HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: ZURICH INSURANCE PLC
First Appellant

ASPEN INSURANCE UK LIMITED
Second Appellant

and

DARIUSZ KOPER
First Respondent

ATTORNEY GENERAL OF THE COMMONWEALTH
Second Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. Part 2 (ss 8 to 15) of the *Trans-Tasman Proceedings Act 2010* (Cth) ("**the TTPA**") makes provision for the service upon a defendant in New Zealand of the originating process of – or perhaps more accurately, an "initiating document" issued by – an Australian court in relation to a "civil proceeding". The expression "Australian court" is defined in s 4 to mean a federal court or a court of a State or Territory. And "civil proceeding" is in turn defined to mean "a proceeding that is not a criminal proceeding".

3. Pursuant to s 9, an initiating document issued by an Australian court or tribunal that relates to a civil proceeding may be served in New Zealand under Part 2, provided that the document is served in New Zealand in the same way that the document is required or permitted, under the procedural rules of the Australian court or tribunal, to be served in the place of issue. Section 10 then provides that service of an initiating document in New Zealand under s 9 has the same effect, and gives rise to the same proceeding, as if the initiating document had been served in the place of issue.

4. At issue in this appeal is whether ss 9 and 10 can validly operate to authorise, or to deem as effective, the service of the process of a State court outside the territory of the

Commonwealth in matters that do not engage federal jurisdiction. There is no dispute that the TTPA, including Part 2, is a law with respect to external affairs within the meaning of s 51(xxix) of the *Constitution*, not least because it was enacted to implement the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement done at Christchurch on 24 July 2008.

5. However, the appellants' ultimate submission is that the Commonwealth Parliament lacks power to make laws with respect to the service of the process of State courts in relation to matters that do not engage federal jurisdiction, otherwise than in reliance on s 51(xxiv). Crucially, that placitum confers upon the Commonwealth Parliament the power to make laws with respect to, amongst other things, the service of the civil and criminal process of State courts throughout the Commonwealth, but not outside it.

Part III: Section 78B Notice

6. Notices under s 78B of the *Judiciary Act 1903* (Cth) have been served.

Part IV: Reasons for judgment below

7. The judgment of the primary judge ("**J**") may be cited as *Dariusz Koper v Zurich Insurance PLC* [2021] NSWSC 1587(**CAB 72**), and that of the Court of Appeal ("**CA**") as *Zurich Insurance PLC v Koper* [2022] NSWCA 128 (**CAB 160**).

Part V: Facts

8. The first respondent ("**Mr Koper**"), and the group members whom he represents, are the registered proprietors of residential units in the Victopia Apartments at 135 Victoria Street West, Auckland, New Zealand. The Victopia Apartments were designed and constructed by Brookfield Multiplex Constructions (NZ) Limited (in Liquidation) ("**BMX NZ**"), an entity incorporated in New Zealand, and without any assets or presence in Australia. The appellants ("**Zurich**" and "**Aspen**" respectively) were among several insurers that insured BMX NZ under a program of professional indemnity insurance (**CAB 73**).

9. In October 2012, the registered proprietors of apartments within the Victopia Apartments, alongside Body Corporate 346799, commenced proceedings ("**the Victopia Proceedings**") in the High Court of New Zealand against, amongst other defendants, BMX NZ and its principal, KNZ International Co Limited ("**KNZ**"), seeking damages in respect of various defects in their apartments and the common areas of the building (**CAB 8**).

10. On 22 March 2017, following a hearing at which BMX NZ played no active role, judgment was delivered in the Victopia Proceedings, awarding damages against BMX NZ and KNZ, a substantial portion of which remains outstanding (**CAB 92**).

11. By a Summons filed 1 April 2021 in the Supreme Court of New South Wales ("**the Summons**"), Mr Koper sought leave, pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("**the Claims Act**"), to bring proceedings under s 4, initially against Zurich alone (**CAB 65**).[1] Section 4 provides, in essence, that if an insured person has an insured liability to a person, that person ("**the claimant**") may recover the amount of the insured liability – that is, the amount of indemnity payable under the relevant contract of insurance – from the insurer in proceedings before a court of New South Wales.

12. In August 2021, whilst Mr Koper's application for leave under s 5 of the Claims Act was pending, he purported to commence his proposed proceedings against Zurich in the Commercial List in the Equity Division of the Supreme Court of New South Wales (**CAB 73**).

