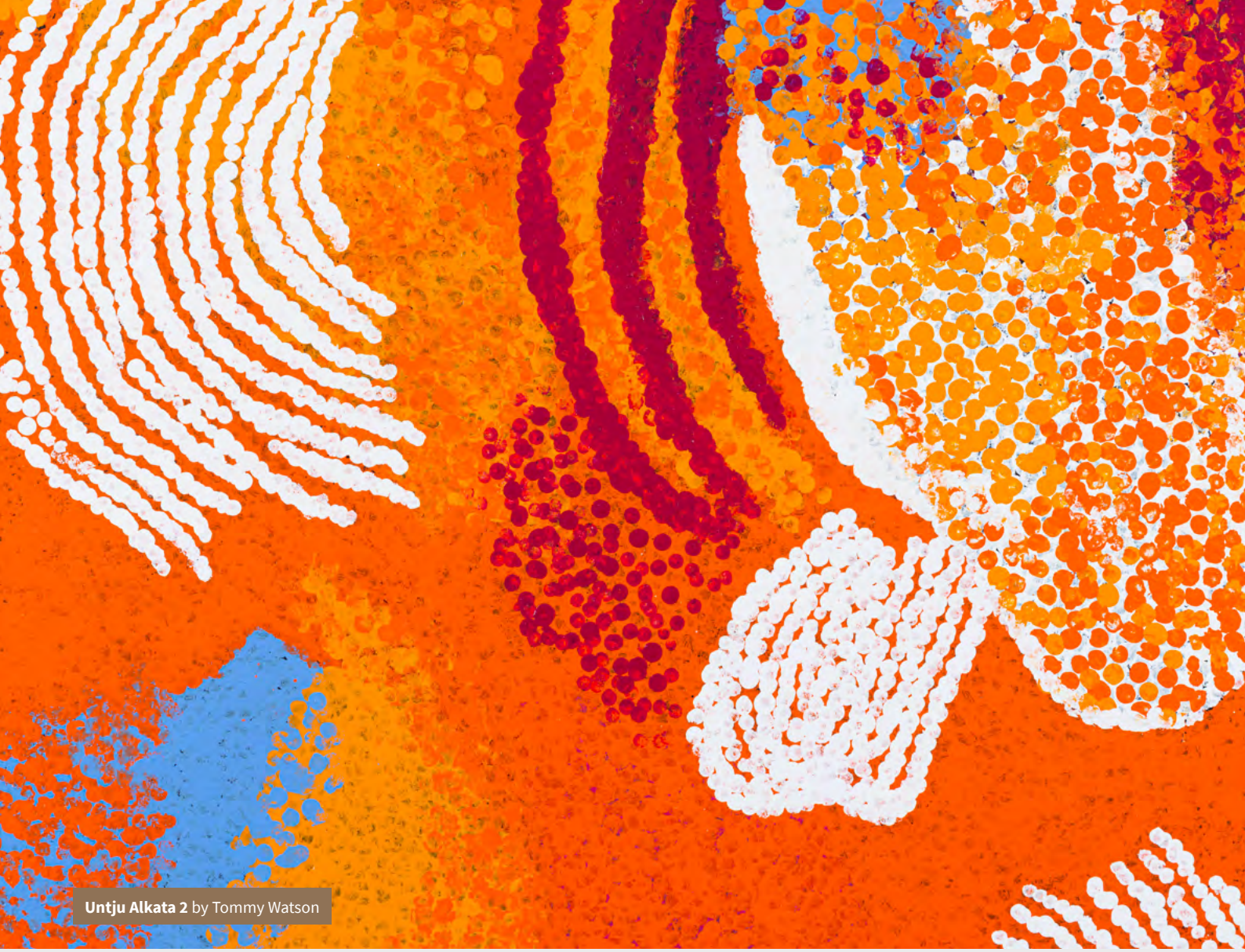

**Untju Alkata 2** by Tommy Watson

# THE REVIEW

## CLASS ACTIONS IN AUSTRALIA 2024/2025

KING&WOOD MALLESONS
金杜律师事务所

# IT'S NOT THE DESTINATION, IT'S THE JOURNEY: INTERLOCUTORY ISSUES IN CLASS ACTIONS

This review period has continued to highlight the significant issues facing both plaintiffs and defendants in their journey to a hearing. This section looks at some key decisions from the past 12 months regarding:

- trends and key judgments for security for costs
- attempts to circumvent limitation periods by taking advantage of statutory suspensions of limitation to amend group member class definitions
- the differing approaches of the Courts in reliance on expert evidence and early determination of objections to evidence, and
- soft class closure.

