Ashurst

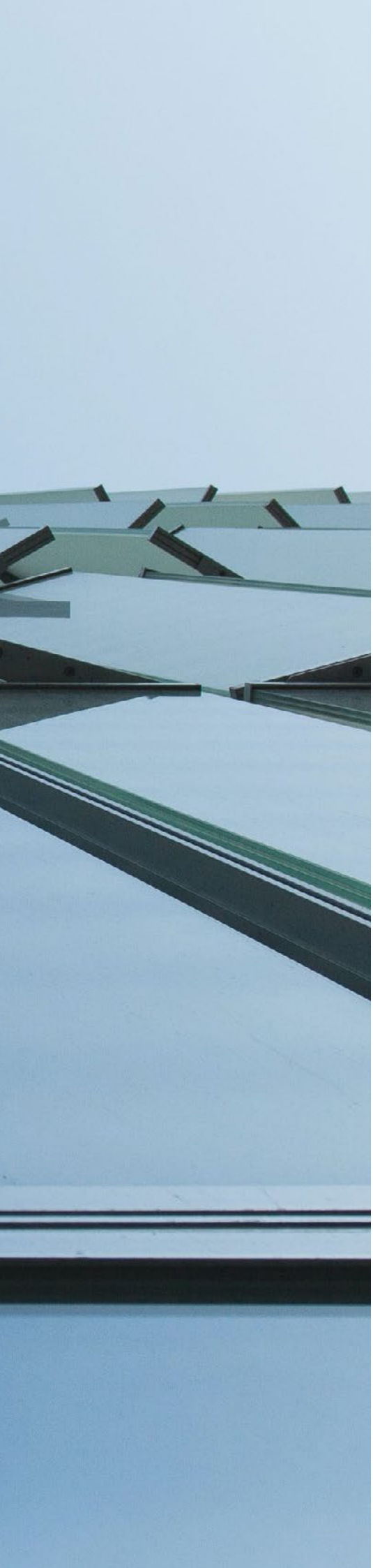
Quickguides

Stopping class actions: Declassing

September 2025

Outpacing change

contents



Introduction

The threshold requirements to bring a class action are a low bar, and unlike the USA there is no "class certification" in Australia (see further our Class Actions Guide).

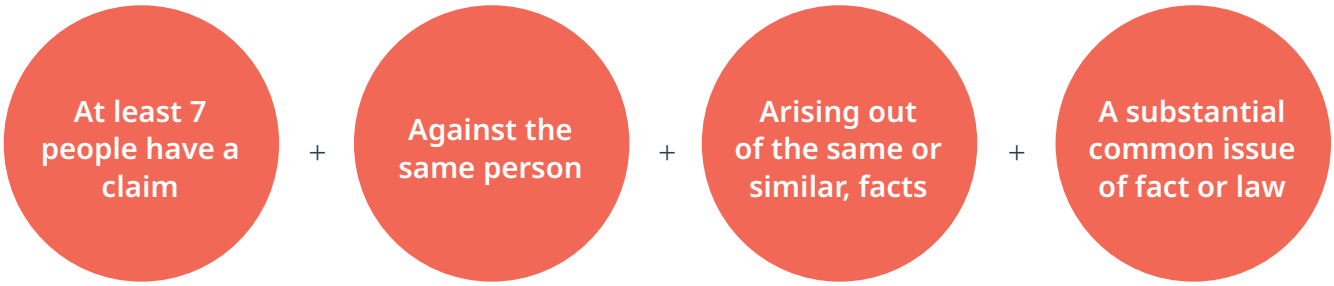
But that doesn't mean there is no way to stop a class action. Just because the requirements for *commencing* are satisfied, does not mean the proceeding can *continue* as a class action.

While *declassing* applications are rare, they have happened – including recently.

And with more and more funders and plaintiff firms in the market, class actions continue to push out into newer areas. As the boundaries get pushed, more class actions are straying into areas that involve more variation in individual circumstances.

Now, more than ever, there will be scope to consider declassing applications. This Quick Guide does just that.

