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Enforcing Australian Class Action Judgments Against Non-Resident Group Members

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Abstract

The High Court in *BHP Group Limited v Impiombato* [2022] HCA 33 concluded that the representative proceeding enacted in Part IVA of the *Federal Court of Australia Act 1976* (Cth) permitted the inclusion of non-resident group members. This article explains the High Court's reasoning. However, the High Court's decision gives rise to a further, related question as to whether non-resident group members would be bound by the outcome of the representative proceeding at its conclusion. This article uses the proceeding against BHP to discuss the powers and practical steps that the Federal Court of Australia may employ to address enforcement in relation to non-resident group members, but also highlights the uncertainties surrounding enforcement.

Introduction

In *BHP Group Limited v Impiombato* [2022] HCA 33 the High Court's judgment and the argument put before it focused on the commencement of a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (colloquially called a class action) and whether non-residents could be included as group members.

The High Court unanimously held that Part IVA should be construed so that non-residents may be included as group members. Part IVA does not contain any express geographic or territorial restriction on the identity of "persons" who can be group members in a representative proceeding. Pt IVA allows the inclusion of all persons as group members in a representative proceeding, irrespective of whether they are Australian residents, who have "claims" of the kind described in s 33C(1) of the *Federal Court of Australia Act 1976* (Cth) that are within the jurisdiction of the Federal Court.

However, a related concern is whether non-resident group members would be bound by the outcome of the representative proceeding at its conclusion. In other words, would an Australian representative proceeding judgment or settlement have a preclusive effect on non-resident group members in their home jurisdiction? Or could a non-resident group member re-agitate the same issues in a new proceeding in another country? This question is made more difficult because of the opt out approach to group membership adopted by Part IVA.

This article explains the High Court's reasoning in *BHP Group Limited v Impiombato* but also uses this proceeding to focus on the important question of enforcement of Australian representative proceeding judgments or settlements in relation to non-resident group members. The article discusses the uncertainties around enforcement and steps that may be taken to assist in improving the likelihood of enforcement, notice and adequacy of representation, while also considering whether non-resident group members should be excluded as part of the conclusion of proceedings.

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Background

Part IVA permits a person(s) to commence a representative proceeding in the Federal Court on behalf of group members where certain statutory criteria are met. Section 33C(1) sets out the criteria: seven or more persons must each have claims against the same person that are in respect of or arise out of the same, similar or related circumstances, and the claims of all seven or more of those persons must give rise to a substantial common issue of law or fact. Where those criteria are satisfied, "a proceeding may be commenced by one or more of those persons as representing some or all of them".[1]

Section 33ZB states that: "A judgment given in a representative proceeding: (a) must describe or otherwise identify the group members who will be affected by it; and (b) binds all such persons other than any person who has opted out of the proceeding under section 33J".

BHP held a 50 per cent interest in a Brazilian company that owned and operated the Germano Complex in Brazil, which included the Fundão Dam. On 6 November 2015, the Fundão Dam failed, releasing a significant volume of tailings. The incident killed 19 people and displaced 700.[2] The dam failure also caused environmental damage, polluting 668 km of watercourses from the Doce River to the Atlantic Ocean.[3] On 6 and 9 November 2015, BHP made announcements on the ASX relating to the incident. Following these announcements, the price of BHP shares on the ASX – and BHP Plc shares on the London Stock Exchange and Johannesburg Stock Exchange – declined significantly. The representative party alleged that:

- between August 2012 and November 2015, BHP was aware of certain risks relating to the Fundão Dam and did not inform the ASX of those matters prior to 9 November 2015 in contravention of ASX Listing Rules and s 674(2) of the *Corporations Act 2001* (Cth); and
- BHP engaged in misleading or deceptive conduct contrary to s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 1041H(1) of the *Corporations Act 2001* (Cth).

BHP argued that Pt IVA of the Act did not permit group members to include persons who are not resident in Australia. This argument was rejected by the Primary Judge, Moshinsky J.[4] The argument was rejected again on appeal in the Full Federal Court by Middleton, McKerracher and Lee JJ.[5] BHP was then granted special leave to appeal to the High Court. The High Court, in two separate judgments, unanimously dismissed the appeal.[6]

High Court's Reasoning – Commencement

[1] *Federal Court of Australia Act 1976* (Cth) s 33C(1).

[2] *BHP Group Limited v Impiombato* (2021) 286 FCR 625, [2] (Middleton, McKerracher and Lee JJ).

[3] Flávio Fonseca do Carmo, Luciana Hiromi Yoshino Kamino, Rogério Tobias Junior, Iara Christina de Campos, Felipe Fonseca do Carmo, Guilherme Silvino, Kenedy Junio da Silva Xavier de Castro, Mateus Leite Mauro, Nelson Uchoa Alonso Rodrigues, Marcos Paulo de Souza Miranda and Carlos Eduardo Ferreira Pinto, 'Fundão tailings dam failures: the environment tragedy of the largest technological disaster of Brazilian mining in global context' (2017) 15(3) *Perspectives in Ecology and Conservation* 145.

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

[5] *BHP Group Limited v Impiombato* (2021) 286 FCR 625.

[6] *BHP Group Limited v Impiombato* [2022] HCA 33.

