

The Review

Class Actions in Australia 2025/2026



Opt out and soft class closure notices: Balancing privacy, reach, and the interests of class members



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In the review period, courts have continued to refine the requirements for opt out and soft class closure notices, balancing the need to effectively reach group members with privacy, cost and practical concerns.

Key considerations include:

- the requirement for adequate notice, with courts refusing soft class closure orders where the proposed notice regime is unlikely to reach a sufficient proportion of the class
- privacy and data minimisation, including preferences for neutral sender domains and limiting personal details in notices to address phishing and cyber security concerns
- multi-channel distribution strategies combining traditional media with digital channels to maximise reach across diverse class compositions, and
- timing and cost allocation, with courts requiring sufficient time for group members to consider their options and confirming that notice costs are generally borne by the applicant in the first instance.

This chapter examines recent cases and sets out practical guidance for developing notice regimes that are economical while maximising reach.

THE REQUIREMENT FOR ADEQUATE NOTICE

Opt out notices

Except with leave of the court, parties must complete an opt out process before the hearing of a representative proceeding can commence.⁸⁶ Opt out notices inform group members of their rights, protecting them from the unwanted extinguishment of their right to pursue separate proceedings. Notices that fail to adequately inform group members of their rights pose a significant hurdle to court approval of a proposed settlement, because a judgment binds all group members unless they have opted out.

Soft class closure notices

A court may also order that notice be given of a party's intention to apply for a 'soft class closure' order, requiring group members who wish to participate in any pre judgment settlement to register by a specified date.⁸⁷ Parties can seek approval to distribute a notice informing group members of that requirement. Courts often approve a combined 'opt out and claim registration' notice, particularly in larger class actions where the group's identity and size are difficult to determine.

The paramount factor a court will consider in determining whether to make such orders is the extent to which a soft class closure is likely to improve the prospects of achieving a reasonable settlement. Whether a sufficient proportion of the group is likely to be properly notified and decide to register is integral to this assessment.

⁸⁶ *Federal Court of Australia Act 1976* (Cth) s33J(4) (and cognate provisions in other jurisdictions); *Fisher v Isuzu Motors Ltd (No 2)* [2025] FCA 1168 at [13].

⁸⁷ *Lendlease Corporation Ltd v Pallas* [2025] HCA 19.

This was illustrated in *JB Hi-Fi*,⁸⁸ where Delany J refused JB Hi-Fi's application for soft class closure orders in a class action concerning extended warranties sold over nearly 13 years. The applicant estimated the class was likely to comprise approximately 8m people, which was objectively 'very large'. JB Hi-Fi proposed to contact potential group members using its records, but there was no available contact information for more than 60% of potential group members. JB Hi-Fi did not propose any alternative communication to reach those members (such as advertising via press, radio, or television).

Justice Delany determined that a soft class closure order was not appropriate because JB Hi-Fi had not articulated a satisfactory proposal for how notice would be communicated to group members for whom no contact information was held. In the absence of an effective notice regime, it was not in the interests of group members to make soft class closure orders.

The decision indicates that parties seeking soft class closure orders must put forward a clear and detailed notice and registration regime that is tailored to the particular class. The court may decline to make orders if the regime will not be effective to attract a sufficient proportion of the potential class.

PRIVACY AND DATA MINIMISATION

Qantas: Balancing privacy considerations

On 18 September 2025, the Federal Court delivered several key rulings in the *Qantas* class action concerning Qantas' alleged conduct during the COVID-19 pandemic regarding flight cancellations, consumer credits and refunds.⁸⁹

All customers who had a flight cancelled during the period 1 January 2020 to 1 November 2022 are group members in the class action. The parties disputed 2 issues regarding the proposed opt out notice:

- whether the notice should be sent from the 'qantas.com' domain, and
- whether to include personal details (including booking references and flight dates) in the notice.

Justice Moshinsky accepted there was a real risk of confusion or suspicion if a 'qantas.com' domain was used, particularly given

recent cyber incidents and phishing concerns. His Honour also held that, due to privacy concerns and data minimisation principles, group member details should not be included in the notice.

