SQUIRE PATTON BOGGS

Opt-in

– Territorial Limitations Do Not Curtail Group Member Participation Rights in Australian Class Actions

Australia – 13 October 2022

On 12 October 2022, the Australian High Court dismissed an appeal brought by BHP Group Limited (BHP), which sought to exclude group members who were not residents in Australia from a class action.[1] The court was unpersuaded by BHP's arguments and determined that Part IVA of the Federal Court of Australia Act 1976 (Cth) (FCA) (Part IVA), which governs representative proceedings, does not contain any limitation on the geographic or territorial qualifications that must be satisfied in order to qualify as a group member.

BHP sought to appeal the decision of the Full Court of the Federal Court of Australia, seeking a determination on the scope and application of Part IVA. Proceedings were brought against BHP on behalf of persons who purchased shares in BHP on the Australian Stock Exchange (ASX), BHP Billiton PLC on the London Stock Exchange (LSE) and/or BHP PLC on the Johannesburg Stock Exchange (JSE) as a result of the failure of the Fundão Dam in Brazil in 2015 (Proceedings). The Proceedings are premised on a claim that group members have suffered loss as a result of BHP's contravention of its continuous disclosure obligations and engaging in misleading and deceptive conduct.

The Proceedings remain on foot in the Federal Court. However, the appeal was brought arising out of an interlocutory application.

BHP argued that Part IVA must be interpreted in a way to not include group members who are not residents of Australia within a representative proceeding. If upheld, that argument would have had the effect of refining the scope of the Proceedings and limiting potential group members to those who purchased shares in BHP on the ASX, LSE or JSE and were domiciled in Australia. The High Court determined that there was no basis within Part IVA to infer territorial limitations and considered any person who has a claim (in accordance with the FCA) could be included within a representative proceeding, irrespective of whether they are a resident of Australia.

Implications for Key Stakeholders

The decision carries potentially significant ramifications for litigation funders, class action proponents, and group members within a class action, both domestically and internationally. It also has implications for actual or prospective defendants, directors and officers, auditors and ASX listed entities who have related parties listed on foreign exchanges such as the LSE.

Development of a potential class of group members has historically been limited to those who reside in Australia. Limited classes often cause complications in ensuring the viability of a claim and the economics of prosecution. Further, the costs associated with developing a class focused purely on domestic participants are often prohibitive and can adversely impact claim-size economics. The clarification on the scope and application of Part IVA of the FCA opens the door for overseas-based funds and institutional investors who may have a claim – or fall within a group member definition – to commence or participate in proceedings, with little to no downside. The court's decision has the real potential to significantly improve claim economics from funding and class-proponent perspectives.

Target defendants to representative proceedings, in particular directors and officers, auditors and ASX listed entities, will likely bear increased downside risks. With the potential inclusion of overseas-based group members in proceedings, claims are likely to become more complex, result in increasing defendant costs, and may lead to delays in the resolution of interlocutory and final court processes. In addition, with potentially larger pools of group members, the likely damages to be paid by unsuccessful defendants will likely increase, particularly if overseas-based funds or institutional investors opt in.

1 *BHP Group Limited v Impiombato & Anor* [2022] HCA 33

On the Horizon

Class action courts will need to adapt to the potential expansion of classes. Among other elements, they will need to consider, and resolve, potentially more complex opt-in and opt-out processes, notification mechanisms across borders – including in non-English speaking jurisdictions – and more involved settlement approval processes where the interests of foreign members will need to be weighed.

Litigation funders and class proponents will naturally welcome the High Court's decision. Conversely, target defendants (and their insurers) will be concerned. The reality is, even before today's decision, litigation funding has been on the rise following the abandonment of the previous government's regulatory reforms. The High Court's decision has the potential to see representative proceedings in Australia increase and expand to include more foreign participants. In fact, it would not be surprising if some claims were recalibrated to specifically include institutional participants based offshore, particularly from Hong Kong, Singapore and the US.

Contacts

Masi Zaki
Partner
T +61 2 8248 7894
E masi.zaki@squirepb.com

Kate Spratt
Associate
T +61 2 8248 7841
E kate.spratt@squirepb.com