## SECURITY FOR COSTS

Australian Courts remained receptive to security for costs applications in class actions during the review period, with security granted in most proceedings in which it was sought. This reflects the continued balancing of parties' legitimate interests - ensuring that adequate and fair protection is provided to a defendant where there is a legitimate concern that an impecunious plaintiff might be unable to pay its costs, while not denying that plaintiff access to the Courts.

(a) Headline trends

| TRENDS | WHAT WE SAW |
|---|---|
| **Form of security** | • **Deeds favoured:** the majority of orders were for deeds of indemnity/deed polls, which remain preferred by litigation funders looking to preserve capital.<br>• **Cash is <u>not</u> king:** cash paid into Court was ordered in only 3 proceedings (but was available as an alternative in other proceedings). |
| **Timing and cooperation** | • Some orders were made by consent, and in some circumstances without the prior filing of an application. |
| **Scope of cover** | • **Procedural steps:** security may be fixed to specific procedural steps such as filing of pleadings and evidence, or taking part in mediation.<br>• **Tranches:** in some matters, security was granted in tranches, occasionally up to the commencement or end of trial.<br>• **Top-up triggers:** security for 'costs in the proceeding' was ordered in at least 3 proceedings, but respondents were permitted to notify applicants when their costs and disbursements reached or exceeded certain limits. |

(b) Notable judgments

Of particular interest from the review period is the Victorian Supreme Court's consideration of security for costs in the context of a GCO.

In circumstances where the plaintiffs' law firm had the benefit of a GCO, Gobbo AsJ held that the relevant inquiry was whether the firm - rather than the plaintiffs - had the ability to satisfy an adverse costs order.[62] A review of the firm's audited accounts revealed material WIP and cashflow concerns, and the evidence established there was a risk it may not be able to meet an adverse costs order.

Her Honour also rejected the firm's proposal to provide an undertaking to pay any adverse costs rather than security – an undertaking would not secure a fund that could be drawn upon, and would merely re-affirm the firm's existing obligations under the GCO, as provided for by the legislative regime. Rather, a fund or asset was required, and the fact that the firm may incur direct borrowing costs to provide security should simply be regarded as part of the expense of mounting (and potentially benefitting from) litigation.

Other decisions of note include:

| JUDGMENT | WHY IT MATTERS |
|---|---|
| **Pie Face class action – *FNH United Pty Ltd v United Petroleum Franchise Pty Ltd* [2025] VSC 190** | • **'Tardy and unsatisfactory' conduct of a proceeding by plaintiffs may weigh in favour of security:** at the time of hearing, the plaintiffs' claims were still not properly formulated and their conduct had resulted in delays and further costs.<br>• Other matters considered by the Court included that the plaintiffs were clearly impecunious; the proceeding was large and complex; previous costs orders had been made in favour of the defendants; and there was no evidence of stultification as 4 funders were still actively considering involvement. |
| **COVID vaccine injuries class action – *Rose v Secretary of the Department of Health and Aged Care* [2025] FCA 339** | • **A less frequent example of refusal to grant security for costs.**<br>• Proceeding was both crowdfunded and funded by a non-commercial funder who did not stand to benefit from the litigation; offer from Mineralogy Pty Ltd to pay the respondents' costs sought by way of security.<br>• The applicants were impecunious, and the applicants' problematic pleadings had unnecessarily augmented the costs the respondents should reasonably be expected to bear.<br>• However, public interest considerations raised by the proceeding, as well as the funder having a binding obligation to pay adverse costs orders and 'substantial assets' to satisfy those orders, appear to have ultimately tipped the balance against ordering security. |

62 *Nathan v Macquarie Leasing Pty Ltd (Security for Costs)* [2024] VSC 606.

(c) Key takeaways

- In good news for defendants, Courts continue to be inclined to make orders for security for costs, to ensure that defendants are protected in class actions.
- For proceedings involving litigation funders or law firms with the benefit of a GCO (only in Victoria), orders for security will be the default position, with debate limited to form and quantum.
- Parties engaging with each other on the issue of security from the commencement of proceedings and reaching a consent position can lead to significant cost, time and resource savings for all.

## LIMITATION PERIODS

At least 4 judgments in the past year have considered the application of limitation periods in class actions where the definition of 'group members' has been amended to add new group members. These decisions reflect a trend, by which amendments expanding the class are heavily scrutinised to ensure limitation periods are not unfairly circumvented, with the default position being that such amendments should take effect prospectively (ie from the date of amendment) unless exceptional circumstances justify a different approach.

