IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2019 01926

NICO ANDRIANAKIS — Plaintiff

v

UBER TECHNOLOGIES INC and others — Defendant

S ECI 2020 01834

JAMAL SALEM — Plaintiff

v

UBER TECHNOLOGIES INC and others — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	3 July 2023
DATE OF RULING:	21 July 2023
CASE MAY BE CITED AS:	Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors
MEDIUM NEUTRAL CITATION:	[2023] VSC 415

PRACTICE AND PROCEDURE – Group Proceedings – Opt out – "Soft" class closure orders – Whether appropriate or necessary to ensure that justice is done – *Supreme Court Act 1986* (Vic) ss 33ZF, 33ZG.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Ms A Staker	Maurice Blackburn Lawyers
For the Defendant	Mr D Sulan SC Ms M Ellicott	Herbert Smith Freehills

HER HONOUR:

Introduction and background

1 Each of these proceedings is a group proceeding (a class action) issued under Part 4A of the *Supreme Court Act 1986* (Vic) (the **Act**). The parties jointly seek orders under ss 33J, 33X and 33Y of the Act for the fixing of a date by which group members may opt out of the proceedings and for notice to be given accordingly.

2 They also seek orders in each case under ss 33ZF and 33ZG of the Act, by which group members will be required to register their interests in the proceedings in order to seek any benefit under any in-principle settlement that is reached at or in consequence of mediations which are to be held later this year. Those proposed orders are in substantially these terms:

> A Group Member may, by the Class Deadline, register their claim by:
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> a. Completing the online registration process through the "Uber Class Action" website at www.mauriceblackburn.com.au/uber; or
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> b. If they are unable to register online, contacting the solicitors for the Plaintiff, Maurice Blackburn, using the contact details provided on the Uber Class Action webpage; or
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> c. Otherwise providing their name and contact information to solicitors for the Plaintiff, Maurice Blackburn,
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> (the **Registered Group Members**). For the avoidance of doubt, Group Members who have registered their claim with Maurice Blackburn before the date of these orders are taken to be Registered Group Members.
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> Pursuant to ss 33ZF and 33ZG of the Act, subject to further order, only Registered Group Members shall be entitled to any relief or payment arising from an agreement to settle the proceedings where that agreement is reached at any time between the date of these orders and 3 March 2024 and the agreement is subsequently approved by the Court. Any Group Member who by the Class Deadline does not opt out and who is not a Registered Group Member, will remain a Group Member for all purposes of this proceeding but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any such settlement (subject to Court approval) of this proceeding.

3 The parties are jointly seeking what has become known as "soft class closure". That expression does not appear in the Act but is employed for convenience. It is commonly used to distinguish orders of the kind presently sought, from orders that would remove unregistered group members from the represented class (by amending the

relevant group definition) or by which unregistered group members would not be permitted to benefit from any judgment given in favour of the plaintiffs. Under the proposed orders, if the proceedings do not settle before trial, the claims of unregistered group members will still be determined in the proceedings. All group members[1] would be bound by the result of the proceedings and entitled to seek to benefit from any judgment given in favour of the plaintiffs. As Murphy and Lee JJ said in *Parkin v Boral*, orders of this kind do not transmogrify an open class into a closed one, but demarcate between registered and unregistered group members, which demarcation only has an effect if a settlement is later reached and approved by the Court.[2]

4 Subject to some minor adjustments, I consider that the parties' proposed orders in respect of opting out and notification are appropriate.

5 I also consider, for the reasons now set out, that the class closure orders are appropriate to ensure that justice is done in the proceeding. My reasons largely accord with the parties' submissions. Orders will be made accordingly.

