Equity Division
Supreme Court
New South Wales

Case Name:	Takata – Class closure and registration
Medium Neutral Citation:	[2019] NSWSC 1493
Hearing Date(s):	25 October 2019
Date of Decision:	1 November 2019
Jurisdiction:	Equity – Class Action
Before:	Sackar J
Decision:	See paras [51]-[54]
Catchwords:	CIVIL PROCEDURE – Representative proceedings-registration – class closure – soft closure
Legislation Cited:	*Civil Procedure Act 2005* (NSW)
Cases Cited:	*Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020 *Gill v Ethicon Sárl (No 2)* [2019] FCA 177 *Kelly v Willmott Forests Ltd (CAN 063 263 650) (in liq) and Others (No 4)* (2016) 335 ALR 429 *Kuterba v Sirtex Medical Limited* [2018] FCA 1467 *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd & Anor* [2017] FCAF 98
Texts Cited:	n/a
Category:	Principal judgment
Parties:	2017/340824: Louise Haselhurst v Toyota Motor Corporation Australia Limited trading as Toyota Australia 2017/353017: Kimley Lloyd Whisson v Subaru (Aust) Pty Ltd 2017/378526: Akuratiya Kularathne v Honda Australia Pty Ltd 2018/9555: Owen Brewster v BMW Australia Ltd 2018/9565: Jaydan Bond v Nissan Motor Co Australia) Pty Ltd

2018/42244: Camilla Coates v Mazda Australia Pty Limited
2018/322648: Philip Dwyer v Volkswagen Group Australia Pty Ltd trading as Volkswagen Australia

Representation:

Counsel:
Plaintiff (s): SG Finch SC, Ms E Holmes
Defendant(s):
2017/340824: G Rich SC, T Kane
2017/353017: T Boyle
2017/378526: J C Hewitt, D T Wong
2018/9555: T Prince
2018/9565: Ms R Higgins SC, J K Entwisle
2018/42244: C E Bannan
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File Number(s):

JUDGMENT

Procedural background

1 The substance of the matter concerns seven different representative proceedings all being heard together. The defendant in each proceeding is a car manufacturer (Toyota, Subaru, Honda, BMW, Nissan, Mazda and Volkswagen) who at some point sold vehicles with a defective Takata airbag. Each member of the class in the different proceedings are people who have owned at some point a vehicle with a defective airbag.

2 This matter has now been on foot for some time. Pleadings have been closed and common questions have been decided. The matter is to be mediated no later than 30 June 2020 and final hearing has been listed for 10 weeks starting 3 August 2020.

3 The remaining issue before the Court at this point, which has been subject to a number of case management hearings, is the issue of registration and whether there should be a class closure and if so whether the closure should be 'hard' or 'soft'.

4 By notice of motion filed 8 August 2018, the defendants in all the proceedings (excluding the **Volkswagen proceedings**, in which similar orders were ultimately sought by notice of motion 12 July 2019) sought orders pursuant to s 163 and s 183 of the *Civil Procedure Act 2005* (NSW) for "opt out" and "registration" ahead of a mediation of the proceedings.

5 On 28 August 2018, I indicated that I would adjourn the motion on the basis that it was too early in the proceedings for notices to be sent to group members (Transcript 28 August 2018, 35-37).

6 The motion was re-agitated in July 2019. On 25 July 2019, I adjourned the matter again at the request of the plaintiff to receive expert evidence as it related to registration and to give the parties more time to discuss the

particular form of the registration notice. At that time I indicated to the parties (Transcript 25 July 2019, 35/2-5):

> I think notices ought to go. I think there ought to be a soft closure and a registration process. My position on the next occasion is to settle the detail of that regime.

7 On 5 September 2019, the hearing was primarily concerned with the form of the Notice to be sent out. I indicated to the plaintiff that in principle I was against notifying potential class members by email (Transcript 5 September 2019, 25/11). I indicated again that I believed registration and 'soft' class closure should occur (Transcript 5 September 2019, 11/16-37). On that date, I indicated that the remaining issues to be determined were the timetabling of the class closure and who should bear the costs (Transcript 5 September 2019, 32/23-37). I made orders on that date fixing a new hearing date and timetabling for the filing of expert evidence.