13. On 15 December 2021, following the publication of the primary judge's reasons on 8 December 2021, his Honour granted the leave sought by Mr Koper (**CAB 149**). In so doing, his Honour:

    (a) held that the Claims Act could not, on its proper construction, apply where the claimant's claim against the insured person could not properly have been brought in a court of New South Wales; but

    (b) accepted that even though Mr Koper's claim against BMX NZ was a claim against a New Zealand company, without any presence or assets in Australia, arising out of a tort allegedly committed in New Zealand, he could nonetheless have brought a claim against BMX NZ in a court of New South Wales in reliance upon Part 2 of the TTPA.

14. On 20 July 2022, the Court of Appeal granted Zurich and Aspen leave to appeal against the orders of the primary judge but dismissed the appeal with costs (**CAB 160**). The essential steps in the reasoning of Bell CJ, with whom Ward P and Beech-Jones JA agreed, were as follows:

[1] On 17 May 2021, Zurich filed a notice of motion seeking, amongst other things, orders that the Summons, or service thereof, be set aside. Any defect in the service of Zurich was subsequently cured by the joinder of Aspen as second defendant (**CAB 69**).

(a) unlike the jurisdiction conferred by, or envisaged as being capable of being conferred by the Commonwealth Parliament in, ss 75, 76 and 77 of the *Constitution*, personal jurisdiction is not a constitutional concept (CA [52])(**CAB 181**), with the result that:

(i) Ch III is not at all concerned with personal jurisdiction (CA [45]) (**CAB 179**); and

(ii) the proposition that the Commonwealth Parliament may not confer jurisdiction upon courts otherwise than under Ch III – and in the case of State courts, otherwise than pursuant to s 77(iii) – does not limit the power of the Commonwealth Parliament to make laws with respect to the service of the process of State courts;

(b) any suggestion to the contrary would produce the consequence, foreclosed by what was decided by this Court in *Flaherty v Girgis*,[2] that s 51(xxiv) could only support laws with respect to the service throughout the Commonwealth of the process of State courts in federal matters, and thus would be rendered otiose (CA [45]) (**CAB 179)**;

(c) nor does the inclusion in the *Constitution* of s 51(xxiv) afford a basis for reading down the other placita in s 51 so as to abstract from them any power to make laws with respect to the service of the process of State courts otherwise than throughout the Commonwealth (CA [41]-[42]) (**CAB 178)**;

(d) as a consequence, the circumstance that ss 9 and 10 of the TTPA, in their purported application to proceedings that would not engage federal jurisdiction, may be said to be a law with respect to external affairs, suffices to establish that those provisions may validly so apply.

Part VI: Argument

Introduction

15. The appellants' case rests upon two propositions concerning the source and extent of the Commonwealth Parliament's power to make laws extending or otherwise altering the territorial jurisdiction of State courts. The first is that the Commonwealth Parliament's power to confer federal jurisdiction upon State courts contains within it, or carries with it as a necessary incident, the power to make, or to authorise the making of, rules with respect to the service of the process of such courts in matters

[2] (1987) 162 CLR 574.

that engage federal jurisdiction. And the second is that while the heads of Commonwealth legislative power comprehend the power to legislate as to the manner in which State courts might exercise their non-federal jurisdiction, the Commonwealth Parliament lacks the power, except to the extent contemplated by s 51(xxiv) and s 77(ii) of the *Constitution*, to make any law altering the reach or scope of State judicial power. The result is that while the Commonwealth Parliament has power to make laws with respect to the service, outside the Commonwealth, of the process of State courts in connection with matters that engage federal jurisdiction, it lacks such power in connection with matters falling within State jurisdiction.

Service of process in connection with matters falling within federal jurisdiction

16. Subject to one matter, there was no dispute below, and there appears to be no dispute now, that:

(a) had Mr Koper sought to litigate his claim against BMX NZ in the Supreme Court of New South Wales, that claim would have fallen to be determined under the common law of New Zealand as the *lex loci delicti* and would not have engaged federal jurisdiction; and

(b) this would have remained the case, even if Mr Koper had relied on the TTPA to effect service upon BMX NZ.

The one matter alluded to above is the Commonwealth Attorney-General's alternative submission before both the primary judge and the Court of Appeal that the TTPA should be construed as performing the dual function of providing for substantive rights and liabilities, by "picking up" and applying the law of New Zealand as surrogate federal law, and conferring jurisdiction to adjudicate upon those rights and liabilities. The consequence, on that submission, is that had Mr Koper relied on the TTPA to bring BMX NZ before an Australian court, the resulting proceeding would have involved a matter arising under a law of the Commonwealth and so engaged federal jurisdiction. That alternative submission may be put to one side at this stage of the argument.

