

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, GORDON, EDELMAN AND STEWARD JJ

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BHP GROUP LIMITED

APPELLANT

AND

VINCE IMPIOMBATO & ANOR

RESPONDENTS

*BHP Group Limited v Impiombato*  
[2022] HCA 33  
*Date of Hearing: 9 August 2022*  
*Date of Judgment: 12 October 2022*  
M12/2022

## ORDER

*Appeal dismissed with costs.*

On appeal from the Federal Court of Australia

### Representation

W A Harris QC with J E Moir for the appellant (instructed by Herbert Smith Freehills)

J T Gleeson SC with A D Pound SC and E Levine for the respondents (instructed by Phi Finney McDonald and Maurice Blackburn Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **BHP Group Ltd v Impiombato**

Statutes – Interpretation – Territorial operation – Presumption against extraterritoriality – *Acts Interpretation Act 1901* (Cth), s 21(1)(b) – Where Pt IVA of the *Federal Court of Australia Act 1976* (Cth) permitted a person to commence a representative proceeding in the Federal Court of Australia on behalf of other persons ("group members") where certain statutory criteria were met – Where Pt IVA did not contain any express geographic or territorial restriction on the identity of persons who could be group members – Whether Pt IVA allowed claims to be brought on behalf of group members not resident in Australia.

Words and phrases – "central focus", "claims", "class action", "federal jurisdiction", "hinge", "in and of the Commonwealth", "matter", "object of legislative concern", "personal jurisdiction", "presumption", "presumption against extraterritoriality", "representative proceedings", "statutory construction", "statutory interpretation", "statutory presumption", "subject matter jurisdiction", "territorial connection", "territorial jurisdiction", "territorial restriction".

*Constitution*, s 77(i).

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

*Federal Court of Australia Act 1976* (Cth), Pt IVA; ss 19, 33A, 33C, 33D, 33ZB.



1 KIEFEL CJ AND GAGELER J. The question in this appeal is whether Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the Act") permits representative proceedings to be brought in the Federal Court of Australia on behalf of group members who are not resident in Australia. The question is entirely one of statutory construction.

2 The question has arisen at an interlocutory stage of a representative proceeding brought by the respondents against the appellant, BHP Group Ltd ("BHP"). The proceeding is brought on behalf of group members identified as persons who purchased shares in BHP or in BHP Group Plc during a defined period and who are alleged to have suffered loss resulting from conduct of BHP in contravention of ss 674(2) and 1041H(1) of the *Corporations Act 2001* (Cth) and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth). The proceeding is within the original jurisdiction conferred on the Federal Court by s 1337B(1) of the *Corporations Act* and by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).

3 The primary judge (Moshinsky J)<sup>1</sup> and, on appeal by leave, the Full Court of the Federal Court (Middleton, McKerracher and Lee JJ)<sup>2</sup> rejected an argument by BHP that Pt IVA of the Act does not permit group members to include persons who are not resident in Australia.

4 Having been granted special leave to appeal to this Court<sup>3</sup>, BHP repeats in the appeal its argument unanimously rejected in the Federal Court. For reasons which follow, the argument must again be rejected, and the appeal must fail.

### **Part IVA of the Act**

5 Part IVA was inserted into the Act in 1992<sup>4</sup>. The Part has now been in operation for more than 30 years. During that period, it and some of its more recent State counterparts have been considered by this Court on multiple occasions<sup>5</sup>.

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1 *Impiombato v BHP Group Ltd [No 2]* [2020] FCA 1720.

2 *BHP Group Ltd v Impiombato* (2021) 286 FCR 625.

3 [2022] HCATrans 13.

4 *Federal Court of Australia Amendment Act 1991* (Cth).

5 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; *Timbercorp Finance Pty Ltd (In liq) v Collins* (2016) 259 CLR 212; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

There is no need to traverse the detail of the Part. Enough for present purposes is to recall some broad features of its operation.

6 Part IVA, as was explained soon after its insertion, "assumes the investment by another law of the Parliament of [the Federal Court] with jurisdiction to entertain the subject matter of the representative proceeding" and "creates new procedures and gives the court new powers, in relation to the particular exercise of that jurisdiction"<sup>6</sup>. The distinction between the jurisdiction of the Federal Court, assumed by Pt IVA, and procedures and powers of the Federal Court relating to the particular exercise of that jurisdiction, created by Pt IVA, needs to be borne firmly in mind when considering BHP's argument about the construction of Pt IVA.

7 The procedures which Pt IVA creates, and the powers which it gives to the Federal Court, do not stand alone. Part IVA is framed on the assumption that it will operate concurrently with the procedures and powers of the Federal Court which relate generally to the exercise of jurisdiction conferred on it. Important amongst the procedures assumed by Pt IVA are rules of practice and procedure<sup>7</sup> which make provision for a proceeding to commence by an applicant filing an originating application<sup>8</sup> and for the service of that originating application on a respondent<sup>9</sup>. Those rules of practice and procedure are in turn framed against the background of certain precepts of the common law. One of those precepts is that (enemy aliens apart) any person who has standing to assert a claim within the jurisdiction of a court has a right to commence a proceeding in the court by filing an initiating process, irrespective of that person's nationality or place of residence<sup>10</sup>. Another is that (voluntary submission apart) service of initiating process on a person against whom the claim is asserted is a necessary foundation

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6 *Poignand v NZI Securities Australia Ltd* (1992) 37 FCR 363 at 365, cited in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 258 [1].

7 Section 38 of the Act.

8 Part 8 of the *Federal Court Rules 2011* (Cth).

9 Part 10 of the *Federal Court Rules 2011* (Cth).

10 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 52 [88].

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for the exercise of jurisdiction by the court to determine that claim against that person<sup>11</sup>.

8 Pivotal to the operation of Pt IVA is s 33C of the Act, which is headed "Commencement of proceeding". Section 33C(1) provides:

"Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them."

In that provision, and throughout the Act, the word "person" includes a body politic or corporate as well as an individual<sup>12</sup> and the word "persons" needs to be read correspondingly<sup>13</sup>.

9 Section 33D complements the permissive concluding words of s 33C(1). By operation of s 33D, a "person" referred to in s 33C(1)(a) who has a sufficient interest to have standing to commence a proceeding on that person's own behalf against "another person" is taken to have a sufficient interest to commence a representative proceeding against "that other person" on behalf of "other persons" referred to in s 33C(1)(a).

10 Section 33A sets out definitions which can only be understood having regard to ss 33C(1) and 33D. Section 33A defines "representative party" to mean "a person who commences a representative proceeding". Importantly to BHP's

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11 *Laurie v Carroll* (1958) 98 CLR 310 at 323, referred to in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 23 [11]. See also (2002) 211 CLR 1 at 36 [55]; *Gosper v Sawyer* (1985) 160 CLR 548 at 564-565; *Flaherty v Girgis* (1987) 162 CLR 574 at 599-600; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 517 [13].

12 Section 2C of the *Acts Interpretation Act 1901* (Cth).

13 Section 18A of the *Acts Interpretation Act 1901* (Cth).

argument, it defines "group member" to mean "a member of a group of persons on whose behalf a representative proceeding has been commenced".

11           Section 33E specifies that (exceptional cases aside) a representative party need not have the consent of a group member in order to commence a representative proceeding on that group member's behalf.

