Federal Court of Australia

BHP Group Limited v Impiombato [2021] FCAFC 93

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| Appeal from: | *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720 |
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| File number: | VID 789 of 2020  |
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| Judgment of: | **MIDDLETON, MCKERRACHER AND LEE JJ** |
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| Date of judgment: | 3 June 2021  |
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| Catchwords: | **REPRESENTATIVE PROCEEDINGS** –shareholder class action – claims brought on behalf of non-resident shareholders – dual listed company structure – whether provisions of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) capable of application to group members not resident in Australia– procedure under Pt IVA – consideration of the meaning of “claim” under s 33C – question of jurisdiction better defined as whether Pt IVA permits an applicant to define group membership as including claims of non-residents – statutory presumption against extraterritorial operation of legislation – s 33C directed to when a particular form of proceeding can be commenced in an Australian court – presumption has no work to do – consideration of class action regimes in different common law jurisdictions and the issue of non-resident group members – consideration of s 33KA of the *Supreme Court Act 1986* (Vic) – whether the Court should exercise its discretion to exclude non-resident group members from the proceeding – order could be fashioned if and when appropriate – strike out application – whether the claims brought on behalf of the shareholders in the United Kingdom company were viable**EQUITY** – Pt IVA supplements powers Court always had and has as a court of equity to hear and determine in a single proceeding the multiple claims against a respondent – consideration of the powers the Court of Chancery had in relation to the conduct of a representative proceeding – concept of jurisdiction not based on mere presence and service, but upon a sufficient connexion being shown between the dispute and forum – purpose of Pt IVA not to narrow regimes that existed in equity’s exclusive or auxiliary jurisdiction – curious result if one could be a group member in a Chancery rule representative proceeding but not under Pt IVA procedures**PRIVATE INTERNATIONAL LAW** – authority of the Court to decide personal actions of non-residents – consideration of the jurisdictional “anchor” – *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; (2002) 211 CLR 1 – territorial nexus the capacity to exercise power over a respondent**HIGH COURT AND FEDERAL COURT** – federal jurisdiction – whether Pt IVA confers jurisdiction on the Court or establishes powers and procedures by which the Court can exercise jurisdiction |
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| Legislation: | *Constitution* ss 71, 77*Acts Interpretation Act 1901* (Cth) ss 9, 21(1)(b)*Australian Securities and Investments Commission Act 2001* (Cth)*Corporations Act 2001* (Cth) ss 9, 674, 1317HA, 1325*Federal Court of Australia Act 1976* (Cth) ss 5, 33A, 33C, 33D, 33E, 33J, 33K, 33V, 33ZB, 33ZF*Judiciary Act 1903* (Cth) s 39B(1A)(c)*Federal Court Rules 2011* (Cth) rr 8.01, 9.21*Supreme Court Act 1986* (Vic) s 33KA*Rules of the Supreme Court 1883* (Eng)Explanatory Memorandum, *Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000* (Vic)  |
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| Cases cited: | *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 4)* [2021] FCA 459*Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1;(2001) 204 CLR 559*Barcelo v Electolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391*BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 374 ALR 627*Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd*[2012] HCA 55; (2012) 250 CLR 503*Cook v Pasminco Ltd* [2000] VSC 534*Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896; (2017) 252 FCR 150*Duke of Bedford v Ellis* [1901] AC 1*Dyczynski v Gibson* [2020] FCAFC 120; (2020) 381 ALR 1*Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; (2020) 101 NSWLR 890*House v R* (1926) 55 CLR 499*Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Ltd* [2014] FCA 982*Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720*International General Electric Co of New York Ltd v Commissioner of Customs and Excise* [1962] Ch 784*John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503*John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298*Laurie v Carroll* (1958) 98 CLR 310*Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98; (2017) 252 FCR 1*Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10*Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; (2002) 211 CLR 1*Nationwide News Pty Ltd v Rush*[2018] FCAFC 70*Niboyet v Niboyet* [1878] 4 PD 1*South Australia v Victoria* (1911) 12 CLR 667*TPT Patrol Pty Ltd (as trustee for Amies Superannuation Fund) v Myer Holdings Ltd* [2019] FCA 1747; (2019) 140 ACSR 38 *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Ltd* [2021] FCA 475*Wigmans v AMP Ltd* [2020] NSWCA 104; (2020) 102 NSWLR 199*Wong v Silkfield Pty Ltd* [1999] HCA 48; (1999) 199 CLR 255 |
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|  | Gleeson J, “Extraterritorial Application of Australian Statutes Proscribing Misleading Conduct”(2005) 79 *ALJ* 296Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Thomson Reuters, 2012)Heydon JD, Leeming MJ and Turner PG, *Meagher, Gummow & Lehane’s Equity, Doctrines & Remedies* (5th ed, LexisNexis Butterworths, 2014)Mulheron R, “Asserting Personal Jurisdiction Over Non-Resident Class Members: Comparative Insights for the United Kingdom” (2019) 15(3) *Journal of Private International Law* 445Pearce D, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019)White R W, “Equitable Obligations in Private International Law: The Choice of Law” (1986) 11 *Sydney Law Review* 92 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Personal Insolvency |
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| Number of paragraphs: | 105 |
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| Date of hearing: | 21 May 2021 |
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| Counsel for the Appellant: | Ms WA Harris QC with Mr KA Loxley |
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| Solicitor for the Appellant: | Herbert Smith Freehills |
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| Counsel for the Respondents: | Mr PW Collinson QC with Mr AD Pound and Ms E Levine |
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| Solicitor for the Respondents: | Phi Finney McDonald and Maurice Blackburn Lawyers |

ORDERS

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|  | VID 789 of 2020 |
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| BETWEEN: | BHP GROUP LIMITED (ACN 004 028 077)Appellant |
| AND: | VINCE IMPIOMBATOFirst RespondentKLEMWEB NOMINEES PTY LTD (AS TRUSTEE FOR THE KLEMWEB SUPERANNUATION TRUST)Second Respondent |

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| order made by: | MIDDLETON, MCKERRACHER AND LEE JJ |
| DATE OF ORDER: | 3 June 2021 |

THE COURT ORDERS THAT:

1. Leave be granted to appeal with such leave being limited to grounds 1 and 2 in the draft notice of appeal (being exhibit CT-2 to the affidavit of Christine Tran affirmed 11 December 2020).
2. A notice of appeal reflecting the leave granted pursuant to order 1 be filed by the appellant forthwith.
3. The appeal be dismissed with costs.
4. The application for leave to appeal dated 11 December 2020 be otherwise dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# A INTRODUCTION AND THE APPLICATION FOR LEAVE

1. This is a further application for leave to appeal in this proceeding, which commenced in May 2018. The application for leave is from a decision of the primary judge in *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720 (**J**).
2. The genesis of this class action was the November 2015 collapse of a Brazilian mine and dam which occasioned the death of 19 people and caused extensive property damage. The mine is a joint venture including BHP Group Limited (**BHP**), formerly BHP Billiton Limited. It is common ground that at all material times, BHP and BHP Group Plc (**BHP Plc**) had a dual listed company structure pursuant to which they operated as if they were a single unified economic entity, with a unified board and management team. BHP is registered in Australia and listed on the Australian Securities Exchange (**ASX**). BHP Plc is registered in the United Kingdom and listed on the London Stock Exchange (**LSE**), with a secondary listing on the Johannesburg Stock Exchange (**JSE**). It is alleged that in the period following the dam collapse, BHP’s stock price fell substantially across all markets.
3. In broad terms, the group members in the class action are all persons who, during a defined period leading up to the collapse, entered into a contract to acquire an interest in fully paid up ordinary shares in: (a) BHP on the ASX (**BHP ASX Shares**); (b) BHP Plc on the LSE (**BHP LSE Shares**); and/or (c) BHP Plc on the JSE (**BHP JSE Shares**), and are alleged to have suffered loss.
4. BHP contends that Mr Vince Impiombato and Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund), the representative applicants, should not be “permitted to, prosecute claims on behalf of persons who do not reside in Australia” and assert that owners of the BHP LSE Shares and BHP JSE Shares do not have a viable cause of action in respect of an alleged failure by BHP to comply with Australia’s continuous disclosure laws. The primary judge rejected these assertions, however, in doing so, BHP contends that the primary judge fell into error in three ways by failing to:
5. construe the application of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**), such that it does not apply to the claims brought on behalf of shareholders of BHP and/or BHP Plc who are not residents of Australia (**Extraterritorial Operation Contention**);
6. exercise a discretion to exclude non-resident group members, by failing to take into account the interests of BHP and the structure of Pt IVA (particularly in respect of finality) in circumstances where his Honour found (at J [130]) that there was “some risk of [re-agitation of subsequent similar subject matter proceedings] occurring” (**Wrongful Discretion Contention**); and
7. construe the application of s 674 of the *Corporations Act 2001* (Cth) (**Corporations Act**), such that the claims of shareholders in BHP Plc ought to be struck out because such persons do not have a cause of action against BHP under s 674, because s 674 does not contemplate loss sustained by foreign investors who purchased shares on a foreign stock exchange (**Strike Out Contention**).
8. Unsurprisingly, the relevant principles informing the discretion to grant leave to appeal are not in doubt. They can be shortly stated. As was observed in *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70 (at [2]–[6] per Lee J, Allsop CJ and Rares J agreeing):