The fundamentals



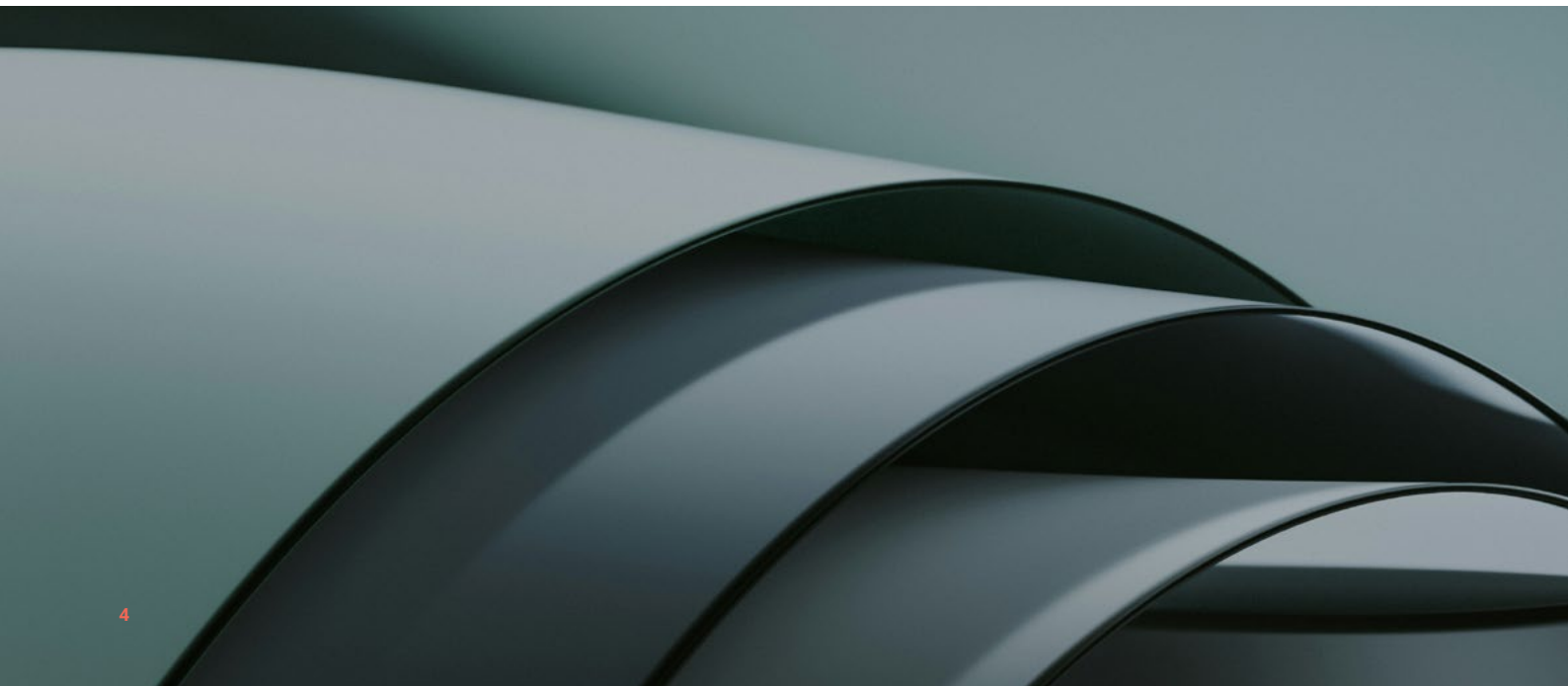
The formal requirements for a class action

The requirements to start a class action are straightforward. They are set out in the diagram above.

Courts take a liberal approach to these requirements: they generally aren't hard to satisfy.

Each person's claim doesn't have to be the same – they just need to have a substantial common issue. The common issue doesn't have to dominate individual issues – it just has to be substantial.

And if there are claims against multiple respondents, it isn't necessary for every class member to have a claim against every respondent. There just needs to be 7 or more people with a claim against each respondent.



Four ways to stop a class action

Leaving aside legal arguments on the substance of a claim, there are four main ways to stop a class action. We focus on the Federal Court provisions, but there are equivalents in the state based regimes:

