



Untju Alkata 2 by Tommy Watson

THE REVIEW

CLASS ACTIONS IN AUSTRALIA
2024/2025

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COMPETING SYSTEMS OF REDRESS

In recent years, a number of proceedings have highlighted the options for redress which exist for group members beyond the traditional class action. Alternative mechanisms include internal and external dispute resolution mechanisms, such as remediation schemes and AFCA complaints, along with bespoke statutory actions, including through the Fair Work Commission and Office of the Australian Information Commissioner (**OAIC**). These competing systems of redress offer multiple pathways for the efficient and fair determination of claims. However, they also bring a risk of multiplicity and an oversaturation of compensatory choice where they exist alongside a concurrent class action. This raises the question of how the class action regime may need to adapt to these alternatives to ensure it continues to uphold the objectives of access to justice, efficiency and fairness.

THE LOW BAR FOR COMMENCING CLASS ACTIONS

As noted in the [Loss in mass tort cases](#) section of The Review, class actions in Australia have a low barrier to entry, with threshold requirements that are ‘deliberately undemanding’ and interpreted broadly to operate in favour of the commencement of a class action. The common issue uniting class members need only be more than trivial and ‘of weight and significance’ – it does not need to be a ‘major’ issue.

In contrast with regimes in the United States, Canada and the United Kingdom, where a plaintiff must obtain certification to commence a class action, such a hurdle was rejected by the Australian Law Reform Commission in its seminal 1988 report on Grouped Proceedings in the Federal Court on the basis that:

‘[certification] expenses are wasteful and would discourage use of the [class action] procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.’⁷

DECLASSING APPLICATIONS

From a respondent’s perspective, the significant benefit of the class action regime can be promoting ‘efficiency in dealing with multiple claims so as to avoid multiple proceedings, inconsistent findings and respondents being unnecessarily vexed’.⁸

However, when faced with a class action when alternative forms of redress may be more appropriate or already underway, a respondent might wish to consider a declassing application, available through s33N of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (and cognate provisions). Under that section, the Court has discretion to order that a proceeding no longer continue as a class action ‘if it is satisfied that it is in the interests of justice to do so’, due to matters of cost, efficiency or inappropriateness, or because ‘all the relief sought can be obtained by means of a proceeding other than a representative proceeding’.

⁷ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, December 1988) at 63 [146].

⁸ *Stack v AMP Financial Planning Pty Limited (No 2)* (2021) 401 ALR 113; [2021] FCA 1479 at [16].

The making of a declassing order is a discretionary decision involving a degree of subjectivity, having regard to the interests of justice, including considerations of the ‘principal objects of the class action procedure’: (a) to promote the efficient use of court time and the parties’ resources, (b) to provide a remedy for persons who may not have the funds to bring a separate action and (c) to protect respondents from multiple suits and the risk of inconsistent findings.⁹ The exercise ‘invites a comparison between the pursuit of the group members’ claims’ and their pursuit in hypothetical, non-representative proceedings.¹⁰

To succeed, a respondent must satisfy the Court that it is in the interests of justice that the proceeding no longer continue as a class action because of the presence of one or more of the conditions in s33N. The general principles applicable to declassing applications were recently reaffirmed in *Waller Legal*, in which Gorton J accepted that declassing was in the interests of justice as the class action ‘would not provide an efficient and effective means of dealing with’ the group members’ claims.¹¹ In that case, the respondent successfully argued that each group member’s case was ‘factually discrete’ such that a class action would ‘not ... appreciably shorten the process of evaluating each group member’s claim or lead to savings of any real significance’. His Honour supported the view that ‘imbalance between common and individual issues’ justified a declassing order.

While the reference in s33N to the ability to obtain relief ‘by means of a proceeding other than a group proceeding’ directs attention to another ‘proceeding’ (defined federally to be a proceeding ‘in a court’, and similarly in the States), considerations of efficiency may equally be capable of taking non-curial processes into account. This may particularly be the case following an initial trial of common issues, where remaining issues are predominantly individual and the efficiency inherent to the determination of common issues is spent.