The starting point is that in exercising the power to grant leave, regard must be had to the statutory charge in s 37M(3) of the [Act] that the power must be exercised or carried out in the way that best promotes the overarching purpose, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

Consistently with the facilitation of a *just* resolution, an applicant must usually show that: (a) in all the circumstances, the decision to be appealed is attended with sufficient doubt to warrant its reconsideration on appeal; and (b) supposing the decision to be wrong, substantial injustice would result if leave were refused: *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399 (Sheppard, Burchett and Heerey JJ). The sufficiency of the doubt in respect of the decision to be appealed and the question of substantial injustice bear upon each other so that the degree of doubt which is sufficient in one case may be different from that required in another. It has also been said that the considerations are cumulative such that leave ought not be granted unless each limb is made out: *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCAFC 139; (2010) 81 ATR 36 at 38 [5] (Ryan, Stone and Jagot JJ); *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98; (2017) 252 FCR 1 at 4 [3] (Jagot, Yates and Murphy JJ).

Additionally, consistent with the facilitation of a *quick, inexpensive and efficient* resolution is the principle which emerges from the oft-cited warning of Jordan CJ in *In re the Will of F. B. Gilbert (Deceased)* (1946) 46 SR (NSW) 318 at 323, that if a tight rein is not kept upon the interference with orders of judges at first instance in the exercise of discretion on a point of practice and procedure, the result will be “disastrous to the proper administration of justice”.

…

Even if it was reasonably arguable that the primary judge’s discretion miscarried, that would not, in and of itself, be a sufficient basis for the grant of leave.

(Emphasis in original).

1. It is convenient to deal with each of the proposed grounds of appeal together insofar as they relate to each of the three contentions of BHP identified above. In the process of dealing with each of the three contentions separately, we will deal briefly with factors relevant to a grant of leave.
2. But before doing so, it is appropriate to make a preliminary point. The draft notice of appeal seeks only two orders: the appeal be allowed and an order for costs. There is no identification of the substantive relief sought if the appeal is successful. Unusually, the interlocutory application below sought, among other things, a declaration. Of course, an interlocutory declaration has long been regarded as being fundamentally misconceived; this is because an interim declaration is inimical to the very nature of declaratory relief, which is to determine, on a final basis, the whole or part of the justiciable controversy: see, for example, *International General Electric Co of New York Ltd v Commissioner of Customs and Excise* [1962] Ch 784 (at 789 per Upjohn LJ, Diplock LJ agreeing) and the cases collected in Heydon JD, Leeming MJ and Turner PG, *Meagher, Gummow & Lehane’s Equity, Doctrines & Remedies* (5th ed, LexisNexis Butterworths, 2014) (at 622–3 [19-140]). As was explained in *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896; (2017) 252 FCR 150 (at 156–7 [27]–[29] per Lee J), however, declarations can be made other than at a final hearing in the special case where the declaration determines *on* *a final basis* an aspect of the matter in dispute. But some procedural complications potentially arise in the current circumstances. Given a declaration is final relief, it might be thought it should have been sought by cross-claim and an application made for a separate final hearing to be heard together with the other applications (which were for interlocutory relief). Any question as to leave to appeal would also arise in a different context if the declaratory relief was refused at a separate final hearing and consideration would have needed to have been given to giving notice to those named as group members prior to the separate final hearing. Alternatively, the relevant relief might arguably have been framed as an interlocutory application to amend the terms of the group definition under s 33ZF(1) (s 33K(1) not being available on the application of a respondent) to make the position as to the identity of the group members clear, rather than being cast in terms of final relief. For reasons that will become evident, however, it is unnecessary to consider these procedural issues further.

# B EXTRATERRITORIAL OPERATION CONTENTION

## B.1 The Issue Generally and Leave to Appeal

1. The first two proposed grounds of appeal raise an issue which, according to one commentator, involves considering how class action legislation, and the principles of private international law should combine to handle the “conundrum” of how a court is to assert personal jurisdiction over non-resident class members, that is, group members domiciled or residing in places outside the jurisdiction in which the class action has been filed: see 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 (at 446).
2. Different class action regimes have approached this problem, peculiar to opt-out class actions, in different ways but, as Mulheron observes (at 446–7), there “has been little unanimity across leading class action systems, *viz*, those in the United States, Canada, Australia and South Africa … on this vexing and evolving issue” (citations omitted).
3. The Extraterritorial Operation Contention raises a point of some importance, which has not been directly considered by an intermediate court of appeal in Australia, and leave to appeal should be granted with regard to grounds 1 and 2.

## B.2 BHP’s Argument

1. The foundational error in the primary judge’s analysis is said to be the rejection (at J [102]) of BHP’s argument that the presumption against the extraterritorial operation of legislation is the “correct starting place” from which to commence the analysis.
2. BHP asserts that there is a well-entrenched common law presumption against the extraterritorial operation of legislation. That presumption works from the premise that the Australian Parliament does not intend to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or state. It is said that the effect of the primary judge’s reasoning was to invert the operation of this presumption so that his Honour’s starting position was to presume the statute applied to persons outside of the jurisdiction, and then to look for any express or implied geographic limitation in Pt IVA that would confine its operation to persons resident within Australia: see J [103], [111].
3. Although BHP accepts, as it must, that the Court has jurisdiction over claims by the representative applicants that concern alleged acts or omissions by BHP in relation to the disclosure, or failure to disclose, information to the ASX, the fact of this jurisdiction is said to be no answer to the question of whether the powers conferred by Pt IVA enable the Court to exercise that jurisdiction with respect to the claims of all persons whom they purport to represent.
4. The claimed upshot of the primary judge’s approach is that Pt IVA creates no distinction between the individual claim of an applicant and the claim of a group member. In other words, the jurisdiction with respect to the representative applicant’s claim automatically grounds jurisdiction in respect of each claim brought on behalf of each group member and the Court is mandated to exercise that jurisdiction absent some “express or necessarily implied restriction inhibiting the availability of [the Pt IVA] procedures to foreign residents”: see J [102].
5. The real question, with which the primary judge did not properly engage, is said to be: “does Pt IVA permit an applicant in a group proceeding to bring, and have determined, claims on behalf of persons outside Australia?” The answer to that question, it is submitted, must start with the presumption that in enacting Pt IVA, the Parliament intended for it to operate within the territorial limits of Australia, and then proceed to analyse whether there is a basis, textual or otherwise, on which to displace that presumption by clear words or necessary implication.
6. Upon a proper construction of the legislation (read in context and having regard to the legislative purpose), BHP says there is nothing which rebuts the presumption that Parliament intended for Pt IVA to operate only within the territorial limits of Australia.

