



Federal Court Relaxes Requirements for Australian Class Actions

Key Points:

- To commence a class action in the Federal Court, s 33C(1)(a) of the class action legislation provides that “7 or more persons” must “have claims against the same person”.
- The Full Court in *Cash Converters International Limited v Gray* [2014] FCAFC 111 posed the question: “Does s 33C(1) of the FCA require that each group member have a claim against each respondent to the proceedings?” The Full Court’s answer was no.
- The decision proceeded on the basis that to satisfy the standing requirements, a class representative must have a claim against each respondent. Further where there are seven class members with a claim against one respondent, then the proceedings may be commenced. The addition of other group members and other respondents is not prohibited. Consequently multi-respondent class actions are now easier to commence.

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 proceedings 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;
- 2) 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 claim 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 to 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.

Prior to the current case, the law was 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 s 33C(1)(a) requires every applicant and represented party to have a claim against the one respondent or, if there is more than one, against all respondents. His Honour relied on the text of the section

and the approach of the Australian Law Reform Commission that recommended the introduction of class actions.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

Decision at First Instance

Farrell J preferred the conclusion of Carr and Finkelstein JJ 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 of Australia Act 1976* (Cth): 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, both classes complied with the requirement of s 33C(1)(a).⁴

The Full Court

The respondents sought leave to appeal on the basis that s 33C(1) requires that each group member whom Ms Gray represents must have a claim against each respondent to the proceeding and that both proceedings are not properly constituted because this requirement is not met. The Full Court granted leave to appeal but dismissed the appeal.

The decision proceeded on the basis that a class representative must have a claim against each respondent. This is required by s 33D, which deals with standing of the representative party.

The Full Court posed the question: “Does s 33C(1) of the FCA require that *each* group member have a claim against each respondent to the proceedings?” The Full Court’s answer was no.

The Full Court first sought to construe the statute by reference to its text, context and purpose. The Full Court held that requirements not mandated by the legislation for commencing a class action should not be otherwise imposed. Provided there are seven class members with a claim against one respondent, then the proceedings may be commenced. The addition of other group members and other respondents is not prohibited. Indeed, joinder may be employed to add other respondents to the proceedings in respect of whom only some group members have claims.

The Full Court considered the earlier decisions of *Philip Morris Ltd v Nixon* and *Bray v F Hoffman La-Roche Ltd*. The Full Court was of the view that the specific issue raised in the current appeal was not in issue in *Philip Morris* because it was not in dispute. The parties had accepted that each group member must have a claim against each respondent. If a point is not in dispute in a case, then the decision lays down no legal rule concerning that decision.⁵ The Full Court considered *Bray* and acknowledged that each of the three judges in that Full Court addressed the issue differently. Carr J stated that it was not necessary to decide the question, but he agreed with Finkelstein J's reasons. Finkelstein J, as explained above, disagreed with *Philip Morris*. Branson J was not persuaded that *Philip Morris* was clearly wrong and considered that it should be followed. In the current judgment, the Full Court endorsed the reasoning of Finkelstein J without explaining whether the point had needed to be resolved in *Bray*. Finkelstein J stated:

It can immediately be acknowledged that a properly constituted representative proceeding must involve a group of seven or more persons each of whom has a claim or claims against one person. But that is all the section requires. It simply does not address the situation where some members of the group, say 10 out of a group of 15, also have claims (that is, causes of action) against some other person, being causes of action which satisfy both s 33C(1)(b) (each claim arises out of the same circumstances) and s 33C(1)(c) (each claim gives rise to common issues of law or fact).

Ramifications

The disagreement over the interpretation of s 33C(1)(a)'s requirement that *seven 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 Full Court in *Cash Converters International Limited v Gray* [2014] FCAFC 111 has sought to authoritatively decide the question of the interpretation of s 33C(1)(a) by siding with *Bray* and holding that it is unnecessary for each class member to have a claim against each respondent. Some class members may have a claim against only some respondents.

The Full Court also seems to be saying that it is not necessary for seven or more class members to have a claim against each respondent. Rather, in the entire class action, all that is needed is seven class members with a claim against one respondent and the representative party has a claim against each respondent. Other respondents can then be joined to the proceedings.⁶ However, as this question was not strictly necessary to be decided on the case before the Full Court, it may be regarded as dicta.

The Full Court's decision is likely to lead to larger, less cohesive classes as class members with claims against only some of the respondents may be included. However, compliance with s 33C(1)(b)—*same, similar or related circumstances*, and s 33C(1)(c), *a substantial common issue of law or fact*—is still required. Nonetheless, there are likely to be more individual or subgroup issues than under the *Philip Morris* approach. Australian class actions may become more protracted. However, the need for multiple class actions to take account of multiple respondents should no longer be needed.

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

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 *Gray v Cash Converters International Ltd* [2014] FCA 420. See also *Jones Day Commentary*, “Commencement Requirements Relaxed for Australian Class Actions?” (June 2014), available at <http://www.jonesday.com/commencement-requirements-relaxed-for-australian-class-actions-06-04-2014>.
- 5 See *Coleman v Power* (2004) 220 CLR 1 at 44–45.
- 6 *Cash Converters International Limited v Gray* [2014] FCAFC 111 at [22].