HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M12/2022

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

RESPONDENTS' SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: ISSUE PRESENTED BY THE APPEAL

2. The issue presented by this appeal, expressed most generally, is whether Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (the **Act**) applies to claims brought by a representative applicant on behalf of group members who are not "resident" in Australia.[1] The Respondents contend that, properly construed, Pt IVA encompasses the claims of all persons having claims of the kind described by s 33C of the Act, irrespective of whether they are Australian "residents".

PART III: SECTION 78B NOTICE

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

PART IV: FACTUAL ISSUES

4. The Appellant (**BHP**) correctly accepts at AS [12] that there are no factual issues in contention on the appeal.

5. Despite that acceptance, AS [30(c)] and fn 42 misstate the primary judge's factual findings. BHP asserts that the enforceability of a judgment in these proceedings, and its capacity to act as a bar to further proceedings, in a non-resident group member's

[1] This framing of the issue reflects Notice of Appeal, [2] **CAB 120**.

"*home jurisdiction*", has been established to be "*doubtful*". The correct position is that the primary judge made provisional findings based on the expert evidence before him, solely for the purpose of BHP's interlocutory application,[2] and specifically for that limb of it (no longer pressed) which sought a discretionary s 33ZF order excluding certain categories of persons from the proceeding.[3] None of those findings have been reached on a final basis; none of them are relevant to the remaining question of construction; and BHP's summary of them is inaccurate.[4]

PART V: ARGUMENT

A. Overview

10 6. The Full Court's reasoning with respect to the ambit of s 33C, and in particular the "*persons"* who can be "*group members*", involved an orthodox exercise of statutory construction, which identified as the proper start and end point the statutory text, considered in context and having regard to purpose.[5]

7. *First*, to construe the word "*persons*" in s 33C(1) as embracing non-residents does not engage the presumption against extra-territoriality relied on by BHP because s 33C does not deal with acts, matters or things over which another sovereign or state properly has jurisdiction.[6] To the contrary, the subject matter of s 33C(1) – when a particular form of proceeding can be commenced in the Federal Court in a matter in which it otherwise has subject matter and personal jurisdiction – is "*obviously*

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2 *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720 (**PJ**) [54] **CAB 31**.

3 PJ [12(b)] **CAB 13**.

4 See PJ [56]-[87] **CAB 31-40** and PJ [130] **CAB 53**. Questions were posed of the experts on a number of differing assumptions, including whether a group member had registered or opted out here, whether the group member had received notice of this proceeding, and whether the new overseas action was brought against BHP Group Limited or against BHP Group Plc. Some of the answers directly contradict BHP's "*doubtful*" claim; for example it was found that, in a new proceeding against *BHP Group Ltd* (the only respondent in this action) commenced in the courts of England and Wales by a group member who had registered to participate in a settlement of this proceeding and had subsequently not opted out, the courts of England and Wales *would* recognise the judgment of the Federal Court: PJ [61] **CAB 32**. By contrast, there was "*some risk*" of non-recognition if a group member did not register or opt out having received notice and a higher risk if notice had not been received at all: PJ [64] **CAB 33**. But even this evidence and preliminary finding as to "*some risk*" says nothing specific to non-residents; the same would be true of any group members, wherever resident, who attempted to sue in the courts of England and Wales on the same causes of action as had been litigated in this action here. It is a feature, if true, of the representative nature of these proceedings, not of their reach to non-residents.

5 *BHP Group Limited v Impiombato* (2021) 151 ACSR 635 (**FCAFC**), [40]-[41] **CAB 85**, referring at [40] to *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); see also *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, [47] (the Court); cf AS, [18].

6 Cf AS, [20].

enough"[7] not a matter where questions of comity between states arise or where it might be thought that jurisdiction properly belongs to a foreign sovereign or state.[8]

8. *Second*, even if the presumption were engaged (which it is not), Pt IVA *does* evince the necessary intention to encompass all persons having claims of the kind described by s 33C(1) irrespective of their place of residence. That is evident when the full task of statutory construction is done, having regard to text, context and purpose. The generality of the word "*persons*" is immediately confined by the adjacent concept of "*claims*" which must mean claims over which the court already has subject matter and personal jurisdiction. The necessary intention to apply Pt IVA to all group members, irrespective of residence, is supported by the contextual matters identified by the Full Court,[9] including, in particular, that Pt IVA was intended to promote access to justice.

9. *Third*, BHP's submission that it is only Pt IVA that confers "jurisdiction" with respect to "*non-party*" group members[10] is of peripheral relevance to its construction argument but, in any event, misstates the concept of jurisdiction. Part IVA confers on the Federal Court the powers and procedures to hear and determine, in a single proceeding, the claims of the representative applicant and *all* group members, in circumstances where the Court *already* has subject-matter jurisdiction over the controversy and personal jurisdiction with respect to the respondent.

10. *Fourth*, BHP's reliance upon overseas materials[11] is again peripheral, but in any event they do not assist its argument.

B. Presumption against extra-territoriality is not engaged

11. The principle underpinning the presumption against the extra-territorial application of legislation is "*that the legislature of a country does not normally intend to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state*"[12] and is not "*within the province of our law to affect or control*"[13]. Reflecting the true scope of the presumption, in

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7 FCAFC, [43] **CAB 85**.

8 Cf ***Barcelo*** *v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423-424; ***Meyer Heine*** *Pty Ltd v China Navigation Company Ltd* (1966) 115 CLR 10, 22-23 (Kitto J), 30-31 (Taylor J), 38 (Menzies J) and 43 (Windeyer J) and the authorities cited at AS, fn 18.