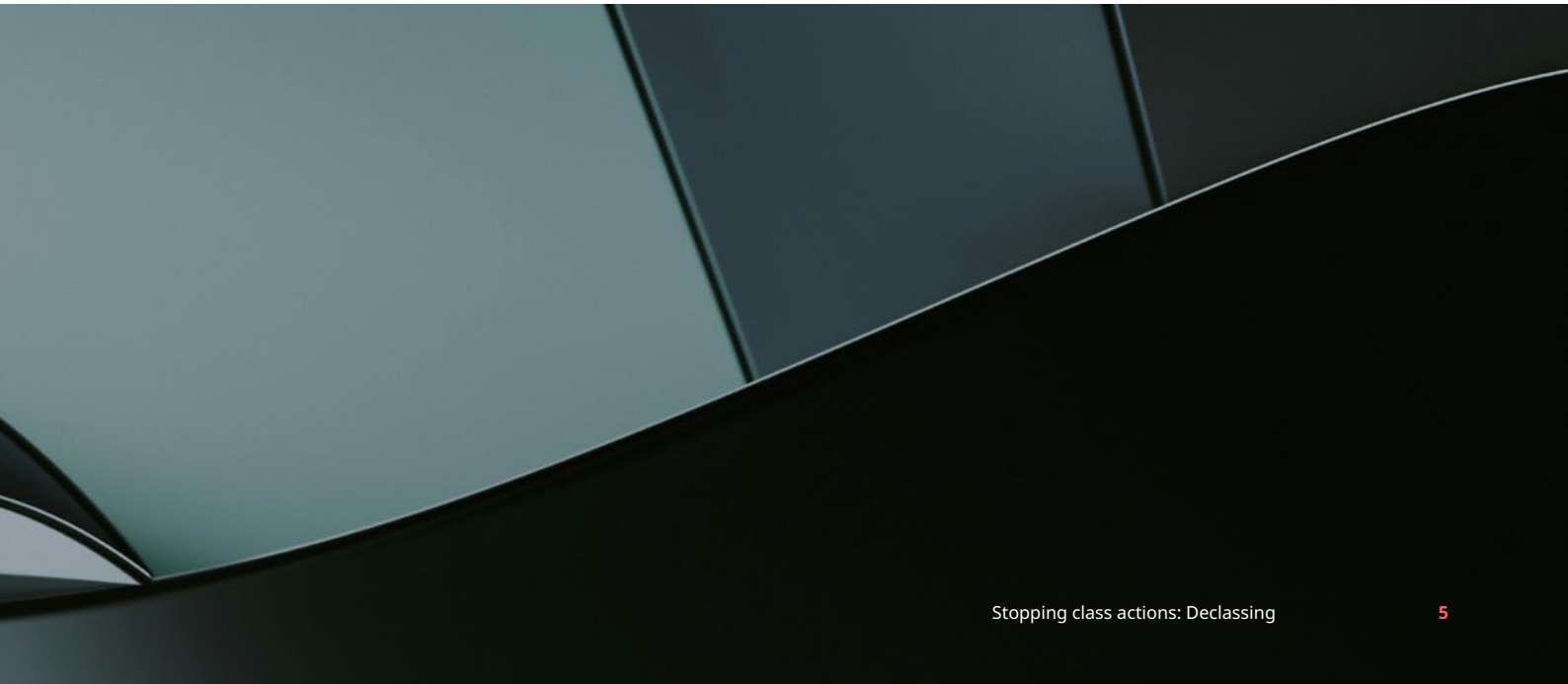
1. If the formal requirements to bring the action aren't met in the first place (section 33C).

2. If at any stage it appears there are less than 7 group members (section 33L).

3. If the relief claimed includes payment to group members, and the cost of identifying group members and distributing money to them would be excessive having regard to the likely total of the amounts (section 33M).

4. Where declassing is in the interest of justice because of certain factors which, broadly speaking, involve comparing the class action with other available proceedings in relation to cost, efficiency, relief available and other factors (section 33N).

The first three are extremely rare (and the third can result in just *that part* of the class action being stopped). The fourth is the more likely to be relevant (albeit it too is rarely used). The fourth is the focus of this guide.



Declassing in the interests of justice

The factors that may support declassing in the interests of justice

Section 33N gives the Court discretion to declass where doing so would be in the interests of justice *because of* one or more factors.

Those factors are:

A. Costs ground
Where the costs of a class action would likely exceed the costs of separate individual proceedings.

B. Individual proceedings ground
Where all relief can be obtained by a different proceeding – although this will almost always be the case, so that alone will not usually be enough for a typical matter.

C. Efficiency ground
Where the class action will not provide an efficient and effective means of dealing with group member claims.

D. Alternative ground
Where it is otherwise inappropriate for the claims to be pursued in a class action.

The approach to the test

The test is generally recognised as multi-stage:

First stage, at least one of those four factors must be made out to enliven the Court's power.

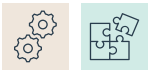
Second stage, the Court must decide whether *because of* that factor (or those factors), it is in the interests of justice to declass. That requires a causal connection between the factor and the interests of justice.

The assessment of those factors is generally approached on the basis of a comparison with other (hypothetical) proceedings, although there is some debate as to whether that is strictly the correct approach for the third and fourth factor.

The defendant bears the onus of satisfying the Court that the power should be exercised.

The first stage: The most likely grounds – efficiency and alternative limbs

Declassing applications to date have tended to focus on limbs (c) and (d) – the efficiency ground and the alternative ground. In relation to those grounds, the Courts have said:



Efficiency and appropriateness (for limbs (c) and (d) respectively) are to be determined in light of all the circumstances, including any relevant comparator proceeding (although there has been some debate about that point).

