HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: BHP GROUP LIMITED
Appellant

and

VINCE IMPIOMBATO
First Respondent

KLEMWEB NOMINEES PTY LTD
(AS TRUSTEE FOR THE KLEMWEB SUPERANNUATION FUND)
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. This appeal raises a single question of law: who may a representative applicant include as a "group member" under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the **Act**); anyone in the world, or only persons within the territory of Australia?

3. Answering that question requires determining whether, as the appellant contends: (a) the constructional presumption against the extraterritorial operation of legislation

applies to Part IVA of the Act; (b) the presumption has not been rebutted by necessary intendment; (c) consequently, the powers and procedures within the Part only apply to persons within Australia such that a representative applicant cannot bring a claim on behalf of a non-resident.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. It is not necessary to give notice under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Judgments below

5. The judgment of the Full Court of the Federal Court of Australia (Middleton, McKerracher and Lee JJ) is *BHP Group Limited v Impiombato* (2021) 151 ACSR 634.

6. The judgment of the Federal Court of Australia (Moshinsky J) is *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720.

Part V: Facts

7. BHP Group Limited (**BHP**) is a company registered in Australia and listed on the Australian Securities Exchange (**ASX**).[1] At all material times, BHP shared a dual listed company structure with a separate company, then known as BHP Billiton Plc (**BHP Plc**), which was registered in the United Kingdom and listed on the London Stock Exchange (**LSE**), with a secondary listing on the Johannesburg Stock Exchange (**JSE**).[2]

8. Through a wholly-owned subsidiary, BHP held a 50% interest in a Brazilian company which owned and operated the Germano complex in the state of Minas Gerais, Brazil.[3] The complex included the Fundão Dam, which failed in November 2015.[4]

[1] *BHP Group Limited v Impiombato* (2021) 151 ACSR 634 (**FCAFC**), [2] (CAB **77**).
[2] *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720 (**FCA**), [4], [38] (CAB 10-11, 24-25); FCAFC, [2] (CAB 77).
[3] FCA, [5] (CAB 11).
[4] FCA, [5], [6] (CAB 11); FCAFC, [2] (CAB 77).

9. The respondents are the representative applicants in a class action proceeding brought against BHP arising from the failure of the dam. They allege breaches by BHP of its continuous disclosure obligations, and misleading or deceptive conduct, in relation to information disclosed to the market regarding the Fundão Dam. The respondents allege that, following the dam failure, BHP's share price declined significantly on the ASX, as did the price of BHP Plc shares on each of the LSE and the JSE.[5]

10. The group definition purports to include persons who, during a defined period preceding the dam failure, contracted to acquire fully paid up ordinary shares in: (a) BHP on the ASX; (b) BHP Plc on the LSE; and/or (c) BHP Plc on the JSE, and are thereby alleged to have suffered loss.[6]

11. A substantial number of shareholders, and the vast majority of BHP Plc shareholders, falling within the group member definition are not resident in Australia.[7]

12. This appeal does not raise any factual issue.[8]

Part VI: Argument

Part IVA of the Act

13. The respondents brought the proceedings under Part IVA of the Act, which broadly permits a representative party to commence a class action on behalf of persons, styled as group members, who have claims that arise out of the same, similar or related circumstances and which give rise to a substantial common issue of law or fact (s 33C). The consent of group members is generally not required (s 33E). The legislation embodies an 'opt-out' class action model (s 33J).

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[5] FCAFC, [2] (CAB 77).
[6] FCA, [3], [20] (CAB 10, 16); FCAFC, [3] (CAB 77).
[7] FCA, [39]-[43] (CAB 25-28).
[8] The evidence that was adduced at first instance before Moshinsky J was directed to alternative relief from that which is sought on this appeal. That alternative relief was an order pursuant to s 23 and/or s 33ZF of the Act that, as a matter of discretion, the Court should exclude non-resident group members to ameliorate the prejudice that their inclusion in the group caused BHP Ltd and BHP Plc. See: FCA, [12](b).