8 The matter was finally before me on the motion on 25 October 2019. The plaintiff stated that the outstanding issues were:

(1) Whether or not there should be a class closure, and if so, the deadline for class closure;

(2) Whether or not group members should be notified by email; and

(3) Whether there should be registration.

9 The plaintiff maintained that they continued to oppose registration and class closure.

10 The defendants however, indicated that they believed I had finally settled these matters on 25 July and 5 September. They maintained that it was time for registration and class closure to occur.

11 There was no disagreement that if a class closure order was made, soft closure would be preferable. That is, the class would be closed until the point

of mediation, and only those who had registered as part of the class would be entitled to any potential settlement reached at mediation. If mediation was unsuccessful then the class would reopen, and any potential class members whether they had registered or not could be entitled to any potential judgement.

12 The form of notice was the subject of substantial agreement between the parties, I was invited to give reasons on the matters of principal and the parties themselves would then finalise the form of notice (Transcript of 25 October 2019, 6-9).

Legal principles

13 In representative proceedings, the Court is given a more supervisory role than in other litigation. The role of the Court in such proceedings is to ensure that the group members' interests are protected, as generally these members may play little or no active part in the proceedings. In *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020, Perram J emphasised (at [21]) that it was the interests of the non-party group members which should be supervised, not the interests of those running the class action. He further noted (at [19]):

> The Court in such cases has a role which involves ensuring that the interests of the non-party group members are not sacrificed to the interests of the parties before the Court. Its role is akin to that of a guardian, not unlike that which the Court has in the case of infant settlements, and is protective: see e.g. *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8] per Jacobson, Middleton and Gordon JJ.

14 Of course, it is also pertinent to note, the duty of the plaintiff lawyers towards the members of the group. As Murphy J noted in *Kelly v Willmott Forests Ltd (CAN 063 263 650) (in liq) and Others (No 4)* (2016) 335 ALR 429:

> The applicant's lawyers owe fiduciary duties to class members who are their clients and they also owe duties to class members who are not their clients. These duties may or may not be fiduciary in nature, but the applicant's lawyers at least have a duty to act in the class members' interests: *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426 (*McMullin*) (Wilcox J); *Courtney (in a representative capacity on behalf of the persons referred to*

in para1 of the Fifth Amended Statement of Claim) v Medtel Pty Ltd (2002) 122 FCR 168 ; [2002] FCA 957 at [57] (*Courtney*) (Sackville J); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480 ; 191 ALR 697 ; [2002] FCA 872 at [24] and [27] (*King*) (Moore J); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 at [15] (*Bray*) (Merkel J).

15 The Court is empowered to make a wide variety of orders in representative proceedings. In particular, under ss 162 and 183 of the *Civil Procedure Act*, it has the power to make orders for class closure and registration:

> **162 Right of group member to opt out**
>
> (1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court.
>
> (2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.
>
> (3) The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.
>
> (4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.
>
> **183 General power of Court to make orders**
>
> In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

16 Class closure and registration orders were considered by the Full Federal Court in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd & Anor* [2017] FCAF 98. The Court in that case made clear that the question of whether and if so when, opt-out notices and registration should be invoked is a matter of the discretion of the Court (at [71]). It is true, as their Honours point out, that 'opt out' representative proceedings were intended to allow group members to take a passive role in the litigation. However, they go on to note (at [74]):

> Having said this, if a class closure order operates to facilitate the desirable end of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF of

> the Act. The courts have accepted on numerous occasions that, in order to facilitate settlement, it is appropriate to make orders to require class members to come forward and register in order to indicate a willingness to participate in a future settlement, and to make orders that class members be bound into the settlement but barred from sharing in its proceeds unless they register:

17 Further, class closure orders operate to facilitate settlement by; 1) allowing both sides to have a better understanding of the total quantum of class' members claims, 2) permitting the settlement amount to be capped by reference to the number of class members and 3) assists in achieving finality. Moreover (at [75]):

> A class closure order that precludes class members, who neither opt out nor register, from sharing in a subsequent settlement may facilitate settlement, and therefore be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding

18 Ultimately, the Court held that "whether it is appropriate to order class closure is a question of balance and judicial intuition" (at [79]). Their Honours also noted, the Court should be cautious 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 judgement (at [76]). It is also true, that caution should be exercised in relation to the stage at which such orders are made.