6 This Court has express power to under ss 33ZF and 33ZG of the Act to require group members to take a positive step in order to be entitled to obtain any relief or benefit arising out of a proceeding issued under Part 4A of the Act, and to specify a date after which, if that step has not been taken by a group member to whom the order applies, the group member is not entitled to any relief or payment or to obtain any such benefit. As s 33ZG provides, the power may be exercised irrespective of whether the Court has made a decision on liability or there has been an admission of liability by the defendant. Section 33ZG elaborates upon the power conferred by s 33ZF, by which the Court may make any order the Court *thinks appropriate or necessary to ensure that justice is done it the proceeding*. The principles that should inform an exercise of power under those provisions were not in dispute. I refer to the summary of those principles

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1 Persons who are presently group members will be permitted to opt out of the proceedings by a date to be fixed. Those who opt out will no longer be group members and will not be bound by the result of the proceedings.

2 *Parkin v Boral* [2022] FCAFC 47 (Murphy, Beach and Lee JJ) (***Parkin***), [8]-[9].

that I recently set out in *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414 which in turn refer to the analysis of J Forrest J in *Matthews v SPI Electricity Pty Ltd*,[3] among other decisions. Those principles apply equally in this case.

The parties' submissions

7 The parties submitted that for the following reasons (which are discussed in more detail in the course of considering the evidence, below) it is appropriate and in the interests of group members as a whole, to close the class in each proceeding in the manner contemplated by the orders:

(a) It is the assessment of the parties' legal representatives that without class closure orders there is a significant risk that settlement negotiations will be unable to proceed. Closing the class for the purpose of mediation will crystallise the number of registered group members which would significantly improve the prospects of reaching settlement prior to trial.

(b) The proceedings are complex and the trial set to be of lengthy duration. In an action of this size, duration and complexity, promoting settlement is clearly a desirable object.

(c) The proceedings commenced in 2019 and most interlocutory steps have now been completed, with mediation ordered to occur in December 2023 and the trial to commence in March 2024.

(d) The parties are in agreement that the proposed class closure orders are appropriate.

(e) Group members will have adequate notice of the proposed class closure and a reasonable amount of time in which to determine whether to join the closed

[3] *Matthews v SPI Electricity Pty Ltd* (2013) 39 VR 255 (*Matthews*). In ***Matthews***, the Court granted an application by consent to close what had been an open class group proceeding, by permitting amendments to the group definition so as to exclude the claims of those group members who did not register their claims by a court-ordered deadline. J Forrest J set out more generally, the principles said to inform an exercise of the power to require group members to take a step in the proceeding in order to be entitled to claim any benefit in relation to it, whether or not such step was accompanied by an amendment to the relevant group definition.

class. The proposed registration process is not overly burdensome to group members.

(f) If a group member fails to register in time, it will only affect their rights if a settlement is reached. In those circumstances, the group member could seek to be included in the class under the court's overall discretion.

(g) As discussed in *Matthews*, registration in mass tort proceedings is an inevitable process if the claims in the proceedings are successful.[4] Soft class closure orders at this stage of the proceedings would simply accelerate that process.

8 The application was supported by affidavits of the plaintiffs' solicitor Michael Donelly, a principal of Maurice Blackburn, and the defendants' solicitor, Cameron Hanson of Herbert Smith Freehills. Both are experience class-action lawyers.

The circumstances of these proceedings

9 The claims made in the proceedings arise out of the introduction of UberX passenger services to Australia in 2014. Broadly described, the plaintiffs in each case contend that Uber Technologies Inc and six other entities within the Uber group of companies intended that UberX would be established in Australia by Uber Partners unlawfully competing with existing point to point passenger services,[5] as a result of which owners, operators and drivers who participated in the provision of those services, would suffer loss. The plaintiffs allege that the defendants[6] agreed or combined with the common intention of injuring the plaintiffs and group members, committing the

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4 *Matthews* (n 3) 277 [80(i)].

5 UberX is defined in the claim as a ride sharing service that was marketed as a "low cost" point to point passenger transport service, available to riders through the Uber app, and to Uber Partners through the Uber Partner App. Uber Partners are defined as persons who downloaded the Partner App and entered into an agreement permitting the use of the Uber Partner App to receive requests for the provision of point to point passenger transport services, and to accept such requests and provide such services. Point to point passenger services are defined as a form of passenger transport service in which the passenger determines the pickup time, location and destination.