This issue of 'circumventing limitation periods' is particularly relevant in the context of class actions, given the legislation establishing the representative proceeding regimes includes a section which provides that upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended (**Suspension of Limitation Periods Section**). Recent decisions have clarified that this section should not be interpreted to allow subsequent amendments which do not relate to the same claim being brought out of time.

(a) Notable judgments

In *Toyota Finance*,[63] the Court maintained the position that the Suspension of Limitation Periods Section only protects claims that were within the scope of the proceeding as originally commenced. New claims or new group members added by amendment are generally subject to limitation periods calculated from the date of amendment, not the original commencement date. His Honour described limitation defences as a 'substantive right' and stated that limitation periods:

> '[142] … reflect a fundamental and all but universal policy that the litigation of stale claims constitutes potentially significant injustice.'

This was also reflected in *BHP Group*,[64] where the Court held that the default position is that amendments to the group definition take effect from the date of amendment, not retrospectively from the commencement of the proceeding. In so holding, Beach and O'Bryan JJ applied the Full Federal Court's decision of *Ethicon Sàrl*,[65] in which the Court stated that this approach:

> '*[51] … prevents the topsy turvy notion that someone retrospectively becomes a group member on commencement, when the Court has thus far proceeded on the basis that they are not group members […and avoids] the vice of potentially resuscitating causes of action by persons who have never sought to agitate them. It would be odd that by becoming a group member through the augmentation of a class, substantive rights were conferred on a claimant that had been either extinguished or barred by operation of statute and could not otherwise be advanced by that claimant.*'

63 *Hepi v Toyota Finance Australia Ltd* [2025] VSC 121.
64 *Impiombato v BHP Group Limited* [2025] FCAFC 9.
65 *Ethicon Sàrl v Gill* (2018) 264 FCR 394; [2018] FCAFC 137.

In considering the importance of the suspension of limitation periods, in *Blue Dog*[66] the Queensland Supreme Court reasoned that discontinuance does not constitute a judicial 'decision' or 'determination' of group members' claims, and therefore the limitation periods would remain suspended unless the Court made an order to the contrary. To avoid the injustice of group members' claims being indefinitely suspended (and defendants being exposed to claims in perpetuity), the Court exercised its 'gap-filling' power under s103ZA of the *Civil Proceedings Act 2011* (Qld) (which allows the Court to make any order necessary to ensure justice is done in the proceeding) and ordered that the limitation periods for group members' claims against the discontinued defendants would recommence 30 days after the date of the discontinuance order.

(b) Key takeaways

- It is crucial that plaintiff lawyers are meticulous when drafting the definitions of 'group members' in originating claims. While it is almost inevitable that 'minor' amendments will be required as the intricacies of the case reveal themselves over time, plaintiffs will struggle to introduce substantive amendments which will benefit from the suspension afforded by the Suspension of Limitation Periods Section.
- Defendants of class actions should always be aware of limitation defences, particularly when plaintiffs seek to amend the definitions of group members or rely on the Suspension of Limitation Periods Section.

## EXPERT EVIDENCE

(a) Pre-trial ruling regarding admissibility of evidence

Admissibility of evidence is usually ruled on during a trial, but in *Boral*[67] the respondent successfully obtained a pre-trial ruling as to admissibility of evidence. As Lee J acknowledged, an admissibility dispute '*brings into focus the recurring problem of spiralling costs of expert evidence in class actions*', and pre-trial rulings can narrow issues in dispute and thereby reduce the costs for both parties in preparing for a trial.

While Lee J ultimately decided not to reject or exclude the evidence that was objected to by the respondent in this instance, this judgment is significant because it demonstrates willingness by the Court to hear and make rulings on admissibility of expert evidence prior to the trial of a class action.

Similarly, in *S&P Global*,[68] the Federal Court declined to exercise the discretion to make rulings on the admissibility of evidence pre-trial. The respondent sought to exclude the entirety of the applicants' expert evidence. Justice Shariff dismissed the respondent's application, on the basis that it was not the appropriate time to rule on the merits of the admissibility arguments in circumstances where the Court did not have the benefit of the parties' opening statements. His Honour also held that particular arguments reflected a pleading dispute which would be better addressed by the parties' submissions.

(b) Court rejects expert evidence in group car loan proceedings

Two *Flex Commissions* class actions were listed for joint trial before Dixon J in late 2024. The plaintiffs in each proceeding sought to rely on expert evidence from a behavioural economist regarding cognitive biases and decision-making vulnerabilities in the loan process, and a linguistics expert's analysis of the complexity and comprehensibility of loan documentation. The defendants objected to the admissibility of this evidence, arguing it was irrelevant, constituted inadmissible opinion evidence, and should be excluded even if technically admissible.