17. It appears to be common ground then, at least when regard is had to the Commonwealth Attorney-General's primary position, that in its application to proceedings in State courts that would otherwise not engage federal jurisdiction, Part 2 of the TTPA does not confer upon such courts the judicial power of the Commonwealth. It is thus no part of the appellants' case to suggest that Part 2 of the TTPA is invalid on the basis that it purports to authorise the exercise by State courts of

Commonwealth judicial power in relation to matters other than those in respect of which federal jurisdiction may be conferred upon such courts under s 77(iii) of the *Constitution*. That being so, the focus of this appeal is not so much the nature of the power exercised by a State court when deciding proceedings in which service upon a defendant has been effected in reliance upon the TTPA, as it is the extent of the Commonwealth's power to make laws with respect to the conditions for binding a defendant to the decision of a State court.

18. In that regard, a convenient starting point for analysis is afforded by the seemingly banal proposition that it is an essential attribute of judicial power that a decision rendered in the exercise of such power is binding upon the parties to a dispute. Were it otherwise, there would be no quelling of the controversies, the resolution of which is central to the judicial function "as an element of the government of society".[3] And at least in so far actions *in personam* are concerned, service is a necessary prerequisite to the binding effect of judicial decisions. As Viscount Haldane observed in *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd*,[4] in a remark to which reference was approvingly made in *Laurie v Carroll*:[5]

> "[t]he root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ *and can be compelled consequently to submit to the decree made*, is a person over whom the Courts have jurisdiction" (emphasis added).

19. To the extent then that the rules that govern the service of a court's process prescribe the class of persons who may be bound by the court's decisions and the circumstances in which such persons might be bound, those rules perform the function of describing, even if only in part, the reach of the judicial power, and therefore of the adjudicative authority, exercised by that court. It is because of this that rules relating to service of process may be distinguished from other forms of adjectival law, such as the rules of evidence or the body of rules, both judge-made and statutory, that govern the stay of proceedings once commenced. Those categories of adjectival law do not set the conditions required to be satisfied for a purported exercise of judicial power to be truly judicial, in the sense of binding upon all parties.

20. Thus, while Bell CJ was, with respect, correct in observing below that personal jurisdiction flows from the act of lawful service of process, such that it is inapposite to

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[3] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [33].
[4] (1916) 2 AC 298 at 302.
[5] (1958) 98 CLR 310 at 323.

speak of personal jurisdiction being "invested in" or "conferred upon" a particular court (CA [50]) (**CAB 181**), it does not follow that, as his Honour further remarked (CA [52]) (**CAB 181**), "[p]ersonal jurisdiction is not a constitutional concept". If, as submitted above, the quelling of controversies by the rendering of binding decisions is at the core of the judicial function, and if personal jurisdiction over a defendant is necessary to bind that defendant, then there can be no exercise of judicial power, at least in respect of actions *in personam*, without personal jurisdiction. And if judicial power is a constitutional concept, then so too must be its essential attributes or prerequisites.

21. That being so, his Honour was incorrect in suggesting below that Ch III is not at all concerned with "the vesting or conferral of personal jurisdiction" (CA [45]) (**CAB 179**). One need only test that proposition by considering, say, a Commonwealth law that prohibits an alien within the meaning of s 51(xix) of the *Constitution*, or a corporation of the sort identified in s 51(xx), from serving an officer of the Commonwealth with the process of this Court. Such a law would, on any view, be a law with respect to aliens or constitutional corporations. Nonetheless, it would, in its practical operation, preclude the exercise of judicial power in a range of cases that would otherwise engage the jurisdiction conferred upon this Court by s 75(v) of the *Constitution*. In other words, the law would amount to an interference with the judicial power that s 71 vests exclusively in this Court. This example, though extreme, highlights the extent to which rules of service can give meaningful effect to, or stultify, grants of federal jurisdiction.

22. Moreover, if valid and effective service is a necessary precondition to a court's power to render decisions that are binding upon a defendant, without which federal jurisdiction – that is, the court's authority to act as "the judicial agent of the Commonwealth"[6] – cannot meaningfully be exercised, then whatever power the Commonwealth Parliament has to make rules of service for courts when exercising federal jurisdiction, must be incidental to its power to invest such courts with federal jurisdiction. So much was recognised by Latham CJ, who observed in *Peacock v Newtown Marrickville and General Co-operative Building Society (No 4)*[7] that "[t]he Federal Parliament may, *in conferring jurisdiction in respect of Federal subject matter*, extend or limit the jurisdiction of a State court in respect of *persons, locality*, amount or otherwise, as it may think proper" (emphasis added). In other words, the

[6] *Lorenzo v Carey* (1921) 29 CLR 243 at 252.
[7] (1943) 67 CLR 25 at 39.

power of the Commonwealth Parliament to make laws with respect to the service of the process of State courts in matters that would engage federal jurisdiction lies either in s 77(iii) of the *Constitution*, or in the combination of s 77(iii) and s 51(xxxix).

