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

FIRST RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II STATEMENT OF ISSUES

2. This case concerns whether ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) (**TTPA**) validly authorise the service of an initiating document issued by the Supreme Court of New South Wales on a person in New Zealand. The issue arises in the context of an application by Mr Dariusz Koper (the **first respondent**) for leave to pursue representative proceedings against Zurich Insurance PLC (the **first appellant**) and Aspen Insurance UK Limited (the **second appellant**) (together, **the appellants**) pursuant to s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (the **Claims Act**). The appellants insured Brookfield Multiplex Constructions (NZ) Limited (in Liquidation) (**BMX**), who the first respondent claims caused loss and damage to him and the class of persons he represents because of its negligence in designing and constructing apartments in New Zealand. BMX is domiciled in New Zealand and has no presence in Australia.

3. The primary judge and the New South Wales Court of Appeal held that s 5 of the Claims Act requires a claimant to show that they could have commenced proceedings against the insured before a court can grant leave to commence or continue proceedings against the insurer under s 4 of the Claims Act.[1] Central to the dispute between the appellants and the first respondent is *how* the first respondent could have commenced his notional claim against BMX in the Supreme Court of New South Wales. The first respondent submitted, and the primary judge and Court of Appeal accepted, that ss 9 and 10 of the TTPA would have authorised service by the first respondent of the notional proceedings on BMX in New Zealand.[2]

4. The issues raised by this appeal and the answers of the first respondent are as follows:

   4.1. Does s 51(xxix) of the *Constitution* support a Commonwealth law permitting service of a writ of a State Supreme Court outside Australia in proceedings that do not arise in federal jurisdiction at the time of service? *The first respondent submits that the answer to this question is "yes".*

   4.2. Do s 51(xxiv) and Ch III of the *Constitution* have the effect that the Commonwealth Parliament lacks power to make a law permitting service of a writ of a State Supreme Court outside the Commonwealth in proceedings that do not arise in federal jurisdiction at the time of service? *The first respondent submits that the answer to this question is "no".*

PART III NOTICES UNDER S 78B OF THE JUDICIARY ACT 1903 (CTH)

5. The appellants filed a notice under s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) on 22 November 2022 (CAB 195-198) and the Attorney General of the Commonwealth (the **Commonwealth**) filed a notice on 2 February 2023.

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1 *Dariusz Koper v Zurich Insurance PLC* [2021] NSWSC 1587 (**PJ**) at [74]-[75] (Core Appeal Book (**CAB**) 110-111), *Zurich Insurance PLC v Koper* [2022] NSWCA 128 (**CA**) at [8] (CAB 170).

2 PJ [78]-[127] (CAB 112-136), CA [35]-[56] (CAB 176-182).

PART IV FACTS

6. The first respondent generally accepts the appellants' summary of the facts and proceedings before the primary judge and the New South Wales Court of Appeal at [8]-[14] of the appellants' submissions (**AS**).

7. However, the first respondent disagrees that there is "no dispute" that his notional claim against BMX "would not have engaged federal jurisdiction" (contra AS [16(a)]). The first respondent agrees that a notional claim by him against BMX would most probably have been a matter within State jurisdiction. However, it cannot be assumed that his claim would not, at any time after service of the initiating document, have arisen in federal jurisdiction. BMX might have pleaded a defence arising under federal law, or a constitutional issue may have arisen in reply, which would have brought the whole matter within federal jurisdiction.[3] The first respondent raised these possibilities before the primary judge, the New South Wales Court of Appeal and in response to the appellants' application for special leave to appeal to this Court.

PART V ARGUMENT

8. In summary, and for the reasons detailed below, the first respondent submits that: (1) ss 9 and 10 of the TTPA are supported by the external affairs power in s 51(xxix) of the *Constitution* (see [15]-[19] below); (2) s 51(xxiv) does not abstract power from s 51(xxix) of the *Constitution* (see [20]-[23] below) and (3) no implication arises from s 51(xxiv) and Ch III restricting the Commonwealth's legislative power with respect to the service of initiating processes of State courts outside Australia in matters that do not arise in federal jurisdiction (see [24]-[51] below).