9 FCAFC, [46]-[55] **CAB 85-88**.

10 Cf AS, [41].

11 Cf AS, [17], [30(c)], [32], fn 50, [40] fn 58.

12 *Niboyet v Niboyet* [1878] 4 PD 1, 7 (James LJ), referred to in FCAFC, [43] **CAB 85**.

13 ***Wanganui-Rangitikei*** *Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581**,** 601 (Dixon J).

Barcelo,[14] Dixon J said: "*Every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law*". And, as Dixon J also observed in *Wanganui-Rangitikei*[15]: "*… the rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter*".

12. Section 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) (**AIA**) reflects the common law presumption against extra-territoriality, and has the same ambit of operation.[16] It does not apply to references to "*persons*", but, relevantly, to "*matters and things*". Like the common law presumption, it has no role to play once a connection with Australia is otherwise established through the text of the statute.[17]

13. BHP's submission that the presumption (whether common law or statutory) is engaged rests entirely on the proposition stated at AS [24] that "*[t]he 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 follows, in BHP's submission, that to give those words their full meaning would give Pt IVA an operation beyond the territory of Australia, thus engaging the presumption against the extra-territorial operation of statutes.[18]

14. The error in BHP's submission is to focus on a single word in s 33C(1) – "*persons*" – and to contend that because it is a word of general application, the presumption against extra-territoriality is necessarily engaged.[19] Contrary to BHP's submissions, the presumption is not engaged merely by the presence of general words in a statutory provision. Rather, the relevant provision must be read as a whole. As Gordon J said in another context of the exercise of statutory construction, "*[t]he task is to construe the language of the statute, not individual words*."[20] The question of whether the presumption is engaged must be determined by reference to whether the provision, construed as a whole and in its context, would extend to subject matters over which

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14 *Barcelo* (1932) 48 CLR 391, 423-424. See also *Meyer Heine* (1966) 115 CLR 10, 23 (Kitto J).

15 (1934) 50 CLR 581, 600.

16 *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, [162] (Branson J).

17 *Re Maritime Union of Australia; Ex parte* ***CSL Pacific Shipping*** *Inc* (2003) 214 CLR 397, 415-417 [41]-[48] (the Court).

18 See also AS, [28].

19 Cf AS [20] fn 19.

20 *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 252 at 261 [34] (Gordon J, Besanko J agreeing); see also *Metropolitan Gas Co Federated Gas Employees' Industrial Union* (1925) 35 CLR 448, 455 (Isaacs and Rich JJ); and *St George Bank Ltd v Federal Commissioner of Taxation* (2009) 176 FCR 424, 432 [28] (Stone J).

jurisdiction properly belongs to some other sovereign or state.

15. Properly understood, the presumption has no application to Pt IVA. Section 33C(1) is concerned with the circumstances in which one or more "*persons*" who have "*claims*" against "*the same person*" may commence a representative proceeding in the Federal Court in respect of a justiciable controversy over which the Court *already* has jurisdiction. In the words used in s 21(1)(b) of the AIA, the "*matters and things*" referred to in s 33C are the procedural mechanisms by which a person (or persons) may *commence* a proceeding in a court which exercises the judicial power of the Commonwealth under ss 71 and 77 of the Constitution and the laws of the Parliament so as to enable the efficient vindication of multiple claims over which the court otherwise has jurisdiction. This is patently *not* a matter over which jurisdiction properly belongs to another sovereign.[21] The ability to include non-residents as group members does not detract from this basic proposition.

16. The focus of each subparagraph of s 33C(1) on the concept of "*claims*" is significant. The claims are not the cause of action pleaded.[22] Rather, they "*have an existence independent of, and antecedent to, the commencement of proceedings*".[23] They must be claims recognised by the law.[24] Critically, they must be claims over which the Federal Court has subject matter jurisdiction.[25] It is thus incorrect to assert, as BHP does, that the provisions of Pt IVA could "*apply to the world at large*".[26] They apply to "*persons*" with "*claims*" over which the Federal Court has jurisdiction; that is, "*claims*" that could otherwise be litigated in the Court by individual action or by the representative action procedure in rule 9.21 of the *Federal Court Rules 2011* (Cth). The claims of the representative applicant and the claims of the group members must also be sufficiently similar or related that they satisfy the criteria in s 33C(1)(a)-(c). The focus in s 33C(1) on the characteristics of the "*claims*" which may be grouped in a representative proceeding thereby ensures that that provision, and Pt IVA as a whole, does not trespass upon *any* jurisdiction which properly belongs to some other sovereign or state. Construed as a whole, the text of s 33C(1) leaves "*no place*"[27] for

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21 FCAFC, [43]-[44] **CAB 85**.

22 FCAFC, [22] **CAB 81**. See also *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 219 [23]-[24] (Moore J); *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, 159 [43] (Lee J).

23 *ACCC v* ***Giraffe World*** *Australia Pty Ltd* (1998) 84 FCR 512, 523 (Lindgren J).

24 FCAFC, [23] **CAB 81-82**; see also *Giraffe World* (1998) 84 FCR 512, 523 (Lindgren J).

25 See FCAFC, [42] **CAB 85**.

26 Cf. AS, [30(c)].

27 *Wanganui-Rangitekei* (1934) 50 CLR 581, 600 (Dixon J).

application of the presumption.

