



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M12/2022
File Title: BHP Group Limited v. Impiombato & Anor
Registry: Melbourne
Document filed: Form 27F - Appellant's Outline of oral argument
Filing party: Appellant
Date filed: 09 Aug 2022

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M12/2022

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

BETWEEN:

BHP GROUP LIMITED
Appellant

and

VINCE IMPIOMBATO
First Respondent

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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

- 10 1. This outline is in a form suitable for publication on the internet.

Part II: Outline of Propositions

Part IVA

- 20 2. The object and purpose of Part IVA of the *Federal Court of Australia Act 1976* (Cth) is to give the Federal Court power to adjudicate the rights of persons who have not invoked its jurisdiction. Part IVA legislates centrally with respect to those persons, whom it defines as “group members”. In enacting Part IVA, Parliament comprehensively set out the manner in which the rights of group members may be bindingly affected by that Court at the suit of another person – the “representative party” (AS [13]-[16]).
- 30 3. The question in this proceeding is: on a proper construction of the legislation, who may be nominated as a group member and thereby subjected to the Federal Court's

adjudication under the provisions of Part IVA – anyone in the world, or persons within the territory?

The presumptions against extraterritorial operation

4. Part IVA must be construed by reference to:
 - a. the common law presumption that “the persons, property and events in respect of which Parliament has legislated are ... limited to those in the territory over which it has jurisdiction”: *Morgan v White; Meyer Heine*.
 - 40 b. the statutory presumption in s 21(1)(b) of the *Acts Interpretation Act* that “in 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”.
5. Each of these presumptions applies unless the contrary intention appears clearly from the text or context of the statute.

The presumption against extraterritorial operation has work to do

6. The presumption has work to do because Part IVA (and s 33C within it) are expressed in perfectly general terms in reference to “persons” who may be “group members”.
7. Respect for the comity of nations is a policy foundation for the presumption (*Barcelo*, per Dixon J). However, contrary to the Respondents’ submissions (RS [11]), the
50 presumption of non-interference with rules of customary international law does not represent the universe of operation of the constructional presumption (AS [29]; Rep [3]-[8]). Relevantly, as a matter of construction, the presumption gives statutory provisions of otherwise universal application an intra-territorial operation – that is, an operation limited to persons, matters and things within the territory – unless Parliament makes clear a contrary intention.
8. The presumption is not rendered redundant if some connection with Australia can otherwise be discerned in the legislation (cf RS [12]). The issue is the extent of territorial operation, not connection with Australia: *Meyer Heine; DRJ v Commissioner of Victims Rights (No 2)*.
- 60 9. Subject to the principles articulated in *Pearce v Florenca* and *Union Steamship*, Parliament is competent to pass laws which have extra-territorial operation, but is presumed not to do so unless the presumption is displaced (Rep [9]).

The presumption is not displaced

10. The presumption applies and is only displaced if the text or context of Part IVA clearly evince an intention that it should operate with respect to persons, matters and things outside the territory in which Parliament was legislating.
- a. The generality of the statutory text brings the presumption into play; it does not defeat or displace it (Rep [13]; Cf RS [22]).
- 70 b. If the presumption applies, the statute must be given effect in accordance with its intra-territorial operation and there is nothing anomalous or uncertain in using residence as the relevant discrimen (Cf RS [23]-[29]).
- c. Within Part IVA, “group member” is a distinct concept from “representative party” (cf RS [30]-[32]). The former term is one of otherwise universal import, and must be construed in light of the presumption.
- d. Section 33ZB does nothing to displace the presumption. Rather, the terms and role played by s 33ZB reinforce the *prima facie* legislative intention of intra-territorial operation. The respondents (properly) concede that s 33ZB cannot operate so that judgment of the Federal Court would bar the bringing of proceedings in a foreign court (RS [34]).
- 80 e. Nothing in the text of the statute discloses an intention that Part IVA should operate to affect the rights of persons outside the territory.
- f. As to purpose, there is little doubt that a key object of Part IVA was to improve access to justice, but there is no indication that Parliament was concerned to improve access to justice in Australian courts for persons in other countries (AS [31]).

Dated: 9 August 2022

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Wendy Harris QC