9. As to (3), the appellants' submissions supporting such an implication are entirely inconsistent with the reasoning in *Flaherty v Girgis*.[4] That case makes clear that: (1) the Commonwealth Parliament can enact a law supported by a constitutional provision outside of Ch III (such as s 51(xxiv)) permitting service of an initiating document of a State court outside that State; (2) a State court has jurisdiction to resolve a dispute about service outside that State effected under a Commonwealth law (owing to s 39(2) of the Judiciary Act and ss 76(ii) and 77(iii) of the *Constitution*); (3) service

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3 See *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ).

4 (1987) 162 CLR 574.

of an initiating document of a State court outside that State under a Commonwealth law in relation to an action not arising in federal jurisdiction does not bring that action within federal jurisdiction; and (4) the source of a State court's authority to adjudicate an action is the same whether a defendant is served pursuant to a Commonwealth law or a State law. There is nothing in the *Constitution* to prevent the reasoning in *Flaherty v Girgis* applying where the Commonwealth law permitting service is supported by a head of power other than s 51(xxiv), such as s 51(xxix).

10. It follows that ss 9 and 10 of the TTPA, which are supported by s 51(xxix), are constitutionally valid and that the first respondent could have served an initiating process issued by the Supreme Court of New South Wales in relation to his notional claim on BMX in New Zealand.

(a) Sections 9 and 10 of the TTPA

11. Section 9(1) of the TTPA permits an "initiating document" issued by an "Australian court or tribunal" (which includes a court of a State (s 4)) that relates to the proceeding to be served on a person in New Zealand under Part 2 of the TTPA. Section 9(2) requires the document to "be 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". A note to s 9(2) provides that it is not necessary that an Australia court be satisfied that there is a connection between the proceeding and Australia.

12. Section 8 has the effect that s 9 only permits service if the proceeding in the Australian court is civil and not criminal (see ss 8(1)(a) and 4); does not relate wholly or partly to an "excluded matter" (see ss 8(2)(a) and 4); does not relate wholly or partly to an "action in rem" (s 8(2)(b)); and does not relate to a matter of the kind prescribed by the regulations (s 8(2)(d)) (although no matter has been prescribed). An "excluded matter" is defined in s 4 to mean:

> (a) the dissolution of a marriage; or
> (b) the enforcement of:
> (i) an obligation under Australian law to maintain a spouse or a de facto partner (within the meaning of the *Acts Interpretation Act 1901*); or
> (ii) an obligation under New Zealand law to maintain a spouse, a civil union partner (within the meaning of the *Civil Union Act 2004* of New Zealand) or a de facto partner (within the meaning of the *Property (Relationships) Act 1976* of New Zealand); or

(c) the enforcement of a child support obligation.

13. Section 10 ascribes a legal effect to the service of an "initiating document" on a person in New Zealand under s 9 of the TTPA. It provides that:

> Service of an initiating document in New Zealand under section 9:
> (a) has the same effect; and
> (b) gives rise to the same proceeding;
> as if the initiating document had been served in the place of issue.

14. Sections 9 and 10 of the TTPA were modelled on ss 12 and 15 of the *Service and Execution of Process Act 1992* (Cth) (**SEPA 1992**),[5] which is significant for the reasons given below at [42].

(b) Sections 9 and 10 of the TTPA are supported by s 51(xxix) of the *Constitution*

15. Sections 9 and 10 of the TTPA are supported by two aspects of the external affairs power in s 51(xxix), either of which is sufficient to support their constitutional validity. The *first* relevant aspect of s 51(xxix) is the power to implement treaties.[6] It is well established that a Commonwealth law will be supported by that aspect of s 51(xxix) if it is "reasonably capable of being considered appropriate and adapted to implementing the treaty".[7]

16. Section 3 of the TTPA identifies one of the purposes of the TTPA as "to implement the Trans-Tasman Agreement in Australian law", being 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 as contained in Australian Treaty Series [2008] ATNIF 12 (see definition of "Trans-Tasman Agreement" in s 4 of the TTPA). Sections 9 and 10 of the TTPA are clearly reasonably capable of being considered appropriate and adapted to implementing articles 4(1) and 4(2) of the Trans-Tasman Agreement. Articles 4(1) and 4(2) are in similar terms to ss 9 and 10, and provide:

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5 See Australian Government, "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report by the Trans-Tasman Working Group" (December 2006) at 9-12 relevantly reproduced at PJ [82]-[83] (CAB 113-115).