19 This concept of 'soft' class closure, that is, where a class may reopen in the event that settlement is not achieved was recently discussed by Lee J in *Gill v Ethicon Sárl (No 2)* [2019] FCA 177. His Honour noted (at [2]-[3]) that although class closure orders have been controversial, 'soft' class closures have become common. Further (at [6]):

> …it is very difficult to see how it is appropriate for a court, exercising a protective and supervisory role in respect of group members, to take the step of extinguishing the property rights of persons on a final basis, unless it is in the context of approving a settlement prior to an initial trial. When this is appreciated, and it is understood that "soft" closure orders can be adapted to serve the admittedly desirable end of facilitating such a settlement, it is not evident to me why a "hard" closure order would ever be appropriate (at least in an open class proceeding or a closed class proceeding with a large number of group members).
>
> …

> There is no doubt that the power exists to make class closure orders to facilitate settlement. Having said that, the power to make "any order" is only enlivened where the court "thinks" the order is "necessary or appropriate" to ensure justice is done in the proceeding. Once the court reaches this level of satisfaction, it follows (subject to constitutional limitations) that the court has power to make an order under s 33ZF. The word "necessary" does not impose a requirement that the court must be satisfied that unless the order is made, the administration of justice will be undermined. Rather, it requires that the proposed order "be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding": see *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191 at 224 [165].

20 There was some debate about whether class closure should be ordered in the event that one party objects. Murphy J in *Kuterba v Sirtex Medical Limited* [2018] FCA 1467 considered the opposition to class closure orders as significant in his decision to not make such orders (at [23],[25]). However, Beech-Jones J in *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83, noted that although the plaintiff resisted class closure orders, it was appropriate in that case to make those orders so to advance settlement negotiations (at [21]-[31]). It is ultimately a matter for the exercise of a discretion. The opposition of a party and the weight given to that opposition will clearly be dependent on the reasons for the opposition not just the fact the order is opposed.

Evidence

21 A number of affidavits were relied upon in the proceedings, namely of the various defendants; affidavits of Jennifer Campbell dated 17 August 2018, 11 July 2019, 25 October 2019; affidavit of Ruth Overington sworn 17 August 2018 and affidavit of Aoife Xuereb sworn 11 July 2019; affidavit of Bruce Lloyd sworn 11 July 2019; affidavit of Kathryn Edghill sworn 11 July 2019; affidavits of Gregory Williams sworn 20 August 2018 and 28 August 2019 and affidavit of Richard Abraham affirmed 11 July 2019; affidavits of Timothy Webster sworn 17 August 2018 and 11 July 2019; affidavit of John Pavlakis affirmed 17 August 2018. And of the plaintiffs; affidavits of Damian Scattini affirmed 24 August 2018 and 23 July 2019.

22 In general, the evidence filed dealt with the issue of the form of registration and notice. I note that the form of notice was almost agreed upon and was subject to some ongoing discussions by the parties. There was also a significant amount of correspondence between lawyers as it related to the parties' arguments for or against registration and class closure.

23 The plaintiff's evidence, in summary, explains that there are future recall notices expected as late as January 2020 and there is therefore concern that not all group members will at this stage know they are group members. They further note that many members have not been informed of what the replacement airbag was, and that this replacement airbag may need to be replaced as well.

24 Of particular note, the plaintiff gave evidence that by July 2019 of the vehicles under recall:

(1) 30.4% of Nissan vehicles still required replacement;

(2) 18.1% of Toyota vehicles still required replacement;

(3) 6.6% of Mazda vehicles still required replacement;

(4) 21.1% of Subaru vehicles still required replacement;

(5) 10% of Honda vehicles still required replacement;

(6) 35.2% of BMW vehicles still required replacement; and

(7) 58.3% of Volkswagen vehicles still required replacement.

25 The defendants' evidence, in summary, explains that it is time for registration and class closure to occur in order to ensure the defendants are equipped with meaningful information regarding numbers of group members so that quantum can be assessed and settlement can be explored.