12           Section 33J confers on each group member a right to opt out of the representative proceeding by giving written notice within a time fixed by the Federal Court. Section 33X ordinarily requires notice to be given to group members both of the commencement of the proceeding and of their right to opt out. Section 33Y indicates that the notice need not be given to group members personally and might well be given by means of a press advertisement or a radio or television broadcast. There is accordingly a "real possibility"<sup>14</sup> that a group member will be unaware of the proceeding and of their right to opt out. The reality of that possibility is specifically acknowledged in s 33Y(8), which provides that failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.

13           Notwithstanding the possibility of a group member remaining unaware either of the proceeding or of their right to opt out, s 33Z empowers the Federal Court, in determining a matter in a representative proceeding, to give a judgment which, by force of s 33ZB, "binds" all group members which the judgment identifies as affected by it, other than group members who have exercised their right to opt out.

14           To the extent that a judgment given by the Federal Court in a representative proceeding binds group members by force of s 33ZB, Pt IVA has been said to create "its own kind of statutory estoppel"<sup>15</sup>. Needless to say, the statutory estoppel is operative as, and only as, part of the domestic law of Australia. Whether, when, and for what purposes, a judgment given by the Federal Court in a representative proceeding might be taken to determine the existence, or preclude the exercise, of legal rights under the domestic law of another country is a matter to be determined under the domestic law of that country. That is a topic on which Pt IVA has nothing to say.

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14   *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 31 [39].

15   *Timbercorp Finance Pty Ltd (In liq) v Collins* (2016) 259 CLR 212 at 235 [52].

**BHP's argument and the ultimate answer to it**

15 This Court said in *Wong v Silkfield Pty Ltd*<sup>16</sup> that "[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".

16 BHP does not dispute that proposition. It does not seek to limit the scope of the references to "7 or more persons" or "the same person" in s 33C(1)(a), or to a "person", "another person" or "that other person" in s 33D. It does not seek to read down the reference to "a person" in the definition of "representative party" in s 33A. It does not deny that a representative proceeding can be commenced and maintained irrespective of the place of residence of the representative party and (subject to the ordinary rules as to service) irrespective of the place of residence of the respondent.

17 BHP argues that the reference to "persons" in the definition of "group member" in s 33A, and presumably likewise the reference to "other persons" in s 33D, must nevertheless be read down to exclude persons who are not "resident" in Australia. Quite apart from the inherent imprecision of the concept of residence on which it hinges, BHP's argument encounters an immediate logical hurdle. The concluding words of s 33C(1) make clear that a representative party and group members are all to come from within the common pool of "7 or more persons" who have claims of the nature s 33C(1) describes. Those words equally make clear that any person from within the pool who becomes a group member could have chosen to be a representative party. If a person in the pool can become a representative party irrespective of their place of residence, as BHP accepts, why can a person in the pool become a group member only if resident in Australia?

18 The reason why the reference to "persons" in the definition of "group member" in s 33A, and presumably to "other persons" in s 33D, must be construed to exclude persons who are not resident in Australia, according to BHP, arises primarily from the potential for a judgment of the Federal Court given in a representative proceeding to affect rights of unknowing and unconsenting group members by force of s 33ZB. BHP says that the existence of that potential means that a construction which excludes non-residents from group membership is necessary to give effect to a "presumption against extraterritorial operation". BHP says that presumption arises both at common law and by force of s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth).

19 BHP's argument is about the construction of a Commonwealth statute. The argument must be addressed in the terms in which it is presented.

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16 (1999) 199 CLR 255 at 260-261 [11].

20 Yet it is impossible not to notice that BHP's argument bears a marked resemblance to an argument about the limits of State legislative power put by the plaintiff and rejected by this Court in *Mobil Oil Australia Pty Ltd v Victoria*<sup>17</sup>. The argument in that case was that the Victorian equivalent of Pt IVA was beyond the legislative power of the Victorian Parliament, insofar as it allowed a representative proceeding to be brought in the Supreme Court of Victoria on behalf of group members resident outside Victoria, for want of a sufficient territorial connection with Victoria. The answer was that a sufficient territorial connection was to be found in the circumstance that the legislation "concern[ed] the jurisdiction of the Supreme Court of Victoria"<sup>18</sup>.

21 The ultimate answer to BHP's argument about construction is to the same effect as the answer to the argument about legislative power in *Mobil Oil*. To the extent that one or other of the common law and statutory presumptions on which BHP relies bears on the construction of Pt IVA, the presumption provides no reason for adopting a territorially restricted reading of the definition of "group member" in s 33A or "other persons" in s 33D. Enough to satisfy both presumptions is the circumstance that Pt IVA as a whole is concerned with the exercise of jurisdiction by the Federal Court. That is the bottom line.

22 The common law and statutory presumptions on which BHP relies have concurrent and complementary operation. Despite an observed tendency<sup>19</sup> for the two presumptions often to have been considered together and sometimes even to have been equated<sup>20</sup>, they are not wholly coincident. Each is best addressed separately.

### **The common law presumption**

23 BHP seeks to label the common law presumption on which it relies a "presumption against extraterritorial operation"<sup>21</sup>. For reasons to be explained, the presumption of the common law of Australia is more accurately labelled a "presumption in favour of international comity".

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17 (2002) 211 CLR 1.

18 (2002) 211 CLR 1 at 23 [10]. See also at 37 [59].

19 See Pearce, *Interpretation Acts in Australia* (2018) at [4.48].

20 Eg *Vicars v Commissioner of Stamp Duties* (NSW) (1945) 71 CLR 309 at 345.

21 cf *Morrison v National Australia Bank Ltd* (2010) 561 US 247 at 255.

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24 For its preferred formulation of the common law presumption, BHP points to the statement made by Isaacs J in *Morgan v White*<sup>22</sup> that "the persons, property, and events in respect of which Parliament has legislated are presumed to be limited to those in the territory over which it has jurisdiction and for the welfare of which it exercises that jurisdiction". The precise formulation of that statement, and of a similar statement made by Barton J<sup>23</sup>, can be seen in the context of *Morgan v White* to have been influenced by nineteenth and early twentieth century notions of territorial restrictions on legislative power<sup>24</sup>. Those notions ceased to have any relevance to Commonwealth legislative power by the time of the commencement of the *Statute of Westminster Adoption Act 1942* (Cth)<sup>25</sup>.

25 Nevertheless, in *Meyer Heine Pty Ltd v China Navigation Co Ltd*<sup>26</sup>, Taylor J referred to the statement made by Isaacs J in *Morgan v White* as one of a number of expressions of the common law presumption appropriate to be applied to a Commonwealth statute penalising the entering into of a contract in restraint of trade. Windeyer J expressed the presumption in language similarly tailored to the statute in issue when he framed the question for decision in *Meyer Heine* as "whether the prima facie presumption, that the Act does not extend to penalize acts done outside Australia, by foreigners, has been displaced"<sup>27</sup>.

26 The statement made by Isaacs J in *Morgan v White* was and remains an adequate reflection of the common law presumption in many statutory contexts. But as a generalisation it is too broad.

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22 (1912) 15 CLR 1 at 13.

23 (1912) 15 CLR 1 at 4-5.

24 See the references in *Morgan v White* (1912) 15 CLR 1 at 4-5 and 13 to *Macleod v Attorney-General for New South Wales* [1891] AC 455.

25 *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 274.

26 (1966) 115 CLR 10 at 30-31.

27 (1966) 115 CLR 10 at 43.

27 Exposition of the common law presumption in play in *Morgan v White* and in *Meyer Heine* can be traced in Australia to *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*<sup>28</sup>. There O'Connor J said<sup>29</sup>:

"Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption 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: *Maxwell on Statutes*, 3rd ed, p 200."