14. Group members are not parties to the proceeding and may be unaware of the action, notwithstanding that they are persons on whose behalf the representative proceeding was commenced (s 33A). As French CJ, Kiefel, Keane and Nettle JJ observed in *Timbercorp Finance Pty Limited (in liq) v Collins*,[9] "group membership … does not require any choice to be exercised".[10]

15. Settlement or discontinuance of representative proceedings requires the Federal Court's approval (s 33V). The Federal Court may determine a matter in a representative proceeding (s 33Z). The Court's judgment (which includes any order approving a settlement under s 33V) is binding on group members, other than those who have opted out (s 33ZB).[11]

16. Section 33ZB creates a form of "statutory estoppel",[12] which, as Moshinsky J and the Full Court noted, bars group members from bringing subsequent proceedings in the Federal Court (or any other Australian court) raising the same issues.[13]

17. The central question raised below was: 'does Part IVA's reference to a "person" who can be a "group member" include a person who is outside the territory?' Throughout the common law world, the question of the application of class action legislation to non-residents is vexed, as the survey undertaken in Mulheron (2019),[14] referred to by the Full Court,[15] demonstrates. Class action participation by non-residents has, as the learned author points out, been the subject of differing "legislative choices".

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[9] *Timbercorp Finance Pty Limited (in liq) v Collins* (2016) 259 CLR 212 at 233 [44].
[10] This observation was made in respect of Pt 4A of the *Supreme Court Act 1986* (Vic), but applies equally to Pt IVA of the Act.
[11] In *Dyczynski v Gibson* (2020) 280 FCR 583, at [338], Lee J described s 33ZB as "the most important provision within Pt IVA", echoing the Full Court of the Federal Court's description of it in *Bright v Femcare* (2000) 100 FCR 331 at [25] as the "pivotal" provision of the Part.
[12] See *Timbercorp Finance Pty Limited (in liq) v Collins* (2016) 259 CLR 212 at [52] per French CJ, Kiefel, Keane and Nettle JJ.
[13] FCA, [104] (CAB 46); FCAFC [65] (CAB 90).
[14] Mulheron R, "Asserting Personal Jurisdiction over Non-Resident Class Members: Comparative Insights for the United Kingdom" (2019) 15(3) *Journal of Private International Law* 445.
[15] FCAFC, [46] (CAB 85-86).

18. The Full Court[16] equated Part IVA's silence with respect to its application to persons outside the territory with a legislative choice that it should so apply and, in doing so, held that the presumptions against extraterritoriality had "no work to do in the search for meaning" of the statutory provisions here in issue.[17] This was an error. The "legislative choice" embodied in Part IVA is one which must be discerned having regard to the statutory and common law presumption that general words in legislation do not apply to persons and things beyond the territory of the Commonwealth unless the contrary intention appears.

10 ***The presumption against the extraterritorial operation of legislation***

19. Every Commonwealth statute falls to be construed against constructional norms embedded in statute and entrenched in the common law. The presumption against extra-territorial application of legislation is one such constructional norm.

20. The existence and nature of the presumption at common law is well-established. The comity of nations gives rise to a presumption that one country's legislature will not deal with persons or matters over which another sovereign state properly has jurisdiction.[18] When interpreting general words in legislation the prima facie presumption is that "a
20 statute is to be construed as limited in its operation to the territory or nationals of the state which enacts it".[19]

21. As O'Connor J pointed out in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*,[20] absent that presumption, most statutes (read literally) would be taken to apply to the whole world. To avoid that absurd result, it is a "well settled rule of

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[16] FCAFC, [46]-[54] (CAB 85-88).
[17] FCAFC, [44] (CAB 85).
[18] *Niboyet v Niboyet* (1878) 4 PD 1, at 7 per James LJ; *Morgan v White* (1912) 15 CLR 1 at 13, per Isaacs J; *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423-424 per Dixon J (***Barcelo***); *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 600-601 per Dixon J; *Reg v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, at 275 per Dixon CJ; *Meyer Heine Pty Ltd v China Navigation Company Ltd* (1966) 115 CLR 10 (***Meyer Heine***), at 22-23 per Kitto J (McTiernan J agreeing), 30–31 per Taylor J, 38 per Menzies J, 43 per Windeyer J; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 416 [45] (referring with approval to *Meyer Heine*). See also Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) at 218 [5.12].
[19] *Meyer Heine* at 43 per Windeyer J.
[20] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J.

construction" that "an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control".[21]

22. That presumption may only be displaced "by express words or necessary implication".[22]

23. Consistent with the common law presumption, s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) provides that "[i]n any Act…references to localities, jurisdictions and other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the Commonwealth".[23]

24. The provisions of Part IVA and the words which identify those on behalf of whom proceedings may be brought—"persons", "group members"—are general (ss 33A, 33C). It was not open to the Full Court simply to ignore, or treat as having no application, the statutory and common law presumptions against which the Part was enacted and falls to be construed.