23. Indeed, it might be asked whether the Commonwealth's legislative power would otherwise suffice to support such laws. For example, s 39(2) of the *Judiciary Act 1903* (Cth) provides for the investiture of State courts with federal jurisdiction in all matters in which this Court has, or could be invested with, original jurisdiction, albeit "within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise". Subsection 39(2) thus preserves, for matters falling within federal jurisdiction, the limits of the territorial jurisdiction of State courts. Let it be assumed then that a common law action is commenced against Victoria by a resident of Queensland in a Queensland court whose writ, under its rules, does not run beyond that State, but that service is sought to be effected, otherwise than in accordance with the *Service and Execution of Process Act 1992* (Cth) ("**the SEPA**"), upon an authorised representative of Victoria in Victoria itself. The action would plainly engage federal jurisdiction. But if the Commonwealth's power to make laws with respect to service of process in matters falling within federal jurisdiction lay outside Ch III, then how could s 39(2) validly preserve the limits of the State court's territorial jurisdiction, so as to render invalid the purported service of process on the representative of Victoria? After all, in so operating, s 39(2) would not be a law with respect to any of the matters enumerated in s 51. It would not be, say, a law with respect to the service throughout the Commonwealth of the process of a State court, as the rule of service that it would preserve in this hypothetical does not provide for the service throughout the Commonwealth of the Queensland court's process. It must therefore follow that if s 39(2) were validly to preserve that rule of service, it would be because the Commonwealth Parliament enjoys, as an incident of its power to invest State courts with federal jurisdiction, the power to set the territorial jurisdiction of such courts when acting as judicial agents of the Commonwealth.

Service of process in connection with matters falling within State jurisdiction

24. It must at this point be asked how else the Commonwealth Parliament is empowered to make laws with respect to the service of the process of State courts. Part of the answer is to be found in s 51(xxiv). That placitum contemplates the enactment of laws with respect to the service throughout the Commonwealth of the process of State courts, even in relation to matters falling within the non-federal jurisdiction of those courts. So much appears to have been accepted in *Flaherty v Girgis*, in which the

plurality, after remarking that "the determination of any question under the *Service and Execution of Process Act* [*1901* (Cth)] regarding service involves the exercise of federal jurisdiction", stated that "it is only if the authority of the court to decide [a] matter, questions of service apart, is derived from federal law that it will be exercising federal jurisdiction in determining the matter".[8]

25. Their Honours proceeded immediately thereafter to observe that s 51(xxiv) "envisages an extension in the reach of the process of the courts of the States and does not speak in terms of the investiture of the State courts with a new substantive jurisdiction".[9] That there is a distinction between extending the reach of a court's process and investing it with additional subject matter jurisdiction is uncontroversial. It explains the observation by Gummow J in *BHP Billiton Ltd v Schultz*[10] that the legislative derivation of a defendant's amenability to a court's process may be quite distinct from that of the subject-matter of the actions entertained by the court. But that distinction does not, in the appellant's submission, detract from the proposition that the reach of a court's process defines the class of persons who might be bound by the decisions of that court, and in so doing, defines the extent to which those decisions might exhibit an essential quality of the exercise of judicial power. Service of a court's writ is thus no mere matter of procedure. And tellingly, one does not find in *Flaherty v Girgis* any suggestion that the Commonwealth might, otherwise than in the exercise of a power incidental to its power to invest State courts with federal jurisdiction or in reliance on s 51(xxiv), legislate so as to extend the territorial jurisdiction of State courts or to alter in some other respect the conditions required to be satisfied for the decisions of those courts to be binding.

26. Accordingly, even as it may be accepted that Part 2 of the TTPA was, save as to its application to defendants in New Zealand, modelled on the SEPA, which was itself enacted in reliance on s 51(xxiv), that fact is not determinative of the validity of Part 2. Nor should it be permitted to obscure the true effect of ss 9 and 10 of the TTPA. In the context of this litigation, had the TTPA not been enacted, Mr Koper could not have validly served an originating process issued by a New South Wales court upon BMZ NZ; it would therefore not have been bound by the decision of any such court in respect of Mr Koper's claim; and that claim could not have been determined in the exercise of the judicial power of New South Wales. The effect of ss 9 and 10, if valid and not read down, would be to alter that state of affairs. Thus, even though it does

[8] (1987) 162 CLR 574 at 598
[9] (1987) 162 CLR 574.
[10] (2004) 221 CLR 400 at 430 [44].

not effect an investiture of jurisdiction, in the sense of conferring authority to adjudicate upon a particular subject matter, the TTPA would, in its purported application to cases falling within non-federal jurisdiction, alter the reach and scope of the judicial power of New South Wales.