## B.3 Foundational Matters

1. The distinction between an applicant’s role as a party advancing an individual claim and the representative role of an applicant is an important part of BHP’s argument. Further, legislative choices made in Australia in enacting Pt IVA (being different choices than those made in some comparator jurisdictions) inform how this common problem of the absent foreign class member in opt-out class actions is to be resolved.
2. It follows that without going further, it is necessary to make some observations as to how Pt IVA works and the roles of the applicant and the group members in the statutory scheme. A more detailed explanation is set out in *Dyczynski v Gibson* [2020] FCAFC 120; (2020) 381 ALR 1 (at 41–3 [162]–[172], 58–60 [245]–[251] per Murphy and Colvin JJ and at 75–80 [325]–[342] per Lee J). The observations below are drawn principally from that summary of how the provisions apply.
3. Pt IVA permits a class action to be commenced by a representative party on behalf of group members (s 33C) whose consent is generally not required (s 33E) but who must be given notice of and an opportunity to opt-out of the proceeding (s 33J).
4. Section 33C(1) identifies the circumstances when a class action may be commenced:

Subject to this Part, where:

(a) 7 or more *persons* have *claims* against the same person; and

(b) the *claims* of all of *those persons* are in respect of, or arise out of, the same, similar, or related circumstances; and

(c) the *claims* of *all of 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.

(Emphasis added).

1. The *first* thing to observe is that the section refers to both *persons* and *claims*. If persons have claims which have a certain character, then those persons can be represented by one or more of the persons commencing a proceeding in the Federal Court of Australia. Section 33D provides that a person referred to in s 33C(1)(a), who has a sufficient interest to commence a proceeding on their own behalf, has a sufficient interest to commence a class action on behalf of the others who have claims. As is evident, there is no express geographical or territorial restriction on the identity of those persons who can be group members or an applicant in a Pt IVA proceeding. Like there is no geographical or territorial restriction on a person who can commence an ordinary *inter partes* proceeding in the Court: see r 8.01 of the *Federal Court Rules 2011* (Cth) (**FCR**).
2. The *second* thing to observe is the focus in s 33C on the notion of a “claim” – a fundamental concept in Pt IVA. It is well established that “claim” is a wide concept and it is not the cause of action pleaded.
3. To speak of a group member or proposed group member having a claim is not to speak of them as having a right or entitlement to relief; but rather the claim (as the word implies) is the existence of a set of circumstances existing anterior to, and separately from, the class action, which, through the exercise of judicial power, may ground a right or entitlement to relief when that person’s rights and entitlements against another person are considered and then determined. It also follows that although the claim must be of a type recognised by law, even if it is ultimately unable to ground a right or entitlement to relief, this does not mean that no claim existed. There is also no express geographical or territorial limitation on the concept of a claim.
4. The “gateway” requirements to commencing a class action are deliberately undemanding; so undemanding that Pt IVA requires only that an applicant surmounts the threefold s 33C criteria and has a sufficient interest to afford standing. There is no threshold examination of the merits of the claims required or contemplated by the statutory scheme. Once commenced, the persons who are group members (who may be unaware the action has been commenced) are the persons on whose behalf the class action has been brought: see s 33A. There are a number of ways that persons cease to be group members, including: (a) opting out before the date fixed by the Court for opting out under s 33J (or later pursuant to leave granted by the Court); (b) when the claim of the group member is no longer able to be advanced because the relevant dispute has been quelled by a settlement binding group members: see s 33V and s 33ZB; (c) by a “declassing” order made by the exercise of the Court’s discretion (including after an initial trial of common issues to provide for group member claims to be advanced individually and determined); or (d) by being excluded following an order being made by the Court.
5. If a person remains a group member, Pt IVA contemplates that if a group member’s claim is determined, it is usually after an initial trial of common issues which binds the respondent as a party and gives rise to a “statutory estoppel”. The making of a s 33ZB order is the mechanism by which non-party group members are bound by any order in the proceeding, including the determination of common questions. The answer to the common questions might (but might not) determine the individual claims of group members. This will depend upon the nature of the claim, and the nature of the answers. In the common circumstance when answers to common questions are not determinative, it will be necessary for a group member’s claim to be determined by that group member taking active steps to prosecute the group member’s individual claim in the Court, often (but not invariably) following a “declassing” order.
6. The group members, including the non-resident group members, are not *parties* to the proceeding. They ordinarily would not be required to take any active step until they have been provided with an opt-out notice, or wanted to participate in any settlement or take steps to advance their individual claim in the Court. The passivity of the group members may have legal consequences for them according to the law of Australia if an order is made binding them as a non-party to any judgment or order (s 33ZB), but subject to this, they remain non-parties in the class action.
7. Given that the role of a representative, as defined and regulated by Pt IVA, is a limited “statutory agency”, care must be taken in framing the relevant question (as BHP does – see [15] above) as whether Pt IVA permits an applicant in a group proceeding “to bring, *and have determined*, claims on behalf of persons outside Australia” (emphasis added). The applicant has an authority to bring a class action and deal, in certain respects, with claims of the type described in s 33C, but this is subject to a number of statutory discretions aimed at ensuring that attempts to promote efficiency do not result in injustice to individuals (including a respondent) and facilitating the supervisory and protective role of the Court towards group members. Absent settlement, the representative role of the applicant will be limited to having common questions (or so-called “questions of commonality”) determined: see *Dillon v RBS Group* (at 164–5 [66]–[67] per Lee J). Absent those relatively rare occasions when these questions are legally determinative of all group member claims, the group member’s bespoke claim will not be determined by adjudication until after opt-out and usually (but not invariably) only after *the group member* has taken active steps to advance the group member’s claim in the Court (and hence taken an active step in the Australian proceeding). The real question is better expressed as: whether Pt IVA permits an applicant to define group membership as including claims of non-residents?

## B.4 Consideration of the Extraterritorial Operation Contention

1. BHP submission is founded on two related propositions:
2. *first*, that Pt IVA operates to confer jurisdiction on the Court because absent “the extension provided by Pt IVA, there is no justiciable issue between the claims of group members and BHP ... because there is nothing in the *Corporations Act*, the [*Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**)]or the [*Judiciary Act 1903* (Cth)] which gives the Court jurisdiction over the potential claims of persons who are not parties” (see, for example, BHP Reply submissions (at [7])); and
3. *secondly,* as a matter of construction of Pt IVA, the common law presumption against the extraterritorial operation of legislation has application because there is no displacement of the presumption that Pt IVA, which confers jurisdiction, does so in a manner which suggests the legislative intention was to extend to the claims of non-residents.
4. With respect, neither of these propositions is well-founded.

### Pt IVA and Jurisdiction

1. It is well to commence by identifying the source of this Court’s jurisdiction over the “matter” (to use this word in its Constitutional sense). Jurisdiction in the sense presently relevant is the authority of the court to adjudicate: *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1;(2001) 204 CLR 559 (at 570 [2] per Gleeson CJ, Gaudron and Gummow JJ).
2. By s 71 of the *Constitution*, judicial power of the Commonwealth is relevantly vested in this Court, being a federal court created by the Parliament (being a jurisdiction as to matters defined by laws made pursuant to the power in s 77 of the *Constitution*). Relevantly, given the nature of this matter, specific provisions of the Corporations Act and the ASIC Act define this jurisdiction (together with s 39B(1A)(c) of the *Judiciary Act* which, since its enactment in 1997, has meant this Court is one of general federal jurisdiction).
3. Contrary to BHP’s submission, Pt IVA does not serve to confer jurisdiction on the Court but rather establishes powers and procedures by which the Court can exercise jurisdiction over matters otherwise conferred upon it provided the “gateway” provisions are surmounted.
4. A class action can only be commenced if there is a *matter* in respect of which the Court has jurisdiction. Of course, the matter is 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. Just as the matter is not the cause or causes of action brought by the applicant, it is also not the individual claims able to be made by group members. A justiciable controversy is identifiable independently of a proceeding, such as a class action, brought for its determination. As Griffith CJ observed in *South Australia v Victoria* (1911) 12 CLR 667 (at 675), “the word “matters” was … the widest term to denote controversies which might come before a Court of Justice.”
5. To say that absent “the extension provided by Pt IVA, there is no justiciable issue between the claims of group members and BHP” cannot be accepted. The Court has jurisdiction because a justiciable controversy of a certain type exists and the Court has been invested with jurisdiction by legislation (including s 39B(1A)(c) of the *Judiciary Act* which provides the “original jurisdiction of the Federal Court of Australia … includes jurisdiction in any matter: … (c) arising under any laws made by the Parliament …”). The 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.
6. What Pt IVA allows is for claims, which like the matter, exist separately from the proceeding, to be grouped. Pt IVA supplements the powers the Court always had and retains as a court of equity (see s 5(2) of the Act) to hear and determine, in a single proceeding, multiple claims against a respondent. In this way it can be seen that Pt IVA is about the exercise (and not the conferral) of jurisdiction.
7. This same critical distinction is illustrated by the fact that there was (and is) no restriction on a non-resident being a person on whose behalf a representative proceeding can be commenced under the Chancery rules reflected in FCR 9.21. The Chancery Court always had wide discretionary powers in relation to the conduct of a representative proceeding; the persons represented were not necessarily residents within the jurisdiction; and they were not necessarily aware of the proceedings in which they were represented: see *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; (2002) 211 CLR 1 (at 21–2 [6] per Gleeson CJ) and the discussion of cases in Mulheron (at 467–9).
8. Whether the Court has jurisdiction, like in a Pt IVA proceeding, is assessed by reference to whether the Chancery rule representative proceeding relates to a matter within the Court’s jurisdiction – not by the rules of the Court regulating how this aspect of the equitable jurisdiction of the Court is to be exercised.