25. The Full Court, with respect, correctly identified that the task of statutory interpretation must begin and end with a consideration of the text.[24] The Full Court went on to say that "[t]he language of s 33C(1) is plain" and to hold that "[a] group member may be <u>any person</u> who has the characteristics specified".[25]

26. But the description of the language of s 33C(1) as "plain"[26] bespeaks the erroneous approach the Full Court took to construing Part IVA. The meaning of the words may

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[21] *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601, per Dixon J.
[22] *Morgan v White* (1912) 15 CLR 1 at 13, per Isaacs J.
[23] Commonwealth is defined as "the Commonwealth of Australia and, when used in a geographical sense, includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory" (s 2B of the *Acts Interpretation Act* 1901 (Cth)).
[24] FCAFC, [40]-[41] (CAB 84-85), having quoted from the reasons of French CJ, Hayne, Crennan, Bell and Gageler JJ in *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].
[25] FCAFC, [42] (CAB 85), emphasis added.
[26] FCAFC, [42] (CAB 85).

have "an apparently clear ordinary or grammatical meaning".[27] However, the legal meaning of the words is only arrived at "after the process of construction is complete",[28] including by application of the "canons of construction".[29] To say that the task of statutory construction must begin and end with consideration of the statutory text is not to endorse a literal approach to statutory construction. There is work to be done in between. [30] Were that not so most statutes would, as O'Connor J pointed out, apply to the whole world.

27. In this case, the Full Court failed to complete the process of construction because it wrongly concluded that the presumption against extraterritorial operation of legislation had "no work to do".[31] The result of the non-application of the presumption was that the Full Court did not discern the *legal* meaning of the statute (instead cleaving to the *literal* meaning of the words).

Application of the presumption against extraterritorial application

28. Taken literally, the provisions of Part IVA would allow an applicant to advance claims of the kind described in s 33C on behalf of any person in any country of the world, and have the Federal Court determine them in a (purportedly) binding way. Therefore, the presumption against extraterritorial operation is engaged.

29. Contrary to the Full Court's reasoning,[32] the presumption's engagement does not depend on looking to whether the provision in question concerns a matter where jurisdiction could properly belong to another sovereign state and then, and only then, applying the presumption. Its application is not conditional on anterior identification of a sovereign state which may have a 'superior' claim to the exercise of jurisdiction. Likewise, the presumption is of general application; it refers, in addition to localities and jurisdictions, to "other matters and things" and prescribes that those "matters and things" *shall be construed* as matters and things in and of the Commonwealth.[33] The Full Court's

[27] *R v A2* (2019) 269 CLR 507 at 521 [32].
[28] *R v A2* (2019) 269 CLR 507 at 521 [32] (citation omitted).
[29] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78] (citation omitted).
[30] *R v A2* (2019) 269 CLR 507 at 520-521 [32] (emphasis added; citations omitted).
[31] FCAFC, [44] (CAB 85).
[32] FCAFC, [43]-[44] (CAB 85).
[33] Section 21(1)(b) of the *Acts Interpretation Act 1901* (Cth).

reasoning imposes a pre-condition on the presumption's application (*viz*, looking first to identify a potential jurisdictional conflict) which is novel and erroneous.

30. Displacement of the presumption requires clear words or must arise by necessary implication.[34] There are no express words in the Act, or the amending legislation which introduced Part IVA, that do so. An intention for Part IVA to apply extraterritorially also does not emerge by necessary implication from the legislation, read in context and having regard to the legislative purpose and construing the statute as a whole.[35] On the contrary, there are a number of indications that tell against the rebuttal of the presumption that Parliament intended for Part IVA to operate within the territorial limits of Australia. In particular:

a. The Act as a whole is not expressed in a general way to have extraterritorial effect. For example, s 3 states that the Act extends only to "every external Territory", being the external territories of Australia. The capitalised "Territory" appears elsewhere in the Act only as a reference to an Australian "Territory"[36] and is used in contradistinction to "foreign country".[37]

b. Section 18 provides that the "process of the Court runs, and the judgments of the Court have effect and may be executed, *throughout Australia and the Territories*" only.[38]

c. The "statutory estoppel" created by s 33ZB is at the core of the legislative scheme[39] and is essential to ensuring that respondents are not subjected to multiple proceedings brought in respect of the same subject matter by or on behalf