Kiefel CJ and Gageler J observed that the question whether Pt IVA permits representative proceedings to be brought in the Federal Court of Australia on behalf of non-resident group members "is entirely one of statutory construction".[7] Equally, Part IVA "assumes the investment by another law of the Parliament of [the Federal Court] with jurisdiction to entertain the subject matter of the representative proceeding" and "creates new procedures and gives the court new powers, in relation to the particular exercise of that jurisdiction".[8]

BHP's argument relied on a common law and statutory "presumption against extraterritorial operation" of a statute. Kiefel CJ and Gageler J stated that the common law presumption is more accurately labelled as a "presumption in favour of international comity".[9] The statutory presumption is based on the *Acts Interpretation Act 1901* (Cth) s 21(1)(b) which provides that, in any Commonwealth Act, "references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth". BHP argued that the presumption meant that:

> the reference to 'persons' in the definition of 'group member' in s 33A, and presumably to 'other persons' in s 33D, must be construed to exclude persons who are not resident in Australia, [because of] the potential for a judgment of the Federal Court given in a representative proceeding to affect rights of unknowing and unconsenting group members by force of s 33ZB.[10]

Kiefel CJ and Gageler J held that as a matter of statutory construction, Part IVA, including s 33ZB "to bind a non-consenting group member who is not resident in Australia to a judgment of the Federal Court determining a matter in which the Federal Court has jurisdiction in a representative proceeding would be to infringe no principle of international law or international comity".[11] Similarly while the *Acts Interpretation Act 1901* (Cth) s 21(1)(b) requires a connection between the subject matter of the statute and the Commonwealth this is satisfied by Part IVA, and does not require "persons" in Part IVA to be read down, because Part IVA is concerned with procedures and powers of the Federal Court relating to the exercise of jurisdiction vested in the Court under other Commonwealth laws.[12]

The plurality judgment of Gordon, Edelman and Steward JJ agreed that the appeal gave rise to a question of statutory construction. Further that the Federal Court of Australia Act does not confer jurisdiction but rather governs how that jurisdiction is to be exercised.[13]

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[7] Ibid [1].

[8] Ibid [6] citing *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 258 [1] (Gleeson CJ, McHugh J, Gummow J, Kirby J, Callinan J).

[9] Ibid [23]-[32]. See *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 275 (Dixon CJ): "a presumption which assumes that the legislature is expressing itself only with respect to things which internationally considered are subject to its own sovereign powers".

[10] Ibid [18].

[11] Ibid [32].

[12] Ibid [39].

[13] Ibid [42]-[43].

The plurality judgment commenced by addressing three types of jurisdiction: federal jurisdiction or subject matter jurisdiction, personal jurisdiction and territorial jurisdiction.[14] The latter was the focus of BHP's arguments.

The plurality explained federal jurisdiction as follows:

> Jurisdiction under federal law is the authority to adjudicate derived from the Commonwealth Constitution and laws. Federal courts, other than the High Court, owe their jurisdiction to laws enacted under s 77(i) of the Constitution. In its terms, s 77(i) allows the conferral of jurisdiction with respect to any of the "matters" mentioned in ss 75 and 76 of the Constitution. As was explained in *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* [(1995) 184 CLR 620 at 653]:
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> > "The matters mentioned in ss 75 and 76 identify federal jurisdiction by such characteristics as identity of parties (s 75(iii), (iv)), remedy sought (s 75(v) itself), content (interpretation of the Constitution – s 76(i)), and source of the rights and liabilities which are in contention (ss 75(i), 76(ii)) ... For this litigation, the particular jurisdiction of the Federal Court invoked by the applicants had been defined by the Parliament with respect to matters arising under laws made by it (s 76(ii))."
>
> … The Federal Court's jurisdiction is defined by Parliament with respect to matters arising under Commonwealth laws (s 76(ii)) in two ways. First, s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) gives the Federal Court original jurisdiction in any matter arising under any laws made by the Parliament (this provision has been described as transforming the Federal Court into a court of general federal jurisdiction). Second, provisions of numerous other Commonwealth statutes vest jurisdiction in the Federal Court, generally with respect to matters arising under those Acts[15]

In addition to federal or subject matter jurisdiction, for a court to hear a matter it also needs a second type of jurisdiction: personal jurisdiction. The Court's personal jurisdiction is established by valid service on the respondent within the territory, the respondent's voluntary submission to the jurisdiction or, in some circumstances, valid service on the respondent outside the territory.[16] A third type of jurisdiction is territorial jurisdiction or the territory to which the authority to exercise power extends.[17]

The plurality held that if an applicant has grounds to make a representative claim that falls within the Federal Court's subject matter jurisdiction (ie s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) or jurisdiction is vested by a Federal law) the Court may hear that claim and rule accordingly.[18] Pt IVA does not create the justiciable issue between the respondent and the group members; the claims that may be determined by the Court exist independently of the representative proceeding.[19] Further, the Court does not need to separately establish personal jurisdiction over the group members in representative proceedings, rather, consistent with the

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[14] See also *Lipohar v The Queen* (1999) 200 CLR 485, 517 [79] (Gaudron, Gummow and Hayne JJ); *Rizeq v Western Australia* (2017) 262 CLR 1, 48 [129] (Edelman J).

[15] *BHP Group Limited v Impiombato* [2022] HCA 33, [48]-[49].

[16] Ibid [51].

[17] Ibid.

[18] Ibid [49].