Such was the case in *Cody Gemtec*,¹² in which actions against insurers arising from COVID-19 era business disruption were declassified, with Lee J concluding: ‘Although in each case I think a class action with a speedy initial trial leading promptly to a Court supervised assessment process would have been more efficient (and fairer) if adopted at the outset, the well-advanced private assessment processes have now become a more efficient mechanism of dealing with the residuum of issues left following the test cases’.

The private assessment processes in question were the internal dispute resolution procedures implemented by the respondent insurers. His Honour found that while those processes would not involve the same degree of judicial supervision as a Court-appointed referee process, ‘there is nothing on the evidence for me to conclude that the process will not be conducted bona fide and there are some measures of review protection for the insureds if they are dissatisfied with an initial determination’.

Justice Lee briefly considered the consequences for those standing behind the action, stating ‘although those promoting the class actions will no doubt experience some loss by reason of the declassing, that is an inevitable consequence of the vicissitudes of class action litigation’, and observing that ‘there is a potential cost benefit in participating in the private claim process for group members (in that outgoings will not be required to be deducted from any amount recovered to reflect the costs associated with maintaining the claim through the class action)’. That is, the fact that lawyers (and funders) will not “clip the ticket” of the private claim process results in a potential cost benefit to group members.

While the legal fees and funding commissions associated with class actions may suggest that respondent-driven private determination processes may ultimately leave claimants better off, consideration also must be given to the likely quantum recoverable and the nature of the process involved.

⁹ *Bright v Femcare Ltd* (2002) 195 ALR 574; [2002] FCAFC 243 at [152]-[155].

¹⁰ *Beecham Motors Pty Ltd v General Motors Holden Australia NSC Pty Ltd* [2021] VSC 855 at [14]-[15].

¹¹ *Jones (A Pseudonym) v Waller Legal Pty Ltd* [2025] VSC 42 at [48].

¹² *Cody Gemtec Retail Pty Ltd v Underwriting Members of Syndicate 2003 at Lloyd's (Declassing Application)* [2024] FCA 1098.



MULTIPLICITY OF ALTERNATIVES

While *Cody Gemtec* involved an internal dispute resolution process to resolve individual claims, alternative redress can come in many shapes and forms, including:

- dispute resolution through AFCA in respect of claims the subject of financial services class actions, which is sometimes pursued by claimants with the assistance of claims aggregators operating parallel quasi-representative actions
- parallel actions under the *Fair Work Act 2009* (Cth) in respect of claims the subject of employment class actions (see [Employment](#) section of The Review)
- individual consumer actions before State tribunals. In *Scenic Tours*,¹³ the NSW Court of Appeal referred to the 2014 resolution by the NSW Civil and Administrative Tribunal of the claims of 2 cruise passengers, observing that '[b]y contrast, these proceedings have still not been finalised more than five years after the various cruises concluded their ill-starred journeys'. A final settlement was not approved by the Court until 2023,¹⁴ following orders for the determination of individual claims by Court-appointed referees¹⁵
- the representative complaint procedure under the *Privacy Act 1988* (Cth) (**Privacy Act**), under which a person may bring a privacy complaint to the OAIC on behalf of class members. Such a complaint is currently on foot against *Medibank* in parallel with a class action in the Federal Court (see [Privacy](#) section of The Review)

- regulatory enforcement actions, including:
 - compensation orders sought by regulators. In 1998, 2 ACCC-led class actions were the subject of successful declassing applications on the basis that the ACCC could instead seek compensation orders¹⁶
 - enforceable undertakings provided to ASIC. In 2006, Multiplex provided an enforceable undertaking to ASIC to compensate shareholders in the amount of \$32m, shutting out those who took up the compensation from participating in the subsequent class action
- other internal remediation processes. For instance, in the course of considering the proposed \$5m settlement of the *Tyro Payments* class action, the Court referred to the remediation which Tyro had '*sensibly and appropriately offered from early on*'.¹⁷

These alternatives may offer advantages to claimants over class actions, including that:

- they may be more tailored to the particular legal framework or factual matrix applicable to the claim
- they may lead to quicker resolution of claims
- they may be able to avoid both the myriad interlocutory disputes arising in class actions, and the legal complexity arising in fully litigated claims, and
- they may not require substantial commissions to be paid to funders or plaintiff law firms.