The implicit focus of the efficiency ground is on the *commonality of the issues* in the class action.

While it will depend on the particular case, an aspect of the question is any additional burden on the plaintiff and group members if they were "relegated to ordinary proceedings".

It has been considered necessary to show that the class action will not provide an efficient and effective means of dealing with the claims.

The "alternative ground" "calls for a broad, evaluative judgment".

It is concerned with whether a class action is an appropriate vehicle.

It has been said to "invite a normative judgment made by reference to the scope and purpose of the Act".

The second stage: interests of justice to declass

This has been said to "involve a degree of subjectivity" and "broadly described as a discretionary decision". In particular though, the interests have been said to include:

- the public interest of promoting efficient use of Court time and parties' resources;
- providing a remedy for those without resources to bring individual actions; and
- protecting defendants against multiple suits and the risk of inconsistent findings.

When to bring a declassing application

The Supreme Court of Victoria has said that:

a. there is no prescribed time limit for making a de-classing order;

b. it is important that the Court be in a position to assess circumstances informing the application of the provision;

c. in particular, there should be a full understanding of the representative plaintiff's case and how it relates to both the common questions and the interests of group members;

d. it is common practice to consider a declassing action after pleadings have closed or at a later time, including after evidence is prepared.

Even so, we think timing may depend on the basis for the application.

For example, where the declassing follows from resolution of a common question, then it would make sense for the application to come promptly after that decision, and the respondent is unlikely to be criticised for not having brought the application sooner.

But where the issue is inherent in the nature of the class action, if the matter proceeds to an advanced stage then the failure to promptly bring the application may count against it, or may otherwise impact the comparison with hypothetical alternative proceedings.

Indeed, case study 4 below involved declassing being ordered because *individual proceedings* were so advanced. The reverse could also happen.

What does declassing achieve – what happens next?

Does the lead applicant still have a claim?

If a declassing order is made, the proceeding will continue – but not as a class action. The effect of declassing is made clear in section 33P:

- The proceeding may be continued as a proceeding by the lead applicant on his or her own behalf against the respondent; and
- A person who was a group member can apply to the Court for orders that they be joined as an applicant in the proceeding.

In other words, the proceeding can continue as conventional proceedings by a single plaintiff, or multiple named plaintiffs. Whether or not they will actually do so is another matter.

Limitation periods for the rest of the class?

When a class action is commenced, the running of any limitation period is suspended under s33ZE. That limitation begins to run again for a group member in a number of circumstances, including if the proceeding is "determined" without finally disposing of the group member's claim.

The courts haven't yet given a clear answer whether a declassing order under s33N of itself constitutes a determination of the proceeding in order for the limitation period to run again.

- A narrow view is that a determination must be a "judicial determination", which a declassing order does not do, because the claim itself has not been determined.
- A broader view is that a declassing order does determine the proceeding insofar as it relates to group members' claims (and the representative proceeding is brought to an end) – and so restarts the clock on limitation periods.

If the narrow view was correct, limitation periods might never expire and respondents would be forever exposed to the risk of claims by group members. To avoid that risk, Courts have made specific orders using the gap-filling provision in s33ZF to restart the limitation period. (That is, to remove doubt about whether it would happen automatically under section 33N).

Group members need to then bring their own proceedings before the limitation period expires (or apply to be joined to the original proceeding, as discussed above).

Case studies:
where declassing has been ordered

Case study 1:

Where there were no common issues in dispute, and individual assessment was required

What the case was about
The group members were clients of a law firm, who had retained the firm in sexual abuse claims against institutions. The essence of the claim was that the law firm did not adequately advise them and adequately pursue claims (e.g. by not advancing certain damages claims, and settling without threatening proceedings).

The law firm admitted that it owed a duty of care, and that it represented that it would apply specialist skill and expertise. It argued that it did properly advise on a case by case basis, and each case had different circumstances, including the circumstances of the alleged abuse, the institution involved, the relationship between the alleged abuser and the institution, the institution's alleged knowledge of abuse or potential abuse, and a legal framework that changed over time.

What the Court did
The Court ordered the proceeding be declassed. The reasons included:

a. The common questions of law were not in dispute or not likely to be the subject of dispute – the law firm's duty of care and associated representations were admitted.

b. The substantive question was whether that duty was breached, and the harm suffered. That was distinct for each group member and would depend on detailed assessment of actual advice, background legal context and the merits of each member's claim.

c. The hearing and determination of the common questions would involve significant time and expense that would not reasonably shorten the analysis of each group member's claim.

d. Accordingly, it was in the interests of justice that the proceeding no longer continue as a group proceeding, even though declassing would lead to time once again beginning to run and some group member claims becoming statute barred.