6 See eg *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 129-130 (Mason J), 171-172 (Murphy J), 258-259 (Deane J).

7 See eg *Victoria v The Commonwealth* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *R v Wei Tang* (2008) 237 CLR 1 at [34] (Gleeson CJ, with Gummow, Heydon, Crennan and Kiefel JJ agreeing on this point).

(1) Initiating process in civil proceedings in a court within the territory of one Party may be served, without leave of a court, in the territory of the other Party.

(2) Service rendered in accordance with this Article shall have the same effect as if it had occurred in the jurisdiction of the court in which the initiating process was issued.

17. "Court within the territory of a party" for Australia in the Trans-Tasman Agreement relevantly means "any court of a State or Territory" (article 1), which is relevantly the same as the definition of "Australian court" in s 4 of the TTPA.

18. Article 3 limits the applicability of article 4 to civil proceedings and excludes its operation from civil proceedings in relation to the dissolution of marriage, enforcement of maintenance obligations and enforcement of child support obligations as well as actions in rem (see articles 3(1), 3(2) and 3(3)). As the summary above of s 8 of the TTPA shows (see [12]), s 8 limits the applicability of ss 9 and 10 of the TTPA in much the same way as article 3 limits the applicability of articles 4(1) and 4(2) of the TTPA. Further support for the relationship between Part 2 of the TTPA and article 4 of the Trans-Tasman Agreement (if it is needed) is found in the explanatory memorandum to the bill that became the TTPA and which states that "Part 2 [of the Bill] implements Article 4 of the Agreement".[8]

19. The *second* relevant aspect of s 51(xxix) is the power to make laws with respect to persons, things or matters geographically external to Australia.[9] The service of an initiating document of a State court on a person in New Zealand is clearly a law with respect to a person, thing or matter outside Australia. It follows that ss 9 and 10 of the TTPA also come within that aspect of the external affairs power.

(c) Section 51(xxiv) does not abstract power from s 51(xxix) of the *Constitution*

20. Notwithstanding the appellants' submission that Part 2 of the TTPA "is a law with respect to external affairs within the meaning of s 51(xxix) of the *Constitution*" (see AS[4]), 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

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8 See Explanatory Memorandum, Trans-Tasman Proceedings Bill 2010 (Cth) at 6.

9 See eg *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 530-531 (Mason CJ), 599-600 (Deane J), 636-637 (Dawson J), 695-696 (Gaudron J); *XYZ v The Commonwealth* (2006) 227 CLR 532at [10] (Gleeson CJ) at [44]-[45] (Gummow, Hayne and Crennan JJ).

relation to matters that do not engage federal jurisdiction, otherwise than in reliance on s 51(xxiv)" (see AS[5]). The appellants' "ultimate submission" should not be accepted for the following reasons.

21. *First*, the submission is unsupported by the text of the *Constitution*. The Commonwealth Parliament's power to make laws is limited to those enumerated in ss 51 and 52 of the *Constitution*, and to those expressed or implied elsewhere in the *Constitution*, including in Ch III.[10] Section 51(xxiv) empowers the Commonwealth Parliament to make laws with respect to "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of States". It does not state that it is the exclusive source of the Commonwealth's power to make laws with respect to the service of process of State courts in non-federal matters. Nor does s 51(xxix) expressly abstract from Commonwealth legislative competence with respect to external affairs the service outside the Commonwealth of the processes of State courts in relation to non-federal matters. In this respect, s 51(xxix) can be contrasted with other powers, such as the banking and insurance powers in ss 51(xiii) and 51(xiv), which expressly abstract State banking and State insurance from Commonwealth legislative power.[11]

22. *Second*, the appellants' ultimate submission is inconsistent with established principles of constitutional interpretation with respect to the heads of power in s 51 of the *Constitution*. Most significantly, it reads down the Commonwealth's power in s 51(xxix) by reference to s 51(xxiv), contrary to the principle that a grant of power in s 51 is not to be read down by reference to other heads of power.[12] It is also contrary to the established rules that heads of power are to be given a broad plenary construction "with all the generality that the words used admit" and should be read "without making implications or imposing limitations which are not found in the express words".[13]

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10 See eg *Rizeq v Western Australia* (2017) 262 CLR 1 at [45] (Bell, Gageler, Keane, Nettle and Gordon JJ).