Since the introduction of the statutory tort for serious invasions of privacy under the *Privacy Act 1988* (Cth), privacy considerations may feature more prominently in support of data minimisation in opt out notices. Although the tort is unlikely to be directly engaged by a court-approved opt out process, its introduction signals a broader legislative shift towards stronger privacy protections that reinforces the court's approach.

Bain: Prioritising data minimisation and security

The Federal Court's judgment in *Bain*⁹⁰ further illustrates how courts balance the level of detail in an opt out notice against privacy considerations. This class action was filed on behalf of retail investors who traded contracts for difference with IC Markets.

The parties disagreed on the level of 'personalisation' of the opt out notice. The applicants submitted that the opt out notice should include various personal details because it would help group members validate the notice and reduce the risk that the opt out notice would be perceived as a scam or phishing. The respondents proposed limiting the notice to include only names, emails and client IDs, with further personalisation raising privacy concerns. The respondents also objected to the relevant underlying data being provided to the applicants given the absence of evidence regarding the security measures in place to safeguard the information.

The Court accepted the respondents' approach, finding that the less detailed opt out notice was sufficient to achieve the primary purpose of informing group members of their right to opt out. The decision prioritised privacy, data minimisation and clear communication. The Court was not persuaded that additional personalisation would meaningfully reduce the risk of recipients perceiving the notice as a scam. The Court was also not persuaded that the personal data should be provided to the applicants, placing weight on the absence of evidence regarding measures that would ensure the security and confidentiality of the data.

This decision reinforces that opt out notices serve the narrow function of informing group members of their right to opt out. It indicates that courts are likely to prioritise privacy and will be reluctant to require the inclusion of extensive personal data absent a compelling necessity.

⁸⁸ *Clarke v JB Hi-Fi Group Pty Ltd* [2025] VSC 664.

⁸⁹ *Haverkort v Qantas Airways Limited* [2025] FCA 1147.

⁹⁰ *Bain v International Capital Markets Pty Ltd (No 4)* [2025] FCA 1060.

MULTI-CHANNEL DISTRIBUTION STRATEGIES

To maximise reach, courts will favour multi-channel strategies that best target potential group members:

- In *Fisher*,⁹¹ the Court ordered traditional newspaper notices in tandem with electronic dissemination (email, SMS, websites) to ensure broad reach across different segments of the group, reflecting the specific context and audience diversity.
- Similarly, in *Preece*,⁹² Anderson J ordered opt out notices to be distributed by email, in-app inbox notification and newspaper publication, as well as display on the Federal Court website. His Honour held that the inability to reach all group members by email was no reason to forgo that channel for those who could be contacted, and preferred in-app inbox notification over a 'pop-up' on the app (as the applicants had sought). His Honour held that this was sufficient to bring the notice to the group members' attention while minimising impact on the operation of the app (which could cause commercial harm).

TIMING CONSIDERATIONS

Whether sufficient time has been allowed for an opt out and registration process turns on whether group members have a genuine opportunity to consider the information and make an informed decision.

In *Arrium*,⁹³ Matthews J approved opt out, registration and soft class closure orders in a shareholder class action. Her Honour accepted that a 3-month period between issue of the notice and the class deadline was appropriate, including because it took place before the Christmas holiday period and gave group members '*sufficient time to consider their position, obtain advice if they choose to do so, and decide whether to opt out or register*'.

Similarly, in *Merrett*,⁹⁴ Williams J made orders for opt out and registration, including soft class closure orders, which included a 3-month period to opt out or register. Her Honour considered that was '*adequate to consider the information, get advice if someone chooses to do so, make a decision regarding opting-out or registering, completing the appropriate form and filing/lodging it as required*'.