Jane Jones (a pseudonym) v Waller Legal Pty Ltd [2025] VSC 42. See further our discussion of this case here.

Case study 2:

After common issues resolved in separate question

Just as case study 1 involved declassing where there was no significant common issue *in dispute*, case study 2 demonstrates the possibility of declassing after there is *no longer* a common issue in dispute, i.e. where it has been resolved through a separate question.

What the case was about

The claim was brought on behalf of people who had guaranteed payments for public hospital care for people who were not eligible for Medicare (primarily overseas visitors or temporary residents). The plaintiffs challenged the legality and enforceability of the guarantees, and sought to have payments refunded and charges set aside.

The principal issue was whether the defendant health districts lacked authority to procure the guarantees such that the guarantees were void or invalid.

That issue was decided in favour of the defendants as part of a separate question (*Fernandez v State of New South Wales* [2019] NSWSC 1736). That left particular arguments based on the circumstances in which each of the guarantees was obtained, such as what was said to each guarantor, the financial circumstances of the patient and the guarantor, and the information each guarantor was given before signing the guarantee.

What the Court did

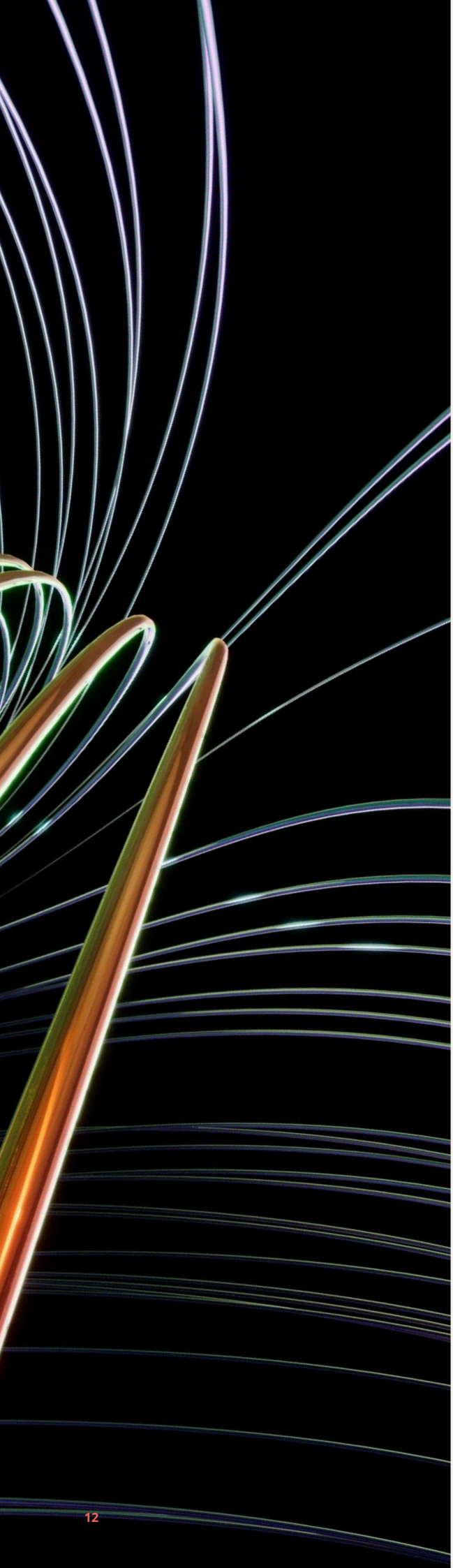
The Court found that the non-common issues were not suitable for determination by way of representative proceedings.

In particular, the Court considered that given the common issues had been resolved:

- all relief sought could be obtained by proceedings other than representative proceedings;
- it was likely that the costs of continuing as representative proceedings would exceed the costs of separate proceedings;
- representative proceedings would not provide an efficient and effective means of dealing with the claims of group members; and
- the representative plaintiffs would not be able to represent the interest of the group members

It should be noted that this was not an application for declassing as such, but rather an application that the proceedings no longer continue (and thus be discontinued) pursuant to s 166(1) of the *Civil Procedure Act 2005* (NSW). That section is the NSW equivalent of s 33N of the FCA and includes substantially the same factors and wording (albeit an additional factor
to s 33N).

Fernandez v State of New South Wales (No 2) [2021] NSWSC 471



Case study 3:

Individual assessment required in respect of both representations and reliance

What the case was about

Group members had acquired shares through (and following the advice of) a broking firm. It was alleged that the firm made representations about the investments that were "partly in writing and partly oral". Not all group members relied on oral representations, and for those that did, the oral representations were different. The combination of representations for that each group member received were also different.