28 Plainly, O'Connor J did not see the implied restriction on the territorial operation of a statute to which he referred in the first sentence as freestanding but rather as a reflection of the "general presumption" which he expressed in the second sentence with reference to *Maxwell on Statutes*. There, the presumption appeared in the precise terms adopted by O'Connor J under the heading "Presumption against a Violation of International Law"<sup>30</sup>.

29 In *Barcelo v Electrolytic Zinc Co of Australasia Ltd*<sup>31</sup>, Dixon J expressed the presumption in the same language drawn from *Maxwell on Statutes* as had been adopted by O'Connor J in *Jumbunna*. His Honour did so interchangeably with language drawn from nineteenth century English authority to the effect that "[i]t is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or State"<sup>32</sup>.

30 Dixon J returned to the presumption in *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*<sup>33</sup>. The "well settled rule of construction", his Honour there explained, is that "an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying

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28 (1908) 6 CLR 309.

29 (1908) 6 CLR 309 at 363.

30 Kempe, *Maxwell on the Interpretation of Statutes*, 3rd ed (1896) at 200.

31 (1932) 48 CLR 391 at 423-424, quoting *Bloxam v Favre* (1883) 8 PD 101 at 107, adopting *Maxwell on Statutes*.

32 (1932) 48 CLR 391 at 424. To similar effect, see *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 416 [45].

33 (1934) 50 CLR 581 at 601.

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".

31 In *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd*<sup>34</sup>, Dixon CJ expressed the presumption yet again. He did so, more pithily, in terms which he said were appropriate to be applied to a Commonwealth statute after the *Statute of Westminster Adoption Act*. He described it as "a presumption which assumes that the legislature is expressing itself only with respect to things which internationally considered are subject to its own sovereign powers".

32 Understood in the more complete terms consistently so explained in *Barcelo, Wanganui-Rangitikei* and *R v Foster*, the common law presumption on which BHP relies provides no basis for reading down the general references to "group member" in s 33A or "other persons" in s 33D. For s 33ZB to bind a non-consenting group member who is not resident in Australia to a judgment of the Federal Court determining a matter in which the Federal Court has jurisdiction in a representative proceeding would be to infringe no principle of international law or international comity. BHP does not argue to the contrary.

### The statutory presumption

33 Section 21(1)(b) of the *Acts Interpretation Act* provides that, in any Commonwealth 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". That language has remained unaltered since the enactment of the *Acts Interpretation Act* in 1901. As a marginal note to the section then indicated, it was modelled on s 17 of the *Interpretation Act 1897* (NSW). The origins of that section have been traced to s 8 of the *Acts Shortening Act 1852* (NSW)<sup>35</sup>. Provisions in corresponding terms have been replicated in interpretation legislation in each Territory and most States<sup>36</sup>.

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34 (1959) 103 CLR 256 at 275. See also at 306-307. See also *Lipohar v The Queen* (1999) 200 CLR 485 at 497 [15].

35 See *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692 at 716-717 [91]-[95].

36 Section 122(1)(b) of the *Legislation Act 2001* (ACT); s 12(1)(b) of the *Interpretation Act 1987* (NSW); s 38(1)(b) of the *Interpretation Act 1978* (NT); s 35(1)(b) of the *Acts Interpretation Act 1954* (Qld); s 27(b) of the *Acts Interpretation Act 1931* (Tas); and s 48(b) of the *Interpretation of Legislation Act 1984* (Vic).

34 No differently from other provisions of the *Acts Interpretation Act*, application of s 21(1)(b) to a particular Commonwealth Act is "subject to a contrary intention"<sup>37</sup>. However, no search for a contrary intention is needed in order to reject BHP's argument that the provision requires that the references to "group member" in s 33A and "other persons" in s 33D of the Act be construed to exclude non-residents. The argument is founded on a misapprehension of what application of the provision involves.

35 Section 21(1)(b) of the *Acts Interpretation Act* says nothing in terms about how statutory references to "persons" are to be understood<sup>38</sup>. It is not concerned with the meaning of any particular statutory expression.

36 The concern of s 21(1)(b) of the *Acts Interpretation Act* with "references to localities jurisdictions and other matters and things" in a Commonwealth statute is not with the manner of expression of a statutory reference but more substantively with the subject matter to which statutory reference is made. Its instruction that all such references are to be "construed" as "references to such localities jurisdictions and other matters and things in and of the Commonwealth" is a requirement that the statute be construed to ensure that a connection exists between the subject matter to which the statute refers, on the one hand, and the Commonwealth of Australia understood compositely as a geographically bounded polity<sup>39</sup>, on the other hand. The "exact nature" of the requisite connection is not prescribed<sup>40</sup>. That is left by the provision to be determined in the construction of the particular statute: "to be implied or imported upon a consideration of the context and the subject matter"<sup>41</sup>.

37 Section 21(1)(b) operates in harmony with s 15AA of the *Acts Interpretation Act*, which requires preference to be given in the construction of the particular statute to the construction which would best achieve the statutory

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37 Section 2(2) of the *Acts Interpretation Act 1901* (Cth).

38 Contra *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 138 [37].

39 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 612-613. See also *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 130 [9]; *Bakewell v The Queen* (2009) 238 CLR 287 at 301 [36].

40 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 600.

41 *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142. See also *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692 at 717-721 [96]-[119].

purpose or object<sup>42</sup>. Depending on what would best achieve the purpose or object of the particular statute in question, a construction which results in the existence of a connection sufficient to satisfy the requirement of the provision might be arrived at in a variety of ways and might well be arrived at through the concurrent application of the common law presumption. The requirement of a provision like s 21(1)(b) has been found in some contexts to be satisfied by treating a law of "apparently universal application" as "applying to acts and omissions taking place in the territory of the legislature"<sup>43</sup>. In other contexts, it has been satisfied by treating the operation of a statute as "hinging on the place of performance of [a] contract"<sup>44</sup>. In yet other contexts, it has been satisfied by limiting the operation of a statute to contracts the proper law of which according to applicable principles of private international law is that of the enacting legislature<sup>45</sup>.

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No one form of connection fits every statutory subject matter in every statutory context, and no implied limitation of statutory language is necessarily required for the connection required by s 21(1)(b) of the *Acts Interpretation Act* to exist in a particular statutory context. For example, in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc*<sup>46</sup>, no limitation was appropriate to be implied into a statutory regime conferring jurisdiction to conciliate and arbitrate "industrial issues". The requisite connection between the subject matter and the Commonwealth was apparent in the definition of "industrial issues" provided by the statute, which relevantly included matters pertaining to the relationship between employers and maritime employees so far as those matters related to trade or commerce between Australia and a place outside Australia.

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<sup>42</sup> See *Thiess v Collector of Customs* (2014) 250 CLR 664 at 672 [23]; *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56 at 71 [89]; 395 ALR 209 at 227-228.

<sup>43</sup> *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 443. Eg *Grannall v C Geo Kellaway & Sons Pty Ltd* (1955) 93 CLR 36 at 52-53.

<sup>44</sup> *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 162 [36].

<sup>45</sup> *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601; *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142-143; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 257 [4]. See also *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 443; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 160 [30].

<sup>46</sup> (2003) 214 CLR 397.