11 See *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 288-289 (the Court); *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369.

12 See eg *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 510 (Menzies J), 523 (Gibbs J); *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 268-269 (Deane J); *New South Wales v Commonwealth* (2006) 229 CLR 1 at [219]-[221] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

13 See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1 at [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), [119] (Kirby J); *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 471 (Mason J), 497

These principles and rules apply equally to s 51(xxix). In *R v Burgess; Ex parte Henry*,[14] in a passage that this Court has cited with approval since,[15] Latham CJ said that:

> It has been argued that sec. 51(xxix) should be construed as giving power to make laws only with respect to some external aspect of the other subjects mentioned in sec. 51. Prima facie it would be as reasonable to argue that any other single power conferred by sec. 51 is limited by reference to all the other powers conferred by that section – which is really an unintelligible proposition. There is no reason whatever why placitum xxix should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power.

23. Similarly, in *New South Wales v The Commonwealth*[16] Mason J and Jacobs J, in separate reasons, each rejected a submission that s 51(xxix) should not be given a wide meaning lest it render redundant other heads of power in s 51, such as the fisheries power in s 51(x) and the Pacific relations power in s 51(xxx).[17] Consistent with these principles, s 51(xxiv) does not abstract legislative power from s 51(xxix) to make laws authorising the service of initiating documents of State courts in New Zealand.

(d) Sections 51(xxiv), 77(ii) and 77(iii) do not limit the Commonwealth's legislative power with respect to service of initiating processes of State courts outside Australia

24. The appellants submit that their case rests upon two propositions, which they set out at AS[15]. Central to those propositions is that Ch III and s 51(xxiv) limit the Commonwealth's legislative power to enact laws permitting service of an initiating document of a State court in a matter that does not arise in federal jurisdiction. This Court has not previously considered whether such an implication exists. As this limitation is not expressed in the *Constitution*, it must be implied.

25. This Court has repeatedly emphasised that implications may only be drawn from the terms of the *Constitution* (where "the relevant intention is manifested according to the

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(Jacobs J). See also *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225 (the Court).

14 (1936) 55 CLR 608 at 639.

15 See *XYZ v The Commonwealth* (2006) 227 CLR 532 at [42] (Gummow, Hayne and Crennan JJ).

16 (1975) 135 CLR 337.

17 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 471 (Mason J), 497 (Jacobs J).

accepted principles of interpretation") and from the structure of the *Constitution* (where it is "logically or practically necessary for the preservation of the integrity of [that] structure").[18] In *Burns v Corbett*, for example, a majority held that Ch III contains an implication preventing a State Parliament from conferring judicial power on a State body that is not a court of the State in respect of any of the matters identified in ss 75 and 76 of the *Constitution.* For Kiefel CJ, Bell and Keane JJ, that implication arose from "[c]onsiderations of constitutional text, structure and purpose"[19] and, in particular, from the provisions of Ch III which "exhaustively identify the possibilities for the authoritative adjudication of matters listed in ss 75 and 76"[20] and which "[recognise] no other governmental institution [other than a court] as having the potential to exercise adjudicative authority over the matters listed in ss 75 and 76".[21] For Gageler J, the implication was necessary to ensure that a State Parliament could not circumvent a Commonwealth law excluding a State court from deciding a matter in s 75 or s 76 by conferring the equivalent State jurisdiction on a State tribunal.[22]

(i) The implication does not arise from the terms of the Constitution

26. It is convenient to start with the terms of Ch III. Section 71 provides that the judicial power of the Commonwealth shall be vested in the High Court and in such other courts as the Parliament creates, and in such other courts as it invests with "federal jurisdiction". Section 73 confers "appellate jurisdiction" on the High Court to determine appeals from federal courts or any court "exercising federal jurisdiction" as well as State Supreme Courts. Section 75 establishes the "original jurisdiction" of the High Court in relation to certain kinds of matters and s 76 empowers the Commonwealth Parliament to confer "additional original jurisdiction" on the High Court to determine other kinds of matters, including "of admiralty and maritime jurisdiction". Section 77 provides that, with respect to any of the matters in ss 75 and 76, the Commonwealth Parliament may make laws:

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18 See *Burns v Corbett* (2018) 265 CLR 304 at [94] (Gageler J) citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ) reproduced with approval in *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169 (Brennan J). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561 (the Court).