### Construction of Pt IVA and the Presumption

1. We then come to the construction of Pt IVA.
2. Before explaining how in legislating Pt IVA, the Parliament adopted one of a number of legislative options available to it to deal with the phenomenon of non-resident group members, it is necessary to say something about the presumption upon which BHP’s Extraterritorial Operation Contention is based.
3. The presumption called in aid is but one of a number of interpretative principles applied by courts to ascertain the meaning of legislation. They are usefully collected in Chapter 5 of Pearce D, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) (at 207–60). Ultimately, however, as was explained in *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd*[2012] HCA 55; (2012) 250 CLR 503 (at 519 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ):

“This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text”. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

(Citation omitted).

1. Contrary to the criticisms made of the approach of the primary judge, this is the true beginning or starting point of the construction task, not a presumption which, depending upon the circumstances, may assist with the search for meaning.
2. The language of s 33C(1) is plain. As noted above, a class action “may be commenced by one or more of those persons [as specified in s 33C(1)] as representing some or all of them”. A group member may be any person who has the characteristics specified. Further, the section is directed at the ability of a person so identified to do an act (commence a type of proceeding) in the Federal Court of Australia, being a court in respect of which the proceeding can be commenced because the Court has jurisdiction granted to it by the Parliament in respect of the relevant controversy.
3. The presumption is a general rule, as expressed by James LJ in *Niboyet v Niboyet* [1878] 4 PD 1 (at 7), that the legislature of a country does not normally intend to deal with persons or matters over which, according to the comity of nations, jurisdiction properly belongs to some other sovereign or state. But s 33C(1) is directed to when a particular form of proceeding can be commenced in an Australian court exercising Ch III judicial power to quell a controversy, which exists independently of the proceeding. The manner of exercise of a jurisdiction conferred on an Australian court is not, obviously enough, a matter where it might be thought jurisdiction properly belongs to a foreign sovereign or state.
4. Cases such as *Barcelo v Electolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 and *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10 and provisions such as s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) (**AIA Act**) (which provides that references to localities, jurisdictions and other matters and things shall be construed as references to localities, jurisdictions and other matters and things in and of the Commonwealth) suggest a number of general principles of statutory construction: see Gleeson J, “Extraterritorial Application of Australian Statutes Proscribing Misleading Conduct”(2005) 79 *ALJ* 296 (at 296–300). But, as noted above, the provision to be construed here relates to how persons can start a particular form of proceeding in an Australian court. The presumption has no work to do in the search for meaning of a statutory provision of this character.
5. Moreover, when one has regard to four aspects of the relevant context and purpose, this conclusion as to the construction of the provision is fortified.
6. *First*, is the issue of legislative choice when a number of options were available as to how one dealt with non-resident group members. Mulheron (at 452–4) identifies and labels five approaches adopted when enacting different class action regimes:
7. the *no provision model*: adopted in Pt IVA and its state cognates (other than in Victoria), the United States federal regime and some Canadian provinces (Ontario and Nova Scotia), whereby the statue is silent about non-resident class members;
8. the *global model*: adopted in various Canadian provinces (Manitoba, British Columbia, Saskatchewan and Alberta), whereby the statute explicitly provides for class actions to be commenced on behalf of both domestic and non-resident class members;
9. the *compulsory opt-in model*: adopted in the United Kingdom and some Canadian provinces (New Brunswick, Newfoundland and Labrador), whereby a non-resident class member must take a positive step to opt-in to the class action (although the class action is otherwise conducted on an opt-out basis);
10. the *exclusion model*: adopted in Victoria (and to an extent in Alberta, Saskatchewan and British Columbia), whereby participation of non-resident class members is not excluded but they can be removed in circumstances identified in the relevant statute; and
11. the *judicial choice* *model*: adopted in Pennsylvania, whereby the “court can (at its discretion), insist that non-resident class members proactively opt-in to the [class] action if certain legislatively-prescribed criteria are met”, even where the class action is otherwise conducted on an opt-out basis.
12. The issue of how to deal with non-resident group members is relevant to any class action regime, particularly one that adopts an opt-out approach. Here at the Commonwealth level, 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.
13. A similar but not identical choice to admit the prospect of non-resident group members was made by Victoria in adopting an “exclusion model”. Pt IVA does not contain an equivalent of s 33KA of the *Supreme Court Act 1986* (Vic). The purpose of this provision was described recently in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 4)* [2021] FCA 459 (at [16] per Lee J), as an attempt to protect, in some circumstances, a group member who was unaware of the fact that a judgment had been entered. But it has a wider significance as being the provision by which the exclusion model operates. It provides that:

 **33KA Court powers concerning group membership**

(1) On the application of a party to a group proceeding or of its own motion, the Court may at any time, whether before or after judgment, order—

(a) that a person cease to be a group member;

(b) that a person not become a group member.

(2) *The Court may make an order under subsection (1) if of the opinion that—*

(a) *the person does not have sufficient connection with Australia to justify inclusion as a group member;* or

(b) for any other reason it is just or expedient that the person should not be or should not become a group member.

(3) If the Court orders that a person cease to be a group member, then, if the Court so orders, the person must be taken never to have been a group member.

(Emphasis added).