39 There are statutory contexts in which discerning a connection of the kind required by s 21(1)(b) of the *Acts Interpretation Act* can give rise to issues of some complexity<sup>47</sup>. This is not one of them. The Act establishes the Federal Court<sup>48</sup> – an institution for the administration of justice in and for the Commonwealth – and provides for the Federal Court to have such jurisdiction as is vested in it under other Commonwealth laws<sup>49</sup>. Part IVA is concerned with procedures and powers of the Federal Court relating to the exercise of jurisdiction so vested. No further or more specific territorial connection is required for Pt IVA in its totality to be characterised as referring to jurisdictions, matters and things in and of the Commonwealth. Section 21(1)(b) of the *Acts Interpretation Act* therefore provides no basis to construe Pt IVA of the Act as being restricted in the manner which BHP contends.

### International comparisons

40 Finally, referring to a recently published international survey<sup>50</sup>, BHP observes that the application of class action legislation to non-residents is currently the subject of differing legislative choices in different national jurisdictions. The observation serves to emphasise that the question arising in the appeal, in the context of Pt IVA, is entirely one of statutory construction. The observation does nothing to assist answering that question.

### Disposition

41 The appeal is to be dismissed with costs.

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47 Eg *Mynott v Barnard* (1939) 62 CLR 68 at 73-74; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 159-162 [28]-[36].

48 Section 5 of the Act.

49 Section 19 of the Act.

50 Mulheron, "Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom" (2019) 15 *Journal of Private International Law* 445.

42 GORDON, EDELMAN AND STEWARD JJ. The issue in this appeal is a question of statutory construction: is Pt IVA of the *Federal Court of Australia Act 1976* (Cth), which permits *claims* to be brought by a representative party on behalf of group members, capable of applying to claims of group members who are not resident in Australia? The appellant, BHP Group Limited ("BHP"), contended that a statutory<sup>51</sup> and common law rule of construction – that, subject to a contrary intent, requires words in a statute describing acts, matters or things in general words to be read so as not to have extraterritorial effect – *must* be applied to Pt IVA so that the Part does not permit a representative proceeding to extend to group members who are not resident<sup>52</sup> in Australia. For the reasons that follow, BHP's contention is rejected and the appeal from the Full Court of the Federal Court of Australia should be dismissed.

43 The starting point is the proper construction of Pt IVA<sup>53</sup>. That is because, depending on the particular statute and its subject matter, the common law and statutory presumptions against extraterritoriality may have little or no role to play in the process of construction. Having regard to its text, context and purpose, Pt IVA encompasses all persons, irrespective of whether they are Australian residents, who have "claims" of the kind described in s 33C(1) of the *Federal Court of Australia Act*, so long as the claims include one claim under the various laws made by the Federal Parliament which vest jurisdiction in the Federal Court, including its accrued jurisdiction<sup>54</sup>. The *territorial connection* of Pt IVA is direct and specific; it concerns the jurisdiction of the Federal Court. It is not necessary or appropriate to infer any further territorial limit into Pt IVA.

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

52 Assuming "resident" has a common or established meaning.

53 See, eg, *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 422-423, see also 406-407; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601, 606-607, 611-612; *Mynott v Barnard* (1939) 62 CLR 68 at 75-76; *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10 at 22-24; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 283 [23]; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 161-162 [32]-[36].

54 *Federal Court of Australia Act*, s 19. See also *Fencott v Muller* (1983) 152 CLR 570 at 603-610; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571-572 [7]-[10], 585-586 [51]-[55].

## Background

44 BHP is a company registered in Australia and listed on the Australian Securities Exchange ("ASX"). At the relevant time, BHP had a dual listed company structure with a separate company, then known as BHP Billiton Plc ("BHP Plc"). BHP Plc was registered in the United Kingdom and listed on the London Stock Exchange ("LSE"), with a secondary listing on the Johannesburg Stock Exchange ("JSE"). Under the dual listed company structure, BHP and BHP Plc operated as if they were a single unified economic entity with a unified board and management team.

45 BHP<sup>55</sup> held a 50 per cent interest in a Brazilian company that owned and operated the Germano Complex in Brazil, which included the Fundão Dam. On 6 November 2015 (AEST), the Fundão Dam failed, releasing a significant volume of tailings and resulting in loss of life and other consequences. On 6 and 9 November 2015, BHP made announcements on the ASX relating to the incident. Following these announcements, the price of BHP shares on the ASX – and BHP Plc shares on the LSE and JSE – declined significantly.

46 The respondents are the representative applicants in a class action commenced against BHP in the Federal Court of Australia under Pt IVA of the *Federal Court of Australia Act*. The group members are relevantly defined to include persons who, during a specified period, contracted to acquire an interest in fully paid up ordinary shares in one or more of BHP on the ASX, BHP Plc on the LSE, and BHP Plc on the JSE, and are alleged to have suffered loss by reason of BHP's conduct. The representative applicants allege that, between August 2012 and November 2015, BHP was aware of certain information and risks relating to the Fundão Dam and that, contrary to the continuous disclosure obligations under the ASX Listing Rules and s 674(2) of the *Corporations Act 2001* (Cth), BHP did not inform the ASX of those matters prior to 9 November 2015. The representative applicants also allege that BHP engaged in misleading or deceptive conduct contrary to s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 1041H(1) of the *Corporations Act*. Before this Court, there was no dispute that the group members' claims could be brought in the Federal Court and, as will be seen, were claims over which the Federal Court had subject matter jurisdiction.

## Statutory framework

47 Section 71 of the *Constitution* vests the judicial power of the Commonwealth in the federal courts the Parliament creates. The Federal Court is

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55 Through a wholly-owned subsidiary, BHP Billiton Brasil Ltda.

such a court. It is a statutory court established by s 5 of the *Federal Court of Australia Act*. That Act does not confer jurisdiction – s 19 provides that "[t]he [Federal] Court has such original jurisdiction *as is vested in it by laws made by the Parliament*" (emphasis added) – but rather governs how that jurisdiction is to be exercised.

48 Jurisdiction under federal law is the authority to adjudicate derived from the Commonwealth *Constitution* and laws<sup>56</sup>. Federal courts, other than the High Court, owe their jurisdiction to laws enacted under s 77(i) of the *Constitution*<sup>57</sup>. In its terms, s 77(i) allows the conferral of jurisdiction with respect to any of the "matters" mentioned in ss 75 and 76 of the *Constitution*. As was explained in *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)*<sup>58</sup>:

"The matters mentioned in ss 75 and 76 identify federal jurisdiction by such characteristics as identity of parties (s 75(iii), (iv)), remedy sought (s 75(v) itself), content (interpretation of the Constitution – s 76(i)), and source of the rights and liabilities which are in contention (ss 75(i), 76(ii)) ... For this litigation, the particular jurisdiction of the Federal Court invoked by the applicants had been defined by the Parliament with respect to matters arising under laws made by it (s 76(ii))."

49 That is also the position in this litigation. The Federal Court's jurisdiction is defined by Parliament with respect to matters arising under Commonwealth laws (s 76(ii)) in two ways. First, s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) gives the Federal Court original jurisdiction in any matter arising under any laws made by

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56 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142. See also *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Gould v Brown* (1998) 193 CLR 346 at 379 [15]; *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78]; *Edensor Nominees* (2001) 204 CLR 559 at 570 [2]; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 377 [6], 394-395 [68]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349-350 [24], 353 [31]; *Rizeq v Western Australia* (2017) 262 CLR 1 at 12 [8], 22 [49]-[50]; *Burns v Corbett* (2018) 265 CLR 304 at 330 [20], 346-347 [70]-[71], 365 [124], 378 [159]-[160].

57 *Edensor Nominees* (2001) 204 CLR 559 at 571 [7].