[34] *Morgan v White* (1912) 15 CLR 1 at 13, per Isaacs J. See also the summary of authorities in *Durham Holdings Pty Ltd v The State of New South Wales* (1999) 47 NSWLR 340, at [44] per Spigelman CJ (with whom Handley and Giles JJA agreed).
[35] *Kumagai Gumi Co Ltd v Commissioner of Taxation* (1999) 90 FCR 274 at [43] per Hill J.
[36] See, eg, ss 12, 25 and 33E of the Act.
[37] "Foreign country" is defined in the Act but is only referred to in the context of persons being disqualified from serving as jurors (having been convicted of an offence against a law of a foreign country) (s 23DI) and giving evidence by video link, audio link or other appropriate means (s 47A). It is not used in Part IVA.
[38] Emphasis added. The Court also has some specially conferred jurisdiction with respect to trans-Tasman matters: see, eg, s 92 of the *Trans-Tasman Proceedings Act 2010* (Cth).
[39] See, eg, foonote 4 above.

of the same persons.[40] There is no textual or contextual[41] indication that Parliament intended for this provision to apply to persons beyond the territory and the jurisdiction of the Federal Court. If Parliament intended for Part IVA to apply to persons outside of Australia, it would have had to indicate, either expressly or by necessary implication, that the terms of s 33ZB operated to bind such persons to a judgment of an Australian court notwithstanding the geographic limitation in s 18. And, had it so indicated, it would not have done so effectively, having regard to the well-settled criteria for the enforceability of foreign judgments at common law.[42] As the primary judge accepted[43] (and was not disputed before or by the Full Court), while non-resident group members might be bound by a judgment for the purposes of other proceedings in an *Australian* court, the enforceability of the judgment, and its capacity to act as a bar to further proceedings, in a non-resident group member's home jurisdiction is doubtful. That doubt lends support to the construction for which BHP contends, assessed as a matter of objective intention. Where the non-application of the presumption could lead to the "undesirable consequence"[44] that foreign group members could take the benefit of a judgment under Part IVA, but not necessarily be visited with the burden of the statutory estoppel under s 33ZB, the legislature should not be taken, in the absence of express words or necessary implication, to have intended Part IVA to apply to the world at large. The same potential imbalance does not arise if the Part is construed conformably with the presumption so as to apply to persons within the territory.

31. The application of the presumption would not defeat the purpose of Part IVA, and there is thus no basis to assume or infer that the legislature intended to override the

[40] See the discussion in Mulheron, op cit, at 455-458.
[41] The explanatory materials for the legislation which introduced Part IVA do not refer explicitly to the scheme contemplating claims on behalf of non-residents.
[42] Those criteria are the subject of the well-known "Dicey's Rule 36", as explained by Allsop CJ in *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 at [161] and referred to by Moshinsky J at FCA [99] None would apply to non-party foreign group members who had not expressly or impliedly (eg, through registration) submitted to the jurisdiction of the Federal Court. The risk that judgment of the Federal Court would not be effective to prevent a group member in another sovereign state invoking the jurisdiction of its own courts in respect of the same wrong or loss the subject of the group proceeding was accepted by Moshinsky J at first instance and not challenged in the Full Court: see, eg, FCA at [64]-[65], [68]. See further Mulheron, op cit, at 455-456.
[43] See preceding footnote.
[44] *Barcelo* at 426, per Dixon J.

presumption.[45] While it may be accepted that Part IVA was not designed to narrow the new form of representative proceedings from that which applied under regimes which existed in equity's exclusive or auxiliary jurisdiction,[46] it does not follow that the purpose of the Part is defeated by construing it to facilitate the bringing of claims on behalf of persons within Australia. The purpose of Part IVA was two-fold: first, to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and secondly, to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits.[47] Neither of these purposes is defeated by confining the potential pool of group members to residents of Australia. Access to justice for Australian residents is enhanced and the efficiency gained through the issuance of common binding decisions, rather than individual decisions, exists irrespective of whether the representative group includes foreign residents. Conversely, there is no indication at all that Parliament was concerned to provide an additional pathway for the bringing of claims in the Federal Court on behalf of foreign persons.