6 A reference to the defendants in this context excludes the fifth defendant, Raiser Operations BV.

tort of conspiracy to injure by unlawful means.

10 The plaintiffs bring these proceedings on behalf of taxi licence holders, accredited taxi-cab operators and accredited drivers, private hire car licence holders, private hire car operators, and accredited hire car drivers who had operated in the claim period, in four Australian states.[7] Separate conspiracies by unlawful means are alleged for each state. For each state, group members are then further stratified based on whether they were, during the relevant period, a taxi licence owner, taxi operator, taxi driver, taxi network service provider, hire car licence owner, hire car operator, and/or a hire car driver. Group members in the Salem Proceeding are persons who hold a claim which was vested, assigned, devolved or transferred to them from a person who would otherwise have been a group member in the Andrianakis Proceeding.

11 Maurice Blackburn identified just under 8,500 group members have registered to date. These registered claimants have submitted claims for 13,347 licences that were either owned or operated during the relevant periods. It is not possible for the parties to identify the total number of potential group members on the information presently available to them.

12 The proceedings have been on foot since 2019 and are significantly advanced at this stage. Most interlocutory steps have been completed. The pleadings in the proceedings are advanced and detailed, lay evidence has been filed by both parties, and expert evidence has been filed by the plaintiffs. A mediation has been ordered to occur in December 2023. The proceedings are set down for trial for a duration of 10 weeks to commence in March 2024.

13 The solicitors for both parties gave their opinions, by their affidavits, as to the perceived difficulties of reaching settlement of the proceedings in the absence of class closure.

14 Mr Donelly's evidence was as follows.

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7 Specifically, Victoria, New South Wales, Queensland and Western Australia.

15 Should the class remain open, it would be difficult to estimate the amount of contingency reserve ought be negotiated in respect of unregistered group members. In Mr Donelly's experience, a contingency amount would be agreed in the usual course of settlement discussions in class action proceedings, to be set aside for claims from "unregistered group members" who registered their claims after the settlement was reached but before the settlement was approved by the Court. In proceedings where the group membership is readily ascertainable, it is possible to estimate the amount set aside for a contingency reserve, so that parties can assess the fairness and reasonableness of the settlement for the class as a whole. In the absence of soft class closure, Mr Donelly was of the view that, unlike in a shareholder or consumer class action, there would be no record held and maintained by the defendants, such that the defendants know the size and constituency of the class. Mr Donelly expected that the losses incurred will be different for each group member. There are a number of different taxi and hire car licences for which losses are being claimed in these proceedings and which could be held by unregistered group members. Income losses are likely to differ as between group members within each state. For example, some accredited drivers may have driven on a part-time basis whereas others drove on a full-time basis. There is a degree of variability in the amount that operators paid to lease licences from licence owners. For group members who did not hold licences, it is not possible to know whether they exited the industry during the relevant period such that their claim for income losses would be less than someone who was part of the industry for the entirety of the relevant period. Mr Donelly said that the combination of these factors would make it difficult to estimate the amount to be put aside in the contingency reserve.

16 To control for these complexities and to ensure that the parties are not negotiating "blind", a statistical sampling process will be used to estimate losses for the purposes of mediation. Substantial work has already been completed on the statistical sampling process and parties have reached an in-principle agreement to utilise the process for the purpose of mediation. The statistical sampling process involves a random sample of group members being selected and their claims referred to a panel of accountants

who individually assess those group members' losses. Those assessments for the random sample are then used to extrapolate from those assessments to the registered population of group members, to form a statistically robust estimate of groupwide losses. Mr Donelly said that the utility of that process would be undermined where there is no registered population. Without a registered population, the extrapolation from the random sample cannot be completed. Mr Donelly is of the view that soft class closure will crystallise the number of registered group members and the quantum of their claims such that the sampling process can be reliably completed and the prospects of settlement significantly improved.