58 (1995) 184 CLR 620 at 653, quoted with approval in *Edensor Nominees* (2001) 204 CLR 559 at 584-585 [50].

the Parliament<sup>59</sup> (this provision has been described as transforming the Federal Court into a court of general federal jurisdiction<sup>60</sup>). Second, provisions of numerous other Commonwealth statutes vest jurisdiction in the Federal Court, generally with respect to matters arising under those Acts<sup>61</sup>.

50 It is well established that a "matter" under the *Constitution* does not mean a legal proceeding between parties or a bare description of a subject matter that falls within a head of federal legislative power<sup>62</sup>. The concept is far broader – it is a justiciable controversy identifiable independently of the proceeding brought for its determination and encompassing all claims made within the scope of the controversy<sup>63</sup>. The word "matters" is of "such generality that it necessarily takes its content from the categories of matter which fall within federal jurisdiction and from the concept of 'judicial power'"<sup>64</sup>. In sum, for there to be a matter in the Federal Court: the Court must have been given jurisdiction with respect to it under s 77(i) of the *Constitution*; there must generally be an immediate right, duty or liability to be established by the determination of the Court<sup>65</sup>; the party instituting the proceeding must have the appropriate standing or interest to have the dispute

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59 Other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter: *Judiciary Act*, s 39B(1A)(c).

60 Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 448 [8.4], referring to Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 158.

61 The Federal Court's jurisdiction is conferred by over 150 Commonwealth Acts: Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 448 [8.3].

62 *B* (2004) 219 CLR 365 at 377 [7].

63 *Fencott* (1983) 152 CLR 570 at 603-606. See also *South Australia v Victoria* (1911) 12 CLR 667 at 675.

64 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 610 [42].

65 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Truth About Motorways* (2000) 200 CLR 591 at 610-611 [43]; *B* (2004) 219 CLR 365 at 375-376 [2], 378 [8].

resolved<sup>66</sup>; and the controversy must be capable of being determined by exercise of judicial power and "in accordance with the independently existing substantive law"<sup>67</sup>.

51 In addition to jurisdiction with respect to subject matter, and the territorial area over which that subject matter may extend, the Federal Court must also have personal jurisdiction, or authority to hear and determine a personal action<sup>68</sup>. That authority stems from the amenability of the respondent to the Court's process<sup>69</sup>. The Court's personal jurisdiction is established by valid service on the respondent within the territory, the respondent's voluntary submission to the jurisdiction or, in some circumstances, valid service on the respondent outside the territory<sup>70</sup>. This appeal is not concerned with the geographic dimension of the Federal Court's jurisdiction ("over which territory does the authority to exercise power extend?")<sup>71</sup>.

52 Part IVA of the *Federal Court of Australia Act* operates within the scheme of the whole of that Act and the Acts which vest the Federal Court with jurisdiction. Part IVA permits a person or persons to commence a representative proceeding in the Federal Court on behalf of group members where certain statutory criteria are met. Section 33C(1) is the foundational provision, setting out the criteria: seven or more *persons* must each have claims against the same *person* that are in respect of or arise out of the same, similar or related circumstances, and the claims of all seven or more of *those persons* must give rise to a substantial common issue of law or fact. Where those criteria are satisfied, "a proceeding may

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66 *Croome v Tasmania* (1997) 191 CLR 119 at 132-133; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 245-246 [31], 256-257 [79]; 399 ALR 214 at 223, 237.

67 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205. See also *Hobart International Airport* (2022) 96 ALJR 234 at 249 [47]; 399 ALR 214 at 227.

68 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 517 [13]-[14], 521 [25]; *Edensor Nominees* (2001) 204 CLR 559 at 570 [2]; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 35 [53].

69 *Mobil Oil* (2002) 211 CLR 1 at 35 [53].

70 *Mobil Oil* (2002) 211 CLR 1 at 37-38 [60]-[61]. See also *Federal Court Rules 2011* (Cth), Pts 10-12.

71 See, eg, *Federal Court of Australia Act*, ss 3,18; *Rizeq* (2017) 262 CLR 1 at 48 [129].

be commenced by *one or more of those persons* as representing some or all of them"<sup>72</sup>. It will be necessary to return to this aspect of s 33C(1).

53 Other provisions of the Part set out various notice requirements, create an opt out process for group members, provide for matters relating to determination, settlement and discontinuance of proceedings, and confer on the Court broad discretionary powers to manage the running of a representative proceeding or order that the proceeding no longer continue as a representative proceeding. Section 33ZB sets out the effect of judgment: a judgment given in a representative proceeding binds all such group members who are identified by the Court to be affected by it, except for those group members who have opted out of the proceeding.

54 Four points should be made. First, like the other Parts of the *Federal Court of Australia Act* (which should be read as a harmonious whole<sup>73</sup>), Pt IVA is procedural, not substantive<sup>74</sup>. As unanimously held by this Court in *Wong v Silkfield Pty Ltd*, "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"<sup>75</sup>. As has just been explained, the *Federal Court of Australia Act* does not confer jurisdiction on the Federal Court – that jurisdiction is found in other statutes passed by Parliament.

55 Second, the *Federal Court of Australia Act* distinguishes between a "matter" and the claim or claims that are properly brought forward by the parties to the matter<sup>76</sup>. All group members must have "claims" under s 33C of the *Federal Court of Australia Act*. Such claims are an integral part of the "matter" in respect of which the Federal Court has jurisdiction<sup>77</sup>. Put in different terms, the "claims" to which s 33C refers have an existence prior to and separately from the

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72 *Federal Court of Australia Act*, s 33C(1) (emphasis added).

73 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 452; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]. See also *Wigmans v AMP Ltd* (2021) 270 CLR 623 at 658 [85].

74 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 628 [136].

75 (1999) 199 CLR 255 at 258 [1].

76 See *Federal Court of Australia Act*, s 22.

77 See *Femcare Ltd v Bright* (2000) 100 FCR 331 at 355-356 [98]-[104].

commencement of the class action<sup>78</sup> and encompass the facts and circumstances which are said to give rise to the action and the legal rights that are asserted as the basis for the action<sup>79</sup>.

56 As Murphy and Colvin JJ stated in *Dyczynski v Gibson*<sup>80</sup>:

"[T]o say that a class member has a 'claim' is not to say that the person has a right or entitlement to relief; but rather that there exists facts, circumstances and legal rights anterior to and independent of the class action, which *may* ground a right or entitlement to relief when that person's claim is ultimately heard and determined by the Court".

In short, Pt IVA does not create the justiciable issue between the respondent and the group members; the "matter" and the claims that make it up necessarily exist independently of the representative proceeding. Part IVA is a procedural mechanism that allows for the grouping of existing claims.

57 Third, while it can be accepted that, without Pt IVA (or an equivalent provision for representative proceedings), the Federal Court could not bindingly adjudicate the claims of the non-party group members unless those persons brought their own proceedings or fell within an established procedure such as one deriving from the procedures of the Court of Chancery<sup>81</sup>, the Court does not need to separately establish personal jurisdiction over the group members in representative proceedings<sup>82</sup>. What matters is that the Court has personal jurisdiction over the respondent. As this Court explained in *Mobil Oil Australia Pty Ltd v Victoria*<sup>83</sup>, to accept the proposition that a court's authority should be confined only to those group members who voluntarily invoke the jurisdiction or are connected with the geographic jurisdiction "would require a radical departure

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78 *Dyczynski v Gibson* (2020) 280 FCR 583 at 627 [166], citing *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 266 [26], *Bright v Femcare Ltd* (2002) 195 ALR 574 at 577 [10], 600 [124] and *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512 at 523.