17. BHP does not identify "*in any specific sense the comity of nations*" that is infringed by giving Pt IVA its ordinary meaning, as required by this Court in *CSL Pacific Shipping*.[28] That is, BHP never identifies the content of *any* norm of customary international law that is said to be infringed by giving the provision its full reach in accordance with its generality. Nor does it identify *which* foreign jurisdiction it says has a superior claim under international law to adjudicate the claims of non-residents in the present circumstances; ie, circumstances where BHP, an Australian company, is sued and served in Australia for alleged wrongs of failing to comply with its obligations of continuous disclosure to the Australian Stock Exchange and misleading or deceptive conduct, causing damage to its shareholders (and the shareholders of BHP Group Plc) wherever located.[29]

18. BHP's argument fails for the very types of reason that the prosecutor's argument failed in *CSL Pacific Shipping.* The presumption is apt to apply to a statute which like the US *Jones Act* is expressed in perfectly general terms throughout (any seaman who suffers personal injury in the course of employment shall have so and so rights); but not apt to apply where the Parliament has expressly drawn at least one connection to Australia (such as in *CSL Pacific Shipping*, where the *Workplace Relations Act* provision was expressly limited to trade or commerce between Australia and a place outside Australia or within or between States or Territories).

19. While it would be *open* to the Parliament (subject to any role for international norms requiring equality before the law[30]) to stipulate a second, or a third, connection with Australia in any such provision, the presumption against extra-territoriality does not *require* it to do so.[31] Indeed, if BHP's argument was correct, the process of statutory construction would be gravely distorted. Despite Parliament having chosen expressly

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28 *CSL Pacific Shipping* (2003) 214 CLR 397, 416-417 [45]-[48] (the Court).

29 See Amended Consolidated Statement of Claim dated 7 September 2020 **BFM 11**.

30 Eg, *International Covenant on Civil and Political Rights*, Articles 14(1) and 26. In the investment context, see also bilateral trade agreements which variously require no less favourable treatment and/or fair and equitable treatment to be provided to foreign investors: e.g. *Australia-United Kingdom Free Trade Agreement*, articles 13.5 section 1 and 13.7 section 1; *Australia-United States Free Trade Agreement* articles 11.2 and 13.2.

31 This proposition is illustrated by *CSL Pacific Shipping* itself but also by earlier authorities. It has never been the case that the presumption must fix upon every word in a statutory provision. Rather, the intent of the presumption is to provide a natural limit to legislation, so that it applies in its subject matter to situations which have a nexus with the jurisdiction: see *O'Connor v Healey* (1967) 69 SR (NSW) 111 at 114 per Wallace P (with whom Jacobs and Holmes JJA concurred) in relation to s 17 of the *Interpretation Act 1897* (NSW).

one way of limiting the reach of the general words of its provision (here, the limitation by the nature of the "*claims*"), the court would go about reading down other general terms in the provision to create as many implied limitations as there are general terms in the provision.

20. It follows that the Full Court was correct to conclude that the presumption "*has no work to do in the search for meaning of a statutory provision of this character*."[32] In so doing, the Full Court approached the task of statutory construction in accordance with established principle and not, as submitted by BHP,[33] by imposing any novel or erroneous "*precondition*" to the application of the presumption. To give the general word "*persons"* its full application when one considers its place in the context of ss 33A and 33C and Pt IVA more generally does not give the Part *any* relevant extra-territorial effect and thus the presumption against extra-territoriality is *never* attracted.

C. Part IVA evinces the necessary intention to encompass all persons with the requisite claims irrespective of residence

21. Even if the presumption against extra-territoriality were engaged, perhaps in some attenuated fashion (which it is not), the text of Pt IVA, construed in its proper context, evinces the necessary intention to encompass resident and non-resident group members within the meaning of the word "*persons*" in s 33C(1).

Text of s 33C(1): the role of the claims

22. The concept of "*persons*" having "*claims*" of the kind described by s 33C(1) is significant. There is no express geographical or territorial limit on the identity of such "*persons*".[34] On a plain reading of s 33C(1), it operates to encompass all "*persons*" who have "*claims*" against the respondent which meet the prescribed statutory criteria. This is apt to encompass foreign residents as well as Australian residents – a foreign resident as well as an Australian resident may have a claim over which the Federal Court has subject matter and personal jurisdiction against a respondent. Thus, even if it were necessary to rebut the application of the presumption against extra-territoriality, the language of s 33C(1) would be sufficient to do so.[35]

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32 FCAFC, [44] **CAB 85**.

33 Cf AS, [29].

34 FCAFC, [21] **CAB 81**.

35 Cf AS, [29].

Uncertainty and unworkability of the proposed "residence" reading down

23. Contrary to BHP's argument, there is no satisfactory textual basis to read down the word "*persons*" in s 33C(1) to mean "residents", as proposed in the Notice of Appeal.

24. BHP has never offered any explanation as to why the application of the presumption against extra-territoriality necessarily entails *residence* being the relevant limiting factor, particularly in light of the fact that introducing the concept of "residence" into s 33C(1) is apt to introduce considerable uncertainty and unworkability into the intensely practical question of group membership.

25. As authorities in the field of tax law illustrate, "residence" is necessarily a question of fact and degree. Usually there will be an express statutory test to guide the exercise. In the case of a corporate entity, determination of "residence" may involve considerations of central management and control, including by reference to the course of business and trading;[36] in the case of an individual, it may require consideration of the person's "*permanent place of abode*", which "*may mean the house in which a person lives or the country, city or town in which he is for the time being to be found*".[37]

26. The complexity and uncertainty inherent in the "residence" criterion advanced by BHP is exacerbated by the lack of clarity as to *when*, relative to the proceeding and the claims that are the subject of the proceeding, a person must be a resident to be a group member. Must a person be a resident at the time of the events giving rise to the claims that are the subject of the proceeding? Or at the time of commencement of the proceeding? Or at both times? What happens if a person changes residence during the proceeding?

27. That uncertainty may be further exacerbated where, as in the present case, many of the largest legally registered shareholders of the respondent are nominees or custodians, and the respondent has incomplete information about the identity of the beneficial shareholders or their location.[38] Is it the residence of the nominee or custodian that is determinative of group membership or that of the beneficial owner? If it is the residence of the beneficial owner, how is that to be determined?

