HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

BETWEEN: BHP GROUP LIMITED
Appellant

10 and

VINCE IMPIOMBATO
First Respondent

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

APPELLANT'S REPLY

Part I: Publication

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

Part II: Reply

2. The Full Court's failure to apply the presumption against the extraterritorial operation of legislation[1] meant that it did not discharge its "*duty*" to give the words of Pt IVA "*the meaning that the legislature is taken to have intended them to have*".[2] Contrary to the Respondents' submissions, BHP is not asking this Court to "*read down*"[3] any provision of Pt IVA, but to construe the language of the statute in accordance with "*well-known doctrine*"[4] and constructional norms prescribed by statute.

10 **The presumption against extraterritorial operation is squarely engaged**

3. In parliamentary democracies that are subject to the rule of law, "*it is not expected that parliaments will pass legislation that applies to people in other countries*".[5] That expectation is not confined to circumstances *"where questions of comity between states arise or where it might be thought that jurisdiction properly belongs to a foreign sovereign or state"* (cf. RS, [7]).

4. The particular assumption that general words in a statute are presumed not to extend to cases governed by foreign law "*is really a specific application of the general assumption against legislation operating extraterritorially*",[6] which has been treated as a separate or subsidiary common law presumption.[7] The Respondents' submissions

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[1] See Appellant's Submissions dated 8 April 2022 (**AS**), [18].
[2] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ. See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[3] See Respondents' Submissions dated 6 May 2022 (**RS**), [23].
[4] *Morgan v White* (1912) 15 CLR 1 at 13 per Isaacs J. See also 4-5, per Barton J.
[5] D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 208 [5.2], emphasis added.
[6] D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 221 [5.15]. Pearce notes that the leading statement of the narrower 'subsidiary' of the presumption is to be found in *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601 per Dixon J.
[7] See *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 415-416 [41]-[45] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692 at 698 [11] per Bell P and at 722-723 [122]-[123] per Leeming JA (with whom Bell P and Meagher JA agreed); *ACCC v Air New Zealand Ltd* (2014) 319 ALR 388 at 464 [362] and 469 [386] per Perram J and the authorities cited at 464-469; *Chubb Insurance Company of Australia Ltd & Ors v*

proceed on the erroneous footing that this distinct assumption or "*specific application*" covers the general presumption's entire field of operation.

5. The "*comity of nations*" is a policy rationale[8] for the presumption against extraterritorial operation. However, it does not follow that the presumption is engaged only where "*jurisdiction properly belongs to some other sovereign or state*" (cf. RS, [14]). Rather, as O'Connor J held in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*, statutes "*are always read as being* primâ facie *restricted in their operation within territorial limits*".[9]

6. It is the general assumption which finds statutory expression in s 21(1)(b) of the *Acts Interpretation Act 1901* (Cth). The constraints the Respondents seek to place on the presumption would, in effect, involve the rewriting of that provision, viz: *"(b) references to localities jurisdictions and other matters and things* ***over which jurisdiction properly belongs to some other state or sovereign*** *shall be construed as references…"*. There is no basis for reading into that provision the pre-condition applied by the Full Court and for which the Respondents contend.[10] The general terms and application of s 21(1)(b) reflect the general terms and application of the common law presumption.

7. Unlike the provisions of Pt IVA, the statutory language construed by this Court in *Re Maritime Union of Australia; Ex parte* ***CSL Pacific Shipping Inc*** (2003) 214 CLR 397

Moore & Ors (2013) 302 ALR 101 at 132-133 [145]-[147] per Emmett JA and Ball J; *C v B* [2007] 1 Qd R 212; QSC 195 at 217 [16] per McMurdo J.

8 "*There are a number of justifications for the presumption against extraterritorial application…In more modern times, the presumption has been based on 'the comity of nations' and the proposition that jurisdiction over persons or matters within the territorial boundaries of one state is properly the province of that state and not others*" Perry Herzfeld and Thomas Prince, *Interpretation* (Lawbook Co, 2nd ed, 2020) 217-218 [9.260], emphasis added and citation omitted.