1. Needless to say, the adoption of an exclusion model allowing the removal of group members who do not have sufficient connexion with Australia to justify inclusion, necessarily presupposes that prior to such an order being made, the person the subject of the removal order is a group member. This was not disputed by BHP.
2. As was accepted by BHP in oral argument, a consequence of the Extraterritorial Operation Contention is that, if it was correct, a non-resident with a claim within federal jurisdiction (which could be grouped with others because of its commonality) could not be a group member in a Pt IVA class action, but could nonetheless be able to advance the claim by: (a) becoming a named party to a proceeding in this Court by being named as a party in a representative proceeding or commencing an ordinary *inter partes* proceeding; (b) being a represented party in a Chancery rule representative proceeding commenced in the Federal Court under FCR 9.21; or (c) being a group member in a Pt 4A class action commenced in the Supreme Court of Victoria (with that Court exercising federal jurisdiction). To say that this would be a surprising outcome is somewhat of an understatement.
3. Needless to say, 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. Similarly, to the extent relevant, it has never been suggested that the later enacted Pt 4A accommodates a species of claims in federal jurisdiction that are not able to be advanced in this Court under Pt IVA. This is consistent with the fact there was no suggestion in the very generally worded Explanatory Memorandum to the *Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000* (Vic) to that effect. Rather, the Explanatory Memorandumnotes that the purpose of s 33KA is “to reflect common law principles regarding the Court’s capacity to exercise jurisdiction over the parties and subject matter of proceedings”.
4. *Secondly*, Pt IVA was enacted with the knowledge that the foundation of jurisdiction at law was the amenability of the defendant to the command of the summons in the originating writ, which depended primarily on presence in the jurisdiction. As Viscount Haldane explained in  *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298 (at 302) “[t]he root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King’s writ, and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction”: see also *Laurie v Carroll* (1958) 98 CLR 310 (at 323 per Dixon CJ, Williams and Webb JJ). Indeed, in Chancery, the mere presence of the defendant was neither a necessary nor a sufficient criterion for the assumption of jurisdiction, but jurisdiction could be more broadly founded upon the residence or domicile of the defendant, or on the cause of action arising, or the subject matter of the suit being situated, in the realm. In short, under the old Chancery procedures, the concept of jurisdiction was not based on mere presence and service, but upon a sufficient connexion being shown between the dispute and the forum: see White R W, “Equitable Obligations in Private International Law: The Choice of Law” (1986) 11 *Sydney Law Review* 92 (at 104).
5. *Thirdly,* as noted above, Pt IVA was enacted to supplement, liberalise, and improve access to, existing procedures. Even before the *Rules of the Supreme Court 1883* (Eng) (the precursor of FCR 9.21), as Lord Macnaghten explained in *Duke of Bedford v Ellis* [1901] AC 1 (at 8), the “old” rule in the Court of Chancery was very simple and perfectly well understood and provided that if a common interest and a common grievance existed, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. This was irrespective as to whether the represented persons were residents. It would no doubt have surprised those responsible for the enactment of Pt IVA for it to be suggested that a consequence of the enactment would be to adopt a new grouped proceeding regime, which had a more restrictive approach as to who could be represented than had existed for centuries in representative proceedings in equity. It is difficult to reconcile such a result with the legislative purpose when one bears in mind that “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” which existed in equity’s exclusive or auxiliary jurisdiction: *Wong v Silkfield Pty Ltd* [1999] HCA 48; (1999) 199 CLR 255 (at 267 [28] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).
6. *Fourthly*, an aspect of the legislative choice in enacting Pt IVA was to allow an applicant to restrict the persons represented to only some of the persons who have claims, so-called “closed classes”: see s 33C. Any constructional argument that non-residents cannot be group members in a class action must recognise that Pt IVA provides that class actions come in a variety of shapes and sizes. The argument cannot be assessed on the basis that all class actions are, like here, commenced on behalf of a large open class. An example taken from the facts of *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Ltd* [2014] FCA 982 illustrates the reach of the submission advanced. In that case, a very small number of sophisticated investors alleged they suffered damage by reliance on a valuation provided by the respondent. The allegations gave rise to at least one common issue (the true value of the property at the time of the impugned valuation) and a class action was commenced (in which each of the group members were specified by name) and was resolved by instructions being received from each group member (a s 33V approval being granted as a consequence). One of the small number of listed group members was an investor entity not resident in Australia. As BHP again accepted in oral submissions, the logic of the Extraterritorial Operation Contention is that the inclusion of the foreign entity as a group member by the representative applicant, with the foreign entity’s express consent, was not licit (although, as noted above, the foreign entity could have commenced its own proceeding against the respondent in the Court). This again would be a surprising result.
7. This last point highlights an important aspect of context in assessing the merit of the Extraterritorial Operation Contention, that is, how the Court has the authority to adjudicate the common claims of group members. Or, to put it another way, and to adopt the expression of Mulheron, what is the jurisdictional “anchor” relied upon to adjudicate the common aspect of non-resident group member claims?

### The Jurisdictional “Anchor”

1. As noted above, on the current state of the law in this country, the Court’s authority at law to decide personal actions is based on its capacity to exercise power to compel a respondent to submit to orders made. But the focus in BHP’s argument is on the role of the non-resident *as a group member in a class action*. As Gleeson CJ observed in *Mobil Oil* (at 23 [11]), the focus on underlying group members in the jurisdictional argument inverts the usual principle as to the jurisdiction of a court, which is the capacity to exercise power over a defending party.
2. The justification for the defending party’s presence or submission “anchor” to asserting jurisdiction can be seen by reference to the majority’s decision in *Mobil Oil*.
3. In that case, the respondent sought a declaration that the amending legislation which inserted Pt 4A into the *Supreme Court Act* was invalid on the basis that its provisions exceeded territorial limits on the power of the Victorian Parliament and was incompatible with the exercise of vested federal judicial power by the Supreme Court of Victoria. It was asserted that Pt 4A attempted to make the Supreme Court of Victoria “a national court for the conduct of class actions” by allowing claims to be made by residents of other states and territories having no necessary connexion with Victoria. A further argument was advanced that the provisions of Pt 4A undermined an implied constitutional principle of federalism prohibiting state legislation which, if given extraterritorial effect, would affect the relationship between another state or a territory and its residents.
4. These arguments were rejected partly because it was observed that if the defendant is served within the jurisdiction, any requirement for a territorial nexus of the state legislation which empowers the court to decide the proceeding is to be found in the defendant’s connexion to the jurisdiction by its presence at the time of service. The sufficiency of that connexion is not affected by whether every claim which is entitled to be adjudicated in the proceeding is actively promoted by the person who is entitled to make it: see 36 [55] per Gaudron, Gummow and Hayne JJ.
5. Reference was made above to s 33KA(2)(a) of the Victorian regime, which allows for the exclusion model and presupposes the existence of non-resident group members. In Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Thomson Reuters, 2012) (at 111–2 [3.280]), the authors relevantly describe s 33KA(2)(a) as a “troubling provision” and note that “it serves little purpose in respect of foreign group members” as it is the defending party’s “amenability to the jurisdiction that is critical”. This comment reflects the views expressed by Hedigan J in *Cook v Pasminco Ltd* [2000] VSC 534, where his Honour relevantly observed (at [21]–[23]):

... The establishment by Part 4A of the group proceeding mechanism is the creation by this State of a means of enforcing obligations arising from acts arguably done both inside and outside the territorial jurisdiction of the State of Victoria … It is enabling legislation which confers rights upon group members who are not named parties to the proceeding and as such the legislation operates with respect to persons. Whilst there might be arguably good policy reasons for limiting the ambit of Part 4A, Part 4A does not itself create any limitation…

… I am not prepared to take the view that interstate groups are excluded from the operation of Part 4A. The legislation is intended to be enabling, not restrictive ...

1. It also reflects the comments of Gaudron, Gummow and Hayne JJ in *Mobil Oil* (at 35 [52]–[53], 38 [61], 39 [68]), citing what was said (by the same judges together with Gleeson CJ and McHugh J) in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503 (at 517 [14]):

In by far the majority of cases, the jurisdiction of Australian courts in personal actions depends on the defendant’s presence in the territorial jurisdiction at the time of service of the originating process.  *In such cases it is not necessary to show any other connection with the jurisdiction*.

(Emphasis added).

1. The inversion (or shift in the focus of attention) in the unsuccessful argument in *Mobil Oil* from the defendant’s amenability to process, to the connexion of the claim or the claimants with Victoria, has obvious similarities to the present argument advanced by BHP in relation to non-resident group members.

### Conclusion

1. As the High Court observed in *Wong v Silkfield* (at 258 [1] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ), Pt IVA confers upon the Court “new powers in relation to the exercise of jurisdiction with which it has been invested by another law made by the Parliament”. It cannot be disputed that the provisions of the laws of the Parliament upon which jurisdiction is conferred on this Court mean that this Court has authority to adjudicate the justiciable controversy between BHP and all other relevant actors, including non-residents. The powers in Pt IVA as to *the exercise of jurisdiction* with which it has been invested by another law are capable of application to claims for loss and damage by non-residents. As the primary judge correctly found, there is nothing about Pt IVA evincing an intention to the contrary. On the state of the law in this country, where jurisdiction is attracted by service on the respondent within the territorial jurisdiction of the court, it is not necessary to show any other connexion with the jurisdiction. Or, put another way, as the authors of *Class Actions in Australia* observed, it is the defending party’s “amenability to the jurisdiction that is critical”.
2. Two final points should be made.
3. *First*, there is BHP’s submission as to the central provision of Pt IVA, s 33ZB. BHP contends there is “no textual or contextual indication that Parliament intended for this provision to apply to persons beyond the jurisdiction of this Court”. But, as the applicant correctly submits, this misapprehends the relevant inquiry. The question is whether, from the perspective of *Australian law*, s 33ZB can operate to create a statutory estoppel with respect to non-residents. Plainly it can. Section 33ZB could not otherwise operate so as to ensure that this Court’s judgment would bar non-resident group members from bringing proceedings raising the same issues under foreign law in a foreign court. That is a matter for the laws of the foreign jurisdiction. The statutory estoppel will, however, operate so as to affect the rights of the non-resident group member bound by the s 33ZB order if and when that non-resident group member seeks the determination of its individual claim under Australian law in this Court (or any other Australian court).
4. *Secondly*, when it comes to the Extraterritorial Operation Contention, any reliance upon a distinction between the Court’s jurisdiction over the claims of the applicants and the group members by asserting that “not all group members have a valid cause of action against the respondent” is beside the point. It is necessary to deal below with BHP’s Strike Out Contention, but even if the claims made on behalf of BHP Plc shareholders for contravention of s 674(2) of the Corporations Act were misconceived, this does not mean that there is not a claim within the meaning of s 33C.
5. The primary judge’s approach was not infected by error and the Extraterritorial Operation Contention should not be accepted.

