JONES DAY

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COMMENTARY

Commencement Requirements Relaxed for Australian Class Actions?

Key Points

- To commence a class action in the Federal Court, the class action legislation provides that "7 or more persons" must "have claims against the same person".
- In class actions involving multiple respondents, a body of inconsistent Federal Court case law has emerged on the question of whether this requirement is met only when all class members have a claim against each of the respondents (the narrow view) or whether it is met simply where the class representative does (the wide view). In *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, the Full Court proceeded on the basis that the narrow view was correct. In contrast, in *Bray v Hoffman La-Roche Ltd* (2003) 130 FCR 317, a Full Court majority preferred the wide view, suggesting that only the class representative (and not the class members) must have a claim against each respondent. Numerous Federal Court judgments since 2003 have split on the correct approach, following one line or the other.
- The latest word on the issue is Farrell J's judgement of 2 May 2014 in *Gray v Cash Converters International Limited* [2014] FCA 420. In that decision, Farrell J followed the *Bray* approach. Unfortunately, in light of the history of the inconsistent Full Court judgments, and the related inconsistent subsequent single judge judgments, Farrell J's judgment does not resolve the debate.
- In practical terms, resolution will require a definitive ruling from, ideally, a five-member bench of the Full Court of the Federal Court or the High Court or, as has occurred in NSW in respect of its class action procedure, legislation to put the issue beyond doubt. (The NSW legislation adopts the *Bray* approach).

Background

Ms Gray commenced two class actions related to the provision of consumer credit by Cash Converters franchises through "personal loan" and "cash advance" contracts. The respondents are alleged to have engaged in unconscionable conduct in contravention of s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), and the interest/fees charged in the credit contracts and cash advance contracts were in contravention of the *Credit (Commonwealth Powers) Act 2010* (NSW), which caps the maximum annual interest rate on consumer credit contracts.

In the personal loan proceedings, Ms Gray obtained personal loans from both Safrock Finance Corporation (Qld) Pty Ltd and Cash Converters Personal Finance Pty Ltd, but the members of the class in that proceeding obtained finance from one or the other but never both. A claim of accessorial liability is also made against Cash Converters International Pty Ltd, the parent company of the other Cash Converter entities, by all class members.

The same representative, this time in proceedings for the cash advance contracts, received credit from only one Cash Converters franchise, Ja-Ke Holdings Pty Ltd, whereas the majority of class members received credit from different franchisees who were not parties to the proceedings. The representative and the class members also made claims for accessorial liability against the same respondents, Cash Converters Pty Ltd and Cash Converters International Pty Ltd.

Commencing Class Action Proceedings with Multiple Respondents

To commence a class action, the members of the class must comply with s 33C (1) of the *Federal Court of Australia Act 1976* (Cth), which provides:

> (1) Subject to this Part, where:
> (a) 7 or more persons have claims against the same person; and
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
> a proceeding may be commenced by one or more of those persons as representing some or all of them.

The respondents in both proceedings argued that in neither proceeding did the class comply with s 33C (1) (a) above because the class members did not claim against each and every respondent. The class members in the personal loans proceedings had claims against either Safrock Finance or Cash Converters Personal Finance but not both. The claims of the class in the cash advances proceedings did not comply as they related to many different franchises, not the respondent franchise with which the representative dealt. Thus it did not matter that the representative and the class members had claims for accessorial liability against the same two Cash Converters entities in every case. They were alleged to be accessories as they shared directors and officers with the franchises and had control over the lending system.