27. This is why, contrary to what was said by the primary judge (J [120]-[122]) (**CAB 132**), there is no analogy to be drawn between the TTPA and the *Foreign Evidence Act 1994* (Cth), the validity of which, in the context of a case falling within State jurisdiction, was considered and accepted in *R v Reid*.[11] By purporting in such a case to regulate the reception of foreign evidence, the *Foreign Evidence Act* did no more than to add to, or to amend, the adjectival law required to be applied in the exercise by a State court of State judicial power. However, it is one thing for the Commonwealth thus to direct the manner of exercise of State judicial power; it is another for the Commonwealth to direct that such power may extend where otherwise it could not. Whether this latter course is available to the Commonwealth, in cases to which s 51(xxiv) of the *Constitution* does not speak, is the question on which this appeal turns.

28. In *Huddart, Parker & Co Pty Ltd v Moorehead*,[12] Griffith CJ described judicial power as "the power which a sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property." It is by dint of the very nature of judicial power as a power of a sovereign authority that one polity does not have the power to alter the reach and scope of the judicial power of another polity; hence the observation by Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*[13] that "[w]hat gives courts the authority to decide a matter is the law of the polity of the courts concerned, not some attempted conferral of jurisdiction on those courts by the legislature of another polity." This rather suggests that quite apart from the limitations upon Commonwealth legislative power that flow from Ch III of the *Constitution*, and subject to qualifications arising from the federal system of government established by the *Constitution*, the Commonwealth Parliament does not have power to alter the reach and scope of State judicial power.

29. The qualifications to this are as follows. First, s 77(iii) makes provision for the conferral of federal jurisdiction upon State courts. Secondly, s 77(ii) empowers the Commonwealth Parliament to make laws defining the extent to which the jurisdiction

[11] [1999] VSCA 98.
[12] (1909) 8 CLR 330 at 357.
[13] (1999) 198 CLR 511 at 573 [108].

of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States. Thus, a law enacted in reliance on s 77(ii) effects a reduction to, but not an expansion of, the scope of State jurisdiction. And thirdly, s 51(xxiv) contemplates the making of laws with respect to the service throughout the Commonwealth of the civil and criminal process and the judgments of State courts.

30. There is otherwise nothing in the *Constitution* that confers upon the Commonwealth Parliament the power to alter the reach of State judicial power. As Gummow and Hayne JJ remarked in *Re Wakim*,[14] "the Constitution does not provide for a single or unitary system of courts. The Commonwealth Parliament does not have power to make laws with respect to 'courts' or 'the legal system'."

31. Reference should also be made to the rejection in *The Boilermakers' Case*[15] of the suggestion that the Commonwealth Parliament "may be at liberty to turn from Ch III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia".[16] The expression "judicial power exercisable within the Federal Commonwealth of Australia" is significant. It is not confined, in terms, to Commonwealth judicial power; instead, by situating the exercise of judicial power within a federal commonwealth, it is apt to denote the judicial power of any polity within the federation. This merits emphasis because, while Ch III is the exclusive source of the Commonwealth Parliament's power to make laws "giving judicial power exercisable within the Federal Commonwealth of Australia", it is telling that Ch III does not make provision for any alteration to the scope of State judicial power except in s 77(ii), as outlined above. It thus does not confer upon the Commonwealth Parliament any broader power with respect to the reach of the judicial power of the States. On the contrary, as was further observed in *The Boilermakers' Case*,[17] "the constitutional sphere of the judicature of the States must be secured from encroachment".

32. It should be apparent then that the lack of power for which the appellants contend does not depend simply upon the exclusivity of Ch III as the source of the Commonwealth's power to confer federal jurisdiction upon State courts. Instead, the appellants' submission is that having regard to:

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[14] Id at 547 [110].
[15] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1955) 94 CLR 254 at 270.
[16] Ibid.
[17] (1956) 94 CLR 254 at 268.

(a) the nature of judicial power and its significance for the government of a polity, as described by Griffith CJ in *Huddart, Parker*; and

(b) the structure of Australian federalism, which, amongst other things, preserves the existence of the States and their respective Constitutions,

the *Constitution*, read as a whole, including with Ch III firmly in mind, confers upon the Commonwealth Parliament no broader power to alter the scope and reach of State judicial power than is contemplated by s 51(xxiv) and s 77(ii).