17 In the absence of soft class closure, mediation would have to occur on an open class basis. Mr Donelly was of the opinion that, in those circumstances, the parties would be faced with significant uncertainty as to the size, and quantum of the losses, of unregistered group members. There would be a significant risk that unregistered group members would come forward after a settlement had already been reached, which would have the effect of diluting the recoveries of registered group members and altering the basis on which the settlement had been reached. It was Mr Donelly's experience in other class action proceedings that a significant number of group members come forward following notice of settlement.

18 Mr Donelly held significant concerns that he would not be able to meaningfully advise the plaintiffs to accept an offer of settlement in circumstances where the class remained open.

19 Mr Hanson, for the defendants, gave the following evidence.

20 In the absence of soft class closure orders, the parties would have to approach mediation on the basis that they were unable to ascertain the total amount being claimed by group members. It is Mr Hanson's experience that class closure orders enable the parties to negotiate any settlement amount on an informed basis by reference to the number of registered group members and the quantum claimed by those group members. Where there is class closure and a settlement is achieved and

subsequently approved by the Court, both group members and the respondent are able to achieve finality in the subject matter of the litigation.

21 In Mr Hanson's opinion, the prospects of settlement at a mediation in this case would be poorer absent class closure. Mediation or settlement discussions would not be informed by a proper understanding of the quantum of the claims to be resolved, nor would any settlement that is agreed necessarily deliver finality to the parties. The unquantifiable risk, even if low, of follow-on claims after a settlement with registered group members would at a minimum impact on any possible settlement amount.

22 On the question of the means by which group members should be notified of the right to opt out and the requirement to register, the parties proposed that the notice be made available in downloadable form from the Supreme Court's website and Maurice Blackburn's website. It was also proposed that the notice be distributed to group members who had registered with Maurice Blackburn to date, and to a number of industry associations and peak industry bodies of the taxi and hire car industries in each state for distribution among their members. Mr Donelly's understanding was that the industry bodies regularly communicate with their members about issues in the industry and would likely maintain up-to-date records of persons who may be group members.

23 Upon considering the parties' application, I advised the parties that I was not satisfied on the evidence that the notification regime was adequate and required the plaintiffs to submit evidence about the proposed arrangements with industry organisations and to provide a proposed schedule of newspaper advertisements for each relevant state.

24 As directed, Mr Donelly filed further evidence, including evidence as to new enquiries he had made about the arrangements that the industry organisations could and would make to distribute or publish the Court-approved notice advising group members of the right to opt out the requirement to register. In substance, the evidence was that:

(a) Maurice Blackburn's team had spoken with representatives of state-specific industry organisations. Mr Donelly deposed to each organisations' capacity to

contact its group members and inform them of the class action and the opt out notice, as follows:

(i) The **Victorian Taxi Association** (**VTA**) is the peak industry body for taxi networks outside of Metropolitan Melbourne. It comprises 15 taxi networks made up of 250 operators across regional Victoria. The VTA will distribute a copy of the notice by email to its members within one week of being notified of the Court's orders.

(ii) The **Transport Matters Party** (**TMP**) was founded by Rod **Barton** and Andre Baruch in April 2018 to represent the interests of the taxi and hire car industry in Victoria. Mr Barton was elected to the Victorian Legislative Council in 2018 and served a four-year term. The TMP maintains an email list comprising 2,000 people (including taxi and hire car owners, operators and drivers). Within one week of being notified of the Court's orders, the TMP will distribute a copy of the notice by email to its members and Mr Barton will publish posts on his social media channels directing potential group members to Maurice Blackburn's website.