# C WRONGFUL DISCRETION CONTENTION

## C.1 BHP’s Submissions

1. An alternative argument was advanced below by BHP relying, in effect, on discretionary powers. In a sense the Wrongful Discretion Contention is connected to aspects of the Extraterritorial Operation Contention as the perceived deficiencies in the defendant’s presence or submission “anchor” to asserting jurisdiction discussed above can be repurposed as reasons in favour of ameliorating any difficulties caused by the presence of non-resident group members. Indeed, the existence of discretionary powers available to be invoked that provide protections to a respondent suffering real identifiable prejudice in a class action being pursued unfairly or inefficiently were remarked upon by Gleeson CJ in *Mobil Oil*, who observed (at 24 [12]):

The legislative policy underlying group proceedings may be open to legitimate difference of opinion, but the primary object is clear enough. It is to avoid multiplicity of actions, and to provide a means by which, where there are many people who have claims against a defendant, those claims may be dealt with, consistently with the requirements of fairness and individual justice, together. The discretionary powers conferred upon the court in dealing with a group proceeding are consistent with that objective. To point to the theoretical possibility that in a particular case those powers might not be exercised wisely, or might operate unfairly, is not to deny the existence of the legislative power to establish such a regime. Possible abuse of legislative power is not a reason for denying the existence of the power [*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151]. And possible misuse of the discretionary powers built into the scheme of Pt 4A does not negate the plain territorial connection between that scheme and Victoria.

1. Specifically, BHP contended that even if claims were able to be made on behalf of non-resident group members, it was appropriate for the Court to exercise its discretion under ss 23 and/or 33ZF of the Act to exclude such persons from the class action. The rejection of this application by the primary judge is challenged in the third, fourth and fifth grounds of appeal (being the Wrongful Discretion Contention).
2. Although the primary judge did not need to decide the question of power, BHP submitted the relief sought falls squarely within the power conferred by s 33ZF and/or s 23 because:
3. *as to s 33ZF*, the test as articulated by the plurality in *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 374 ALR 627 (at 637 [51] per Kiefel, Bell and Keane JJ), that an “issue has arisen in a pending proceeding between the parties to it, and that the proceeding will be advanced towards a just and effective resolution by the order sought” is satisfied. BHP contended that the notion of what is “just” is not a one-sided inquiry having regard only to the interests of group members. An order under s 33ZF that ensures the proceeding continues in a manner that is just to the respondent, and not unjust to any other party, is within the scope of the section. Removing those group members who, notwithstanding their participation in this proceeding, retain a right of action against BHP in respect of the same subject matter overseas, it was said, ensures that BHP has the benefit of certainty and finality in respect of the proceeding, and is therefore an order to ensure that justice is done in the proceeding; and
4. *as for s 23*, the only express limitations on the exercise of the Court’s power are that the Court has “jurisdiction” and thinks that the order “is appropriate”. It was said that even if it is accepted that “appropriate” is to be read as “appropriate to the protection and enforcement of the right or subject matter in issue in the proceeding”, that construction accommodates an order that serves to protect the right of BHP in the proceeding.
5. In any event, in deciding not to order the exclusion of non-resident group members, or to order that the proceeding on behalf of such group members be permanently stayed pending an amendment to the definition of “group member” (or even considering such a course), it was contended that the primary judge failed to take into account a material consideration which must be properly weighed in the exercise of the discretion: the interests of BHP in the proceeding and, more particularly, BHP’s interest in certainty and finality in respect of the proceeding.
6. The relevant analysis of the primary judge (at J [130]–[132]) was as follows:

… the sole ground upon which [BHP] seeks the exclusion of all non-resident Group Members (or all non-resident shareholders of BHP Plc) is the risk of re-agitation of the same issues in a new proceeding in another country against BHP Plc or [BHP]. While I accept there to be, at least, some risk of this occurring, I do not consider it appropriate, on balance, to make such an order pursuant to s 33ZF or s 23 or the Court’s incidental power (assuming there is power to do so). The order sought by [BHP] would see the exclusion from the represented group of a large number of persons who (it is to be assumed for present purposes) have arguable claims against [BHP]. I do not consider the exclusion of either cohort (that is, all non-resident Group Members or all non-resident shareholders of BHP Plc) to be in the interests of justice because it would deprive the relevant Group Members of the ability to pursue their claims within the framework of this representative proceeding. Further, the exclusion of either cohort may well be productive of inefficiency and wasted costs, as the excluded Group Members would then need to commence separate proceedings against [BHP] in this Court (or another Australian court), if they wished to pursue the claims.

To the extent that [BHP] submits that s 33ZB will not operate to bind non-resident Group Members because they will be able to commence a new proceeding raising the same issues in the courts of the United Kingdom or South Africa, this submission misconceives the terms and effect of s 33ZB. Any judgment in this proceeding *will* bind Group Members (other than those who opt out) *as a matter of Australian law*. Thus, s 33ZB will operate in accordance with its terms. If a subsequent proceeding is commenced in a foreign country, the effect (if any) of the judgment in this proceeding will be a matter to be determined by the law (including rules of private international law) of that country.

For these reasons, on balance, I do not consider it to be in the interests of justice in this proceeding to make an order excluding all non-resident Group Members or all non-resident shareholders in BHP Plc.

1. It is asserted that this reasoning considers only the perspective of non-resident group members. That was so notwithstanding the primary judge accepting (at J [130]) that there was “at least, some risk of [re-agitation] occurring”.
2. BHP submits that the law recognises a series of rules designed to achieve finality in the quelling of disputes by the exercise of judicial power. By excluding from the group those foreign residents who are likely to retain a right of action against BHP notwithstanding the exercise of judicial power in this proceeding, the Court would be ameliorating a substantial unfairness.
3. Finally, an order excluding all non-resident shareholders (or at least those shareholders of BHP Plc) would, BHP contends, serve to promote settlement of the proceeding. The retention of a substantial number of group members who will retain their rights of action against BHP Plc regardless of any settlement, promotes significant uncertainty. This will make the process of compromising the proceeding far more challenging, including in respect of the direct claims of shareholders of BHP who are resident in the jurisdiction.

## C.2 Consideration of the Wrongful Discretion Contention

### The Alleged Error and the Ambit of the Argument

1. Proposed appeal grounds 3 to 5 concern the exercise of discretion by the primary judge. BHP correctly accepts it must establish *House v R* (1926) 55 CLR 499 error in respect of these grounds.
2. It is important to start with what orders were sought below and how it is said the primary judge erred in rejecting this aspect of the application.
3. The relevant relief sought by BHP in the interlocutory application was in the following terms:

2. An order pursuant to s 23 and/or s 33ZF of the Act that:

a. shareholders of BHP Group Limited and/or BHP Group plc who are not residents of Australia be excluded from the class of persons defined as Group Members in this proceeding *nunc pro tunc*; alternatively

b. the proceeding be stayed pending an amendment by the Joint Applicants to paragraph 3 of the Consolidated Statement of Claim dated 16 August 2019 to limit the definition of Group Members to shareholders of BHP Group Limited and/or BHP Group plc who are residents of Australia.