33. Three consequences flow from this. First, it is no answer to the appellants' case to say, as Bell CJ did below (CA [54]) (**CAB 182)**, that "ss 9 and 10 of the TTPA could not fairly be considered to be, nor construed as, constituting the Supreme Court as 'the judicial agent of the Commonwealth' in the exercise of judicial power". That ss 9 and 10 do not purport to invest State courts with the judicial power of the Commonwealth, may be, and has been, accepted. But that says nothing about whether there is, in the Commonwealth Parliament, a power to make laws, otherwise than in reliance on s 51(xxiv), concerning the conditions that must be satisfied, by way of service of process, for a decision made in the exercise of State judicial power to be binding upon the parties to a proceeding. At most, Bell CJ's remark assumed the existence of such a power, and to that extent, begged the question.

34. Secondly, the appellants' case does not depend on an assertion that the other placita in s 51 of the *Constitution* should be read down by reference to s 51(xxiv) or that s 51(xxiv) should be seen as abstracting from those other placita the power to make laws with respect to the service of the process of State courts otherwise than throughout the Commonwealth. Bell CJ may well have been correct in observing that "legislation on the topic of service of process should not be treated as being exhausted by s 51(xxiv) on some form of an *expressio unius* principle of constitutional interpretation" (CA [42]) (**CAB 178)**. However, that does not suffice to dispose of the appellants' case.

35. And thirdly, his Honour fell into error in suggesting that because, like all the placita in s 51, s 51(xxiv) is expressed to be "subject to this Constitution", it must follow that if the appellants were correct in their argument, s 51(xxiv) could only empower the Commonwealth Parliament to make laws with respect to the service throughout the Commonwealth of the process of State courts in cases that engage federal jurisdiction (CA [45]) (**CAB 179)**. This proceeded upon a misapprehension that the appellants' argument was underpinned by the simplistic assertion that because Ch III is the

exclusive source of the Commonwealth's power to confer federal jurisdiction on State courts, there must be an implied limitation, having its provenance in Ch III, that confines the Commonwealth's power to make laws with respect to the service of process of State courts to federal matters. However, as is made clear above, the appellants' argument focuses upon a broader lack of Commonwealth legislative power, unless expressly granted, to alter the scope and reach of State judicial power. That being so, the subjection of s 51(xxiv) to Ch III does not, on the appellants' case, produce the consequence that that placitum can only support laws that apply to federal matters. Instead, s 51(xxiv) should, like s 77(ii), be seen as a limited grant of power to make laws concerning the reach and scope of State judicial power, where there is otherwise no power to do so. That necessarily assumes, and embraces the possibility, that s 51(xxiv) may be relied upon to make laws that apply in cases falling within the non-federal jurisdiction of State courts.

36. In any event, it must be borne in mind that the phrase "subject to this Constitution" is an admonition that the placita of s 51 are to be read in the context of the *Constitution* as a whole, including with regard to implied limitations upon Commonwealth legislative power.[18] Implications drawn from the text and structure of *Constitution* must in turn accommodate its express language; hence the embrace in *The Engineers' Case*[19] of the proposition that "if the text is explicit the text is conclusive, alike in what it directs and what it forbids".[20]

37. It is instructive then to consider the approach taken in construing s 122 of the *Constitution*, which empowers the Commonwealth Parliament to "make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth" but does not contain the phrase "subject to this Constitution". It has been said that even accounting for this omission, "i[t] can hardly be suggested that s 122 operates other than subject to the Constitution".[21] And yet this alone has never been seen as being determinative of the vexed question of whether the strict separation of judicial from legislative or executive power effected by Ch III applies to laws made under s 122. In the same way, if the lack of power for which the appellants contend were better seen as having its provenance in some implied constitutional limitation, the phrase "subject to this Constitution" should not be understood as mechanically

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[18] *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 606 and 653.
[19] (1920) 28 CLR 129 at 150.
[20] *Attorney-General for Ontario v Attorney-General for Canada* (1912) AC 571 at 583.
[21] *Newcrest Mining* (1997) 190 CLR 513 at 606.

dictating that that limitation should operate upon s 51(xxiv) in precisely the same way as it operates upon, say, s 51(xxix), regardless of the precise language of those placita.