26 Of particular note, it appears on the defendants' evidence that by July 2019 of the vehicles under active recall:

(1) 74% of Nissan vehicles had been rectified;

(2) 91% of Toyota vehicles had been rectified;

(3) 91.8% of Mazda vehicles had been rectified;

(4) 82% of Subaru vehicles had been rectified;

(5) 97.5% of Honda vehicles had been rectified; and

(6) 69.6% of BMW vehicles had been rectified.

27 It was unclear how many Volkswagen vehicles had been rectified on the defendants' evidence.

Submissions

28 The plaintiff filed updated, comprehensive submissions before the hearing. In the submissions they indicated that they continued to oppose registration. The plaintiff submitted that in the event of registration, the Court should not order a class closure. The plaintiff submitted that in the event a class closure was ordered, it should occur after settlement but before settlement approval.

29 The plaintiff submits that it is still too early to order registration. Group members are not well enough informed to make a decision about whether to participate in the mediation. Many members may not have received recall notifications, and others are unable to assess any potential loss. Mediation and settlement are not dependent on registration, rather the defendants can develop a settlement sum based on the information they already know such as the number of defective vehicles sold.

30 In cases such as this, with a broad and diverse group membership, closure of the class even on a soft basis risks stripping the open class action system of its purpose. That is a class closure would undermine the members access to justice and ability to participate in the procedures.

31 The plaintiff submits that class closure will not facilitate settlement, as settlement is unlikely if one party opposes it, particularly on the ground that it would unfairly shut out too many group members. Where the class is potentially so big, and the opt-out and registration notices are likely to be complex, many members are likely to be locked into participating in settlement. The plaintiffs, given their duties to group members, will not settle their respective proceedings in the event the registrants represent a disproportionately small percentage of group members.

32 Further, the plaintiff argues that class closure is not necessary to provide commercial certainty. The defendants have their own knowledge about the number of relevant vehicles and a cap placed in its liability. The Court should be cautious before accepting that the Defendants will not settle without certainty provided by class closure. First, the Court does not have a role to protect the defendants' interests, and there is no reason why the defendants would not settle on the basis of a distribution scheme to be applied to all group members who come forward, together with a cap on its exposure.

33 Given that the class closure will not encourage settlement from the plaintiff's perspective, it is therefore appropriate, if a class closure order is made, to have the class close after settlement has been reached but before it is approved.

34 The plaintiff submits that group members should in any case be notified by email. Notification by email is common in class actions and the orders proposed by the defendants included notification by email. If the defendants are serious that registration is necessary in order to provide them with information to assist with settlement, then they would be content for the widest possible dissemination of the Notice. The plaintiff submits that it is more likely

that a group member will be informed of their rights, and take significantly more seriously, a direct communication than an advertisement in the newspaper.

35 Finally the plaintiff pre-emptively sought a stay of the orders to consider an appeal on this issue.

36 The defendants noted that these issues had already been the subject of oral hearing on 25 July 2019 and 5 September 2019, where I, on a preliminary basis, indicated that I believed registration and class closure should occur.

37 The defendants all indicated that class closure and registration should occur in advance of the mediation because it would operate to facilitate the desirable end of settlement, by allowing both sides to have a better understanding of the total quantum of class members' claims. In this case class closure is needed as potential group members' claim is idiosyncratic and depends on a variety of factors such as purchase price of the vehicle, many class members have already had their airbags replaced and thus may not consider they have any pecuniary loss and the potential liability may be affected by the application of limitation defence. Registration without class closure would not have the effect of capping the total settlement amount and would therefore be less likely to facilitate settlement.

38 The defendants submit that the plaintiff's argument that they will not settle the proceedings if the registrations represent a disproportionately small number of group members does not provide a foundation to resolve the application. First, the assessment of any settlement must be made at the time of the proposed settlement; the plaintiff should not pre-emptively determine they would decline a beneficial settlement. secondly, the issue is not whether a large or small number of group members register, the issue is whether the class members have a sufficient opportunity to make an informed decision about registration.

39 The defendants submit that if a soft closure is ordered, the registration date, that is the date the class closes, should be approximately 8 weeks prior to

meditation. The specified date, that is the date the class would reopen should be the first day of trial.