3. Alternatively to order 2, an order pursuant to s 23 and/or s 33ZF of the Act that:

a. shareholders of BHP Group plc who are not residents of Australia be excluded from the class of persons defined as Group Members in this proceeding *nunc pro tunc*; alternatively

b. that the proceeding be stayed pending an amendment by the Joint Applicants to paragraph 3 of the Consolidated Statement of Claim dated 16 August 2019 to limit the definition of Group Members to:

i. shareholders of BHP Group Limited; and

ii. those shareholders of BHP Group plc who are residents of Australia.

4. Alternatively to orders 2 and 3, an order pursuant to s 23 and/or s 33ZF of the Act that any shareholders of BHP Group Limited and/or BHP Group plc who are not residents of Australia and who do not submit to the jurisdiction of the Court by registering their interest to participate in the proceeding within [eight weeks of these orders] are excluded from the class of persons defined as Group Members in this proceeding.

1. The primary judge is alleged to have erred in rejecting prayers 2 and 3 on the following grounds:

3. The Judge erred in failing to exclude, pursuant to s 23 or s 33ZF of the Act, shareholders of BHP Group Limited and/or BHP Group plc who are not residents of Australia from the class of persons defined as Group Members in this proceeding *nunc pro tunc*.

4. Alternatively to ground 3, the Judge erred in failing to (or even considering whether to) permanently stay the proceeding pending an amendment by the joint applicants to paragraph 3 of the Consolidated Statement of Claim dated 16 August 2019 to limit the definition of Group Members to:

a. residents of Australia; alternatively

b. shareholders of BHP Group Limited and those shareholders of BHP Group plc who are residents of Australia.

5. In failing to properly exercise his discretion in the manner outlined in grounds 3 and 4, the Judge failed to:

a. take into account a relevant consideration, namely the interests of the respondent; and/or

b. weigh any prejudice to the respondent against any prejudice to non-resident Group Members.

1. Importantly, the rejection of the relief specified in prayer 4 was not the subject of challenge, a matter to which it will be necessary to return. Moreover, it can be seen the sole ground on which BHP relies is that the primary judge failed to take into account its interest in certainty and finality in respect of this proceeding.
2. As is evident from the extract above, the primary judge identified that the sole ground on which BHP sought to have the non-resident group members excluded was the potential prejudice by reason of the risk of re-agitation of the same issues in potential foreign proceedings and accepted that there was “some risk” of that occurring. In coming to that conclusion, the primary judge assessed and made findings about the risk of re-litigation in the United Kingdom and South Africa.
3. This argument does not do justice to his Honour’s reasons. During the course of his careful analysis, the primary judge considered the interests of BHP and the countervailing interests of non-resident group members. This is evident from his Honour’s conclusion (at J [130]) which clearly demonstrates a balancing of relevant considerations: “[w]hile I accept there to be, at least, some risk of [re-litigation] occurring, I do not consider it appropriate, on balance, to make such an order pursuant to s 33ZF or s 23 or the Court’s incidental power (assuming there is power to do so).” Plainly it was open to the primary judge to accord weight to the detriment of excluding “a large number of persons who (it is to be assumed for present purposes) have arguable claims against [BHP]” and to the fact that the course urged by BHP “may well be productive of inefficiency and wasted costs”.
4. Moreover, proposed orders 2 and 3 are highly problematic. The orders affect the rights of the non-resident group members and it is strongly arguable that notice ought to be given to them in circumstances where the relief would exclude them from the class action or prevent them from advancing their individual claims in the class action. These orders of exclusion are very blunt proposed remedial responses to the perceived problem. Australia has adopted a no provision model. If the operation of that model results in an unfairness in an individual case, Pt IVA has within it discretions to ensure that any prejudice can be ameliorated, but to do so in such a way as to not totally exclude a sub-class of group members who have claims that can be grouped. In any event, it is not as if by excluding non-residents the Court will not have to look at the question of purchases of BHP LSE Shares and/or BHP JSE Shares on foreign exchanges, because some Australian resident group members (who also purchased BHP ASX Shares) will remain group members.
5. There is no arguable error in his Honour rejecting the relevant relief the subject of the application for leave to appeal. This would be sufficient to reject leave to appeal with respect to proposed grounds 3, 4 and 5, but there is a further reason why leave should be refused.

### Prejudice and Prayer 4

1. BHP have a point in that there is a desirability in certainty.
2. As noted above, in the absence of some remedial response, the primary judge accepted (at J [130]) that there was “at least, some risk of [re-agitation] occurring”.
3. This is not an insignificant potential problem in the present case. To the extent that BHP is able to ascertain the geographic location of the beneficial holders, it appears that a slight majority of the shares held in BHP (for which that information was available, representing 62-64% of shares issued in BHP) were beneficially held by persons based outside of Australia during the relevant period, whereas an overwhelming majority of the shares in BHP Plc were beneficially held by persons based overseas. The uncertainty confronting BHP in defending a proceeding with a substantial cohort of non-resident group members is exacerbated by the significant presence of nominee and custodian holders which assists to obscure the true identity and extent of group members.
4. The complaints of BHP as to uncertainty echo common criticisms made of the Australian approach (seen in *Mobil Oil*) of accepting the defendant’s presence or submission “anchor” to asserting jurisdiction and allowing non-resident group members to be present in an opt-out class action.
5. Various justifications have been advanced for adopting the different approach of a compulsory opt-in model as adopted in the United Kingdom. These include, most importantly, the prospect raised by BHP of non-resident group members, who do not prosecute their claim in this class action, commencing another proceeding in another jurisdiction. As a matter of principle, in the United Kingdom, an *active step* to be taken by a non-resident group member to submit to the jurisdiction (such as taking a step to advance their individual claim or participating in any settlement) was perceived to be desirable because otherwise, as Mulheron notes (at 457–8):

Whilst ever the relevant limitation periods have not expired, there would be no closure or finality for defendants, even where large sums of money had been set aside (and distributed) as a result of class litigation adjudicated by the UK Court that purported to cover a world-wide class.

Both academic and law reform opinion has supported the view that an express requirement to opt-in is the most straightforward method of ensuring that personal jurisdiction over non-resident class members is established. Some Canadian judges have also strongly supported that approach, as being “prudent” [*Nantais v Teletronics Proprietary (Canada) Ltd* (1995), 25 OR (3d) 331 (Gen Div) [82]], that it “avoids potential difficulties in exercising jurisdiction over class members outside the province who have not taken any initiative to attorn to the [court’s] jurisdiction” [*Harrington v Dow Corning Corp* (1997), 29 BCLR (3d) 88 (SC) [9] (Mackenzie J)], and that it “is seen as having [an] advantage” over other bases [*Harrington v Dow Corning Corp* [2000] BCCA 605, (2000), 82 BCLR (3d) 1, [74] (Huddart JA, writing for the majority), citing: *Class Actions* (Consultation Memo No 9, 2000) [31]; and cited in, eg: *McSherry v Zimmer* [2012] ONSC 4113, [120]]. The UK rules-making committee took note of the opt-in Canadian statutory precedents and of its judicial commentary, and both were influential in the enactment of the UK Jurisdiction Provision.

(Some footnotes excluded).

1. Indeed, even in *Mobil Oil* itself, Callinan J, in differing from the other members of the Court, held the view that non-resident group members had to submit to the Victorian court’s jurisdiction by opting in, in order to be bound (at 82 [190]). Further, as Mulheron notes (at 472–3):

… the Ontario class actions judge, Cullity J, rejected this potential “anchor point” in *Parsons v McDonald’s Restaurants of Canada Ltd* [(2004), 45 CPC (5th) 304 (SCJ)]. Whilst that case was successfully appealed on other grounds, this particular point was not subject to appeal. Cullity J pointed out that the defendant’s presence or submission was an “anchor” in traditional two-party litigation, because it signiﬁed that the defendant had an “obligation for the time being to abide by its laws and accept the jurisdiction of its court while present in its territory” [at [21]]. However, where the question was whether non-resident class members were to be bound by a domestic court’s judgment, “the application of the obligation theory to bind a defendant present in the foreign country would not be sufﬁcient to justify an exercise of jurisdiction over such absent members” [at [21]] …

The drafting of the UK Jurisdiction Provision shows that, rightly, there was no appetite to regard the traditional rule of the defendant’s presence or submission as governing the position of non-resident class members. That was a rule borne of a different scenario. The status of non-residents who are involved in a class action being litigated elsewhere is, as Cullity J correctly pointed out, a question of an entirely different order – albeit that the UK law-makers *analogised* that traditional approach: submission by the non-resident is required.