32. The Full Court referred to the extrinsic materials relating to the introduction of Part IVA[48] for the proposition that those materials lack any suggestion "that Part IVA would not allow a non-resident claim to be advanced in a class action". But this, like the Court's general approach to construction of the Part, erroneously inverted the presumption and assumed that, in the absence of any express or implied geographic limitation in Part IVA,[49] the legislature was to be taken to intend to legislate with respect to the adjudication of rights of persons beyond the territory. But, consonantly with the US Supreme Court's reasoning in *Morrison v National Australia Bank*,[50] in holding that

[45] Cf. *Kumagai Gumi Co Ltd v FCT* (1999) 90 FCR 274 at 283.
[46] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267.
[47] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [82] citing the Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at [13], [18]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174-3175. Rather than indicating that the legislature was concerned in enacting Part IVA to ensure that the existing representative procedure was not diminished, this implies that the existing procedure was ineffective to achieve those purposes; were it otherwise, legislating to allow for the collectivisation of claims and a common binding judgment would not have been seen to enhance access to justice or deliver efficiency in the administration of justice (since those objectives would already have been achieved if the existing procedure was efficacious) (cf. FCAFC, [53]).
[48] FCAFC, [51] (CAB 87).
[49] FCAFC, [47], [51], [63], [65].
[50] 130 US 2869, 2879 (2010), observing that the issue of jurisdiction over non-resident class members "became a matter of whether a court thought Congress "wished the precious resources of United States courts … to be

non-resident shareholders could not advance class action claims for contravention of US securities laws, there is no indication in the extrinsic materials—such as a desire to provide access to Australian courts to persons in foreign jurisdictions—that could conceivably supply the necessary implication of extraterritorial application.

The source of the Federal Court's jurisdiction or power to determine the claims of group members in representative proceedings

33. The Full Court held that Part IVA does not itself confer "jurisdiction" on the Federal Court, but instead establishes a scheme of powers and procedures by which the Court can exercise jurisdiction otherwise conferred upon it.

34. It is unclear how this conclusion—even if it be correct—could defeat the application of the presumption against extraterritoriality. It appears that, in characterising Part IVA as conferring power (only), the Full Court was seeking to support a conclusion that the Court's jurisdiction to adjudicate the claims of group members lies elsewhere and is unfettered by any territorial constraints. But whether Part IVA confers jurisdiction or power, the critical question is "with respect to whom? Who may be a group member?"

35. Contrary to the approach below,[51] this question cannot be side-stepped by positing that once jurisdiction has been attracted by the initiation of proceedings in the Federal Court, it is attracted with respect to the claims of any and all persons named by the representative party as group members. Without Part IVA (or some equivalent provision for representative proceedings), the Federal Court could not bindingly adjudicate the claims of the non-party group members.[52]

36. While the Federal Court might have subject-matter jurisdiction with respect to the alleged contraventions in the present proceeding of the *Corporations Act 2001* (Cth) and

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devoted to [non-resident class members] rather than leave the problem to foreign countries"" (quoting *Bersch v Drexel Firestone, Inc*, 519 F 2d 974, 985 (1975)) – such "foreign countries" in the case at hand being the jurisdictions responsible for regulating the market for securities in BHP Plc. See further the discussion in Mulheron, op cit, at 459-460.

[51] See per the Full Court at FCAFC [31] (CAB 83); and per Moshinsky J at FCA, [102] (CAB 45).

[52] As Gleeson CJ held in *McBain, Re; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 390 [7]: "[n]ot all parties to legal disputes submit their disputes for resolution by the judicial process. If they do not, no occasion for the exercise of judicial power arises".

the *Australian Securities and Investments Commission Act 2001* (Cth), neither of those statutes, nor the *Judiciary Act 1903* (Cth), is a source of the personal jurisdiction to adjudicate the claim of a person who has not invoked the Court's authority for that purpose.[53] Nor do they confer the power to do so.

37. As Branson J observed in *Bray v F Hoffman-La Roche Ltd*, "[i]f all group members have claims for damages or other compensatory relief against all respondents which satisfy the requirements of s 33C(1)(b) and (c), they will not need to invoke the jurisdiction of the court under [other legislation] to establish their entitlement to proceed under Pt IVA of the FCA".[54] In other words, Part IVA is the source of the Court's jurisdiction or power to determine the rights of those who are group members.