(iii) The **New South Wales Taxi Council** (**NSWTC**) is the peak body for the taxi industry in New South Wales. It holds 7,436 member email addresses and has 2,700 followers on its Facebook page. The NSWTC will distribute a copy of the notice and the newspaper advertisement (in English and translations) by email to its members. It will, within one week of notification of the Court's orders, distribute those emails and publish posts on its website and Facebook page directing potential group members to Maurice Blackburn's website.

(iv) The **NSW Hire Car Association** (**NSWHCA**) was formed in 2015 to represent the interests of the hire car industry in New South Wales. The NSWHCA maintains a Facebook page with over 600 followers. It will,

within one week of notification of the Court's orders, publish a post on the page informing its followers of the class action and directing potential group members to Maurice Blackburn's website.

(v) **Taxi Council Queensland** (**TCQ**) is the peak taxi industry body in Queensland comprising 600 members. The TCQ distributes a weekly electronic newsletter to an email distribution list of 1,700 subscribers. It will publish entries in three to four editions of its newsletter between the notice date and deadline to inform readers of the class action and direct potential group members to Maurice Blackburn's website.

(vi) The **Queensland Taxi Licence Owners Association** (**QTLOA**) comprises 1,136 members approximately half of which are taxi licence owners. Its Chief Executive Officer, Paul **Scaini**, is a member of nine Facebook pages associated with the Queensland taxi industry. The QTLOA will distribute a copy of the notice by email within one week of notification of the Court's orders. Mr Scaini will publish posts on each of the Facebook pages informing members of the class action and directing potential group members to Maurice Blackburn's website.

(vii) **Limo Action Group Queensland** (**LAGQ**) was founded in 2016 to represent the interests of limousine owners, operators and drivers in Queensland. LAGQ holds contact details for approximately 370 former and current members. Within one week of notification of the Court's orders, LAGQ will distribute a copy of the notice to its email list and publish a post on its Facebook page informing members of the class action and directing potential group members to Maurice Blackburn's website.

(viii) There are no peak associations for the taxi, hire car or limousine industries in Western Australia. Maurice Blackburn identified two prominent individuals who have the capacity to reach a wide cohort of

potential group members in WA.

Athan Tsirigotis has 20 years' experience in the taxi industry and is a registered group member. Mr Tsirigotis operate a Facebook group called "Perth Taxi Group" comprising 3,800 members. He is also a member of the Charter Vehicle Operators Facebook group. Mr Tsirigotis will publish a post in each Facebook group, within one week of being notified of the Court's orders, informing members of the class action and directing potential group member to Maurice Blackburn's website.

Julie Murray is the Business Manager of Mandurah Taxi Pty Ltd and is the former secretary and treasurer of the now wound up WA Country Taxi Operators Association. Ms Murray holds 40 email addresses for former members of her association. She will distribute a copy of the notice by email within one week of being notified of the Court's orders.

(ix) Maurice Blackburn identified national-level industry bodies.

The **Australian Taxi Industry Association** (**ATIA**) is the peak national body for the taxi industry. It comprises 50 member organisations with approximately 9,000 to 10,000 taxis nationally. Within one week of being notified of the Court's orders, the ATIA will distribute a copy of the notice by email to its member organisations and request that the notice is distributed amongst their members.

(x) **Black & White Cabs** is one of the largest taxi networks in Australia and has fleets across Queensland, New South Wales, Western Australia and Victoria. Black & White Cabs holds 1,584 email addresses for taxi licence owners and operators. The company's Executive Administrator, Kathy **Boorman** operates a Facebook page called "Black & White Cabs Family Page" comprising approximately 3,200 members. Ms Boorman is also a member of the Australian Taxi Owners Facebook page along with approximately 1,800 other members. Black & White Cabs will distribute

a copy of the notice by email within one week of notification of the Court's orders. Ms Boorman will publish posts on each of the Facebook pages informing members of the class action and directing potential group members to Maurice Blackburn's website.

(b) The plaintiffs had previously filed subpoenas to the regulators of state licences and accreditations but Mr Donelly explained that the subpoenaed lists were of "varying quality" and not useable for the purpose of distributing notices.