19 *Burns v Corbett* (2018) 265 CLR 304 at [2] (Kiefel CJ, Bell and Keane JJ).

20 *Burns v Corbett* (2018) 265 CLR 304 at [3] (Kiefel CJ, Bell and Keane JJ).

21 *Burns v Corbett* (2018) 265 CLR 304 at [45] (Kiefel CJ, Bell and Keane JJ).

22 *Burns v Corbett* (2018) 265 CLR 304 at [99] (Gageler J).

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States; and

(iii) investing any court of a State with federal jurisdiction.

27. The Commonwealth's powers in Ch III are complemented by s 51(xxxix) of the *Constitution*, which gives the Commonwealth Parliament power to make laws with respect to "matters incidental to the execution of any power vested by [the] Constitution in the Parliament … or in the Federal Judicature".

28. When Ch III uses the term "jurisdiction" "it is *invariably* qualified, either expressly, or by necessary implication".[23] There are "five distinct usages" of the term "jurisdiction" in Ch III: (1) "appellate jurisdiction" in s 73; (2) "original jurisdiction" in ss 73(i), 75 and 76; (3) "admiralty and maritime jurisdiction" in s 76(iii); (4) jurisdiction which "belongs to" the courts of the States in s 77(ii) (and which predates Ch III); and (5) "federal jurisdiction" in ss 71, 73(ii), 77(iii) and 79.[24] It is the last distinct usage of the term "jurisdiction" (that is, "federal jurisdiction") that is the focus of the appellants' submissions.

29. The term "jurisdiction" when used in Ch III is not simply a concept of the general law and should not be conflated with the different meanings and uses of that term.[25] It is helpful first to say a few things about the general uses of the term. In *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* the plurality of French CJ, Gummow, Hayne and Crennan JJ said that:[26]

> "Jurisdiction" is a generic term used in a variety of senses, some of which relate to matters of geography, some to persons and procedures, and others to constitutional and judicial structures and powers such as those sourced in Ch III of the Constitution.

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23 Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, The Federation Press, 2020) at [1.2] (emphasis original).

24 Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, The Federation Press, 2020) at [1.2].

25 See *Plaintiff S164/2018 v Minister for Home Affairs* (2018) 92 ALJR 1039 at [6]; *Deputy Commissioner of Taxation v Huang* (2021) 96 ALJR 43 at [46].

26 (2012) 247 CLR 240 at [14] (French CJ, Gummow, Hayne and Crennan JJ).

30. Their Honours then reproduced the following passage from *Lipohar v The Queen* in which the Court explained that: [27]

> 'Jurisdiction' may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject matter of those actions entertained by a particular court, or, finally (iii) to locate a particular territorial or 'law area' or 'law district'.

31. More recently, in *Rizeq v Western Australia* Edelman J observed that:[28]

> Jurisdiction, in the sense of an authority to adjudicate, has a number of dimensions …. It has a geographic dimension ("over which territory does the authority to exercise power extend?"); a personal dimension ("over which persons does the authority to exercise power extend?"); and a subject matter dimension ("over which subject matters does the authority to exercise power extend?").

32. In relation to the "personal dimension", in *Plaintiff S164/2018 v Minister for Home Affairs* Edelman J explained that "[o]ne usual requirement for the personal dimension of jurisdiction is that the person has been properly served with the court's process or the person has submitted to the court's authority".[29] And in *Deputy Commissioner of Taxation v Huang* his Honour said that "[m]erely because a court has personal jurisdiction, in other words jurisdiction over a person, does not mean that it has unlimited jurisdiction to make any orders against that person". [30]

33. Returning to the terms of Ch III, the word "matter" refers to a "justiciable controversy identifiable independently of the proceeding brought for its determination and encompassing all claims made within the scope of the controversy".[31] The term

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27 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at [15] (French CJ, Gummow, Hayne and Crennan JJ) reproducing *Lipohar v The Queen* (1999) 200 CLR 485 at [79] (Gummow, Gaudron and Hayne JJ).

