



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: M12/2022  
File Title: BHP Group Limited v. Impiombato & Anor  
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#### Important Information

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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

10

and

VINCE IMPIOMBATO  
First Respondent

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

### RESPONDENTS' OUTLINE OF ORAL ARGUMENT

#### 20 PART I: FORM OF SUBMISSIONS

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

#### PART II: STATEMENT OF ARGUMENT

2. **Common ground:** BHP is an Australian company, sued and served in Australia, for compensation under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* for the damage alleged to have been suffered by its shareholders (and shareholders of the dual-listed entity, BHP Plc) by BHP's wrongs done in Australia; wrongs of failing to disclose material information to, and misleading, the ASX. The substantive causes of action are made available to *all* shareholders, wherever located, subject to proof of causation. No 'long arm' jurisdiction is in play.
- 30 3. The Federal Court has: (a) *subject matter jurisdiction* to hear the claims for damages by all shareholders, wherever located, against BHP (under s 39B(1A)(c) of the *Judiciary Act* and s 1337B(1) of the *Corporations Act*); and (b) *personal jurisdiction* over BHP (by reason of BHP's presence in the jurisdiction at the time of service).
4. Shareholders, wherever located, may vindicate their causes of action against BHP in the Federal Court by various *procedural mechanisms*: individual action, joint action (under r 9.02 of the *Federal Court Rules*) or the traditional representative action in equity (now r 9.21). In dispute only is whether the modern representative action under Pt IVA of the *FCA Act* is rendered unavailable to shareholders described as "non-residents": **RS [50]-[56]**.

5. **The presumption against extra-territoriality:** The presumption is but one of a wide range of principles of statutory construction which may be brought to bear to determine the reach of a contested provision. The presumption applies only where the statute makes no express provision connecting its subject matter with Australia. In its statutory form (*Acts Interpretation Act 1901* (Cth), s 21(1)(b)) it provides no answer as to *how* or *how many times* the confinement to Australia is to occur; but (leaving offences aside) it will normally be by a *single integer*.
6. The common law form of the presumption may be expressed generally or in more specific rules. But in every case, whether under statute or common law, it will be necessary to  
10 look to the statute's context, subject matter and purpose, and its 'central focus', to ascertain the *content* of the confinement to, or extension from, Australia.
7. The presumption is ultimately sourced in principles of comity or international law.
8. The presumption may readily be displaced by indications of a contrary intention through express words, necessary implication, or any countervailing considerations drawn from the subject matter, history or purpose of the statute: **RS [11]-[12], [17]-[19]**.
9. **Part IVA of the FCA Act does not operate extra-territorially:** The central focus of Pt IVA is to provide *a more efficient set of procedures* for the commencement, conduct and determination of a representative action in the Federal Court than is available under the old equity action. The Part is *facilitative* and *protective*: of the group members, the  
20 respondent and the Court's resources. The requirement for '7 or more persons hav[ing] claims' with the requisite commonality, being claims where the Court independently has subject matter and personal jurisdiction over the matter, confines the Part to Australia: **RS [15]-[16]**.
10. **Section 21(1)(b) has no relevant operation upon Pt IVA:** As in *Ex parte CSL* at [41]-[43], Pt IVA generally and s 33C in particular are not 'at large'. The 'matter or thing' 'in and of Australia' is the conferral of powers on, and regulation of procedures of, an Australian court when dealing with claims in a matter over which it otherwise has jurisdiction. Additionally, the 'matter or thing' is the effective vindication of choses in  
30 action situated in Australia (the place where BHP is resident and served). Once the Part has drawn those links to Australia, s 21(1)(b) has no additional operation to require the persons having such claims to be persons 'in and of' Australia: **RS [12]**.
11. **The common law presumption, however expressed, has nothing further to say about Pt IVA or, put differently, is amply complied with:** Pt IVA, as a law about *procedure*,

and procedure of an Australian court in a matter in which it otherwise has *jurisdiction*, presents no offence to comity or international law. As in *Ex Parte CSL* at [45]-[54], BHP fails to identify any other jurisdiction to which Australia should yield in the adjudication of numerous claims which share commonality and arise under Australian law in respect of alleged wrongdoing in Australia. Nor does BHP identify any principle of comity or international law that is offended by Australia adopting an ‘opt-out’ model (supported by notice and the option of registration) for each member of the common group, wherever ‘located’, to manifest their consent to be bound by the benefits or burdens of the group action including under s 33ZB: **RS [13]-[20]**.

- 10 12. **If necessary to go this far, Pt IVA exhibits a clear contrary intent:** ‘Person’ or ‘persons’ is used three times in s 33C. In each case, the generality of the term is deliberate and explained by the context and purpose of Pt IVA: **RS [22], [30]-[32]**.
13. To read in a limitation excluding non-resident group members would require a total reconstruction of Pt IVA for which there is no guide in the text. Why ‘residence’ over domicile, or over physical presence? At what date? Complex factual enquiries would arise as to who is within or without the represented group, antithetical to the beneficial purposes of the Part: **RS [23]-[29]**.
14. Any ‘residence’ limitation would contradict the fundamental Parliamentary choice to respect the autonomy of all group members, wherever located, by the ‘opt-out’ procedure.  
20 It would go further than the UK model which expressly permits ‘opt in’ for foreign domiciled persons and would deny the benefits of the Part to ‘foreigners’ even if they chose not to opt out, or indeed positively register participation: **RS [33]-[37]**.
15. BHP’s construction would defeat the core purposes of the Part and render it deficient as against the old representative action in equity. ‘Non-resident’ group members who wish their claims, under an Australian statute, to be determined by an Australian court, would have to resort to the other procedures; multiplying actions, costs and demands on court time. Satellite litigation over the composition of the group would be encouraged, against no clear standard in the text: **RS [38]-[49]**.
16. **Overseas materials:** BHP’s argument also finds no support in the international authority  
30 or materials to which it refers: **RS [58]-[61]**.



Justin Gleeson SC

Dated 9 August 2022