(Some footnotes omitted, emphasis in original).

1. Although the approach in this country of accepting the defendant’s presence as an “anchor” is an obstacle to accepting BHP’s submission as to jurisdiction, this does not determine the distinct question as to whether it is necessary or appropriate in some cases (and at an appropriate time) to take steps to ameliorate a practical problem or injustice caused by the presence of non-resident group members.
2. No doubt settlement would be promoted if there was some certainty about the size of the class and the likely quantum of the claims of group members who would participate in any settlement. This is not a case where aggregate damages are sought. Without expressing any concluded view, in the particular circumstances of the present case, it might be argued that immediately prior to the hearing or in the context of a settlement proposal or mediation there may be some merit in an order requiring a non-resident class member to take a positive step to opt-in to the class action, although the class action is otherwise conducted on an opt-out basis. As can be seen from the Canadian cases and the law reform discussion which preceded the introduction of legislation in the United Kingdom, this would address any real prejudice in having a passive, non-resident group member being able to commence a separate proceeding elsewhere by requiring group members outside Australia to take a step demonstrating that they have attorned to the Court’s jurisdiction. It would give the sort of certainty needed to allow BHP to settle the Australian class action, if it otherwise thought it desirable to do so.
3. As we have recorded, there was no appeal against the rejection of relief in terms of prayer 4. This is no doubt because BHP recognised, with respect correctly, that the primary judge did not fall into *House v R* error in rejecting such an application at this stage of the proceeding. Notwithstanding this case commenced over three years ago, as the primary judge observed (at J [134]), a defence has not yet been filed, discovery has not yet taken place, the issues in the proceeding have not yet been defined, and there is no imminent mediation taking place.
4. What is relevant to note at present, in considering the question of prejudice in leave being sought to appeal the rejection of prayers 2 and 3, is that there is no fetter on a different application being made at a later time for a more appropriately framed order relying on s 33ZF, when it might be thought such an order is more likely to meet the statutory requirement that it be appropriate or necessary in the interests of justice.
5. As to any residual concerns as to power to make an order under s 33ZF, it is beyond the scope of this judgment to enter into extended debate about any form of “opt-in” or class closure orders and it is unnecessary to do so. It suffices to note that as Beach J recently explained in *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Ltd* [2021] FCA 475 (at [68]), s 33ZF(1) has been the source of power by which this Court has regularly made class closure and registration orders if it was thought necessary or appropriate to ensure that justice was done in the proceeding: see *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98; (2017) 252 FCR 1 (at 21–2 [74], [75] per Jagot, Yates and Murphy JJ). Recently, in *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; (2020) 101 NSWLR 890 the Court of Appeal of New South Wales held that a form of order in that case effected a “contingent extinguishment of group members’ rights of action” and so could not be said to be licit: see 904 [59] per Payne JA, Bell P, McFarlane and Leeming JJA, Emmett AJA agreeing). A further decision of the same court in *Wigmans v AMP Ltd* [2020] NSWCA 104; (2020) 102 NSWLR 199 (McFarlane, Leeming and White JJA), took a similar view. Although there is, with respect, much to be said for Beach J’s observations in *Wetdal* (at [81]–[95]) as to *Wigmans* and *Haselhurst*, in our view, on any view of the law, an order could be fashioned if and when it did become necessary or appropriate to ensure that justice was done to ensure that BHP was not vexed with the prospect of non-resident group members, who do not take a step to prosecute their claim in this class action, having the ability to commence another proceeding in another jurisdiction.
6. Leave should be refused to allow BHP to advance proposed appeal grounds 3 to 5.

# D STRIKEOUT CONTENTION

1. Proposed grounds of appeal 6 and 7 challenge the primary judge declining to find, on an interlocutory application, that the shareholders of BHP Plc do not have a viable cause of action against BHP under s 674 of the Corporations Act. In addressing BHP’s application to strike out these claims, it was contended that the primary judge overlooked BHP’s argument that the terms of s 674, necessarily read in conjunction with ss 1317HA and 1325, do not contemplate loss sustained by foreign investors who purchased shares on a foreign stock exchange. His Honour reasoned (at [157(a)]) that these compensatory provisions (that is, ss 1317HA and 1325) “are not in terms restricted to loss or damage suffered by reason of investing in shares acquired on the ASX. Indeed, there is nothing in the text that requires the loss or damage to relate to a person’s share trading at all”.
2. These proposed grounds can be dealt with relatively shortly.
3. Properly understood, the question for the primary judge was whether the facts pleaded at [71]–[80] of the amended consolidated statement of claim disclosed at least arguable claims on behalf of BHP Plc shareholders. In this respect, as the primary judge observed (at J [149]), BHP faced a “substantial hurdle”. As the primary judge concluded (at J [157]), “[t]extually, the words of the relevant provisions requiring a causal connection [ss 1317HA(1) and 1325 of the Corporations Act] are expressed in general terms, making it difficult for [BHP] to establish, on a strike out application, that the pleaded causal link is not even arguable”.
4. BHP submitted with some force that what it proposed was a form of demurrer, which would have involved no consideration of any disputed facts or facts found at an initial trial. Reference was made to Beach J’s comments in *TPT Patrol Pty Ltd (as trustee for Amies Superannuation Fund) v Myer Holdings Ltd* [2019] FCA 1747; (2019) 140 ACSR 38 that in considering any notion of normative causation, that is, in terms of what the statute requires to impose legal responsibility for loss and damage, the type of contravention in question is highly relevant. His Honour noted (at [1641]):

You can say all you like about normative causation concerning misleading or deceptive conduct and whether reliance is required. But it is a category mistake to think that such analysis could or should drive the analysis for normative causation concerning a breach of the continuous disclosure provisions. So the real question is: what is the normative causation test involved in the combination of s 674 with s 1317HA or the combination of s 674 with s 1325?

1. Beach J went on to explain (at [1648]–[1652]) the purpose of s 674 and how that purpose and the text are consistent with imposing legal responsibility for the loss on the company. The point made by BHP is that this purpose is not evident in an approach to the statutory norm which could result in holding one entity responsible for losses suffered on an entirely different market for another entity’s securities.
2. It is not appropriate for us to express any views as to the strength of BHP’s contentions as to the scope and purpose of s 674 and how this informs causation, or the proposition that having regard to the statutory text, subject matter and purpose, s 674, read together with s 1317HA or s 1325, accommodates the claims of BHP Plc shareholders as pleaded in the amended consolidated statement of claim on the basis that the loss or damage claimed is alleged to have been suffered “because of” a contravention of s 674 by BHP. Nor, in the absence of detailed argument, is it appropriate for us to express views as to whether there could conceivably be any differences as to the range of causally related losses depending upon the particular norm breached (because loss which is alleged to have “resulted from” a contravention – the other relevant statutory words of causation in s 1317HA – must be read as “resulted directly or indirectly” due to the combination of the definition of “result” in s 9 of the Corporations Act and s 18A of the AIA Act).
3. The primary judge was not required to resolve the causation issue with respect to the operation of ss 674, 1317HA and 1325 and, as his Honour correctly recognised (at [149]), there is every reason for caution in the Court “determin[ing], at a preliminary stage, and without a full factual context, a complex and novel question of statutory construction, namely whether the losses claimed to have been suffered by the shareholders of BHP Plc are within the contemplation of the relevant statutory provisions.”
4. There was no arguable error in his Honour’s approach and the issue will be one for any initial trial. Additionally, in these circumstances, there is no sufficient prejudice established. Leave to appeal with respect to proposed grounds of appeal 6 and 7 should be refused.

# E CONCLUSION AND ORDERS

1. For the above reasons, leave to appeal should granted with respect to grounds 1 and 2 but the appeal should be dismissed. Leave to appeal should be otherwise refused. Costs should follow the event.

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| I certify that the preceding one hundred and five (105) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Middleton, McKerracher and Lee. |

Associate:

Dated: 3 June 2021