28 (2017) 262 CLR 1 at [129] cited in *Plaintiff S164/2018 v Minister for Home Affairs* (2018) 92 ALJR 1039 at [6] (Edelman J). See also *BHP Group Limited v Impiombato* (2022) 96 ALJR 956 at [51] (Gordon, Edelman and Steward JJ).

29 (2018) 92 ALJR 1039 at [6]. See further *Laurie v Carroll* (1958) 98 CLR 310 at 323-324 (Dixon CJ, Williams and Webb JJ).

30 (2021) 96 ALJR 43 at [46].

31 *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at [50] (Gordon, Edelman and Steward JJ) referring to *Fencott v Muller* (1983) 152 CLR 570 at 603-606 (Mason, Murphy, Brennan and Deane JJ) and *South Australia v Victoria* (1911) 12 CLR 667 at 675 (Griffiths CJ). See also *Burns v Corbett* (2018) 265 CLR 304 at [70] (Gageler J) referring to *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich, Starke JJ); *Fencott v Muller* (1983) 152 CLR 570 at 603 (Mason, Murphy, Brennan and Deane JJ); *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [27] and [30] (French CJ, Kiefel, Bell and Keane JJ).

"federal jurisdiction" has been described by this Court as the "authority to adjudicate" a controversy about legal rights "through the exercise of judicial power";[32] the "authority to adjudicate that is derived from the Constitution or a Commonwealth law"[33] and the "adjudicative authority for the purpose of quelling controversies about legal rights and legal obligations" in respect of any of the matters listed in ss 75 and 76.[34] Further, as Toohey, McHugh and Gummow JJ explained in *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations (Qld)*:[35]

> 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))

34. For a State court to have jurisdiction to resolve a dispute, it is necessary that it have the different dimensions of jurisdiction identified by Edelman J in *Rizeq v Western Australia* (see above at [31]). Where the matter arises in federal jurisdiction, s 39(2) of the Judiciary Act gives a State court jurisdiction to adjudicate the dispute. Section 39(2) is supported by the Commonwealth Parliament's power in s 77(iii) of the *Constitution*[36] and relevantly provides:

> The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it …

35. The "matters in which the High Court has original jurisdiction" are those in s 75 of the *Constitution*. The "matters … in which original jurisdiction can be conferred upon it"

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32 See eg *Burns v Corbett* (2018) 265 CLR 304 at [70] (Gageler J) referring to *Rizeq v Western Australia* (2017) 262 CLR 1 at [50] (Bell, Gageler, Keane, Nettle and Gordon JJ), quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 (Isaacs J). See also *BHP Group Limited v Impiombato* (2022) 96 ALJR 956 at [48] (Gordon, Edelman and Steward JJ) and the authorities cited therein.

33 See *Burns v Corbett* (2018) 265 CLR 304 at [71] (Gageler J). See also *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 (Isaacs J).

34 See eg *Burns v Corbett* (2018) 265 CLR 304 at [20]-[21], [26] (Kiefel CJ, Bell and Keane JJ). See also *Rizeq v Western Australia* (2017) 262 CLR 1 at [51]-[52] (Bell, Gageler, Keane, Nettle and Gordon JJ).

35 (1995) 184 CLR 620 at 653 (Toohey, McHugh and Gummow JJ), quoted with approval in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [50] (Gleeson CJ, Gaudron and Gummow JJ) and more recently in *BHP Group Limited v Impiombato* (2022) 96 ALJR 956 at [48] (Gordon, Edelman and Steward JJ).

36 See eg *Burns v Corbett* (2018) 265 CLR 304 at [25] (Kiefel CJ, Bell and Keane JJ).

are those in s 76 of the *Constitution*, which relevantly includes s 76(ii). That provision allows the Commonwealth Parliament to confer "original jurisdiction on the High Court in any matter… arising under any laws made by the Parliament".

