Multiple respondents in class actions: The Federal Court resolves the debate

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Introduction

Class action proceedings against multiple respondents have been the subject of conflicting judicial authority and debate. The Full Court of the Federal Court of Australia in Cash Converters International Limited v Gray recently considered whether s 33C of the Federal Court Act 1976 (Cth) (FCA) requires each group member in a representative proceeding to have a claim against each respondent.

Seemingly resolving more than ten years of uncertainty, the Full Court held that it is not necessary for each group member to have a claim against each respondent. In doing so, the Full Court thoroughly explored the legislative framework surrounding commencing a representative proceeding, as well as the legal authorities which have considered the issue.

The dispute

Ms Gray (as lead applicant on behalf of approximately 40,000 group members) commenced two representative proceedings under Part IVA of the FCA against various credit providers and their franchisees (collectively, Cash Converters). The claims against Cash Converters alleged that certain fees charged, and interest rates applied, under loan agreements were either void or unconscionable.

Section 33C(1) of the FCA (which is contained within Division 2 of Part IVA) provides that:

'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.'

It was common ground that s 33D of the FCA required Ms Gray (as representative applicant) to have a claim against each respondent (which she did). However, not every member of the class had a claim against each respondent. Cash Converters therefore argued that the proceedings were not properly constituted under s 33C(1) and should be struck out.

Cash Converters was unsuccessful at first instance. On appeal, it submitted that as a matter of statutory construction, the ordinary and natural meaning of s33C(1)(a) is that each of the seven persons must have claims against the ‘same person’ – being the respondent or respondents to the suit. As some group members did not have claims against some respondents, according to Cash Converters, this meant that the representative proceedings had not been properly commenced.
Cash Converters relied upon the Full Court decision of *Philip Morris (Australia) Ltd v Nixon* in which the parties had accepted 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 respondent, against all respondents. The Court in *Philip Morris* acknowledged that the parties’ agreement on the issue was consistent with the structure of the legislation.

Ms Gray argued that s 33C(1) does not impose such a requirement and, as such, the representative proceedings had been properly commenced. Ms Gray relied upon the Full Court decision of *Bray v F Hoffman-La Roche Ltd* in which the Court disagreed with the approach taken in *Philip Morris*. The first instance judge had preferred the reasoning in *Bray*.

**The decision**

The question before the Full Court was what does s 33C(1) require if the applicant’s circumstances (and those of the group members) give rise to a claim of multiple wrongdoing against more than one respondent.

Analysing s 33C(1) of the FCA, the Full Court held that:

- the section only requires a properly constituted representative proceeding to involve a group of seven or more persons, each of whom has a claim or claims against one person;
- the section does not address the situation where some group members do not have a claim against some respondents, and the court should not take it upon itself to read such a requirement into the legislation;
- to require each class member to have a claim against each respondent would impose a condition inconsistent with the words used in, and the purpose of, the legislation, and would likely require a complicated re-structure of a representative proceeding or a separate action completely undermining many of the objectives of the legislation (for example, a reduction of legal costs, promotion of the efficient use of court resources, etc.); and
- the section will be satisfied provided that the applicant and six other persons have a claim against each respondent.

As such, the Full Court concluded that the proper construction of s 33C(1) does not require every group member to have a claim against all respondents and, therefore, Ms Gray’s representative proceedings had been properly commenced.

In resolving the inconsistency between the legal authorities, the Full Court noted that the parties in *Philip Morris* accepted (wrongly in the Full Court’s view) that s 33C(1) required each party to have a claim against each respondent. As the issue was therefore not in dispute in those proceedings, the case was not binding and the Full Court was not obliged to follow it.

In relation to *Bray*, while the Full Court acknowledged that each of the judges addressed the issue differently, it ultimately agreed with the comments of Finkelstein J in *Bray*:

‘… I am of the very firm view that there is nothing in the language of s33C(1), when considered in isolation or in its setting, which requires that result [that it is necessary for every applicant and every represented party to have a claim against all respondents].’

Cash Converters’ appeal was accordingly dismissed.

**Concluding comments**

Allowing group members to not have claims against some respondents avoids the need to commence separate proceedings or having to re-structure a representative proceeding (for example, by creating a ‘sub-group’ or appointing additional applicants). It will likely be welcomed as it means that multiple class actions arising from the same substratum of facts should no longer be required.

However, it will not be without its own complications, particularly where a class action is settled on a global basis without reference to the respondents’ liabilities to particular class members. It will create an extra layer of complexity about how the settlement ‘pie’ should be divided. In those circumstances, settlements will need to be carefully considered to avoid disputes between class members.

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