[19] Ibid [56].

accepted understanding of the basis upon which courts exercise authority to decide personal actions, the Court only needs personal jurisdiction over the respondent.[20]

Turning to territorial reach or jurisdiction. The territorial reach of the Court's powers over the subject matter in Pt IVA is necessarily as extensive as the substantive laws which confer that jurisdiction in relation to particular claims. Accepting that non-residents may be group members under Pt IVA in such circumstances is not to say that the Federal Court of Australia Act operates extraterritorially in any relevant sense. The determination of the group members' claims, as a matter of Australian law, does not have any effect or execution outside Australia.[21] This includes s 33ZB which binds group members to a judgment as a matter of Australian law but does not affect a person's rights under foreign law in respect of the same or similar subject matter. Whether Australian judgments will be recognised and enforced in other jurisdictions, and in what circumstances, is a matter for foreign law.[22]

The Outstanding Issue

The High Court's judgment focused on the commencement of a representative proceeding and whether non-residents could be included as group members. There is an important related concern at the conclusion of the representative proceeding: whether non-resident group members are bound by the outcome of the proceeding. The concern has been articulated by the United States Supreme Court in *Phillips Petroleum Co v Shutts* in relation to the American opt out class action as follows:

> As a class-action defendant[,] petitioner is in a unique predicament. If [US court] does not possess jurisdiction over this plaintiff class, petitioner will be bound to 28,100 judgment holders scattered across the globe, but none of these will be bound by the [US court's] decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party … has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.[23]

In the Australian context - would an Australian representative proceeding judgment or settlement have a preclusive effect on non-resident group members in their home jurisdiction? Or could a non-resident group member re-agitate the same issues in a new proceeding in another country.

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[20] Ibid [57].

[21] Ibid [66].

[22] Ibid [70].

[23] *Phillips Petroleum Co v Shutts*, 472 US 797, 805 (1985). See also Zachary Clopton, 'Note, Transnational Class Actions in the Shadow of Preclusion' (2015) 90 *Indiana Law Journal* 1387, 1393 (describing the "Heads I win; tails you lose" asymmetries of foreign group members' class litigation options, namely the ability to accept a favourable outcome but avoid an unfavourable outcome).

As the US Supreme Court alludes, and other commentators have expressly stated,[24] it is the unique position of group members in an opt out regime that creates uncertainties as to res judicata, or enforcement, in foreign jurisdictions. Unlike a representative party they do not submit to the jurisdiction of the Australian court when commencing proceedings. Equally they are not subject to the service of process to establish personal jurisdiction in relation to the Australian court. Indeed, it is accepted Australian law that the "the Court does not need to separately establish personal jurisdiction over the group members in representative proceedings".[25]

Group members will only interact with the representative proceeding if they opt out of the proceeding, or, assuming they do not opt out, they register their interest, typically to participate in a settlement or judgment.[26] If a group member opts out then they are excluded from the Australian proceeding and no issue of enforcement arises. If a group member registers, then they are aware of the proceeding and communications can occur. Where a successful outcome is achieved for the group then it is likely that registered group members will come forward to participate in the remedy achieved. Settlement agreements also usually include releases. However, the releases are typically provided by the applicant on behalf of the group members, rather than by group members individually.[27] Nonetheless, issues of enforcement are unlikely to occur.

However, group members may take none of the above steps: they are part of the group by falling within the group definition[28] but do not exclude themselves when the opportunity to opt out is provided, but they also do not participate in any settlement/judgment favourable to the group. Similarly, they may not opt out and the respondent may be successful in its defence. Pursuant to Australian law, in particular s 33ZB, these group members would be bound by the outcome of the proceedings in Australia. However, could a group member commence a claim in another jurisdiction? Kiefel CJ and Gageler J stated:

> Notwithstanding the possibility of a group member remaining unaware either of the proceeding or of their right to opt out, s 33Z empowers the Federal Court, in

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[24] Andrea Pinna, 'Recognition and Res Judicata of US Class Action Judgments in European Legal Systems' (2008) 1(2) *Erasmus Law Review* 31, 40-41, 60; The Law Reform Commission of Hong Kong, *Class Actions* (May 2012) [7.6].

[25] *BHP Group Limited v Impiombato* [2022] HCA 33, [57] (Gordon, Edelman and Steward JJ) citing *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 23 [10]-[11] (Gleeson CJ), 35 [53], 36 [56] (Gaudron, Gummow and Hayne JJ). See also *Laurie v Carroll* (1958) 98 CLR 310, 323 (Dixon CJ, Williams and Webb JJ) citing *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298, 302 (Viscount Haldane).

[26] The "closed class" or cases involving "book building" where the lawyers and/or litigation funders enter into retainers and/or litigation funding agreements may provide another category of interaction with the representative proceeding as the group members will affirmatively consent to their inclusion in the representative proceeding.

[27] The order is usually expressed as "Pursuant to s 33ZF of the Act, the Applicants be authorised nunc pro tunc on behalf of the group members to enter into and give effect to the Settlement Deed and the transactions contemplated thereby for and on behalf of the group members". See eg *Farey v National Australia Bank Ltd* [2016] FCA 340 (Beach J); *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, [124]-[131] (Murphy J). Where group members come forward to participate in a settlement an individual release could also be secured: see *Dyczynski v Gibson* (2020) 280 FCR 583, 675 [392] (Lee J) ("In the early days of Pt IVA, it was common for respondents to seek contractual releases from group members or procure deed polls.").

[28] *Federal Court of Australia Act 1976* (Cth) s 33E; *BMW Australia Limited v Brewster* (2019) 269 CLR 574, 618-619 [108] (Gageler J); *Carnival plc v Karpik (The Ruby Princess)* (2022) 404 ALR 386, 402 [57], 404 [65] (Rares J).

> determining a matter in a representative proceeding, to give a judgment which, by force of s 33ZB, "binds" all group members which the judgment identifies as affected by it, other than group members who have exercised their right to opt out.
> To the extent that a judgment given by the Federal Court in a representative proceeding binds group members by force of s 33ZB, Pt IVA has been said to create "its own kind of statutory estoppel". Needless to say, the statutory estoppel is operative as, and only as, part of the domestic law of Australia. Whether, when, and for what purposes, a judgment given by the Federal Court in a representative proceeding might be taken to determine the existence, or preclude the exercise, of legal rights under the domestic law of another country is a matter to be determined under the domestic law of that country. That is a topic on which Pt IVA has nothing to say.[29]

In short, the answer requires identification of the other jurisdiction and its law on enforcement of judgments from a representative proceeding. The BHP shareholder representative proceeding provides an example of this. At first instance BHP filed expert evidence on foreign law as to the position in England and Wales, Scotland, Northern Ireland and South Africa.