36. The different usages of the term "jurisdiction" outlined above, and the constitutional significance of those differences, is reflected in the reasoning and conclusions of the High Court in *Flaherty v Girgis*.[37] The issue in that case was whether State rules regulating the extraterritorial service of the processes of the Supreme Court of New South Wales were inconsistent for the purposes of s 109 of the *Constitution* with provisions of the *Service and Execution of Process Act 1901* (Cth) (**SEPA 1901**). The underlying proceeding was a tort claim brought by a resident of New South Wales against a resident of Queensland. The relevant provisions of SEPA 1901 were ss 4 and 12, which were the predecessors to ss 12 and 15 of SEPA 1992 on which ss 9 and 10 of the TTPA were modelled. At the time *Flaherty v Girgis* was decided s 4 relevantly provided that:

> (1) A writ of summons issued out of or requiring the defendant to appear at any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth.
>
> (2) Subject to any rules of court that may be made under this Act, the service under this section of a writ of summons may be effected:
>
> (a) in the same manner as if the writ were served on the defendant in the State or part of the Commonwealth in which the writ was issued;
>
> …

37. Section 12 provided that:

> When a judgment is given or made against a defendant who has been served with a writ of summons under this Act, such judgment shall have the same force and effect as if the writ had been served on the defendant in the State or part of the Commonwealth in which the writ was issued.

38. Acting Chief Justice Mason, Wilson and Dawson JJ held that SEPA 1901 was "essentially enabling" in relation to the extraterritorial service of civil processes and that "the adoption of its procedures has no other significant result than to render service out of the jurisdiction valid, in circumstances in which it might otherwise be legally

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37 (1987) 162 CLR 574.

ineffective".[38] Their Honours observed that "[t]he jurisdiction which is exercised in granting or refusing leave to proceed under [a] federal Act is clearly federal; it could be no other".[39] Their Honours continued:[40]

> Whilst the determination of any question under [SEPA 1901] regarding service involves the exercise of federal jurisdiction, jurisdiction over the subject-matter of the action, once service has validly been effected, derives from the same source whether or not the service is extraterritorial. It is only if the authority of the court to decide the matter, questions of service apart, is derived from federal law that it will be exercising federal jurisdiction in determining the matter. Section 51(xxiv) of the Constitution, under which [SEPA 1901] is enacted, 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. It is in conformity with that legislative power that the provisions of [SEPA 1901] are framed as they are.

39. The above passage uses the term "jurisdiction" in its different senses: in the territorial sense ("out of the jurisdiction"), in the constitutional sense ("an exercise of federal jurisdiction" and "investiture of State courts with a new substantive jurisdiction"), in the subject matter sense ("jurisdiction over the subject-matter of the action") and in the personal sense ("once service has been validly effected").

40. Justices Brennan and Deane, writing separately, made observations similar to those of the plurality. Justice Brennan observed: [41]

> Although s. 4(1) [of SEPA 1901] authorizes extraterritorial service within the Commonwealth of any writ, the Act does not confer jurisdiction on or affirm the jurisdiction of the court out of which the writ is issued to entertain every action commenced by the issue of a writ thus served.

41. Justice Deane similarly explained: [42]

> Where such a valid law of the Commonwealth requires, as an element of effective service of the originating process of a State court outside the territorial limits of the State, the exercise by the State court of judicial functions, those functions will be exercised under the Commonwealth law and will involve an exercise by the State court of federal jurisdiction. Once that federal jurisdiction in relation to service has been exercised and service has been effected however,

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38 *Flaherty v Girgis* (1987) 162 CLR 574 at 596 (Mason ACJ, Wilson and Dawson JJ).

39 *Flaherty v Girgis* (1987) 162 CLR 574 at 597 (Mason ACJ, Wilson and Dawson JJ).

40 *Flaherty v Girgis* (1987) 162 CLR 574 at 598 (Mason ACJ, Wilson and Dawson JJ).

41 *Flaherty v Girgis* (1987) 162 CLR 574 at 601.

42 *Flaherty v Girgis* (1987) 162 CLR 574 at 609.

it is State jurisdiction which is subsequently exercised pursuant to that service except, of course, to the extent that the determination of the substantive issues involves an exercise of federal jurisdiction.