What the Court did

The Court declassed the proceeding, considering a lack of commonality of claims meant a class action would not provide an efficient or effective means of resolving the claims.

The Court found that there was a lack of commonality in the claims due to there being 282 separate alleged share transactions across group members, allegedly in reliance on different representations (or different combinations of representations), requiring individual assessments of both the representations and the reliance, and that this outweighed any common issues.

Meaden v Bell Potter Securities Ltd (No 2) (2012) 291 ALR 482

Case study 4:

Where test cases were already well advanced

What the case was about
This case involved class actions against four different insurers concerning business interruption insurance claims arising out of the COVID pandemic.

Before the class actions were filed, the insurers adopted a process of "test cases". They identified test cases, ran them in two Courts, and then put in place "private" processes of assessment, not subject to Court supervision, which were said to be informed by the principles emerging from those test cases. However, the test cases did not bind the policyholders who had not been a party to them, and so some of those policyholders commenced class actions against the four insurers.

The insurers sought to have the proceedings declassed on the basis that the test cases resolved all common issues in each of the class actions, and any residual issues could be determined pursuant to internal claims processes set up by the insurers. They argued that these processes would facilitate the resolution of the claims quickly, cheaply and fairly.

What the Court did
The Court declassed each class action on the basis of s 33N(1)(c) (the efficiency ground).

The Court considered that a class action (followed by a Court supervised assessment process) *would have been* more efficient and fair if adopted at the outset. However, because the test case and private assessment process was well advanced, it had become a more efficient mechanism.

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

Case study 5:

Relief sought did not require class action

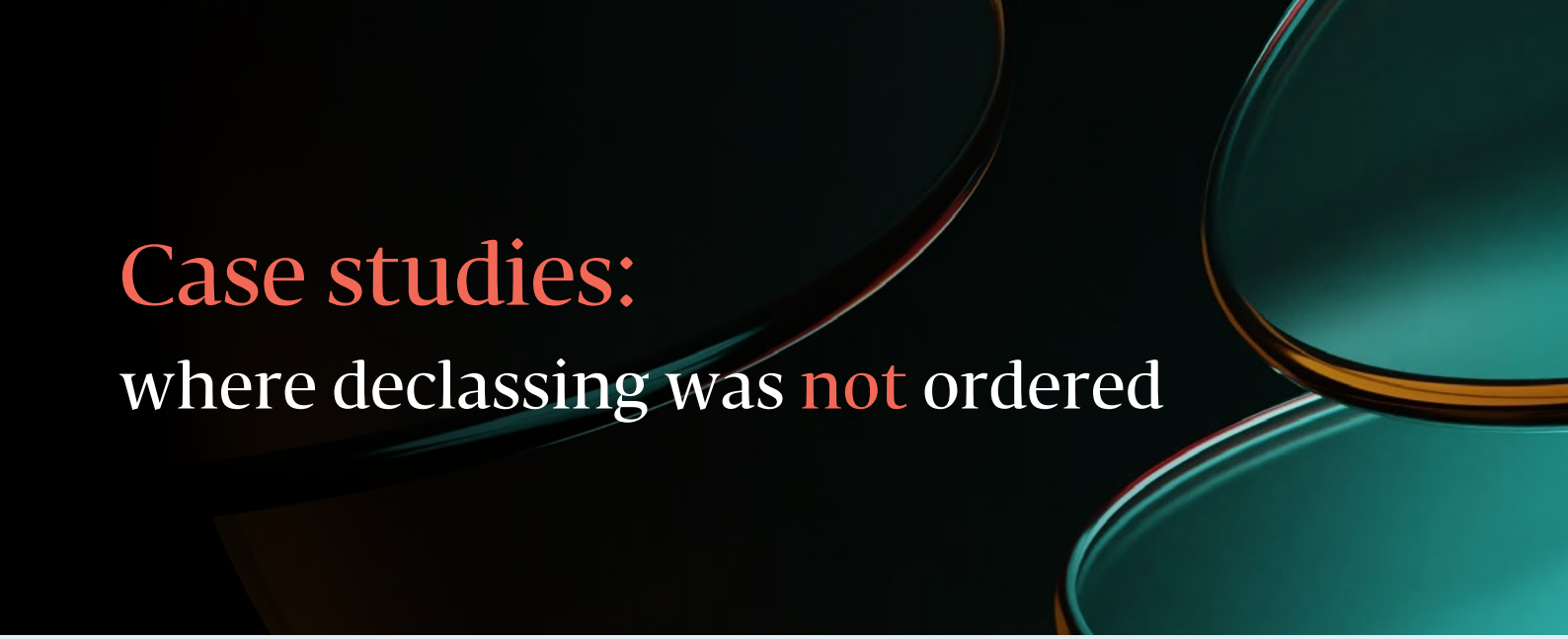
What the case was about
This was a class action on behalf of all health care workers in NSW Health, seeking declarations that orders mandating COVID-19 vaccines for healthcare workers were constitutionally invalid.