Moshinsky J, the judge at first instance, explained that the expert evidence on English and Welsh law was that if a new proceeding were commenced against BHP Ltd by (i) the applicants or (ii) a group member who registered to participate in a settlement of the present proceeding (following the distribution of notices with respect to the same) and who did not subsequently opt out of the present proceeding, the court of England and Wales would recognise the judgment of the Federal Court in the present proceeding.[30]

However, where a new proceeding were commenced against BHP Ltd by a group member who did not register to participate in a settlement of the present proceeding and did not opt out of the present proceeding (following the receipt of notices with respect to the same), Moshinsky J found "that there is, at least, some risk that the [English/Welsh] court would not recognise a judgment of this Court in such circumstances".[31]

Further, as to whether or not a court of England and Wales would recognise a judgment of the Federal Court if a new proceeding were commenced against BHP Ltd by a group member who did not register and did not opt out and who did not receive notices with respect to participation in any settlement, Moshinsky J found "there is a higher risk that the [English/Welsh] court would not recognise a judgment of this Court in such circumstances".[32] The expert evidence relating to Scots law and Northern Ireland law was to a similar effect.[33]

In relation to South Africa, the expert evidence opined that a registered group member would be precluded from bringing the same action against BHP Ltd in South Africa.[34] Further, and

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[29] *BHP Group Limited v Impiombato* [2022] HCA 33, [13]-[14]. See also [70] (Gordon, Edelman and Steward JJ).

[30] *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720, [61].

[31] Ibid [64].

[32] Ibid.

[33] Ibid [68].

[34] Ibid [77].

unlike the position in England and Wales, an unregistered group member who did not opt out but received notices would also be precluded from bringing the same action against BHP Ltd in South Africa. However, this was based on the assumption that it can be demonstrated on the balance of probabilities that the member in question received, read and was in a position to understand the notice.[35] Group members who did not receive any notice relating to opting out of or registering an interest to participate in any settlement, and did not opt out or register would not be precluded from bringing the same action against BHP Ltd in South Africa.[36]

The above evidence in relation to the BHP shareholder representative proceeding established that the risk of non-enforcement of an Australian judgment in a foreign jurisdiction is greater where a group member is unaware of the representative proceeding, having not received notice, than when they had notice but failed to take action.

The US courts provide a further example of how enforcement of a judgment from a representative proceeding may be approached. In *Phillips Petroleum Co. v Shutts* the focus was personal jurisdiction over group members, but in the US class action context personal jurisdiction was permitted to be achieved through lower standards that that which applied to a defendant.[37] Personal jurisdiction over a group member could be achieved through ensuring "the named parties adequately represented the absent class", the provision of the "best practicable" notice and an opportunity to remove themselves from the class action.[38]

Canadian courts have held that it may be appropriate to enforce a foreign judgment against non-resident group members who have not opted out of a foreign representative proceeding if the following three criteria are met: (1) there is a real and substantial connection between the cause of action and the foreign court; (2) the rights of non-residents are adequately represented; and (3) the non-resident class members are afforded procedural fairness, including adequate notice and the right to opt out.[39]

The approach adopted by the above jurisdictions may be put more broadly by reference to the general principle at common law that it is a defence to the enforcement of a foreign judgment where natural justice has been denied. Natural justice includes notice of the proceedings and the opportunity to present a case before an impartial tribunal.[40]

Other approaches to the enforcement of a judgment from a representative proceeding have been suggested but will not be examined here.[41]

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[35] Ibid [78].

[36] Ibid [79].

[37] *Phillips Petroleum Co v Shutts*, 472 US 797, 808, 812 (1985).

[38] Ibid.

[39] *Parsons v McDonald's Restaurants of Canada Ltd* (2005) 74 OR 3d 321 (Ontario CA); Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (July 2019) 34.

[40] *Boele v Norsemeter Holding AS* [2002] NSWCA 363, [24] (Giles JA, with whom Handley and Beazley JJA agreed); *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69, [50] (Rares J); *Nyunt v First Property Holdings Pte Ltd* [2022] NSWCA 249, [132] (Bell CJ). See also Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed 2020) [40.82].

[41] Rachael Mulheron, "Asserting Personal Jurisdiction Over Non-Resident Class Members: Comparative Insights for the United Kingdom" (2019) 15(3) *Journal of Private International Law* 445, 466-482 (discussing eight "anchors" for asserting personal jurisdiction over non-resident group members which would

The above analysis raises two questions:
(1) what steps can a respondent take to bind a non-resident group member to the outcome in an Australian representative proceeding and prevent the commencement of new proceedings in the non-resident group member's home jurisdiction?
(2) if a foreign jurisdiction will not enforce a judgement from an Australian representative proceeding against non-resident group members, or the position is unclear, can/should those group members be excluded from the Australian representative proceeding?

Binding a non-resident group member

For a respondent to be able to enforce a judgment, including a judgment giving effect to a settlement,[42] there will be a need to focus on the notice provided to group members and the opportunity to present a case, which in the representative proceeding context equates to the adequacy of representation afforded to group members. The existence of an impartial tribunal is unlikely to be an issue.