28. The imprecision of BHP's proposed reading down is highlighted by its own

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36 *Bywater Investments Ltd v Federal Commissioner of Taxation* (2016) 260 CLR 169, 208 [77] (French CJ, Kiefel, Bell and Nettle JJ).

37 *Harding v Commissioner of Taxation* (2019) 269 FCR 311, 329-330 [41] (Davies and Steward JJ), quoting *Applegate v Federal Commissioner of Taxation* [1978] 1 NSWLR 126, 134 (Sheppard J).

38 PJ [43] **CAB 25-28**.

inconsistent use of other concepts as apparent synonyms for "residence".

a. AS [17] and AS [18] refer, respectively, to persons "*outside the territory*" and "*beyond the territory of the Commonwealth*". AS [42] and [46] refer to "*persons within the territory*". This is patently not the same as residence and begs further questions: when must a person be "*within the territory*" in order to be a group member? And for how long must the person be "*within the territory*"?

b. At AS [30](c) and AS [31], BHP introduces yet another concept: a "*foreign group member*" or "*foreign persons*". It is not clear whether, on this formulation of BHP's argument, the disqualifying characteristic is foreign residence, foreign nationality, or something else.

29. The lack of certainty and clarity as to the manner in which, on BHP's argument, the word "*persons*" in s 33C(1) is to be read down by application of the presumption serves to expose the flaws inherent in its construction. Moreover, it reveals that the proposed reading down does not follow securely from the posited application of the presumption and would, in substance, involve an impermissible re-writing of the statutory words. There is nothing in the statutory context or the presumption itself that identifies any criterion other than that described by the plain words of s 33C(1).

Different meanings for term "*person*" within the one provision?

30. If BHP's construction were to be contemplated, is the term "*person*" or "*persons*" being used in the same way in the three places it appears in s 33C, in accordance with the presumption that words repeated in a statute are used with the same meaning,[39] and if not, why not?

31. BHP is seemingly silent on whether the *representative applicant* must be a resident. Section 33C(1) relevantly provides that, where there are "*7 or more **persons** who have claims against"* the respondent, then (subject to the other criteria in s 33C(1) being satisfied) "*a proceeding may be commenced by one or more of **those persons** as representing some or all of them*" (emphasis added). In the absence of any geographical or territorial restriction on a person commencing an ordinary *inter partes* proceeding in the Court,[40] it would be anomalous to construe s 33C(1) as imposing such a limitation on either the representative applicant or the group from which such

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39 *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376; [2016] HCA 4, 387 [65] (the Court) and the authorities there cited; *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818; [2020] HCA 29, 838 [95] (Edelman J).

40 FCAFC, [21] **CAB 81**, referring to r 8.01 of the *Federal Court Rules 2011* (Cth).

applicant may be drawn. It would also be inconsistent with s 33D(1), which provides that a "*person referred to in s 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person …*".

32. As to the position of the respondent, must it also, for consistency, be a resident? BHP attempts to side-step this problem by suggesting that the term "*person*" is to be construed differently in the case of a respondent because "*the Act expressly contemplates that a respondent may be a foreign resident*" by enabling the Rules of Court to make provision for service out of jurisdiction.[41] But this only leads to the highly unlikely proposition that the word "*persons*" in s 33C(1) is susceptible of different constructions insofar as it applies to the representative applicant and the group members on the one hand and the respondent on the other. In any event, such rules of court could be used equally to effect service of notices under s 33X on non-resident group members; so they provide no reason to give the same term different meanings within the same provision.

The role of s 33ZB and the opt-out model of Part IVA

33. In relation to s 33ZB, it is unclear what is meant by BHP's submission that there is "*no textual or contextual indication that Parliament intended for this provision to apply to persons beyond the jurisdiction of the Federal Court*".[42] BHP appears to suggest that s 33ZB is not capable of binding "*persons outside of Australia*"[43] and that this supports a construction of s 33C which excludes such persons from being group members – otherwise they could take the benefit of a judgment under Pt IVA but not the burden of the statutory estoppel created by s 33ZB. Such a suggestion misapprehends the effect of s 33ZB.[44] The effect of the section is rather that, from the perspective of *Australian law*, s 33ZB operates to create a statutory estoppel with respect to all group members.[45] Indeed, the position in relation to the operation of s 33ZB is the same for *any* group member. The finality, as a matter of Australian law, effected by operation of s 33ZB benefits all group members. This finality also benefits the respondent who knows that if the matter proceeds to settlement or judgment, thereafter – in any

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41 AS, [40] fn 56, referring to s 59(2)(g) of the Act.

42 AS, [30(c)].

43 AS, [30(c)]. Cf PJ, [99] **CAB 44**, where BHP's submission is recorded as being that s 33ZB is not capable of binding "*non-resident group members*".

44 FCAFC, [65] **CAB 90**.

45 FCAFC, [65] **CAB 90**. See also ***Timbercorp*** *Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212, 235 [52] (French CJ, Kiefel, Keane, and Nettle JJ).

Australian court, and in any foreign court which under its choice of law rules applies Australian law, it can never be vexed again by the same claims. Section 33ZB thus evinces a relevant connection to Australia; there is no basis to read it down, as BHP suggests, to apply only to residents of, or persons within, Australia.