The respondents applied for declassing orders relying on section 33N(1)(b) (the individual proceeding ground), on the basis that all relief sought could be obtained by a proceeding other than a representative proceeding. The application was unopposed.

What the Court did
The Court ordered declassing.

Lee J was satisfied declassing was in the interests of justice. In particular, his Honour noted that there was no claim for damages in any form, or for relief "bespoke to individual group members". The matter was simply an "application for declaratory relief" in respect of the health orders that either would or would not be made (and take effect or not), and there was no utility in that order being sought on behalf of other people.

Kikuyu v Hazzard [2022] FCA 310



Case studies:
where declassing was not ordered

Case study 6:

Common issue forming part of individual assessment

What the case was about
This was a class action on behalf of about 3,500 group members who alleged they were employees rather than contractors, and sought employee entitlements.

The respondent argued that the group membership was large and diverse, that a multi-factorial test applied to determine if an employment relationship existed for each group member, and that these factors would apply differently to different group members. It therefore argued there was no substantive common issue of fact or law, such that a class action would not provide an efficient and effective means of dealing with claims and would take longer and be more expensive.

What the Court did
The Full Court held that an issue over whether one of factors going to the multi-factorial test of whether group members were employees could be a 'substantial common issue'. It did not matter that this common issue would not determine the ultimate issue of whether the group members were ISGM employees.

ISG Management Pty Ltd v Mutch (2020) 385 ALR 146

Case study 7:

Common question around the defendant's conduct (even though individual assessment of impact on group members would be required)

What the case was about

This claim alleged nuisance from noise and odour emissions from an oilseed processing factory. The plaintiff sought to convert ordinary proceedings into a class action, which was resisted (and so these issues were considered in that context).

The Court appeared to accept that the individual elements of the claims of group members would require individual assessment and not be common issues – e.g. the assessment of loss and damage, and perhaps aspects of causation. Also, as each group member occupied land at different distances from the factory, each group member would have different experiences of odour and noise emanating from the factory.

The respondent argued that lack of commonality between group members meant that a class action would not provide an efficient and effective means of dealing with the claims (the efficiency ground), and it was otherwise inappropriate for the claims to proceed through a class action (the alternative ground).

What the Court did

The Court allowed the class action to proceed, finding that the group proceeding is an efficient and appropriate method of dealing with the factual and legal allegations *that focus on the conduct of the defendant* as opposed to *the consequences for group members.*

Green & Ors v GrainCorp Oilseeds Pty Ltd [2023] VSC 395

Case study 8:

Common question about whether a "system" existed applies to all group members

What the case was about

The claim alleged that insurance brokers had a "system" where they would request information from borrowers, misrepresent they considered the suitability of two insurance products which in fact had little to no value, and only recommend and provide materials for those products.

The respondents applied to declass the proceeding on the basis that:

- the Court would need to consider the individual circumstances of each group member to determine liability and causation;
- the total quantum of group members' claims is disproportionately low relative to the risks and costs of the representative proceeding, which is made worse by the low participation rates in recent class actions concerning life and consumer credit insurance. This means that legal costs would be borne by fewer group members, reducing even further the pool of money available to group members if the claim is successful;
- there are alternative dispute resolution mechanisms available to group members to recover valid claims without deductions for legal or litigation funder's fees.

What the Court did

The Court declined to declass the proceeding because resolving the common questions as to whether the "system" existed, and whether the brokers were trained and expected to recommend the insurance products, would aid the resolution of the claims generally.

The Court also held that it would be more efficient to continue as a representative proceeding because the cost of individual proceedings would exceed the likely costs of the representative proceeding, and individual proceedings would also give rise to multiplicity of claims, witnesses giving evidence on multiple occasions, and the risk of inconsistent findings across similar claims.

It was also considered unlikely that group members would be able to use alternative dispute resolution without legal assistance (and therefore fees) given the complexity of the factual and legal issues.

McDonald v Australian Life Insurance Distribution Pty Ltd [2025] FCA 678

Case Study 9:

Common issues surrounding existence of a system and the scope of a duty of care

What the case was about

The case involved allegations that a law firm breached duties by failing to take reasonable precautions to ensure that group members received common law claims advice before accepting redress offers under the scheme established by the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth). The claim alleged the law firm had implemented a "system" which involved the use of standard processes and template documents for the provision of legal services.