25 Mr Donelly's evidence was that group members are active and engaged in the proceedings and the proceedings have been well publicised. A significant number of group members have already registered their claims with Maurice Blackburn. The notices would occur against a background of significant media coverage of these proceedings. Maurice Blackburn conducted what Mr Donelly described as a well-publicized campaign to engage group members. The proceedings were the subject of various newspaper articles, radio and television broadcasts, published some time ago, between November 2017 and November 2019. A monthly taxi and hire car magazine (*DriveNow,* no longer in print) published regular reports on the proceedings between 2017 and early 2023. Maurice Blackburn held a number of "town hall" meetings in Sydney, Brisbane and Perth, for potential group members. It was submitted that that those factors increase the likelihood that the notice will come to non-registered group members' attention and, more generally, mitigate against the risk that class closure will affect significant numbers of non-registering group members.

26 On the basis of the above-mentioned evidence, I consider that orders requiring group members to register an interest in the proceeding in order to participate in any settlement reached before trial, are appropriate to ensure that justice is done in the proceeding. My reasons can be briefly stated.

27 *First*, the issues raised by the proceedings are complex both legally and factually. All litigation carries risk. To state the matter simplistically, as complexity increases, risk to both parties, increases. Should the proceedings not settle, the costs of conducting

the joint trial (set down for 10 weeks commencing March 2024) will be very substantial. If the proceedings are resolved on terms that meet Court approval, group members will have obtained an outcome judged to be in their interests while avoiding the significant additional costs of trial and the risks and uncertainties inherent in litigation. A step that is judged to be likely to assist the parties to resolve the proceedings is a step towards producing a tangible benefit for group members. I accept, for the reasons given in evidence by the parties' solicitors, that closing the class in each case is a step likely to assist the parties to resolve the proceedings. As the Court of Appeal said in *Regent Holdings,* the more accurate and complete the available information as to quantum, the more likely that rational settlements will be achieved.[8] Where a class closure order operates, as in this case, to facilitate the desirable ends of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in a proceeding and may therefore be regarded as an order that is appropriate to ensure that justice is done in the proceeding, under ss 33ZF and 33ZG of the Act. In such circumstances, orders closing the class in each case also serve the overarching purpose.[9]

28 *Second*, having regard to the evidence of Mr Donelly, I am satisfied that group members will receive appropriate and sufficient notice of the requirement to register an interest in the proceedings as a condition of claiming a benefit, should it become available under any settlement reached before trial.

29 *Third*, I am satisfied that there no identifiable prejudice to group members in requiring registration now, rather than at some later at which the proceeding might resolve or be decided on terms that require group member participation in order to claim a benefit.

30 *Fourth*, the orders are in effect subject to further order. At this point, group members are to be notified that upon reaching any agreement to settle the proceedings prior to

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8 *Regent Holdings Pty Ltd v State of Victoria and Anor* (2012) 36 VR 424, 429-430 [20]-[23] (***Regent Holdings***), cited in *Matthews* (n 3) 275 [80(d)] in the context of the class-closure application discussed earlier in these Reasons..

9 See *Civil Procedure Act 2010* (Vic) s 7.

3 March 2024, any Group Member who by the Class Deadline has not registered or has not opted out of the proceeding in accordance with the Court's orders, will remain a Group Member for all purposes of this proceeding but shall not, without leave of the Court, be permitted to seek any benefit pursuant to that settlement. If any group member can sufficiently demonstrate unfair prejudice to them in the operation of the orders, they may apply to be re-admitted to the class, by exercise of the Court's discretion.

31 Orders will be made accordingly.

CERTIFICATE

I certify that this and the fifteen preceding pages are a true copy of the reasons for Judgment of Nichols J of the Supreme Court of Victoria delivered on 21 July 2023.

DATED this twenty-first day of July 2023.

Associate