9 (1908) 6 CLR 309 at 363, emphasis added. In *Morgan v White* (1912) 15 CLR 1, at 13, Isaacs J expressed the presumption in this way: "*…unless the language of a Statute by express words or necessary implication indicates the contrary, the persons, property, and events in respect of which Parliament has legislated are presumed to be those in the territory over which it has jurisdiction and for the welfare of which it exercises that jurisdiction.*" (emphasis added). See also 4-5, per Barton J and the authorities cited there. Similarly, in *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256 at 306, Windeyer J held as follows: *"A statute in general terms is always construed as prima facie affecting things and persons within the territory of the country which enacts it, and not affecting things elsewhere…Territoriality (as an element in domicile, residence or presence) rather than political allegiance has by our law been recognized as the ordinary foundation of curial jurisdiction"* (emphasis added).

10 *Marshall v Watson* (1972) 124 CLR 640 at 649 per Stephen J; *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 12 per Gibbs J.

was not silent about extraterritorial operation. By its express terms, s 5(3) of the *Workplace Relations Act 1996* (Cth) applied to "*trade and commerce between the States, between Australia and a place outside Australia, and within and between Territories and between a State and a Territory*".[11] Those express words meant that s 21(1)(b) of the *Acts Interpretation Act* had "*no relevant operation*".[12] By contrast, Pt IVA creates a statutory regime which permits representative applicants to commence class actions on behalf of "*persons*", styled as "*group members*". These general words – words about which the class action regime hinges – are "*at large*".[13] To the extent that the Respondents contend that the words "other matters or things" in s 21(1)(b) of the *Acts Interpretation Act* are inapt to capture "persons" (RS, [12]), that submission is at odds with the Court's decision in *CSL Pacific Shipping Inc* and RS, [18].[14]

8. The prosecutor in *CSL Pacific Shipping Inc* sought to rely on a second (and distinct) ground, arising from the "*specific application*" of the presumption against extraterritorial operation mentioned above (namely: that the Parliament "*is not readily to be taken as intending to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or State*"[15]). In that case, the prosecutor had positively asserted that jurisdiction belonged to the Bahamas (being the flag of the *CSL Pacific* ship). That was the context in which this Court "*required*" (RS, [17]) that the prosecutor identify "*in any specific sense the comity of nations*"[16] or "*a normative requirement of customary international law*"[17] that preserved to the law of the Bahamas the matters in issue. There is no such onus on BHP. Rather, where general words in a statute are used (such as "*any seaman*", or "*persons*"), the presumption against extraterritorial operation has "*readily apparent application*".[18]

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[11] *CSL Pacific Shipping Inc* at 416 [43], per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.
[12] *CSL Pacific Shipping Inc* at 416 [43].
[13] Cf. *CSL Pacific Shipping Inc* at 416 [43].
[14] In that paragraph of their submissions, the Respondents accept that the presumption is apt to apply to a statute (as in the US *Jones Act*) expressed as applying to *"any seaman"*. See *CSL Pacific Shipping Inc* at 416 [43].
[15] *CSL Pacific Shipping Inc* at 416 [45].
[16] *CSL Pacific Shipping Inc* at 417 [48].
[17] *CSL Pacific Shipping Inc* at 418 [50].
[18] *CSL Pacific Shipping Inc* at 416 [43].

"Relevant connection" is not dispositive

9. The Respondents' submission that the presumption against extraterritorial operation has no role to play once a connection with Australia is established[19] "*bears a distracting resemblance to the test for extraterritorial legislative competence*".[20] The Respondents' submissions confuse the operation of the presumption with the antecedent constitutional question of whether Parliament was able to legislate extraterritorially: "*the question is one of construction, not power*".[21] That is, legislative competence is not dispositive of the question of "*whether from the object or subject-matter or history of the enactment an intention so to do clearly appears so as to rebut the presumption raised by the common law canon of construction*".[22]

10. The fact that each of the persons mentioned in s 33C of Pt IVA must have a "claim" is neither here nor there; it is not an expression of territorial connection or limitation.[23] It does not provide an answer to the question: are the relevant "persons" whose claims may be litigated by a representative party those within in the territory or anywhere in the world?