Notice

Part IVA provides for the provision of notices. Kiefel CJ and Gageler J observed:

> Section 33Y indicates that the notice need not be given to group members personally and might well be given by means of a press advertisement or a radio or television broadcast. There is accordingly a "real possibility" that a group member will be unaware of the proceeding and of their right to opt out. The reality of that possibility is specifically acknowledged in s 33Y(8), which provides that failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.[43]

The Federal Court Practice Note states in relation to opt out notices that a notice should be "sent, published or broadcast via media which are best calculated to achieve the effective dissemination of the notices among class members in the most cost-effective way".[44]

For a domestic perspective the Part IVA notice regime provides for a range of forms of notice and accepts that a group member may be bound by the outcome in a representative proceeding even if the group member does not receive the notice, nor know that there is a representative proceeding of which they are a group member is on foot. However, from the perspective of foreign enforcement of a judgment the standard of notice may be higher. Consequently, where non-resident group members form part of the group an effective notice that brings the commencement of the proceeding and the right to opt out to the group member's attention is a key concern. Further notice of a settlement, its terms and the ability

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support enforcement of a judgment, but concluding that the "due process" approach adopted by the US and Canada "is probably the most rigorous, defensible, and fairest to the non-resident [group] members").

[42] *Dyczynski v Gibson* (2020) 280 FCR 583, 643-644 [244]-[249] (Murphy and Colvin JJ), 675 [391] (Lee J) citing *Clark v National Australia Bank Limited (No 2)* [2020] FCA 652, [24] (Lee J) ("The reason why the group members although non-parties are bound to the s 33V settlement order is by the making of a s 33ZB order, which means the settlement order binds group members who did not opt out.").

[43] *BHP Group Limited v Impiombato* [2022] HCA 33, [12].

[44] Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 20 December 2019, 12.2(d).

of a group member to object or raise concerns about the terms of the settlement may be needed.[45]

In shareholder claims, such as the BHP representative proceeding, effective notice to all shareholders can usually be achieved through utilizing the share register.[46] Other types of representative proceeding such as consumer claims or mass torts, including product liability, often do not have a central register or list of names and addresses, and as a result notice must be given through notices using various forms of media such as newspapers, websites and social media. Moreover, the traditional written notice may not be the most effective depending on the claims and characteristics of the group.[47] It must also be borne in mind that it is not just the method by which notice that is given that is important, but also that the notice is comprehendible by the persons who comprise the group – some of which may have attained only basic levels of literacy.[48] Moreover, depending on the location of non-resident group members, languages other than English may need to be employed.[49]

It should be noted that while achieving effective notice is important in binding non-resident group members, a matter of importance to a respondent, the more effective the notice, the more group members who may participate in a representative proceeding which may increase the quantum of any settlement or judgment.

Adequacy of Representation

In the Australian representative proceeding context group members do not present their case individually, rather a representative party presents its own case which is representative of the claims of the group, or at least the common issues raised by the claims.[50] From a natural justice perspective this means that it is the representative party that must be afforded the opportunity to present the case, but also that the group member's case must be adequately represented by the representative party.[51]

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[45] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [5(f)] (Moshinsky J) ("an important consideration will be whether group members were given timely notice of the critical elements [of a settlement], so that they had an opportunity to take steps to protect their own position if they wished."); *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited* [2020] FCA 510, [4] (Jagot J).

[46] Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 20 December 2019, 12.3; *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720, [111].

[47] See *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423, [45] (Lee J) ("advanced Western societies have reached a stage where significant parts of the community, and, in particular, younger members of the community, more readily digest information conveyed to them in an audio-visual rather than written form.').

[48] Ibid at [45]-[50].

[49] See eg DBE17 (by his litigation guardian Marie Theresa Arthur) v the Commonwealth of Australia (VID1392 of 2019), Opt Out Notice which provided the notice in 19 languages.

[50] *Timbercorp Finance Pty Ltd (in liquidation) v Collins* (2016) 259 CLR 212, 233 [44], 234-235 [49], 235-236 [53]-[54] (French CJ, Kiefel, Keane and Nettle JJ), 254 [141]-[142] (Gordon J).

[51] *Hansberry v Lee* 311 US 32, 42-43 (1940); *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 408 (Brennan J); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 27 [21] (Gleeson CJ) (referring to the need to ensure "that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf".)

While adequacy of representation is a core requirement in some overseas class actions regimes, such as the United States and Canada where it is requirement for the certification of the class action to go forward,[52] in Australia it has received less attention.[53] Rather than being a positive threshold or gateway requirement for commencement of a representative proceeding, like the matters in s 33C, it is addressed in the negative by s 33T which permits the court to replace a representative party on an application by a group member if it appears that the representative party "is not able adequately to represent the interests of the group members". In *Wong v Silkfield Pty Ltd* the High Court referred to s 33T as a 'safeguard'.[54] Section 33T has also been described as providing "a remedy for a group member who considers that a representative party is not able adequately to represent the interests of the group members".[55] However, group members are not positively obliged to seek the replacement of an inadequate representative. Indeed, inaction is in keeping with the role of group members.[56] Moreover, as discussed above in relation to notice, there may be group members who do not know of the existence of the representative proceeding, let alone who is the representative party and whether they are able to provide adequate representation.[57]

In the current context it is the respondent that will want to ensure adequacy of representation so as to bind non-resident group members but the respondent does not have standing under s 33T to seek to have an inadequate representative replaced. This may be overcome through reliance on s 33ZF.[58] However, a respondent may not be well placed to appreciate the interests of group members.[59] Alternatively in the state jurisdictions of New South Wales, Queensland and Tasmania the Court may, "on application by the defendant or of its own motion", order that proceedings no longer continue as a representative proceeding if the Court is satisfied that "it is in the interests of justice to do so because: … (d) a representative party is not able to adequately represent the interests of the group members".[60] The respondent has standing and adequacy of representation can be tested. This may prompt the replacement or addition of a representative party. However the remedy is the discontinuance

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[52] *Federal Rules of Civil Procedure* (US) r 23(a)(4); *Class Proceedings Act 1992* (Ontario) s 5(1)(e); *Class Proceedings Act 1996* (British Columbia) s 4(1)(e). See *Perera v GetSwift Ltd* (2018) 263 FCR 1, 86 [359] (Lee J)

[53] Michael Legg, 'Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest' (2009) 32(3) *UNSW Law Journal* 909, 924 (drawing on the US requirements and arguing that "the Federal Court has not given adequacy of representation the prominence it deserves"); Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 3rd ed 2022) [5.360].

