

# Representative Proceedings: To plead or not to plead?

*Philip Morris (Australia) & Ors v Nixon & Ors [2000] FCA 229*

The Federal Court has held that to satisfy section 33C requirements of the *Federal Court of Australia Act 1976* (Cth) for 'representative proceedings', actions involving more than one defendant will only proceed when all claims made by a class are against each of the defendants acting collectively and not individually. On appeal to the High Court this decision was upheld.

## The facts

A number of individuals attempted to bring representative proceedings against three leading cigarette manufacturers pursuant to section 33C of the *Federal Court of Australia Act*. The class alleged that each defendant had engaged in a systematic course of misleading and deceptive conduct in inducing each member of the class to have either taken up smoking or to continue smoking. It was submitted that each defendant knew of the others' conduct, encouraged it, and permitted it to continue. Breaches of section 52 of the *Trade Practices Act* were alleged, as were two counts of negligence involving a breach of duty of care, although one was later withdrawn.

In separate judgments, the Full Court of the Federal Court (Spender and Hill JJ concurring with Sackville J) overturned the decision of Wilcox J that the action proceed as a representative proceeding.

## To claim against "the same person"

Of concern to the Court was that each member of the class did not have an individual cause of action against each of the respective defendants, though taken as a whole all claims made did involve each of the three defendant cigarette manufacturers. It was argued on behalf of the class that the case raised issues that went beyond merely a claim founded on the conduct of a particular defendant towards a particular consumer, that it painted a picture on a "larger canvass"; that cigarette manufacturers be called to account for their collective conduct that deceived consumers by representing that smoking was safe. The case ultimately failed on the point of collective conduct. It was held by the Court that as the class alleged certain misconduct against each of the defendants *individually*, the threshold requirement in section 33C(1)(a) that *each* claim be made against "the same person"

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was not satisfied.

Wilcox J had granted representative proceeding status with reference to an earlier decision handed down by His Honour, stating:

"... the only way of making sense of s33C(1)(a) is to interpret it as restricting the use of Pt IVA to claims that, by their nature and assuming that they have substance, are shared by at least seven persons. I use the word 'shared' in the sense explained by pars (b) and (c); that is, that the claims of all the persons are in respect of, or arise out of, the same, similar or related circumstances and give rise to a substantial

common issue of law or fact."

This is where the Full Federal Court clearly diverges. It will not suffice that a class as a whole has claims that span or arise from circumstances involving more than one defendant. It was held that members could proceed with their cause of action on an individual basis.

A final appeal was made to the High Court<sup>1</sup> against the decision of the Federal Court to dismiss an Amended Statement of Claim, and of its refusal to grant leave to re-plead the representative proceedings issue. Their Honours (Gleeson CJ, Kirby and Callinan JJ) concerned themselves with the issue of

public interest in determining whether to grant leave to re-plead. Kirby J pointed out that by proceeding on an individual basis as opposed to a class "puts them [the members of the class] out of court on a pleading point on a matter of general public importance"<sup>2</sup>. Despite this concern the High Court refused leave on all grounds. **PL**

**Footnotes:**

<sup>1</sup> *Nixon & Ors. v. Philip Morris (Australia) & Ors.* (unreported) HCA (21 June 2001)

<sup>2</sup> *Ibid.*



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