79 *Dyczynski* (2020) 280 FCR 583 at 627-628 [167]-[168].

80 *Dyczynski* (2020) 280 FCR 583 at 628 [168] (emphasis in original).

81 Williams and Guthrie-Smith (eds), *Daniell's Chancery Practice*, 8th ed (1914) vol 2 at 1589-1592.

82 *Mobil Oil* (2002) 211 CLR 1 at 23 [10]-[11], 35 [53], 36 [56].

83 (2002) 211 CLR 1.

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 [respondent] to the court's process"<sup>84</sup>. Part IVA was enacted with the knowledge that personal jurisdiction is dependent on the amenability of the respondent to the jurisdiction, not the presence in the territory of persons on whose behalf the proceeding is being advanced. As with the Victorian class action regime under consideration in *Mobil Oil*, the bases upon which the Federal Court can assume jurisdiction over a respondent in a personal action were "untouched" by the provisions made for representative proceedings in Pt IVA<sup>85</sup>.

58 Fourth, Pt IVA provides for a process that enables unwilling group members to opt out of the proceeding<sup>86</sup>. Parliament did not, when enacting Pt IVA, alter the bases of the jurisdiction of the Federal Court. Instead, Parliament chose the opt out provisions<sup>87</sup> as the statutory mechanism to ensure that persons are not made subject to the Court's jurisdiction (or bound by a judgment given in a representative proceeding) if they are unwilling to participate<sup>88</sup>. The integrity of Pt IVA "depends upon group members having the right to opt out"<sup>89</sup>. The opt out mechanism has a central place in the scheme: the hearing of a representative proceeding must *not*, except with the leave of the Court, commence earlier than the date before which a group member may opt out of the proceeding<sup>90</sup>. The Court has a power to order notices at any stage<sup>91</sup>, and certain notices are mandatory,

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84 *Mobil Oil* (2002) 211 CLR 1 at 35 [53]; see also 23 [10]-[11].

85 *Mobil Oil* (2002) 211 CLR 1 at 38 [61].

86 See *Mobil Oil* (2002) 211 CLR 1 at 34-35 [51].

87 See, eg, *Federal Court of Australia Act*, ss 33J, 33K(4), 33X, 33Y, 33ZB, 33ZE.

88 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3175.

89 *BMW Australia* (2019) 269 CLR 574 at 629 [137]. See also *Femcare* (2000) 100 FCR 331 at 347-348 [67]-[68], 349 [75]; *Wigmans* (2021) 270 CLR 623 at 656-657 [80].

90 *BMW Australia* (2019) 269 CLR 574 at 629 [137], referring to *Federal Court of Australia Act*, s 33J(4); see also 630 [142]. See also *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia [No 4]* [2010] FCA 749 at [22]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (In liq)* (2015) 325 ALR 539 at 573 [180]; *Dyczynski* (2020) 280 FCR 583 at 648 [270].

91 *Federal Court of Australia Act*, s 33X(5).

including the notice of group members' right to opt out before a specified date that is prior to the hearing of the representative proceeding<sup>92</sup>. Although "the reality is that ... notice[s] may not have come to the attention of, or been fully appreciated by, all group members"<sup>93</sup>, the Court is given flexible powers to ensure that notice is reasonably likely to come to the person's attention<sup>94</sup> and to protect the integrity of the opt out process (for example, by ensuring that public representations made during the opt out period are not misleading)<sup>95</sup>.

### Statutory construction and the "presumption" against extraterritoriality

59 In statutes<sup>96</sup>, like the *Federal Court of Australia Act*, where there is no express provision relevantly addressing the territorial reach of the subject matter of the statute, the task is to identify the *hinge*<sup>97</sup> (also referred to as the *statutory springboard*<sup>98</sup>, *general subject matter*<sup>99</sup>, *object of legislative concern*<sup>100</sup>,

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92 *Federal Court of Australia Act*, s 33X(1)(a).

93 *BMW Australia* (2019) 269 CLR 574 at 630 [142], quoting *Blairgowrie Trading* (2015) 325 ALR 539 at 573 [180]. See also *Femcare* (2000) 100 FCR 331 at 348 [71]-[72].

94 *Federal Court of Australia Act*, ss 33X, 33Y.

95 See, eg, *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2008] FCA 575 at [18]-[19]; see also [9], referring to *Federal Court of Australia Act*, ss 23, 33J, 33K and 33X.

96 Putting to one side statutes creating criminal offences, to which different considerations will apply.

97 *Insight Vacations* (2011) 243 CLR 149 at 162 [36]; *Old UGC Inc* (2006) 225 CLR 274 at 282-283 [22].

98 *Law Society of New South Wales v Glenorcy Pty Ltd* (2006) 67 NSWLR 169 at 177-178 [35]-[43]. See also *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692 at 732 [157]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Darnia-Wilson* [2022] FCAFC 28 at [23].

99 *Mynott* (1939) 62 CLR 68 at 86. See also *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 143-144.

100 *Barcelo* (1932) 48 CLR 391 at 423; *Wanganui-Rangitikei* (1934) 50 CLR 581 at 612.

*central conception*<sup>101</sup>, *character*<sup>102</sup> or *central focus*<sup>103</sup>) of the statute and identify its territorial connection, if any. The applicable provisions, read in context, may have a hinge or subject matter with a clear territorial connection<sup>104</sup>. That task – of identifying the "central focus" of a statute – is purely a question of statutory construction. As Leeming JA said in *DRJ v Commissioner of Victims Rights [No 2]*<sup>105</sup>, the hinge or central focus is identified "as a matter of construction, based on subject matter and scope, and with a regard to internal indications and to avoiding improbable and absurd outcomes. It will be relevant to have regard to the purpose of the statute, the likelihood that the statutory purpose will be evaded if made to depend upon something readily altered at the instance of the parties, and the need to avoid an unduly restrictive approach whereby more than one factum is required to bear a connection".

60 That approach to construction has been applied in a variety of contexts, including: where statutes modified or voided contractual rights and obligations (*Barcelo v Electrolytic Zinc Co of Australasia Ltd*<sup>106</sup>, *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society*<sup>107</sup> and *Kay's Leasing Corporation Pty Ltd v Fletcher*<sup>108</sup>); where a statute was concerned with liability for negligence in relation to the supply of recreational services (*Insight Vacations Pty Ltd v Young*<sup>109</sup>); where statutes provided for compensation in relation to

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**101** *Old UGC Inc* (2006) 225 CLR 274 at 283 [23]; *Infosys Technologies Ltd v Victoria* (2021) 64 VR 61 at 64 [7], 72 [44].

**102** *Mynott* (1939) 62 CLR 68 at 86.

**103** *Insight Vacations* (2011) 243 CLR 149 at 161 [33].

**104** See, eg, *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 415-416 [41]-[43].

**105** (2020) 103 NSWLR 692 at 732 [157]. Putting to one side the different considerations applicable to legislation creating an offence.

**106** (1932) 48 CLR 391 at 421-422.

**107** (1934) 50 CLR 581 at 601, 606-607, 611-612.

**108** (1964) 116 CLR 124 at 143-144.

**109** (2011) 243 CLR 149 at 161-162 [32]-[36].

accidents or acts of violence (*Mynott v Barnard*<sup>110</sup> and *DRJ*<sup>111</sup> respectively); and where statutes were concerned with the performance of work within an industry (*Old UGC Inc v Industrial Relations Commission (NSW)*<sup>112</sup>) or for a continuous period of time with one employer (*Infosys Technologies Ltd v Victoria*<sup>113</sup>).