The Court found that this expert evidence was irrelevant and inadmissible, reinforcing the principle that judicial fact-finding should be grounded in direct evidence from the parties and analysis of actual loan documents.[69] The Court emphasised that, under the *Evidence Act 2008* (Vic), evidence is only relevant if it could rationally affect the probability of a fact in issue.

66 *Blue Dog Group Pty Ltd v Credit Suisse Equities (Australia) Limited & Ors* [2025] QSC 101.
67 *Parkin v Boral Ltd (Materiality Evidence Ruling)* [2025] FCA 70.
68 *ACN 117 641 004 Pty Ltd (in liq) v S&P Global, Inc (No 4)* [2025] FCA 72.
69 *Nathan v Macquarie Leasing; Fox v Westpac (No 2)* [2024] VSC 643.

Opinion evidence is generally inadmissible unless it is based on specialised knowledge that is beyond the ordinary experience of the Court. The Court distinguished this case from *Trivago*[70] and *Google*[71] where it was necessary for the Court to form a view about whether consumers had been or were likely to have been misled by marketing or by systems processes.

This decision highlights:

- the importance of direct, transaction-specific evidence rather than relying on expert predictions or academic frameworks, and
- the fact that expert evidence is of little utility where it is not based on specialised knowledge beyond the Court's own capabilities or where it is not directly relevant to the facts in issue.

## SOFT CLASS CLOSURE / REGISTRATION

(a) Clarity on the power to order soft class closure

In *Lendlease*,[72] the High Court held that the NSW Supreme Court is empowered under s175(5) of the *Civil Procedure Act 2005* (NSW) to order that notice be given to group members of a defendant's intention to seek 'class closure' orders. By doing so, the High Court has aligned the position in NSW with that of the Federal Court.[73]

The central theme emerging from the unanimous decision, delivered through 5 separate judgments, is that the Court's power under s175(5) to approve settlements encompasses the authority to order the giving of notices where necessary to do justice between the parties, and to facilitate any settlement and finality as a matter of practical necessity. Such power is not defeated by the notion of 'fundamental precept' of the opt-out regime that a group member need not do anything to obtain the benefit of a settlement or favourable judgment.

(b) Granting class closure orders

Courts assess class closure orders on a case-by-case basis, focusing on whether they are appropriate and necessary to achieve justice. Key factors include:

- **Facilitation of settlement:** Orders may be justified in complex, costly proceedings.[74]
- **Adequacy and length of notice:** Where sub-group members cannot be readily identified, the Court requires robust notice measures. In *Beach Energy*, limiting notice to the *Australian Financial Review* was deemed inadequate, and additional publication in US media was ordered. The notice period must also be long enough for group members to respond.[75]
- **Stage and timing:** The timing of closure relative to the proceedings and mediation is important to avoid prejudice.[76]
- **Mediation/settlement arrangements:** Orders are less likely without mediation or settlement discussions in place.[77]

Less persuasive factors are:

- **Multiple orders and notices:** The Court does not find the potential risk of confusion from further orders or notices persuasive.[78]
- **Costs of notice:** Notice costs are considered but not given undue weight if necessary for adequate notice,[79] though proportionality remains relevant.[80]

(c) Group members who fail to register before a registration deadline

Soft class closure orders typically bar unregistered group members from settlement (or, in principle, judgment) benefits unless the Court grants leave. Leave is only given if excluding the member would cause unfair prejudice - mere prejudice is not enough. See Settlement scrutiny section of The Review.

70 *Australian Competition and Consumer Commission v Trivago NV* (2020) 142 ACSR 338; [2020] FCA 16.71
71 *Australian Competition and Consumer Commission v Google LLC and Another (No 2)* (2021) 391 ALR 346; [2021] FCA 367.
72 *Lendlease Corporation Limited v Pallas* [2025] HCA 19. For a detailed analysis, see KWM Insight It's a question of power: High Court registers approval of notices of potential class closure 8 May 2025.
73 *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47.
74 *Nelson v Beach Energy Ltd* [2025] VSC 339 (**Beach Energy**) at [18].
75 Ibid at [30].
76 *Kilah v Medibank Private Ltd (No 2)* [2024] VSC 519 (**Medibank**) at [22]-[24].
77 Ibid at [32].
78 Ibid at [27].
79 *Beach Energy* at [29].
80 *Medibank* at [27].

# ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3,700 lawyers in 26 global locations, we draw from our Eastern and Western perspectives to deliver incisive counsel.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.