The presumption is not displaced by "clear words or necessary implication"

11. The Respondents submit that the generality of the language of s 33C(1) – which is "*apt to encompass foreign residents as well as Australian residents*" – itself rebuts the presumption against extraterritorial application (RS, [22]). This repeats the error in the judgments below; the Respondents invert the presumption against extraterritorial application by submitting that the absence of an express territorial limit means that

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[19] RS, [12], citation omitted.
[20] *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692 at 726 [137] per Leeming JA (with whom Bell P and Meagher JA agreed).
[21] *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692 at 726 [136] per Leeming JA (with whom Bell P and Meagher JA agreed).
[22] *Re Iskra; Ex parte Mercantile Transport Co Pty Ltd* [1963] SR (NSW) 538 at 553 per Brereton J.
[23] Cf. RS, [19], and cf. the express territorial connection provided for in s 5(3) of the *Workplace Relations Act* 1996 (Cth) which was dispositive of the appeal in *CSL Pacific Shipping Inc*.

Pt IVA applies universally. To the contrary, the use of this general language is the very thing which attracts the presumption.

12. There is no uncertainty or unworkability created by using "residence" as the discrimen for determining who is within and who is outside the jurisdiction for the purposes of Pt IVA (cf. RS [23]-[29]). The presumption draws a distinction between persons within the territory and those outside of it. Residence is a perfectly orthodox practical expression of that distinction.[24] Similarly, while adopting a different legislative model, the legislature of the United Kingdom's decision to require those class members not *domiciled* in the UK to opt-in to competition law class actions illustrates that the Respondents' practical concerns regarding the "residence" criterion are overblown.[25]

13. Contrary to the Respondents' submissions, the generality of the language of Pt IVA enlivens the presumption, and does nothing to rebut the *prima facie* restriction to operation within territorial limits. The presumption does apply, and may only be displaced by clear words or necessary implication.

14. There is no express indication[26] anywhere in Pt IVA that a person outside the territory may be included as a "*group member*". In the absence of "*clear words*", the Respondents call upon a series of "*contextual matters*" to prop up their submission that Pt IVA evinces an intention to permit a representative applicant to bring a claim on behalf of a person who is outside the territory of Australia. None of those extrinsic matters gives rise to any necessary implication of extraterritoriality.

Dated: 27 May 2022

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[24] See, for example, Windeyer J's reference to "*[t]erritoriality (as an element in domicile, residence or presence)…*" in *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256 at 306, emphasis added. See also *Jefferys v Boosey* (1854) 4 HLC 815 at 928 per Parke B.

[25] See also Dixon J's references to "*domicile*" in *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 424-425.

[26] Cf. express indications of extraterritorial operation contained in other statutory provisions, eg, *Federal Circuit and Family Court of Australia Act 2021* (Cth) ss 25(2), 132(2); *Judiciary Act 1903* (Cth) s 47; *Age Discrimination Act 2004* (Cth) s 9(3); *Australian Securities and Investments Commission Act 2001* (Cth) s 12AC; *Fair Entitlements Guarantee Act 2012* (Cth) s 9; *Sex Discrimination Act 1984* (Cth) s 9(19)–(20); *Migration Act 1958* (Cth), s 228A.

ANNEXURE A

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

1. *Age Discrimination Act 2004* (Cth), s 9(3)
2. *Australian Securities and Investments Commission Act 2001* (Cth), s 12AC
3. *Fair Entitlements Guarantee Act 2012* (Cth), s 9
4. *Federal Circuit and Family Court of Australia Act 2021* (Cth), ss 25(2), 132(2)
5. *Judiciary Act 1903* (Cth), s 47
6. Merchant Marine Act of 1920 (46 USC 883), s 27 (The Jones Act) (as at 1953)
7. *Migration Act 1958* (Cth), s 228A
8. *Sex Discrimination Act 1984* (Cth), ss 9(19)–(20)
9. *Workplace Relations Act 1996* (Cth), s 5(3) (as at 2002)