40 The defendants submit that it cannot consent to the notification of class members by email because some of those email addresses it has for group members have been obtained specifically for the purposes of the recall and it cannot use those addresses for another purpose.

41 The defendants submit that the request for a stay is premature, any appeal will have to turn on any reasons given.

Consideration

42 I tentatively indicated at previous hearings, that it was my view that registration and class closure should occur. Having carefully reconsidered the matter, I remain of the view that registration and class closure is at this point appropriate notwithstanding the fresh materials I received.

43 In my view, it is appropriate to order a class closure and registration. It seems to me ultimately, that the parties must come to terms with the reality of the situation, and that involves all sides having an understanding of who will be in the class and therefore what the likely damages will be. It is timely, in my view, for that exercise to take place.

44 The proceedings have been on foot well in excess of a year and are well advanced. The pleadings have closed and the common questions have been decided. There are various procedural steps in place for the preparation and service of the evidence. Mediation has been ordered for June 2020, and a hearing date is set for August 2020.

45 It is true, that due to the large number of potential class members, who will likely play little active role in the proceedings, their interests need carefully to be considered before making any such procedural orders.

46 However, as with any litigation, parties should endeavour to resolve matters if possible prior to final hearing. Sections 56, 57 and 58 of the *Civil Procedure Act*, for example, implicitly require parties constructively to explore the resolution of the matter in a timely and cost efficient manner. The plaintiff seemed to suggest that if a disproportionate number of people failed to register there would be little point in a mediation. I do not accept this. All parties should participate in good faith and make genuine attempts to resolve the litigation.

47 It seems to me, that through the process of giving an appropriate notice, any potential members that want to participate, will be given the opportunity to do so.

48 Further, it may be accepted, that not just the defendants before me, but many other car manufacturers have had well publicised issues with the alleged air bags. The Takata air bag has featured prominently in the media in very recent times. The notion of vehicle recall has been brought to the attention of many members of the public. Many affected by the airbags have already received notices and participated in a recall, and have already taken active involvement in relation to their motor vehicles. I note in passing, although it was not in evidence, it is not seriously controversial that the ACCC from time to time, has purported to notify anyone affected by the Takata airbags to have their vehicles checked. It is also a matter of some notoriety that there is a dedicated website to the Takata airbags, whereby one can search their vehicle registration to determine whether they need to have their airbag replaced.

49 The proceedings in this case are somewhat unwieldy and there have been many different recall notices over many years. Further the profile of the members is likely to be quite varied including those who have bought a car new, sold a car, bought it second hand or arranged some sort of loan financing for the car. It may also be observed that there is never an ideal time to order a class closure, but I consider it is now an appropriate time.

50 The defendants want to get a handle on who is or is not likely to participate and therefore formulate a settlement proposal. The plaintiff urges the Court not to move too quickly lest people fail to register. Given the length of the hearing and the resources that would be involved, it is imperative that parties explore whether the matter can resolve at mediation. A mediation will only be effective if the parties know the likely number of participants and can thus offer an amount reflective of those numbers.

51 It seems to me, entirely appropriate for the opt out and registration process to proceed. It is most important because orders will cause plaintiffs to identify the likely damages with greater specificity than they have done so to date. It is time, in my view, for commercial reality to bite.

52 I am of the view that a soft closure is appropriate in the circumstances of this case. This would provide more certainty for the parties going into settlement but in the event that settlement is unsuccessful allow the class to reopen to allow all group members to participate in any judgement. I would order a soft closure as proposed by the defendant. That is, the registration date when the class will close will be 8 weeks prior to mediation. The specified date when the class will reopen will be the first day of trial. This would allow sufficient time for settlement to be reached in the weeks following the mediation.

53 Having read the submissions and carefully reconsidered the matter, I am now of the view that email is an appropriate way to notify group members. It seems to me appropriate, and in the interest of all parties for there to be as widespread notification as possible. The Court stands ready to facilitate this process.

54 Short minutes should be prepared to reflect these reasons and have the matter relisted to finalise the form of notice and for any other consequential orders. In addition I would deal with any application for a stay.

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