

## Article Information

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## Federal Court of Australia approves its power to make future orders for class closure

**The Full Federal Courts' decision in *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 (Parkin) confirms the courts' power to issue pre-mediation (and settlement) soft class closure notices to group members. The decision hints at the (positive) appetite of the Federal Court in making future orders for class closure that facilitate a just outcome,<sup>[1]</sup> simplifies the assessment of quantum prior to settlement, and reduces an element of risk in funded litigation.**

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### Opt-Out Nature of Class Actions

The Australian position on class closure orders is set out in Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**). It serves as a guide for commencing Class Actions in the Federal Court of Australia, and is the reason why they are run on an 'opt out,' and 'open' basis.

By virtue of the Act, class actions are commenced by a representative applicant on behalf of 'group members.' Group members are not required to register their interest, provide their consent, or even have knowledge of the proceedings on foot. Whilst the Act provides that a group member might 'opt-out' of the proceedings,<sup>[2]</sup> it does not compel one to submit information prior to settlement or judgment in order to participate.

Ultimately, an 'opt-out' proceeding means that the size and composition of a class is difficult to quantify in pre-settlement discussions. Uncertainty as to the potential quantum of a claim complicates settlement negotiations.

### Background

The parties in *Parkin* sought clarification from the Federal Court on its statutory power to issue notices to class members following two 2020 judgments handed down in the Court of Appeal of New South Wales. Both judgements considered the court's powers pursuant to the *Civil Procedure Act 2005* (NSW), in sections that mirrored the powers conferred by the Act on the Federal Court.

In *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia*,<sup>[3]</sup> the court found that its statutory powers did not extend to authorise it to make orders relating to class closure before settlement. It rationalised that, a class closure order extinguishes the cause of action of a group member. Therefore, that ordering the issuance of one was beyond the scope of its statutory 'gap-filling' power in facilitating a just outcome.

In *Wigmans v AMP Ltd*<sup>[4]</sup> the court found that making an order to issue a notice for soft closure was contrary to the 'fundamental precept' of the class action regime.<sup>[5]</sup> Here, it rationalised that a group member was entitled to not act prior to settlement, or judgement.

### Questions

In seeking clarity on the courts' statutory powers, the parties in *Parkin* filed applications which put two questions to the Court. Namely, whether:

1. section 33ZF of the Act permitted the Court to make orders to notify group members that, if they failed to register

their interest, or opt out by a given date, they would remain a group member, but not be entitled to benefit from settlement (subject to Court approval) (**Question One**); and

2. section 33X(5) permitted the court to order that group members be notified that in the event of a settlement, the Applicant would seek an order which (if made) would prevent a group member that had failed to register their interest, or opt out by a given date, from being entitled to benefit from settlement (**Question Two**).

## Findings and Discussion

Ultimately, the court found that, whilst no power under s 33ZF of the act was ‘enlivened,’<sup>[6]</sup> the specific power available under s 33X(5) permitted the court to issue the orders sought by the Applicant in Question Two.

As to the precedential decisions from the Court of Appeal in New South Wales, the court in *Parkin* found that:

1. the decision in *Wigmans*<sup>[7]</sup> was ‘plainly wrong.’ Here, the court affirmed that s 33X(5) conferred a power that was ‘broad and unqualified’<sup>[8]</sup> with respect to making an order that a notice be issued to group members at ‘any stage’ and of ‘any matter’<sup>[9]</sup>; and
2. contrary to *Wigmans*<sup>[10]</sup> assertion on ‘*fundamental precept*,’ the court held that whilst group members may take a passive role in proceedings, they can also be required to act prior to settlement, and that the court may exercise its statutory powers to motivate them to do so.

In its discussion relevant to Question One, the court found that the power conferred by s 33ZF was discretionary and ‘gap filling.’<sup>[11]</sup> On the facts, the court did not consider that a ‘gap’ applied, given the relevance of s 33X(5) in providing a resolution to the issue at hand. Interestingly, however, the court hinted at its sentiment towards potential future application of s 33ZF in the following comment:

*‘one could not foreclose the possibility, depending upon the circumstances of the case, that such an order could advance the effective resolution of proceedings.’*<sup>[12]</sup>

## Conclusion - What does it Mean

The decision of the Full Federal Court, means that parties can expect to be awarded notices that identify the intention of ascertaining future class closure orders in proceedings. This has resulted in the ratification of a strategy in which parties can agree to obligate group members to affirm their interest, or opt-out prior to mediation (for settlement purposes).

As for the future of class-closure, the court comments on the potential of the issuance of class closure orders enlivened by s 33ZF in instances where they effect the effective resolution of proceedings.

Going forward, competing interpretations of the statutory powers conferred upon the courts leaves room for the High Court to interpret the matter, or perhaps, call for statutory reform. Given the positive findings as to the ability for pre-mediation notices to be issued, the Federal Court will likely be the preferred jurisdiction for class actions commenced on an open class basis.

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<sup>[1]</sup> *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 at [144].

<sup>[2]</sup> Part IVA Section 33J *Federal Court of Australia Act 1976* (Cth).

<sup>[3]</sup> (2020) 101 NSWLR 890.

<sup>[4]</sup> (2020) 102 NSWLR 199.

<sup>[5]</sup> *Wigmans v Amp Ptd* (2020) 102 NSWLR 199 at [89].

<sup>[6]</sup> *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 at [1].

<sup>[7]</sup> *Wigmans v AMP Ltd* (2020) 102 NSWLR 199.

<sup>[8]</sup> *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 at [111].

<sup>[9]</sup> *Ibid*.

<sup>[10]</sup> *Wigmans v AMP Ltd* (2020) 102 NSWLR 199.

[\[11\]](#) *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 at [13].

[\[12\]](#) *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47 at [144].