38. But for s 33C of the Act, group members would be strangers to proceedings commenced under Part IVA. Every group member necessarily has a "claim". However, s 33C is the statutory mechanism by which "the unilateral act of the representative plaintiff and the lawyers retained"[55] transforms a stranger into a group member who may be bound by the court's judgment pursuant to s 33ZB.

39. So while it may be accepted that the Court has jurisdiction in respect of an ordinary *inter partes* proceeding brought by a non-resident, who invokes and subjects themselves to the jurisdiction of the Federal Court, for contraventions by BHP of the *Corporations Act* and/or the *ASIC Act*, it does not thereby follow that they could commence a representative action on behalf of others who have not submitted to the Court's jurisdiction.

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[53] As the Full Court noted, "[j]urisdiction in the sense presently relevant is the authority of the court to adjudicate": FCAFC, [30], citing *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 570 [2], per Gleeson CJ, Gaudron and Gummow JJ. That authority is conferred by s 1337B of the *Corporations Act* (when read in combination with the definition of "Corporations legislation"), which confers jurisdiction with respect to "civil matters arising under the Corporations legislation". The "matters" with respect to which jurisdiction is so conferred are relevantly identified in ss 1325(1) and (2) and s 1041I(1) of the *Corporations Act* and ss 12GM and GF of the *ASIC Act*, each of which permits a person who has suffered or is likely to suffer damage as a result of a contravention to bring proceedings to recover (or prevent) such damage.

[54] *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 at [208].

[55] *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited* [2020] FCA 510 at [11] per Jagot J.

40. Likewise, once the Court's jurisdiction is attracted by valid service on the respondent,[56] it does not thereby follow that it has the jurisdiction to determine the claims of non-resident group members: cf. the Full Court's reasoning at FCAFC, [56]-[57], [63] (CAB 88-89, 90).[57] Personal jurisdiction over the respondent is a necessary, but not sufficient, anchor to allow the Court to determine group member claims. Were it otherwise, there would be no need for Part IVA.[58]

41. It is Part IVA which enables the Court to exercise jurisdiction and power in respect of non-party group members and their claims.

42. And this drives one back to the question: on a proper construction of Part IVA, who may be included as a group member and purportedly bound by the outcome of representative proceedings – anyone in the world, or only persons within the territory? This is the question which, contrary to the reasoning of the Full Court, fell to be answered by reference to the presumption.

43. This is not a question answered by reference to the Chancery rules relied upon by the Full Court.[59] While Part IVA performs a similar function to the Chancery rules, it does not follow from the existence of a parallel jurisdiction in equity[60] that Part IVA "is about

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[56] It should be noted that, in contradistinction to the denotation of "persons" who may be group members, the Act expressly contemplates that a respondent may be a foreign resident provided that the personal jurisdiction of the Court can be established through service. In this regard, section 33A of the Act defines "***respondent***" as "a person against whom relief is sought in a representative proceeding". Under s 59(2)(g) of the Act, "the Rules of Court may make provision for or in relation to… the service and execution of the process of the Court, including the manner in which and the extent to which the process of the Court, or notice of any such process, may be served out of the jurisdiction of the Court".

[57] "Where jurisdiction is attracted by service on the respondent within the territorial jurisdiction of the court, it is not necessary to show any other connexion with the jurisdiction": FCAFC, [63] (CAB 90). While that may be true of 'traditional' proceedings between an applicant who has invoked (and thereby submitted to) the Court's jurisdiction and a respondent who has been validly served, it is not so in respect of group members outside the territory who are not parties to the proceeding.

[58] The reasons that group proceedings lie outside the 'traditional' rule were discussed by Cullity J of the Ontario Superior Court in *Parsons v McDonald's Restaurants of Canada Ltd*. (2004), 45 CPC (5th) 304 (SCJ) at [19]-[22]. His Honour described (at [21]) the "special features" of class proceedings and concluded: "[w]here…the question is whether members of a class who were not present in the foreign country are to be bound by the foreign judgment, the application of the obligation theory to bind a defendant present in the foreign country would not be sufficient to justify an exercise of jurisdiction over such absent members".

[59] FCAFC, [36], [52]-[53] (CAB 84, 87-88).