38. It follows that the appellants' argument, if correct, would not entail the gloss upon s 51(xxiv) posited by Bell CJ, and thus, to the extent that *Flaherty v Girgis* might be taken as authority for the proposition that laws enacted in reliance on s 51(xxiv) may apply to non-federal matters, the appellants' case is not at odds with that decision. That being so, it is simply not the case that if the appellants were to succeed in this appeal, there would be no need, as Bell CJ suggested (CA [45]) (**CAB 179)**, for s 51(xxiv). On the contrary, if the appellants were correct in their submission, the inclusion in the *Constitution* of s 51(xxiv) as an expedient:

(a) to bind the former colonies as a nation; and

(b) to overcome doubts as to the power of the former colonial legislatures to make laws with respect to extra-territorial service,[22]

in the face of what would otherwise be the Commonwealth's lack of power to make laws with respect to the reach of the non-federal jurisdiction of State courts, would be rationally explicable.

The consequences of the appellants' argument

39. The effect of the submissions developed above is that where there is no engagement of s 51(xxiv), the Commonwealth cannot make laws with respect to the service of the process of State courts except under Ch III in matters that would engage federal jurisdiction.

40. Crucially, acceptance of that proposition would not prevent the Commonwealth from seeking to bring about a closer integration of the Australian economy with that of another country by legislating to ensure that a defendant located in that other country can more easily be sued in an Australian court. It is well established that the Commonwealth Parliament may, in the one law, confer jurisdiction upon a court and, assuming it is otherwise within power, require that matters falling within such jurisdiction be determined by reference to the law of another polity, which is applied as surrogate federal law, such that any such matter is a matter arising under a law made by the Commonwealth Parliament, within the meaning of s 76(ii) of the *Constitution*. The *Nauru (High Court Appeals) Act 1976* (Cth) ("**the Nauru Appeals**

[22] J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 614.

Act"), the validity of which was upheld in *Ruhani v Director of Police* (2005) 222 CLR 489, is an example of such a law.

41. Section 5 of that Act provided:

> "(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.
>
> (2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).
>
> (3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave."

42. In describing the effect, and finding in favour of the validity, of s 5, Gleeson CJ observed that "[a]n otherwise valid law of the Parliament may pick up the law of Nauru as the law to be applied in determining rights and liabilities in issue in an exercise of federal jurisdiction. Furthermore, such a law may, in the one provision, both create a right and provide a remedy."

43. Another example of a law that both creates a right and provides a remedy, in the sense of conferring jurisdiction upon a court to enforce that right, is s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ("**the Cross-Vesting Act**"). That provision relevantly states that the Federal Court may "exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of the Australian Capital Territory … relating to cross-vesting of jurisdiction". The effect of s 9(3), when read with the provision in s 4 of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) for the Federal Court to have jurisdiction in relation to "ACT matters", was recognised in *Crosby v Kelly*[23] as being both to create legal rights by reference to the content of ACT law and to confer jurisdiction upon the Federal Court to determine matters involving those rights.

44. It would therefore be open to the Commonwealth Parliament, in reliance upon the "external affairs" power in s 51(xxix), to enact a law:

> (a) conferring upon State courts the jurisdiction to determine claims against New Zealand defendants, where what would otherwise be the *lex causae* is "picked up" and applied as surrogate federal law; and

[23] (2012) 203 FCR 451.

(b) extending the reach of the writs of those courts to New Zealand in respect of such claims.

45. There can be no suggestion then that the effect of the appellants' argument would be unduly to circumscribe the Commonwealth's powers with respect to the implementation of treaties entered into for the purpose of enhancing economic ties with other nations. The circumstance that, both at first instance and on appeal, the Commonwealth Attorney-General advanced an alternative submission that Part 2 of the TTPA operates in a manner analogous to s 5 of the Nauru Appeals Act, is telling.

46. Of course, the appellants deny that Part 2 of the TTPA can be so characterised or construed. There are at least two reasons for this. First, the language of ss 9 and 10 simply does not accommodate such a construction. The former permits the service in New Zealand of an initiating process of an Australian court, but it says nothing about the rights or remedies that constitute the subject-matter of the proceedings so initiated. The latter addresses the effect of service of that process, and in so doing, importantly provides that service under s 9 has the same effect, and gives rise to the same proceeding, as if the initiating document had been served in the place of issue.

47. If an initiating document were issued by the Supreme Court of New South Wales, and served upon the New South Wales branch office of a New Zealand company, in respect of a claim for negligence arising out of conduct occurring in New Zealand, the ensuing proceeding would be a proceeding falling within non-federal jurisdiction. The rights and liabilities of the respective parties would be determined by applying first the choice of law rules developed as part of the common law of Australia, and then the common law of New Zealand, as modified or supplemented by statute.

48. If, however, the same initiating document were served, not in New South Wales, but in New Zealand in reliance upon s 9 of the TTPA, then on the alternative construction of the TTPA advanced by the Commonwealth Attorney-General, the resulting proceeding would engage federal jurisdiction, and the rights and liabilities of the respective parties would fall to be determined under a law of the Commonwealth, albeit by reference to the content of the law of New Zealand.