[54] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266 [25] (Gleeson CJ, McHugh J, Gummow J, Kirby J, Callinan J).

[55] *Femcare Ltd v Bright* (2000) 100 FCR 331, 336 [18] (Black CJ, Sackville and Emmett JJ).

[56] *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212, 231-232 [38] (French CJ, Kiefel, Keane and Nettle JJ), 250-251 [126], 252 [132] (Gordon J).

[57] Michael Legg, 'Judge's role in settlement of representative proceedings: Lessons from United States class actions' (2004) 78 *Australian Law Journal* 58, 64.

[58] Ibid; *Perera v GetSwift Ltd* (2018) 263 FCR 1, 87 [361] ("Even absent an application by a group member, the broad power contained in s 33ZF would allow the Court to intervene in order to ensure the claims of group members were being adequately represented and advanced.")

[59] Vince Morabito, "Replacing Inadequate Class Representatives in Federal Class Actions: Quo Vadis?" (2015) 38(1) *UNSW Law Journal* 146, 177.

[60] *Civil Procedure Act 2005* (NSW)s 166(1)(d); *Civil Proceedings Act 2011* (Qld) s 103K(1)(d); *Supreme Court Civil Procedure Act 1932* (Tas) s 75(1)(d).

of the proceedings, something that a respondent may find acceptable, but which does not address the issue of binding non-resident group members.

Remaining uncertainty

It must be recognized that while notice and procedural fairness are central concerns in common law jurisdictions for the enforcement of a judgment, exactly what that equates to may vary from jurisdiction to jurisdiction, and may not be clear in a particular jurisdiction. For example, notice in US class actions for a monetary claim is expressed as follows: [61]

> the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

Australian notices would presumably need to meet this bar, although the Australian legislation inverts the test and adds cost as a consideration.[62] The two approaches may coalesce,[63] but they may not. Moreover, the notice may need to advise the non-resident group member that a foreign court is seeking to assert jurisdiction over them, which may be unexpected, and may impact their rights in their home country ie any claim under the law of their home country may be unable to be brought if the foreign judgment is enforceable.[64]

Further, adequacy of representation and notice may be insufficient or irrelevant in other jurisdictions where the concept of an opt out representative proceeding is rejected based on other principles. In Europe an opt out regime may impinge on constitutional concerns such as consent (or representation without authorization), party autonomy in litigation, including whether to commence proceedings and how to resolve them, and compliance with stricter requirements of due process.[65] Equally, it has been argued that an opt out regime could meet these requirements.[66] The position in Europe is still evolving. For example the European Union's Representative Actions Directive requiring all Member States to provide in their national laws for a representative action entered into force on 24 December 2020.[67] Member

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[61] *Federal Rules of Civil Procedure* (US) r 23(c)(2)(B).

[62] *Federal Court of Australia Act 1976* (Cth) s 33Y(5) ("The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.").

[63] See *Femcare Ltd v Bright* (2000) 100 FCR 331, 350-351 [78]-[84] (Black CJ, Sackville and Emmett JJ) (discussing US requirements and finding: "The concepts of "best practicable notice" and "reasonableness" having "due regard to the practicalities and peculiarities of the case", … , are not appreciably different from the concepts employed in Part IVA of the Federal Court Act of "reasonably practicable" and "unduly expensive".").

[64] *Parsons v McDonald's Restaurants of Canada Ltd* (2005) 74 OR 3d 321, [39], [42] (Ontario CA).

[65] See eg *In re Alstom SA Securities Litigation*, 253 FRD 266, 285-287 (SDNY 2008) (discussing French law as at 2008 where an opt out class action was contrary to French Constitutional principles and public policy, namely rights to notice, consent and party autonomy in litigation); Andrea Pinna, 'Recognition and Res Judicata of US Class Action Judgments in European Legal Systems' (2008) 1(2) *Erasmus Law Review* 31.

[66] See eg *In re Vivendi Universal, S.A. Securities Litigation* 242 FRD 76 (SDNY 2007); *In re Vivendi Universal, S.A. Securities Litigation* 2009 WL 855799 at *3 (SDNY Mar. 31, 2009) (the Court concluded that German and Austrian courts were not likely to give res judicata effect to a judgment entered in this case, while French, English and Dutch courts were likely to do so); Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (Springer 2019) Ch 3.

[67] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJL 409. For a summary of the Directive see Anton Burri and Gian Marco Solas, 'Third-Party

States had to transpose the Directive by 25 December 2022, and must put the new rules into force by 25 June 2023.[68] The Directive permits either opt in or opt out forms of representative action.[69] However, an opt in regime is mandatory for consumers who are not habitually resident in the Member State in which the representative action is brought.[70] As members of the European Union utilize representative actions more, then judgments or settlements from other jurisdictions may be viewed with less suspicion. Equally, having adopted a mandatory opt in regime for non-resident group members, concerns about an opt out approach in this context may persist.

The above discussion has focused on common law systems and the European Union. However, other legal systems approaches, such as China or India, may be relevant depending on the location of non-resident group members.