34. By contrast, section 33ZB could not operate, of its own force, so as to ensure that this Court's judgment would bar either resident or non-resident group members from bringing proceedings raising the same issues in a foreign court. That would be a matter for the laws of the foreign jurisdiction. It is thus irrelevant whether, as a matter of private international law, the judgment of the Federal Court would operate as a bar to a hypothetical new proceeding in a foreign jurisdiction. In Australia, its full operation cannot be denied.[46] The application of foreign law, which may differ between different jurisdictions, cannot determine the proper construction of Pt IVA. Accordingly, no "*potential imbalance*" of the kind referred to by BHP arises.[47]

35. Section 33ZB operates side-by-side with the legislative choice made by Parliament to adopt an *opt-out* class action model, and thus to extend the benefits and finality of the Pt IVA regime to all persons who fall within the defined group, save if they exercise their right to opt out. As the Full Court correctly observed, "*a choice was made to include no provision excluding the possibility of non-resident group members being a type of group member which, as Mulheron explains, is a feature of all opt-out regimes*".[48] The fundamental protections afforded to group members in this regime are the right to opt out (s 33J), supported by notice requirements (s 33X(1)(a)), and the court's supervisory powers over the conduct of the proceeding. The court can ensure that the opt out notice to be given to group members is reasonably likely to come to their attention, wherever they may be found, within Australia or beyond. Remaining a group member thereafter entails a choice not to opt out of the proceeding: cf AS [14].[49] Group members who do not elect to opt out, whether residents of Australia or not, have consented to the benefits and burdens of the Pt IVA proceeding and will be bound by the judgment in the proceeding in accordance with s 33ZB, as a matter of Australian

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46 See eg *Barcelo* (1932) 48 CLR 391, 407 (Rich J), 413 (Starke J).

47 Cf.AS, [30](c). Further, as noted above at fn 4, BHP's submissions also misrepresent the findings made by the primary judge in relation to this question.

48 FCAFC, [47] **CAB 86**, referring to 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 (**Mulheron**).

49 That was also recognised in respect of Pt 4A of the *Supreme Court Act 1986* (Vic) in *Timbercorp* (2016) 259 CLR 212, [44] (French CJ, Kiefel, Keane and Nettle JJ).

law.

36. The legislative choice adopted by Parliament in respect of Pt IVA may be contrasted with the choice made by the legislature of the United Kingdom that class members not "domiciled" in the UK at a time specified must *opt in* to the UK's competition law class actions, at the time and in the manner specified, to benefit and be bound by the action.[50] The absence of any such express treatment of non-resident group members in Pt IVA is indicative of a legislative choice by Parliament not to differentiate between resident and non-resident group members. The UK model also demonstrates the point made at [23]-[29] above: where a legislature *does* wish to deal with "non-residents" in some different fashion, it does so expressly by stipulating the relevant discrimen (in the UK model, domicile) and the date it must be satisfied.

37. Further, it is not to the point that s 3 states that the Act extends to "*every external Territory*" (as defined) or that s 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*".[51] The fact that a Pt IVA representative proceeding may be brought on behalf of non-resident group members does not extend the application of the Act, or the reach of the Court's process or judgments, beyond Australia. The reach of the Court's process is defined by the rules relating to the issue and service of the writ within, and in certain cases outside, the territory and the amenability of the defendant to that writ.[52]

The context and purpose of Part IVA

38. Any application of the presumption depends upon the context of the legislation, the legislative purpose and the construction of the statute as a whole.[53] The context in which s 33C and Pt IVA generally must be construed is to be understood in the widest sense possible, and includes the existing state of the law and the mischief which the statute was intended to remedy.[54] The conclusion that Pt IVA evinces an intention to

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50 See s 47B(11) of the *Competition Act 1998* (UK); see also Mulheron, p 448.

51 Cf AS, [30(a)] and [30(b)].

52 Eg, *Gosper v Sawyer* (1985) 160 CLR 548, [8]; *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240; [2012] HCA 33, [17] (Gleeson CJ, Gaudron and Gummow JJ); *John Pfeiffer Pty Ltd v Rogerson* (2002) 203 CLR 503, 517 [14].

53 *Kumagai Gumi Co Ltd v Commissioner of Taxation* (1999) 90 FCR 274 at 283 [43].

54 *R v A2* (2019) 269 CLR 507, 521 [32] (Kiefel CJ and Keane J), 525 [124] (Bell and Gageler JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 411-412 [88] (Kiefel J); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); see also *Alcan (NT) Alumina Pty Ltd v Commissioner of*

encompass all group members irrespective of their place of residence, unless they opt out of the proceeding, is fortified by the context and purpose of Pt IVA.

39. *First,* as the Full Court recognized, the presumption against extra-territoriality is but one of a number of interpretative principles applied by courts to ascertain the meaning of legislation.[55] In particular, in this case, it runs up against the principle of construction that "*[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.*"[56] As this Court said in ***Wong*** *v Silkfield Pty Ltd*, "*[l]ike other provisions conferring jurisdiction upon or granting powers to a court, Pt IVA is not to be read by making implications or imposing limitations not found in the words used*".[57] That principle militates in favour of the natural and ordinary reading of the word "*persons*" in s 33C(1) as encompassing all persons, whether resident in Australia or not, having claims of the kind prescribed.

40. *Secondly*, Pt IVA was enacted against the historical concept of jurisdiction founded "*upon a sufficient connexion being shown between the dispute and the forum*",[58] and *not* upon the presence in the territory of persons on whose behalf the proceeding was being advanced. That proposition was emphasised by this Court in ***Mobil Oil*** *v Victoria*.[59] BHP's contention that personal jurisdiction over the respondent is a necessary, but not sufficient, anchor to allow the Court to determine the group members' claims is, in reality, a restatement of the argument rejected in *Mobil Oil*[60] that a court's authority under the representative proceedings legislation in Pt 4A of the *Supreme Court Act 1986* (Vic) is limited to those persons who voluntarily invoke the court's jurisdiction or have some other connection with the territory.[61] As Gleeson CJ observed,[62] that argument "*inverts the usual principle as to the jurisdiction of a court,*

Territory Revenue (2009) 239 CLR 27, 31 [4] (French CJ), 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); and *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J).