Currently, the law is divided upon the issue of whether the class members must claim against each and every respondent. Sackville J, as part of a Full Federal Court, in *Philip Morris Ltd v Nixon*, reasoned that where there are multiple respondents, every class member must have a claim against each of them since where there is a single respondent, every class member must have a claim against that respondent.[1]

Equally, in a judgment of the Full Court of the Federal Court, in *Bray v F Hoffman La-Roche Ltd*, Carr J held that it is only the representative who must have a claim against every respondent.[2] The class members need only claim against one of the respondents. Finkelstein J, in the same case, considered that conclusion consistent with the policies of the Act: to reduce costs, enhance access to justice, improve the usage of court resources and determine common issues consistently.[3]

Personal Loans Proceedings. Farrell J preferred the conclusion of Carr and Finkelstein J in *Bray v F Hoffman La-Roche Ltd* for the reason that it accorded with the policy behind the introduction of class actions into the Federal Court and with the overarching purpose of procedural decisions found in s 37M of the *Federal Court Act 1976:* to resolve disputes quickly, efficiently and inexpensively. The overarching purpose has not previously been considered in the cases on this question. As Farrell J preferred the *Bray* approach, the class complied with s 33C requirements. It did not matter that the representatives claimed against one or other, but not both, of Safrock Finance Corporation (Qld) Pty Ltd and Cash Converters Personal Finance Pty Ltd. It was enough that the representative party, Ms Gray, had claimed against them both.

Cash Advances Proceedings. Farrell J also accepted that the class definition in these proceedings satisfied the requirements of s 33C. As a starting point, Farrell J noted that a claim for accessorial liability under the *Trade*

Practices Act 1974 (Cth), and its successor, the *Competition and Consumer Act 2010* (Cth), is distinct from a claim against a principal contravener. The representative joined the franchisee with which she dealt but none of the franchisees with which the group members dealt. Since Farrell J preferred the *Bray* approach on that issue, the class complied with s 33C. It was enough that the representative claimed against the franchisee; the group members were not obliged to do so. The claims of the group members as against the Cash Converters entities involved common issues of law or fact, namely whether those entities, in sharing directors and officers with the franchises and directing their lending practices, had knowledge of the contraventions. The result was that there were substantial common issues of law or fact, and s 33C was thereby satisfied.

Ramifications

The disagreement over the interpretation of s 33C(1)(a)'s requirement that "7 or more persons have claims against the same person", as shown by the conflicting positions taken in *Philip Morris* and *Bray*, has raged for more than 10 years.

The *Philip Morris* approach tends to create smaller, more cohesive classes as the class members, like the representative party, must have a claim against all respondents. The *Bray* approach allows for larger, less cohesive classes as class members with claims against only some of the respondents may be included. Under both approaches, the cohesiveness of the class is also determined by s 33C(1)(b), "same, similar or related circumstances", and s 33C(1)(c), "a substantial common issue of law or fact". Consequently, the *Philip Morris* approach is likely to lead to class actions that are more manageable and have less individual or sub-group issues than under the *Bray* approach. However, the *Philip Morris* approach is said to create a proliferation of class actions, as separate class actions need to be commenced against individual or sub-sets of respondents so as to comply with s 33C(1)(a). The multiple class actions, involving some overlapping common questions, may then create case management issues.

The *Philip Morris* approach has tended to hold sway for most of the past 10 years, but various commentators and law reform reports have argued for change. This has resulted in the class action procedure that was adopted in New South Wales in 2011, which was very closely modelled on the Federal procedure, including a provision to adopt the *Bray* approach.[4]

In the Federal Court, even after the decision in *Gray v Cash Converters International Limited* [2014] FCA 420, the issue remains vexed and requires an authoritative decision by a higher court.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

John Emmerig
Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Michael Legg
Sydney
+61.2.8272.0720
mlegg@jonesday.com

Andrew Berriman, an associate in the Sydney Office, assisted in the preparation of this Commentary.

Endnotes

1 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 at 514.
2 *Bray v F Hoffman La-Roche Ltd* (2003) 130 FCR 317 at 345-346.
3 *Bray v F Hoffman La-Roche Ltd* (2003) 130 FCR 317 at 373-374.
4 *Civil Procedure Act* 2005 (NSW) s 158(2).