeared to determine, adversely, a class member's claim.

Beech-Jones J held that the regime provided for class actions by Part 10 of the *Civil Procedure Act 2005* (NSW) would be significantly undermined if the Court could not make orders finally determining a class member's rights and it could not do so before the representative party's claim was determined. His Honour also considered that Part 10 contemplated orders such as those sought by Rolls Royce PLC. In particular, his Honour found there was support for the orders in the words of s 182(2), which provides:⁹

182 Suspension of limitation periods

...

(2) The limitation period does not begin to run again unless either the member opts out of the proceedings under section 162 or the proceedings, and any appeals arising from the proceedings, are determined *without finally disposing of the group member's claim*.

His Honour observed that s 182(2) necessarily contemplates the Court making orders of the type sought by Rolls Royce.

The Court granted Rolls Royce PLC's application and made orders dismissing the claims by unregistered class members and that the dismissal operate as "a final determination of the rights of the individual [class] members ... to claim damages or other relief against [Rolls Royce PLC]"¹⁰ for the relevant event.

Ramifications

Opt-out class actions were adopted in Australia to extend access to justice to as many persons as possible. Consequently, opt-out class actions do not require the consent or identification of class members at the time the proceedings are commenced. However, to conclude a class action in which the class members receive compensation or other personal benefit, it is necessary to identify the class members. Identification is usually achieved through the closing of the class.

Class closure has attracted criticism because access to justice for those facing social or economic barriers may only be facilitated up until they are required to identify themselves and document their claim. The factors that may prevent a person signing up to a class action when it is commenced may still apply at the time of a settlement. Moreover, the class members' claims may be extinguished without them receiving any compensation. However, this does not remove the truism that compensation cannot be assessed or distributed if the identity of a class member remains unknown. Consequently, courts have been concerned to ensure that they balance the practicalities of concluding a class action with fairness to class members.

Lam (No 5) stands out from past cases involving class closure due to the timing of the orders. The Court not only closed the class but dismissed the claims by unregistered class members prior to any judgment or settlement.

It is important to note, however, that implicit throughout Beech-Jones J's decision in *Lam (No 5)*, and in the authorities his Honour cited, is that proper notice must be given to unregistered parties.¹¹ In *Lam (No 5)*, unregistered members were given repeated notices that, if they did not either opt out or register their claims, they would have to apply for leave of the Court to pursue their claims. They were advised on each occasion that failing to do so would result in their losing their rights to claim compensation.

Lawyer Contacts

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Endnotes

- 1 *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83 at [29]-[30]; *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [3]-[4].
- 2 *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83 at [29].
- 3 *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83 at [31]; *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [4].
- 4 *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [5].
- 5 *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [7].
- 6 *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [8].
- 7 *King v AG Australia Holdings Limited* [2002] FCA 1560 at [6]; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212 at [65].
- 8 *Matthews v SPI Electricity Pty Ltd* [2013] VSC 17; 39 VR 255 at [31].
- 9 *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [13] (Beech-Jones J's emphasis).
- 10 *Lam v Rolls Royce PLC (No 5)* [2016] NSWSC 1332 at [16(2)].
- 11 See M Legg, “The Controversial Class Closure Mechanism: Is it Fair?” (2015) 2 (April) *Law Society of NSW Journal* 72.