55 FCAFC, [440] **CAB 84**. Other relevant principles have already been noted, including that statutory provisions must be construed as a whole and not by focussing on individual words divorced from their context (see [14] fn 20, above), that provisions must be construed in their statutory context and in light of their purpose and the mischief they seek to address (see [38] fn 54, above) and that words repeated in a statute are presumed to have the same meaning (see [30] fn 39, above).

56 *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (the Court).

57 (1999) 199 CLR 255, 260-261 [11] (the Court).

58 FCAFC, [52] **CAB 87**.

59 (2002) 211 CLR 1, 23 [10].

60 (2002) 211 CLR 1.

61 AS, [39]-[41], [44].

62 (2002) 211 CLR 1, 23 [11]. And see 24 [12] as to the relevance of the indisputable existence of the territorial connection between the group members' claims and Australia.

which is the capacity to exercise power over a defendant." Likewise, Gaudron, Gummow and Hayne JJ noted that "*Mobil's submission, if accepted, would require a radical departure from the hitherto accepted understanding of the basis upon which State and federal courts exercise authority to decide personal actions. That authority stems from the amenability of the defendant to the court's process.*"[63]

41. Contrary to BHP's contention,[64] *Mobil Oil* cannot be distinguished on the ground that it concerned the constitutional question of the Victorian Parliament's power to legislate extra-territorially. The submission made by Mobil Oil, and rejected by this Court, was that Pt 4A exceeded the legislative powers of the Victorian Parliament because the Supreme Court could only validly exercise jurisdiction in relation to the claims of non-Victorian resident group members, otherwise so it was said the Supreme Court of Victoria would exercise a "*national jurisdiction in group proceedings*".[65] In rejecting that contention, this Court reasoned that Pt 4A only operates in relation to claims in respect of which the Supreme Court of Victoria otherwise had jurisdiction.[66] That is, Pt 4A does not itself confer jurisdiction.[67]

42. Indeed, the dissenting judgment of Callinan J in *Mobil Oil*[68] adopted the very kind of reading down approach urged by BHP, but it was just that, a dissenting judgment.

43. *Thirdly*, prior to the enactment of Pt IVA, the old Chancery representative action procedure permitted a representative suit to be brought in respect of a common grievance, irrespective of whether the persons represented included non-resident non-parties.[69] As Gleeson CJ noted in *Mobil Oil*:[70]

> "*In order to put the matter into perspective, it is necessary to bear in mind that there is no novelty in the conferring of jurisdiction to hear and determine actions or suits in which a plaintiff or a defendant is appointed to represent others who are not parties to the proceedings… Subject to the capacity of the court managing representative proceedings to control the proceedings in such a manner as to ensure fairness, a capacity usually conferred by wide discretionary*

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63 (2002) 211 CLR 1, 35 [52]-[53].

64 AS, [44]-[45].

65 (2002) 211 CLR 1, 22 [7] and 34 [49].

66 (2002) 211 CLR 1, 23 [10]-[12] and 34 [50]-[55].

67 Cf AS [45], fn 66. This conclusion was not reliant upon s 33KA of the *Supreme Court Act*. Section 33KA(2)(a) cannot be viewed as a provision rebutting the presumption against extra-territoriality where it would otherwise have applied. It is represents no more than a particular legislative choice at the edges of the scheme in Pt 4A of that Act to make express the Supreme Court's discretionary power to remove a person who does not have a sufficient connection with Australia to justify being a group member. See also FCAFC, [60]-[61] **CAB 89-90**.

68 See in particular (2002) 211 CLR 1, 76-83 [179]-[196].

69 FCAFC, [53] **CAB 88**, citing *Duke of Bedford v Ellis* [1901] AC 1, 8 (Lord Macnaghten).

70 (2002) 211 CLR 1, 21-22 [6].

> *powers in relation to the conduct of the action, persons represented in such proceedings were not necessarily residents of the local territory in which the proceedings were taken.*[71]"

44. Given that the representative action procedure could (and still can under r 9.21 of the *Federal Court Rules*) be used to bind represented persons outside the territorial jurisdiction of the court,[72] Parliament should be taken to have intended that Pt IVA, introduced to enhance access to justice, enacts a form of representative procedure that is broader, rather than narrower, than the existing procedure.

45. That Pt IVA was introduced for the purpose of enhancing access to justice and to aid in the efficiency of court processes was recognised by Kiefel CJ, Bell and Keane JJ in *BMW Australia Ltd v* ***Brewster*****:**[73]

> "*The objectives of Pt IVA of the FCA were identified by the Australian Law Reform Commission ("the ALRC") prior to its enactment. They were 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.*[74] *Part IVA of the FCA … pursued these objectives through the regime for representative proceedings tailored to address these defects in the law.*"

46. In particular, one aspect of the mischief sought to be remedied by Pt IVA was to overcome the limitations of the existing procedures, including the "same interest" requirement in the Chancery procedure reflected in the Court Rules (then O 6 r 13).[75] As the High Court said in *Wong*, "*[c]learly, the purpose of the enactment of Pt IVA was not to narrow access to the new form of representative proceedings beyond that which applied under regimes considered in cases such as* Carnie".[76] It would be incongruous to construe s 33C(1) as, on the one hand, *expanding* the class of persons on whose behalf a representative proceeding could be commenced by reference to the

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71 As to the practice concerning representative orders in proceedings in Chancery, see also *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 74-79 (Starke J).