61 Only after identifying the hinge of the provisions and revealing the territorial connection (if any) of the subject matter, does the question of the application of the common law presumption against extraterritoriality arise<sup>114</sup>. The so-called "presumption" is an interpretive principle whose force depends upon the extent to which the hinge of the provisions departs from common expectations that Parliament's concern with the subject matter is limited to matters within its territory. Put another way, the general common law presumption of territoriality – that an enactment describing acts, events, matters or things in general words, so that, if constrained by no consideration lying outside its expressed meaning, its application would be universal, should not be understood as extending extraterritorially<sup>115</sup> – is a rule of construction only and "it may have little or no place where some other restriction is supplied by context or subject matter [of the statute in issue]"<sup>116</sup>. Whether a restriction is supplied by the context or the nature of the subject matter is a question of statutory construction which necessarily precedes the application of the presumption.

62 This Court has never taken a uniform or mechanistic approach to applying the presumption<sup>117</sup>. Where the hinge or the central focus of the subject matter is identified and it does not have a clear territorial connection (that is, it appears to be at large), the presumption will generally require that the hinge be construed as

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110 (1939) 62 CLR 68 at 75-77, 86.

111 (2020) 103 NSWLR 692 at 733-736 [158]-[179].

112 (2006) 225 CLR 274 at 282-283 [22]-[23].

113 (2021) 64 VR 61 at 77 [67], 78-79 [73], 80 [79].

114 *Old UGC Inc* (2006) 225 CLR 274 at 283 [23]. See also *Insight Vacations* (2011) 243 CLR 149 at 161 [32]-[33].

115 See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Wanganui-Rangitikei* (1934) 50 CLR 581 at 600-601.

116 *Wanganui-Rangitikei* (1934) 50 CLR 581 at 601.

117 See *DRJ* (2020) 103 NSWLR 692 at 720-721 [113]-[119].

territorially limited, subject to a contrary intention<sup>118</sup>. Where the central focus of the subject matter of the statute, on its proper construction, has a territorial connection, it will ordinarily be unnecessary to look for further territorial restrictions<sup>119</sup>. The presumption has never been understood such that it needed to be applied to all elements or words in a statute.

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Section 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) does not compel a different approach or give rise to a different conclusion<sup>120</sup>. Section 21(1)(b) 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"<sup>121</sup>. Section 21(1)(b) does not answer the question: what is the matter or thing which should be construed, subject to contrary intent, as "in and of" the Commonwealth? And, as this Court said in *Insight Vacations*<sup>122</sup>, "the question of geographical limitation arises regardless of the engagement of a provision such as" s 21(1)(b) of the *Acts Interpretation Act*. The common law rules of statutory construction, including those relating to the "presumption" against extraterritoriality, step in to assist in identifying the territorial restriction<sup>123</sup>. Where the statute is in general terms, and where s 21(1)(b) applies, the approach to construction of the statute and the conclusion are necessarily the same.

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**118** *Insight Vacations* (2011) 243 CLR 149 at 161-162 [32]-[36]. See also *Barcelo* (1932) 48 CLR 391 at 422-423, see also 406; *Wanganui-Rangitikei* (1934) 50 CLR 581 at 601, 606-607, 611-612; *Mynott* (1939) 62 CLR 68 at 75-77; *Old UGC Inc* (2006) 225 CLR 274 at 283 [23].

**119** *Barcelo* (1932) 48 CLR 391 at 422; *Old UGC Inc* (2006) 225 CLR 274 at 283 [23], see also 278 [1], 292 [59]; *Insight Vacations* (2011) 243 CLR 149 at 161-162 [32]-[36].

**120** See *Wanganui-Rangitikei* (1934) 50 CLR 581 at 600-601; *Insight Vacations* (2011) 243 CLR 149 at 159-162 [27]-[36].

**121** See also *Acts Interpretation Act*, s 2(2), which provides that the application of the Act is subject to a contrary intention.

**122** (2011) 243 CLR 149 at 159 [28], citing *Kay's Leasing* (1964) 116 CLR 124 at 142-144.

**123** *Wanganui-Rangitikei* (1934) 50 CLR 581 at 600-601.

**The hinge or central focus of the subject matter of Pt IVA of the *Federal Court of Australia Act***

64 As has been observed, the sole issue is the proper construction of Pt IVA: can group members in representative proceedings include non-residents of Australia?

65 Section 33C is generally worded<sup>124</sup>. There is no express geographic or territorial restriction in s 33C or elsewhere on the identity of the "persons" who can be representative applicants or group members (or indeed, respondents) in a representative proceeding. BHP's argument proceeds from the position that the statutory and common law presumption against extraterritoriality must apply so that s 33C should be read as *not* permitting non-resident group members. BHP sought to draw a distinction between representative applicants and group members in a representative proceeding on the basis that the representative applicants, but not the group members, had submitted to the jurisdiction of the Federal Court. That is the wrong starting point.

66 The hinge by which the *Federal Court of Australia Act* operates is the powers and procedures for determining proceedings within the Court's jurisdiction. That hinge thus depends on s 19, which provides that the Court has such original jurisdiction as is vested in it by laws made by the Parliament. Absent those laws, the Federal Court has no jurisdiction. Part IVA operates by allowing the grouping of "claims" where each group member has at least one claim under one of the laws which have vested jurisdiction in the Federal Court. For example, in this case, the grouped claims are under the *Corporations Act* and the *Australian Securities and Investments Commission Act*. As Moshinsky J observed at first instance, the territorial reach of the Court's powers over the subject matter in Pt IVA is necessarily as extensive as the substantive laws which confer that jurisdiction in relation to particular claims. Territorial limits might be found in the substantive laws. Otherwise, if those laws do extend to claims for loss and damage by persons who are not resident in Australia, then the Court may exercise its powers in relation to those persons. But accepting that non-residents may be group members under Pt IVA in such circumstances is not to say that the *Federal Court of Australia Act* operates "extraterritorially" in any relevant sense. The determination of the group members' claims, as a matter of Australian law, does not have any effect or execution outside Australia<sup>125</sup>. Given the clear territorial connection of the Court's

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124 See [52] above.

125 *Federal Court of Australia Act*, s 18.

jurisdiction, neither the *Federal Court of Australia Act* nor Pt IVA has extraterritorial operation that would engage the presumption.

67 BHP's construction of Pt IVA ignores the *Constitution* and the legislation passed by the Commonwealth Parliament vesting jurisdiction in the Federal Court, and rewrites the *Federal Court of Australia Act*. BHP's construction would require Pt IVA to read that "*the powers and procedures within the Part only apply to persons [resident] within Australia* such that a representative applicant cannot bring a claim on behalf of a non-resident" (emphasis added). BHP does not explain how Pt IVA alone of all of the Parts in the *Federal Court of Australia Act* should be or could be interpreted in that way.

68 None of the fundamental principles or bases for establishing the jurisdiction of the Federal Court is confined by reference to an applicant's location or residence. BHP's construction would signal a "radical departure" from the accepted bases<sup>126</sup>. Part IVA does not show any intention to affect or alter those fundamental principles or bases of jurisdiction. Instead, Pt IVA takes the Federal Court's jurisdiction as it finds it; it regulates the procedure "for dealing not only with claims that are made, but also claims that *could* be made" against a respondent amenable to the jurisdiction of the Federal Court<sup>127</sup>. The claims must satisfy the criteria in s 33C – namely seven or more persons must have claims against the same person that are in respect of or arise out of the same, similar or related circumstances, and those claims must give rise to a substantial common issue of law or fact – and at least one of those claims must be a claim over which the Federal Court has been vested with jurisdiction by a federal Act to hear and determine.