PRACTICAL IMPLICATIONS

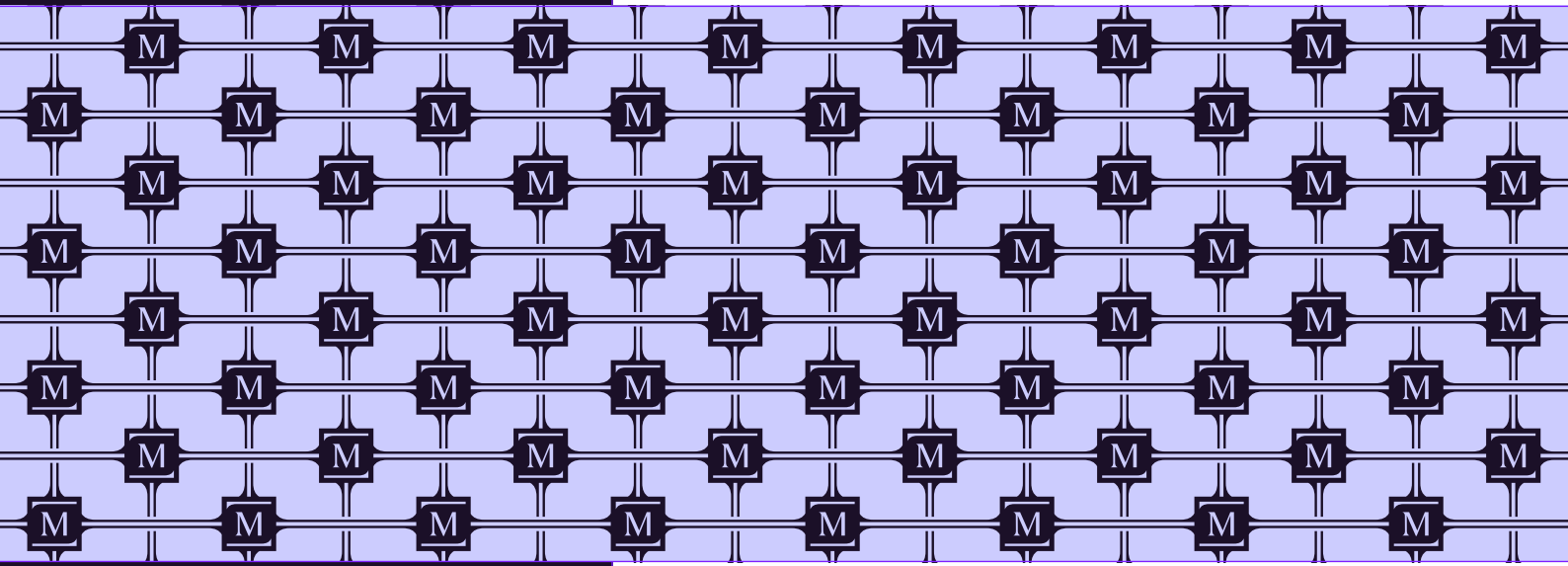
- In considering whether to make soft class closure orders, courts are likely to scrutinise whether a proposed notice regime will effectively reach the relevant group members to ensure that the soft class group is not 'artificially low'. Where registration or soft class closure is sought before settlement, parties should put forward a clear notice regime demonstrating that a sufficient proportion of group members will be reached.
- Although personalised notices may be intended to reduce group member confusion, courts will balance the benefits of personalisation against privacy concerns.
- Privacy concerns must be kept front of mind when developing opt out notice procedures. Creative solutions that maximise reach while balancing these concerns may be welcomed by courts.
- Set a realistic timeframe for opting out and registration, having regard to the group's characteristics and holiday periods. Consider carefully whether the proposed timing and form of any registration or soft class closure process is justified to enable group members to properly consider their position (including by obtaining advice) and make an informed decision.

91 *Fisher v Isuzu Motors Ltd (No 2)* [2025] FCA 1168.

92 *Preece v Aristocrat Leisure Limited* [2025] FCA 742.

93 *Bogan v The Estate of Peter John Smedley (Deceased) (Soft Class Closure Ruling)* [2025] VSC 434.

94 *Merrett v Queensland (Queensland Police Service) (No 2)* [2026] QSC 154.



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