[60] Indeed, there is a question whether the parallel jurisdiction survived the introduction of Part IVA; in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 263 [18], this Court commented that "Part IVA establishes a regime which supplants [the equitable procedures]".

the exercise (and not the conferral) of jurisdiction".[61] Still less is the existence and scope of the equitable jurisdiction determinative of the scope of Part IVA, or liable to defeat the presumption against extraterritoriality of legislation.[62] In this regard, the Full Court seems to suggest that because the Chancery procedures could be used to determine the claims of any person who had the same interest as the claimant, Part IVA must be construed as extending to the claims of non-residents. That is a non sequitur. The limits of the Federal Court's equitable jurisdiction are not, in any event, in issue in this proceeding.

44. Likewise, the question whether Part IVA enables a representative party to submit for determination the claims of persons outside the territory was not[63] answered by this Court's decision in *Mobil Oil*.[64] *Mobil Oil* concerned a challenge to the validity of Part 4A of the *Supreme Court Act 1986* (Vic). The appellant asserted that the legislation was beyond the power of the Victorian legislature in its application to group members in other States and Territories. The High Court held, relevantly, that a territorial nexus with the State of Victoria existed by reason of the effective service of proceedings in the Supreme Court of Victoria on the defendant.[65]

45. This sufficed to demonstrate that the legislation was constitutional. But the question whether, as a matter of construction, Part 4A permitted proceedings to be brought on behalf of persons outside Australia did not arise and was not addressed by the High Court.[66]

46. The postulated distinction between the exercise and conferral of jurisdiction was central to the Full Court's reasoning in rejecting BHP's argument below.[67] However this distinction, it is respectfully submitted, does not affect the disposition of the appeal. Even if one accepts that Part IVA identifies the persons over whom jurisdiction may be

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[61] FCAFC, [35] (CAB 84).
[62] Cf. FCAFC, [37], [53] (CAB 84, 88).
[63] Cf. FCAFC, [57], [61] (CAB 89-90).
[64] *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 (***Mobil Oil***).
[65] *Mobil Oil* at [10]-[11] per Gleeson CJ; [59]-[60] per Gaudron, Gummow and Hayne JJ.
[66] Had such a question arisen in *Mobil Oil*, s 33KA of the *Supreme Court Act*, referred to by the Full Court at FCAFC, [48] (CAB 86), which expressly contemplates that persons outside Australia might be group members, would have been relevant to whether the presumption against extraterritoriality had been displaced. There is no equivalent provision to s 33KA in the Act.
[67] The Court described it as a "critical distinction": FCAFC, [36] (CAB 84).

exercised, rather than *conferring* jurisdiction on the Court to determine group member claims, the question becomes whether Part IVA, on its proper construction, empowers the Court to exercise its jurisdiction over non-residents. And that question falls to be determined in accordance with the constructional principles outlined above. If the presumption against the extra-territorial operation of statutes is attracted (which, by virtue of Part IVA's general words, it is) and is not rebutted by necessary intendment (which it is not), then the power to exercise jurisdiction over, and bindingly determine the claims of, persons who are not party to the proceeding must be read as being limited to those persons within the territory.

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Part VII: Orders sought

47. The appeal be allowed with costs.

48. A declaration that Part IVA of the Act does not apply to the claims brought by the Respondents (being the Joint Applicants in the substantive proceedings) on behalf of shareholders of BHP and/or BHP Plc who are not resident in Australia.

Part VIII: Time estimate

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49. It is estimated that two hours is required for the presentation of the oral argument of the appellant.

Dated: 8 April 2022

.....
Wendy Harris QC
(03) 9225 7719
harriswa@vicbar.com.au

.....
Kane Loxley
(03) 9225 7295
kane.loxley@vicbar.com.au

.....
Jess Moir
(03) 9225 8444
jess.moir@vicbar.com.au

ANNEXURE A

List of constitutional provisions, statutes and statutory instruments referred to in the submissions

1. *Acts Interpretation Act 1901* (Cth)

2. *Australian Securities and Investments Commission Act 2001* (Cth) (between 8 August 2012 and 9 November 2015)

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3. *Corporations Act 2001* (Cth) (between 8 August 2012 and 9 November 2015)

4. *Federal Court of Australia Act 1976* (Cth)

5. *Supreme Court Act 1986* (Vic)

6. *Trans-Tasman Proceedings Act 2010* (Cth)