69 In such a context – interpreting a provision that governs how the jurisdiction of an Australian court is to be exercised; a matter so directly territorially connected to Australia – the presumption against the extraterritorial operation of legislation does not have any role to play. There is no basis to apply the presumption to exclude group members who may reside outside of the physical territory of the jurisdiction. Who makes the claim and where they live does not determine the jurisdiction of the Federal Court or the claims that may be brought in accordance with the procedures in Pt IVA.

70 BHP placed considerable reliance on s 33ZB, which provides that a judgment given in a representative proceeding binds all group members who are identified by the Court to be affected by it, other than persons who have opted out of the proceeding. BHP submitted that this should be presumed not to apply to

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<sup>126</sup> *Mobil Oil* (2002) 211 CLR 1 at 35 [53].

<sup>127</sup> *Mobil Oil* (2002) 211 CLR 1 at 38 [61] (emphasis added).

persons outside the territory and that there is no textual or contextual contrary intention. In support of that contention, BHP submitted that s 33ZB is essential to ensuring that respondents are not subjected to multiple proceedings brought in respect of the same subject matter by or on behalf of the same persons. That contention should be rejected. As the Full Court emphasised, s 33ZB only binds persons as a matter of Australian law. The parties accept that s 33ZB is not capable of, and does not purport to, affect a person's rights under foreign law in respect of the same or similar subject matter. Whether Australian judgments will be recognised in other jurisdictions, and in what circumstances, is a matter for foreign law.

71 It is unnecessary to fully address the question, raised in submissions, of whether the common law presumption only applies where a statute extends to subject matters over which, according to the comity of nations or international law, another sovereign or state properly has jurisdiction. That is not what Pt IVA does. For present purposes, it is sufficient to recognise that the common law presumption has been stated without reference to<sup>128</sup>, and applied without reliance on<sup>129</sup>, the comity of nations or international law. The "presumption" is a rule of statutory construction. Given the Commonwealth Parliament's now recognised extraterritorial legislative competence, it is important not to conflate the question of statutory construction with that of constitutional validity: "the fact that a provision in a particular form would have been within the competence of the legislature does not provide any positive assistance towards the true construction of a provision expressed in perfectly general terms without any territorial restriction"<sup>130</sup>. Regardless of any inconsistency with international law or comity, the common law presumption has been applied, for example, to construe the territorial limits of legislation conferring entitlements in apparently universal terms

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**128** cf *Jumbunna Coal Mine* (1908) 6 CLR 309 at 363; *Morgan v White* (1912) 15 CLR 1 at 13; *Seaegg v The King* (1932) 48 CLR 251 at 255; *Meyer Heine* (1966) 115 CLR 10 at 30-31, 43; *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101 at 132-133 [144]-[147]; *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388 at 469 [386]; *DRJ* (2020) 103 NSWLR 692 at 698 [11], 722-723 [122]-[123].

**129** In the context of Commonwealth legislation, see, eg, *Meyer Heine* (1966) 115 CLR 10 at 23-24, 30-33, 43. See also *Darnia-Wilson* [2022] FCAFC 28 at [14]-[18], [23]-[32], [46]-[49].

**130** *Mynott* (1939) 62 CLR 68 at 75. See also *R v Foster*; *Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 275.

(such as forms of statutory compensation<sup>131</sup> or workplace entitlements like long service leave<sup>132</sup>).

## Text

72 BHP's construction would also have the odd consequence that the same word – "person" – would be interpreted differently within s 33C. The meaning of "person" in s 33C when concerned with the respondent and the representative party is not said to be confined by residence but the meaning of "person" in s 33C when concerned with group members is to be confined by residence in Australia. Differing meanings of the word "person" within the same provision would be unlikely and anomalous, given the general assumption that words repeated in a statute are used with the same meaning<sup>133</sup>. BHP's construction is also inconsistent with the text of s 33C, which provides that, where seven or more "persons" have claims of the relevant kind, "a proceeding may be commenced by one or more of *those persons* as representing some or all of them" (emphasis added). The logic is clear: the "person" who commences the proceeding must be one of the group of "persons" who have claims of the relevant kind. If the representative party may be a non-resident, then, as a textual matter, necessarily so too may the group members.

## History

73 That Pt IVA permits the inclusion of non-resident group members is consistent with the history of representative proceedings. As Gleeson CJ observed in *Mobil Oil*, "[s]ubject 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 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; and they were not even necessarily aware of the proceedings"<sup>134</sup>. Part IVA was

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131 See, eg, *Mynott* (1939) 62 CLR 68 at 73, 75-77, 86; *DRJ* (2020) 103 NSWLR 692 at 733 [158], 736-737 [180]-[184].

132 See, eg, *Infosys Technologies* (2021) 64 VR 61 at 63-64 [2]-[7], 68 [28], 70-71 [38]-[39], 72 [44]-[45].

133 *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [65]; 328 ALR 375 at 388-389; *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818 at 838 [95]; 381 ALR 601 at 625.

134 *Mobil Oil* (2002) 211 CLR 1 at 22 [6].

enacted to supplement and improve the existing procedures. It did not remove or narrow access to the Court's existing jurisdiction but provided a more detailed and expansive regime compared with the pre-existing rules for representative proceedings<sup>135</sup>. As the respondents submitted, "[i]t 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 commonality of their claims but, on the other hand, *narrowing* the class of persons by reference to their residence".

## Purpose

74 That construction is also consistent with the purposes of Pt IVA, which include, as is evident from the provisions of the Part and supported by the extrinsic materials<sup>136</sup>, the creation of an efficient and comprehensive mechanism for the determination of similar claims: that, subject to the right to opt out, "everyone with related claims should be involved in the proceedings and should be bound by the result"<sup>137</sup>. In contrast, BHP's construction would undermine the purpose of Pt IVA by not allowing non-residents to be group members in representative proceedings (whereas they could commence *inter partes* proceedings or be part of a representative proceeding under r 9.21 of the *Federal Court Rules 2011* (Cth)). This would create a risk of a multitude of parallel proceedings or actions, directly contrary to the purpose of Pt IVA.

## Practical difficulties with BHP's construction

75 BHP's submission that Pt IVA should be read down to exclude non-residents is also unworkable. Immediately, the question which would arise on that construction is: how is residence to be determined? Residence may be a complex inquiry with a range of different standards in different legislation and there would be an unresolved question of *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. BHP's contention that residence is a practical expression of the distinction between persons within the territory and outside of it, as demonstrated

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135 Wong (1999) 199 CLR 255 at 267 [28]. See also *Wigmans* (2021) 270 CLR 623 at 655-656 [77], discussing Pt 10 of the *Civil Procedure Act 2005* (NSW) (the equivalent to Pt IVA).

136 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174-3175.

137 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at 44 [92], see also 24 [57].

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by the legislative model adopted in the United Kingdom that makes a distinction between class members domiciled and not domiciled in the United Kingdom, does not assist in resolving these difficulties. Part IVA adopts what has been described as the "no-provision model"<sup>138</sup>, recognising that there are different legislative models in comparable jurisdictions. That was a deliberate legislative choice.

## Orders

76                    The appeal should be dismissed with costs.

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**138** Mulheron, "Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom" (2019) 15 *Journal of Private International Law* 445 at 452-455.