The application to declass was on the basis that the pleaded claims did not give rise to common questions of law and fact. The defendants argued that the pleaded features of the alleged "system" were so generalised that it could not form the basis of common questions (rather the advice given to group members must be individually analysed).

What the Court did

The Court rejected the declassing application, finding that the pleadings and materials used by the defendants clearly raised the issue of whether the defendants had a common, structured system for representing clients who had been subjected to child sexual abuse and who wished to make applications to the National Redress Scheme. This included issues surrounding whether a system existed, what its features were, and whether it gave rise to an increased risk of harm. Common issues also arose in relation to the terms of the client retainer and its impact on the content of the duty of care owed by the defendants.

The Court acknowledged that issues of breach and causation will require individual consideration, but said that "that fact should not distract from a consideration of the common issues that arise for determination on the pleadings". The Court distinguished the Waller Legal matter (case study 1 above) on the basis that the defendant in that case admitted the duty of care, such that all that remained were the individual issues of breach and causation.

The evidence also showed that there were approximately 20,000 group members, of which almost 500 had already expressed their interest in the proceedings. The Court indicated that declassing would have had negative implications for the resources of the Court and parties, and the characteristics and geography of the group members meant that it would not be in the interests of justice for group members pursue individual claims. For example, declassing would have significant implications for some group members' capacity to access legal services. It would also result in a large number of claims being made in different jurisdictions in Australia with the attendant risk of inconsistent findings.

Holmes v Knowmore Legal Service Limited & Ors [2025] VSC 561

Case Study 10:

Where admissions were insufficient to resolve common issues

What the case was about

The case involved a class action alleging that the AFL and Geelong Football Club failed to take reasonable precautions to manage the risk of harm to AFL players from concussion injuries.

The defendants argued the claims did not give rise to common questions of law, and would be almost entirely determined by the resolution of issues that are individual and not common. The defendants also argued that the evidence showed individual proceedings would give rise to significant cost savings and efficiencies due to the small number of group members and the extensive claim period.

What the Court did

The Court recognised the need to resolve individual issues in relation to breach, causation and damages. However, despite admissions from the defendants relating to the existence of a risk of harm and that they owed players a duty of care, the Court said it was clear that there would be significant common questions relevant to the risk of harm, the scope of the duty, the reasonableness of the systemic precautions pleaded by the plaintiff, and the impact that the relationship between the parties has on those matters.

The Court also found that the evidence did not show that group members' claims would be resolved more quickly and efficiently if they were pursued in individual proceedings.

However, the Court agreed that a 38-year claim period significantly reduced the degree of commonality due to changes in the knowledge of the risk of harm associated with concussions as well as the defendants' rules, regulations, policies and procedures – all of which was likely to have an adverse significant impact on costs and resources if the proceedings continued as a class action.

As a result, the Court limited the initial trial to claims that fall within a nine-year time period pleaded in relation to the lead plaintiff. This would lead to reduced time and costs, whilst the resolution of questions of law and findings of fact in the initial trial would likely be of significant assistance as it would inform the parties' consideration of claims that fall outside the initial period.

Rooke v Australian Football League & Anor [2025] VSC 560

Key contacts

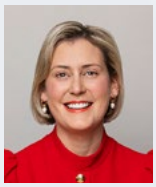
Please don't hesitate to reach out to our team to discuss how a declassing application might be considered in specific factual circumstances.

Ian Bolster
Head of class actions
T +61 2 9258 6697
M +61 421 555 841
ian.bolster@ashurst.com

Nick Mavrakis
Partner
T +61 2 9258 6501
M +61 412 746 245
nicholas.mavrakis@ashurst.com

Meredith Bennett
Partner
T +61 7 3259 7080
M +61 429 678 265
meredith.bennett@ashurst.com

Andrew Carter
Partner
T +61 2 9258 6581
M +61 412 398 830
andrew.carter@ashurst.com



Felicity Healy
Partner
T +61 2 9258 6150
M +61 416 545 914
felicity.healy@ashurst.com

Angela Pearsall
Partner
T +61 3 9679 3737
M +61 413 482 477
angela.pearsall@ashurst.com

Mark Bradley
Partner
T +61 3 9679 3363
M +61 400 338 104
mark.bradley@ashurst.com

John Pavlakis
Partner
T +61 2 9258 6062
M +61 408 117 344
john.pavlakis@ashurst.com

Thomas Storer
Partner
T +61 2 9258 5844
M +61 403 680 244
thomas.storer@ashurst.com

Adrian Chai
Partner
T +61 8 9366 8104
M +61 409 661 368
adrian.chai@ashurst.com

Ashurst

ashurst.com

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