49. In other words, service in New Zealand would not have the same effect, and the proceeding would not be same proceeding, as if the initiating process were served in New South Wales. Rather, the Supreme Court of New South Wales would be exercising the judicial power of a different polity – namely, the Commonwealth, as distinct from New South Wales – and applying a federal law in the determination of

the plaintiff's claim, albeit coincidentally with the same substantive content as the law that would otherwise govern the claim.

50. It does not assist this alternative construction of the TTPA to say that both in *Ruhani* and in *Crosby v Kelly*, the language of the relevant provisions did not readily suggest a reading that attributed to them the dual function of creating rights and liabilities, albeit by reference to the content of the law of another polity and conferring jurisdiction to adjudicate upon those rights and liabilities. Neither s 5 of the Nauru Appeals Act nor s 9(3) of the Cross-Vesting Act contains references to a particular step purportedly authorised under the Commonwealth law having "the same effect" or giving rise to "the same proceeding" as the step whose consequences the law is attempting to mirror. Those expressions suffice to exclude the Commonwealth Attorney-General's alternative reading.

51. Secondly, as was observed above, Part 2 of the TTPA was modelled on the SEPA. Sections 9 and 10 of the former have analogues in ss 15 and 12 of the latter respectively. And it has never been accepted that the result of effecting service under the SEPA is that the ensuing proceeding engages federal jurisdiction, where the rights and liabilities in issue are creatures of federal law, albeit with the same content as under the State or other law that would have governed the claim had the SEPA not been invoked. Indeed, that assertion is foreclosed by *Flaherty v Girgis*, in which, at the risk of repetition, it was held that service under the *Service and Execution of Process Act 1901* (Cth) was not determinative of the polity whose judicial power was being exercised in the resulting proceeding. Indeed, if, as appears to be undisputed, *Flaherty v Girgis* was correctly decided, and if the language used in ss 9 and 10 of the TTPA has its provenance in the SEPA, then what basis is there for ascribing to that language in one statute a meaning different from that which it bears in the other? In the appellants' submission, that question does not admit of any cogent answer.

52. The result is that:

(a) ss 9 and 10 of the TTPA cannot validly apply in proceedings that do not engage federal jurisdiction;

(b) the expression "civil proceeding" in the TTPA should be read down accordingly;

(c) Mr Koper could not, therefore, have brought an action against BMX NZ in a court of New South Wales for the purpose seeking relief in respect of the defects in the Victopia Apartments; and

(d) the Claim Act did not confer upon Mr Koper any right of action against either Zurich or Aspen in connection with any liability of BMX NZ for those defects.

53. Mr Koper's application for leave to commence proceedings under s 4 of the Claims Act should accordingly have been dismissed with costs.

Part VII: Orders sought

54. The appellants seek the following orders:

(a) Appeal allowed.

(b) Set aside order 2 of the orders of the Court of Appeal made on 20 July 2022, and in place thereof, make the following orders:

(i) Appeal allowed.

(ii) Set aside the orders the Supreme Court of New South Wales made on 8 and 15 December 2021, and in place thereof, make the following orders:

(A) The Summons filed 1 April 2021 be dismissed.

(B) The first defendant's Notice of Motion filed 17 May 2021 be dismissed.

(C) The plaintiff pay the defendants' costs.

(iii) The first respondent pay the appellants' costs of the proceedings in the Court of Appeal.

(c) The first respondent pay the appellants' costs of the appeal to this Court.

Part VIII: Time for oral argument

55. The appellants estimate that one and a half hours will be required for the presentation of oral argument on their behalf.

Dated: 9 January 2023

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

ZURICH INSURANCE PLC
First Appellant

ASPEN INSURANCE UK LIMITED
Second Appellant

and

DARIUSZ KOPER
First Respondent

ATTORNEY GENERAL OF THE COMMONWEALTH
Second Respondent

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the particular constitutional provisions and statutes referred to in the appellants' submissions are as follows.

No	Description	Version	Provision(s)
1.	*Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW)	Current	ss 3, 4, 5
2.	Commonwealth Constitution	Current	ss 51 (xxiv), 51(xxix), 75, 76, 77,
3.	*Judiciary Act 1903* (Cth)	Current	s 39
4.	*Service and Execution of Process Act 1901* (Cth)	Version from 16 Oct 1901 to 31 March 1992	
5.	*Service and Execution of Process Act 1992* (Cth)	Current	
6.	*Trans-Tasman Proceedings Act 2010* (Cth)	Current	s 4, Part 2 (ss 8 to 15)