Excluding non-resident group members

An alternative or additional step is to seek an order excluding all non-resident group members who do not register to participate in a proceeding at settlement or judgment.[71] The suggestion here is a notice advising non-resident group members that to participate in a settlement or judgment they must register, and failure to register results in exclusion from the representative proceeding and associated remedies. Importantly there is no extinguishment of the non-resident group member's claims at any point. Rather the non-resident group member remains free to commence proceedings in their home jurisdiction. The power to make such an order may be found in a number of provisions:

- s 33K – an order to amend the group definition provided the representative party sought leave to make the amendment, otherwise resort would need to be made to the "gap-filling" general power in s 33ZF that requires that the Court thinks such an order is "appropriate or necessary to ensure that justice is done in the proceeding";
- s 33V - an order made as part of approving a settlement, or perhaps better described as, an order approving the discontinuance of the non-resident group members' claims;
- s 33Z(1)(g) – which allows for such other order as the Court thinks just in determining a matter in a representative proceeding; and

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Funding under the EU's New Representative Actions Directive' (2022) 15(1) 25 *Global Competition Litigation Review* 29.

[68] Ibid Article 24(1).

[69] Ibid Article 9(2).

[70] Ibid Article 9(3).

[71] *Impiombato v BHP Group Limited (No 2)* [2020] FCA 1720, [133] (Moshinsky J). See also *In re Vivendi Universal SA Securities Litigation* 242 FRD 76, 107 (SDNY 2007) ('in the case of a settlement, the Court can fashion a proof-of-claim mechanism intended to bind all participants and discourage relitigation'). However, the usual approach in the US is to consider whether non-resident group members can be included in a class action by refence to whether they will be subject to res judicata in their home jurisdiction as part of certification and the superiority requirement. Superiority exists where a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy": *Federal Rules of Civil Procedure* (US) r 23(b)(3). See *Willcox v Lloyds TSB Bank, PLC*, 2016 WL 8679353, *9 (D Hawaii, 8 January 2016) ("The trending approach of federal courts nationwide appears to be evaluating the res judicata effects of class judgments with respect to groups of foreign plaintiffs and then excluding from the class those whose home countries would not honor a class judgment from the United States.'); Michael Murtagh, 'The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies' (2011) 34 *Hastings International and Comparative Law Review* 1.

- s33X(5) – which allows the court to order that notice of any matter by given to group members would need to be combined with the above powers[72] to advise of the need to register.

The Victorian regime would also be able to rely on s 33KA where non-resident group members can be removed if (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.[73]

An analogous form of order was made in *King v GIO* where Moore J made orders for the group definition to be redefined by reference to whether shareholders had returned a form to participate in the representative proceeding. Moore J proceeded on the basis that any judgment was to only bind the members of the redefined group, however, the matter settled with the settlement only benefiting the members of the redefined group.[74]

The above procedural steps may be contrasted with the more contentious "class closure" order.[75] Typically class closure orders are classified as "soft closure" orders or "hard closure" orders. A hard closure order incorporates both a registration requirement and an order extinguishing claims that do not register within the specified time. A soft closure order requires registration but the ramification of not registering, extinguishment of the claim, only occurs if a settlement is reached. If no settlement is reached then the claim continues.[76] At the time of writing there existed different views between the New South Wales Court of Appeal and Full Court of the Federal Court of Australia as to the power of the court to make class closure orders, relying on s 33ZF or s 33X(5) and their NSW equivalents, at various points in the litigation.[77] It is possible that an order may be sought that non-resident group members must register and failure to do so results in their claim being extinguished. However, this would then require consideration of whether the extinguishment would be recognised by the home jurisdiction. This defeats the aim of excluding the non-resident group member so as to avoid the argument about the binding effect of an Australian judgment or settlement.

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[72] *Federal Court of Australia Act 1976* (Cth) s 33K(4) provides power to give notice where an order is made pursuant to s 33K(1) so that s 33X(5) may not be needed.

[73] *BHP Group Limited v Impiombato* (2021) 286 FCR 625, [46]-[48] (Middleton, McKerracher and Lee JJ).

[74] *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980, [7]-[10]. See also *Matthews v SPI Electricity (Ruling No. 13)* (2013) 39 VR 255, 263 [27]-[28] (Forrest J); *Haselhurst v Toyota Motor Corporation Australia* (2020) 101 NSWLR 890, 907-908 [82]-[83] (Payne JA). See also Michael Moore, 'Ten Years Since King v GIO' (2009) 32 (3) *UNSW Law Journal* 883, 891-894.

[75] See *Haselhurst v Toyota Motor Corporation Australia* (2020) 101 NSWLR 890, 907-908 [82]-[83] (Payne JA) (noting by reference to the orders in King v GIO, that such an order was not for class closure as the persons who ceased to be group members were not barred from bringing separate proceedings).

[76] *Gill v Ethicon Sàrl (No 2)* [2019] FCA 177, [1] (Lee J).

[77] See *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890; *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; *Parkin v Boral Limited (Class Closure)* [2022] FCAFC 47. See also Emerson Hynard, "'Class Closure' and the Question of Power in Representative Proceedings" (2022) 96 *Australian Law Journal* 816.

Returning to the registration or exclusion approach, while power exists, consideration must be given to whether such an order should be made, including whether it is just.[78] As explained above the two main reasons are to avoid the costs and uncertainty of trying to conform with a foreign jurisdictions' requirements for recognition of a judgment. Excluding non-resident group members who do not register improves certainty – they are not bound. Non-resident group members that do register have submitted to the jurisdiction of the Australian court thus increasing the likelihood that a judgment or settlement will be recognized in the home jurisdiction. Excluding non-resident group members may also remove the need to incur additional costs in seeking to bind them. Those costs are not just incurred by the parties, but by the tax-payer funded justice system which must grapple with the uncertainties set out above.