72 See also *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 429, where McHugh J noted that the use of the representative action procedure in order to facilitate the representation of persons, whether or not they consented or even knew of the action, "*was particularly true of actions arising from the activities of joint stock companies and friendly societies*".

73 (2019) 269 CLR 574, 611 [82]; see PJ, [113] **CAB 48**, where Moshinsky J quoted this passage.

74 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, pp 3174–5.

75 So much was recognised by this Court in *Wong* (1999) 199 CLR 255, 260-261 [12] (the Court), referring to s 33C(2). See also ALRC, *Grouped Proceedings in the Federal Court*, Report No 46, 1988, at [5], [40]-[45], [57], [92]-[93].

76 (1999) 199 CLR 255, 267 [28] (the Court); see FCAFC, [53] **CAB 30**.

commonality of their claims but, on the other hand, *narrowing* the class of persons by reference to their residence.

47. Had Pt IVA had been intended to narrow the class of persons on whose behalf such a proceeding could be commenced compared to the existing Chancery procedure, one would expect to see that intention clearly expressed in the ALRC Report, the Parliamentary debates and the legislation itself. As the Full Court said, "*there is no suggestion in any of the extrinsic materials that Pt IVA would not allow a non-resident claim to be advanced in a class action when the claim could otherwise be advanced by the person with the claim in this Court by other means.*"[77] On the contrary, the extrinsic materials point to a concern that "*everyone with related claims should be involved in the proceedings and should be bound by the result*".[78]

48. Contrary to BHP's submissions,[79] reading a "residence" requirement for group membership into s 33C(1) is not consonant with the accepted purposes of Pt IVA identified in *Brewster*. As the primary judge[80] and the Full Court[81] recognized, reading down (or re-writing) s 33C(1) in the way proposed by BHP would undermine the purpose of Pt IVA by creating a risk of a *multitude of parallel individual or representative actions* (under r 9.21) by non-resident applicants, *in addition to* a Pt IVA representative proceeding by resident applicants. BHP's construction would *promote* multiplicity of actions, one of the very things Pt IVA was intended to *reduce.*

49. Given the evidence-intensive nature of an enquiry into residency status, BHP's proposed re-interpretation would also likely result in satellite litigation to determine group membership, further undermining the efficiencies in administration of justice that Pt IVA was intended to achieve. Ultimately, BHP's re-interpretation would lead to a "*partial and haphazard*" operation of legislation which "*does not accord with the general policy upon which the legislation seems to have proceeded*".[82]

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77 FCAFC, [51] **CAB 87**.

78 ALRC, *Grouped Proceedings in the Federal Court*, Report No 46, 1988, at 44 [92]; see also at 24 [57].

79 Cf AS, [31].

80 PJ, [114] **CAB 48**.

81 FCAFC, [53] **CAB 88**.

82 *Barcelo* (1932) 48 CLR 391, 423 (Dixon J).

D. Part IVA does not confer jurisdiction

50. As the Full Court characterised the issue, adopting the expression in the Mulheron article, BHP in substance contends that Pt IVA is the jurisdictional "anchor" required to adjudicate the common aspects of non-resident group members' claims.[83] While the relevance of this submission to BHP's constructional argument is unclear, the submission is, in any event, incorrect.

51. Part IVA does not itself confer jurisdiction on the court. Rather, it establishes the powers and procedures by which the court can *exercise* the jurisdiction that it otherwise possesses to hear and determine, in a single proceeding, the "*claims*" of seven or more "*persons*" having the characteristics described in s 33C. As Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ stated in *Wong*,[84] "*Part IVA creates new procedures and confers upon the Federal Court new powers in relation to the exercise of jurisdiction with which it has been invested by another law made by the Parliament.*" Similarly, in *Mobil Oil*,[85] Gleeson CJ observed (with respect to Pt 4A of the *Supreme Court Act*) that "*[i]t only operates in relation to claims in respect of which the Supreme Court otherwise has jurisdiction*".

52. As the Full Court recognised, the Federal Court's subject-matter jurisdiction is conferred by reference to the concept of a "matter" being "*the broad justiciable controversy between the actors to it comprised of the substratum of facts and claims representing or amounting to the dispute or controversy between or among them.*"[86] A "matter" is a concept broader than the relevant proceeding or the causes of action or claims of an applicant or group members.[87]

53. Here the "matter" can be expressed as whether BHP is liable to its shareholders, and if so which, for damage suffered by misleading the ASX in the manner alleged. The Court's jurisdiction over the "matter" is conferred by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (in respect of "*any matter arising under any law made by the Parliament*") and/or s 1337B(1) of the *Corporations Act 2001* (Cth) (in respect of "*civil matters arising under the Corporations legislation*").[88] The Full Court was

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83 See FCAFC, [55]-[56] **CAB 88-89**.

84 (1999) 199 CLR 255, 258 [1] (footnote omitted).

85 (2002) 211 CLR 1, 23 [10].

86 FCAFC, [33] **CAB 83**.

87 FCAFC, [33] **CAB 83**; *Palmer v Ayres* (2017) 259 CLR 478, 490-491 [26]-[27] (Kiefel, Keane, Nettle and Gordon JJ).

88 See also FCAFC, [31] **CAB 83**.

correct to conclude that *"[t]he existence of jurisdiction has nothing to do with whether an actor to the justiciable controversy is a party to a proceeding or a group member*".[89]

54. Further, the Court has the necessary personal jurisdiction over BHP by reason of BHP's presence in the jurisdiction at the time of service of process upon it. This suffices to establish the requisite personal jurisdictional "anchor".[90] Contrary to BHP's contention,[91] it is not necessary separately to establish personal jurisdiction "*to adjudicate the claim of a person who has not invoked the Court's authority for that purpose*", ie, jurisdiction over the non-party group members.[92]

55. AS [37] mischaracterizes the remarks made by Branson J in *Bray v F Hoffman-La Roche*.[93] There, Branson J was concerned with whether the primary judged had erred in concluding that the claims made on behalf of the group members for injunctive relief under s 80 of the *Trade Practices Act 1974* (Cth) and for declaratory relief under s 163A of that Act were sufficient to constitute "*claims*" within the meaning of s 33C(1) of the Act. Branson J was not there expressing any considered view as to whether Pt IVA was jurisdictional in nature; her Honour's observation was only concerned with the invocation of jurisdiction pursuant to s 80 and s 163A of the *Trade Practices Act*.

