

# Australian Appeal Court Endorses Class Action Closure Process but with Warnings

## IN SHORT

**The Background:** Australian courts have made "class closure" orders which require group members to come forward and register their interest. The orders may also provide that failure to register means that the group member cannot participate in any recovery, whether by settlement or judgment, but the group member's claim is extinguished or barred.

**The Issue:** Do Australian courts have power to make "class closure" orders and what factors should they consider in exercising their discretion?

**The Outcome:** A class closure order that facilitates the desirable goal of settlement may be permitted under s33ZF of the *Federal Court of Australia Act 1976* (Cth). However, if settlement is not achieved, an order extinguishing the claims of group members who did not respond is not permitted. More generally, consideration should be given to the point the case has reached, the attitude of the parties, and the complexity and likely duration of the case.

Recently, in *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296, the Federal Court deviated from past class action practice. Registration was required to facilitate a mediation and group members could only participate in any settlement if they had registered. If a settlement was achieved and approved by the court then unregistered group members obtained no recovery and lost their right to a claim. However, unlike past orders, if no settlement was reached then unregistered group members could still participate in any judgment.

<p><b>Australian Class Action Procedures</b> <b>The "Opt Out" Model</b></p> <ul style="list-style-type: none"> <li>• Australian class action legislation provides that a class action can be commenced without the express consent of group members and that all of the claimants who fall within the group definition are part of the class action.</li> <li>• However, group members must be given an opportunity to exclude themselves, or opt out, of the class action.</li> <li>• Group members who remain within the defined group are bound by the outcome of the proceedings.</li> </ul>	<p><b>The Problem with Class Closure</b> <b>Undermining the Goal</b></p> <p>Australian courts, to facilitate settlement—and at the request of the parties—have made "class closure" orders that require group members to come forward and register their interest.</p> <p>The orders have frequently had the effect that failure to register means that the group member cannot participate in any recovery, and the group member's claim is extinguished or barred. The approach has been criticized as undermining the access-to-justice goal of an opt out class action, but has persisted as a practical necessity to achieve finality.</p>
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The judgment was appealed to the Full Court of the Federal Court of Australia. While the Full Court did not need to expressly address the novel class closure order, it chose to provide guidance as it considered class closure to be an important part of class action procedure (*Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98).

The primary judge expressed doubt that the court had power to make an order, before the initial trial of a class action, to extinguish a group member's right to share in the fruits of a subsequent judgment unless the group member took steps to register in the proceeding. However, the judge did not rule on that question and instead addressed the issue as an exercise of discretion, ruling that it was not necessary or appropriate to make orders extinguishing the unregistered group members claims at that time.

The Full Court considered the power to make class closure orders. It accepted that requiring group members to take active steps to "register" in order to share in a settlement of a class action undercut, to some extent, the opt out rationale underpinning the class action regime. However, the Full Court found that there was power to make a class closure order relying on s33ZF of the *Federal Court of Australia Act 1976* (Cth), which provides: "the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding." If a class closure order facilitates the desirable end of settlement, then it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and, therefore, appropriate under s33ZF. Settlement is facilitated because it allows a better understanding of the total quantum at stake in the proceedings. Moreover, the Full Court stated that an important aspect of the utility of the class action was its ability to achieve finality not only for group members but also for the respondent.

The Full Court endorsed the primary judge's remarks in relation to discretion and used them to express a number of cautions. The Full Court warned of the need to be vigilant before making a class closure order that, in the event settlement is not achieved, operates to lock class members out of their entitlement to make a claim and share in a judgment—"the facilitation of settlement is a good reason for a class closure order but, if settlement is not achieved, an order to shut out class members who do not respond to an arbitrary deadline is not." Further caution needed to be exercised in relation to the stage at which a class closure order is made. The earlier the order the greater the opt out rationale was likely to be harmed. The Full Court expressly stated that "the Court should usually not exercise the discretion to make a class closure order based merely on a respondent's assertion that it is unwilling to discuss settlement unless such an order is made." This was based on a view that it is the nature of opt out class actions that the respondent will be faced with uncertainty regarding the quantum of class members' claims because the number of claimants may be unknown.

After providing the above guidance the Full Court recognized that:

Whether it is appropriate to order class closure is a question of balance and judicial intuition. The Court must take into account the interests of the class as a whole in requiring class members to take steps to facilitate settlement, and consider the surrounding circumstances including the point the case has reached, the attitude of the parties, and the complexity and likely duration of the case.

### THREE KEY TAKEAWAYS

1. The Full Court found that the class action legislation provided Australian courts with the power to make class closure orders. The power may be exercised to facilitate the goal of settlement.
2. The Full Court also endorsed the approach of the primary judge which changed prior practice and provided that if no settlement was reached then unregistered group members could still participate in any judgment.
3. The operation of the orders creates some uncertainty where a settlement is not immediately achieved. Would a settlement at a later time, before or after trial, require a further class closure order or could the earlier order still be relied upon? Would the way in which an unsuccessful mediation concluded become relevant—would terminating the mediation mean new orders were required, but adjourning the mediation and reaching a settlement at a later session, that the existing orders could still be relied on?

### CONTACTS



John M. Emmerig  
Sydney



Michael J. Legg  
Sydney

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