A third reason is to avoid the making of futile orders by the court that may undermine confidence in the administration of justice. Public confidence in the administration of justice requires that court processes and orders are enforceable and therefore complied with. Finality is an essential feature of judicial power.[79] If an Australian court's judgment or approval of a settlement includes non-residents but those non-residents are not bound by the outcome in overseas jurisdictions this may undermine respect for Australian justice. The concern that a court should not make orders that are unenforceable, or futile, can be observed in a broad range of cases.[80] The difficulty here is that whether the Australian judgment will be enforced is uncertain.

The exclusion of non-resident group members is criticized on the basis of undermining the objectives of access to justice and compensation, as well as deterrence.[81] The non-resident is excluded from accessing compensation. Further, by not requiring that all losses be compensated then the representative proceeding fails to cause the respondent to internalize all the costs of its misconduct. However, here the non-resident group member is only excluded if they fail to register. Compensation and deterrence are pursued but the non-resident group member must come forward by the deadline. This is the same issue that arises domestically

[78] *Federal Court of Australia Act 1976* (Cth) ss 33ZF and 33Z(1)(g) refer to justice. *Federal Court of Australia Act 1976* (Cth) s 33K has been interpreted as only being able to be exercised in the interests of justice: *Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 8)* [2021] FCA 295, [27] (Middleton J); *Carpenders Park Pty Ltd v Sims Limited* [2020] FCA 1681, [43]-[44] (Rares J). *Federal Court of Australia Act 1976* (Cth) s 33V has been interpreted as requiring consideration of whether a proposed settlement is fair and reasonable: *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [7] (Jacobson, Middleton & Gordon JJ) and for a discontinuance, where the practical effect will be to return group members to the position they were in before the commencement of the representative proceeding, whether the discontinuance would be unfair or unreasonable or adverse to the interests of group members: *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435, [8]-[10] (Murphy J).

[79] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[80] See, eg, *Stemcor (A/sia) Pty Ltd v Oceanwave Line SA* [2004] FCA 391 (subpoena to a foreign entity); *Sweeney v Howard* [2007] NSWSC 262, [13] (Windeyer J); *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 71–3 [72]–[78] (Basten JA) (suppression orders); *Tucker v Mongbwalu Goldfields Investments Limited* [2021] FCA 135, [10] (McKerracher J) (injunction). See also *Wimalaratne v Minister of Immigration and Multicultural Affairs* [2000] FCA 964, [15] (Katz J) (referring to the maxim "Lex non praecipit inutilia" (which may be rendered as "The law commands not useless things")).

[81] Janet Walker, 'Crossborder Class Actions: A View from Across the Border' [2004] *Michigan State Law Review* 755, 770. There is an assumption here that all jurisdictions share these objectives.

for a representative proceeding.[82] Equally, the answer is ensuring effective notice to make group members aware of the need to register, and an accessible and easily comprehensible registration process. Even then barriers to participation by group members may persist.

Excluding non-resident group members, so that the group is under inclusive, has also been argued to undermine finality for a respondent. However, what is sometimes called "global peace" assumes not just that all group members are included, but they are bound by the judgment or settlement, or if not, will not seek to re-litigate the dispute elsewhere. Simply including non-resident group members does not guarantee finality. A registration requirement would assist in binding non-resident group members as they will have submitted to the jurisdiction of the Australian court. However, the timing of registration will be important. A respondent that settles a representative proceeding on attractive terms for it, or successfully defends a representative proceeding, will not want non-resident group members being able to avoid that outcome by them choosing not to register.[83]

Lastly, it should be observed that the need to exclude non-resident group members may turn on the likelihood of re-litigation in another jurisdiction. The risk of further litigation in another jurisdiction may depend on a range of factors, such as the existence of a cause of action, the amenability of the respondent to jurisdiction in the foreign court, the non-expiration of any statute of limitations, an available procedural vehicle such as a representative proceeding of some kind if the claim is small, and the ability to obtain legal representation, which in turn may depend on legal fee rules or the availability of financing for legal fees. If re-litigation in practice is unlikely then excluding non-resident group members may be unnecessary.[84]

Conclusion

The High Court in *BHP Group Limited v Impiombato* concluded that the representative proceeding enacted in Part IVA of the *Federal Court of Australia Act 1976* (Cth) permitted the inclusion of non-resident group members. The High Court's decision then gives rise to the related question of enforcement of a representative proceeding judgment or settlement in relation to non-resident group members. The Federal Court of Australia has a number of powers and practical steps that it can employ to address enforcement in relation to non-resident group members – namely though effective notice and adequate representation. However, uncertainty persists as to what a foreign jurisdiction will require before enforcing an Australian representative proceeding judgment or settlement against their residents. To reduce uncertainty and improve the likelihood of enforcement the Federal Court also has

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[82] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569, 574 [13] (Stone J); *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2018) 358 ALR 384, 392 [44] (Murphy J). See also Vince Morabito, 'Judicial Responses to Class Action Settlements that Provide No Benefits to Some Class Members' (2006) 32 *Monash University Law Review* 75.

[83] See eg *Bersch v Drexel Firestone, Inc*, 519 F2d 974, 996 (2d Cir 1975) ("if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been").

[84] The author's research produced only one case where a group member's home jurisdiction (Canada) declined to recognize a class action judgment from another jurisdiction (United States): *Parsons v McDonald's Restaurants of Canada Ltd* (2005) 74 OR 3d 321 (Ontario CA) (rejecting US class judgment based on inadequate notice of the right to opt out). See also *Campos v Kentucky & Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep 459, 473-4 (observing in obiter, that judgments given in a US class action proceeding did not give rise to res judicata in England as the group members had not been served with process).

power to exclude non-resident group members who do not register to participate in a proceeding at settlement or judgment.