56. Further, AS [38] incorrectly proceeds on the basis that the beneficial grouping procedure in s 33C(1) serves as a source of the Court's jurisdiction with respect to the group members. As noted above, the invocation by BHP of the notion of "*personal jurisdiction*" over non-party group members[94] misstates the concept of jurisdiction as explained in *Mobil Oil*. The Court's personal jurisdiction has been properly invoked, on behalf of all group members, by service on BHP. Accordingly, the Court possesses subject-matter and personal jurisdiction with respect to the claims made by the Respondents, on their own behalf and on behalf of all group members.

E. Overseas materials

57. BHP's argument also finds no support in the international authority or materials to which it refers.

58. The Mulheron article demonstrates that, while different jurisdictions take different

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89 FCAFC, [34] **CAB 84**.

90 FCAFC, [56] **CAB 88-89**; cf. AS, [36]; [39]; [40].

91 Cf AS, [36].

92 AS, [36].

93 Cf AS, [37] referring to *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, [208].

94 AS, [36].

approaches to the inclusion of "non-residents" in group proceedings, where non-residents are to be treated differently this is done by express statement and criteria in the legislation, such as in the UK model discussed above at [36]. In those jurisdictions which, like the Federal Court, describe the group members generally, there is no authority for a reading down of group membership by reason of the presumption against extra-territoriality.

59. The decision of the US Supreme Court in ***Morrison*** *v National Australia Bank*,[95] referred to by BHP,[96] is not relevant to the question of construction at issue here. *Morrison* concerned whether the relevant norm of conduct in the *Securities Exchange Act 1934* applied in respect to foreign plaintiffs suing foreign and US defendants for misconduct in connection with securities traded on foreign exchanges. The issue of the extra-territorial application of legislation arose in respect of the statute imposing the substantive norm of conduct, the *Securities Exchange Act*, and not in respect of the statute regulating the class action regime. The result in *Morrison* was that the foreign shareholders could not sue under the *Securities Exchange Act* in relation to misconduct on foreign exchanges, whether by direct action or by a class action.[97]

60. The more relevant US authority, albeit in the US constitutional context, is *Phillips Petroleum Co v Shutts*,[98] where an argument that, absent express consent, a Kansas court did not have jurisdiction over the claims of out-of-state class members was rejected by the US Supreme Court. The Court held that, subject to due process protections, "*a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.*"[99]

61. BHP's reliance on ***Parsons*** *v McDonald's Restaurants of Canada Ltd* is also misplaced.[100] *Parsons* concerned whether two Canadian class actions should be dismissed because of an earlier court-approved settlement of an Illinois class action

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95 130 US 2869 (2010).

96 AS, [32].

97 BHP ran the equivalent argument in the courts below, in so far as it sought to have those parts of the consolidated statement of claim pleading claims for loss and damage for contravention of s 674 of the *Corporations Act* on behalf of shareholders of BHP Group Plc struck out, and was unsuccessful: see FCAFC, [97]-[104] **CAB 97-99**. It has not sought special leave to appeal from that part of the Full Court's decision.

98 472 US 797 (1985).

99 472 US 797 (1985), 811-812 (Rehnquist J, for the Court).

100 Cf AS, fn 58, referring to *Parsons* (2004) 45 CPC (5th) 304.

raising substantially the same subject matter. In considering whether, from an international perspective, the Illinois court had jurisdiction over the proceeding, the Ontario Supreme Court observed that, in the circumstances of that case, the residence of the defendant in the foreign jurisdiction "*would not necessarily have been enough to bind non-resident members of a putative* class ***before they were given notice of the proceedings***" (emphasis added).[101] Ultimately, the Court concluded that the Illinois court had jurisdiction, but the lead plaintiff could not bind the class members prior to certification of the Illinois action or the class members having had an opportunity to opt out. *Parsons* does not stand for any proposition to the effect that non-residents could not be group members.

PART VI: NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

62. There is no notice of contention or notice of cross-appeal.

PART VII: TIME ESTIMATE FOR ORAL ARGUMENT

63. The Respondents estimate that they will require two hours for oral argument.

Dated 6 May 2022

…….	…….	……..
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101 *Parsons* (2004) 45 CPC (5th) 304, [20].

ANNEXURE A

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

1. *Acts Interpretation Act 1901* (Cth), s 21

2. *Commonwealth Constitution*, ss 71 and 72

3. *Corporations Act 2001* (Cth), ss 674, 1337B

4. *Federal Court of Australia Act 1976* (Cth), ss 3, 18, Pt IVA, ss 33A, 33C, 33D, 33J, 33X, 33ZB and 33ZF

5. *Federal Court Rules 2011* (Cth), r 9.21

6. *Interpretation Act 1897* (NSW), s 17

7. *Judiciary Act 1903* (Cth), s 39B

8. *Supreme Court Act 1986* (Vic), Pt 4A, s 33KA

9. *Trade Practices Act 1974* (Cth), ss 80, 163A