While the evidence necessary in a declassing application will ultimately '*vary greatly, depending on the facts and the form*' of the action,¹⁸ a respondent pointing to an alternative redress scheme might consider these advantages, and, in keeping with the matters considered in *Cody Gemtec*, provide evidence that any alternative process will be conducted bona fide and provide claimants with adequate protections and rights of review. In particular, any respondent relying on an internal dispute resolution or remediation process may benefit from establishing the process with these factors in mind.

¹³ *Scenic Tours Pty Ltd v Moore* (2018) 361 ALR 456; [2018] NSWCA 238.

¹⁴ *Moore v Scenic Tours Pty Ltd* (No. 6) [2023] NSWSC 948.

¹⁵ *Moore v Scenic Tours Pty Ltd* (No. 5) [2023] NSWSC 392.

¹⁶ *Australian Competition & Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512; [1998] FCA 819; *Australian Competition and Consumer Commission (ACCC) v Internic Technology Pty Ltd* (1998) 42 IPR 225; [1998] FCA 818.

¹⁷ *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd* [2023] FCA 590 at [19].

¹⁸ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [130].

While an economic incentive may continue to exist for an enterprising law firm or funder to pursue a class action, in circumstances where alternatives holding discernible advantages exist, the question arises as to whether the interests of justice favour the continuation of the parallel court action?

Section 33N is one avenue through which that question may be answered.

The preferencing of non-curial alternatives in *Cody Gemtec* represents a positive development in taking account of the range of redress options available to claimants. It should not be assumed that class action regimes possess a statutory monopoly to which claimants and respondents must invariably be subject.

BRIEF UPDATE ON MULTIPLICITY

While the decision in *Cody Gemtec* drew attention to alternative means for claimants to obtain redress, the Courts continue to deal with a host of multiplicity and carriage disputes between competing class actions. There were 4 sets of proceedings which were consolidated in the review period, with key takeaways being:

- where plaintiff firms run consolidated actions together, there is a real prospect that the Court will appoint an independent costs referee to monitor cost effectiveness and avoid duplication of work¹⁹
- in determining how an action should proceed, the Court will take into account the track record of cooperation between plaintiff firms. Cooperation and competition between firms should not be seen as a binary and can exist simultaneously²⁰
- cheaper funding models (eg such as one firm's lower percentage under a GCO) are a relevant but not determinative factor in carriage contests between plaintiff firms, with factors such as relevant experience and funding security holding weight²¹

- a common defendant is sufficient for consolidation, even where not all defendants in the competing actions are the same²²
- the Court will place significant weight on the originality and quality of the legal work undertaken by competing firms, and will take a dim view of a copy-paste approach without intellectual input, and²³
- the Court's decision in a multiplicity dispute is discretionary. An appellate Court will not simply apply the 'correctness standard' but will consider whether *House v The King* error has been demonstrated.²⁴

19 *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847; *Singh v Harvey Norman Holdings Ltd; Daglas v Harvey Norman Holdings Ltd* [2025] VSC 290.

20 *Kajula Pty Ltd v Downer EDI Ltd* [2024] VSCA 236 (**Downer**).

21 *Vingrys v International Capital Markets Pty Ltd & Ors* [2024] VSC 455; *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847 (**IC Markets**).

22 *Inglis v Insurance Australia Limited* [2025] VSC 91; *Dawson v Insurance Australia Limited* [2025] VSC 92.

23 *IC Markets*.

24 *Downer*.





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