42. The reasoning in *Flaherty v Girgis* makes clear that: (1) the Commonwealth Parliament can enact a law supported by a constitutional provision outside Ch III (such as s 51(xxiv)) permitting service of an initiating document of a State court outside that State; (2) a State court has jurisdiction to resolve a dispute about service outside that State effected under a Commonwealth law (owing to s 39(2) of the Judiciary Act and ss 76(ii) and 77(iii) of the *Constitution*); (3) service of an initiating document of a State court outside that State under a Commonwealth law in relation to an action not arising in federal jurisdiction does not bring that action within federal jurisdiction; and (4) the source of a State court's authority to adjudicate the action is the same whether a defendant is served pursuant to a Commonwealth law or a State law. There is nothing in the *Constitution* to prevent the reasoning in *Flaherty v Girgis* applying where the Commonwealth law permitting service is supported by another head of power in s 51, such as s 51(xxix).

43. The reasoning in *Flaherty v Girgis* has been applied in subsequent cases of this Court and its correctness has not been doubted. In *Lipohar v The Queen* the plurality (Gaudron, Gummow and Hayne JJ) cited *Flaherty v Girgis* when it stated that a State court would not be exercising federal jurisdiction at the trial of persons charged with indictable offences under the common law merely because the service of those persons had occurred pursuant to provisions in SEPA 1992.[43] To that statement the plurality added that SEPA 1992 "operates 'in aid of the functions of the States and does not relate to what otherwise is a function of the Commonwealth'".[44] And in *Truong v The Queen* Gummow and Callinan JJ held that it followed from the reasoning in *Flaherty v Girgis* and *Lipohar v The Queen* that the fact of an accused person being brought

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43 *Lipohar v The Queen* (1999) 200 CLR 485 at [69] (Gaudron, Gummow and Hayne JJ) citing *Flaherty v Girgis* (1987) 162 CLR 574 at 598 (Mason ACJ, Wilson and Dawson JJ); see also [79] (Gaudron, Gummow and Hayne JJ), [166] (Kirby J).

44 *Lipohar v The Queen* (1999) 200 CLR 485 at [69] (Gaudron, Gummow and Hayne JJ) citing *Aston v Irvine* (1955) 92 CLR 353 at 364 (the Court). See also *Flaherty v Girgis* (1987) 162 CLR 574 at 593 Mason ACJ, Wilson and Dawson JJ) citing the same passage from *Aston v Irvine* (1955) 92 CLR 353.

into a State by processes provided under federal law does not render any subsequent State curial processes an exercise by the State court of federal jurisdiction.[45]

44. The reasoning in *Flaherty v Girgis* applies directly to the first respondent's notional claim against BMX in the Supreme Court of New South Wales. The first respondent could have served an initiating document on BMX under ss 9 and 10 of the TTPA. If BMX had disputed the effectiveness of service, the dispute would have arisen under a Commonwealth law and the Supreme Court of New South Wales could have resolved that dispute owing to s 39(2) of the Judiciary Act. Once the dispute regarding service was resolved, the source of the Supreme Court of New South Wales' authority to resolve the notional claim would have been State law if the matter arose in non-federal jurisdiction or Commonwealth law if the matter arose in federal jurisdiction.

45. The reasoning in *Flaherty v Girgis*, and the analysis of the terms of Ch III above at [26]-[35], are inconsistent with Ch III containing an implication that the Commonwealth Parliament's power to make laws with respect to the service of initiating documents of a State court is limited to matters arising in federal jurisdiction.

46. As a matter of completeness, it is necessary to deal with two additional matters from the appellants' submissions.

47. The *first* matter is the appellants' submission that an essential attribute of "judicial power" is a court's authority to bind a defendant (see AS [18]-[22], [25]). That submission is inconsistent with both the distinction between "federal jurisdiction" and "judicial power" and with the meaning of "judicial power". The distinction was recognised as early as 1905 in *Ah Yick v Lehmert* where Griffith CJ explained that:[46]

> In the case of the High Court, the extent to which that Court may exercise judicial power is defined by the Constitution; in the case of other Courts it is not defined by the Constitution, and must, again of necessity, be defined by the Commonwealth law which creates those Courts or invests them with federal jurisdiction. The term "federal jurisdiction" means authority to exercise the judicial power of the Commonwealth, and again that must be within limits prescribed.

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45 See *Truong v The Queen* (2004) 223 CLR 122 at [78] (Gummow and Callinan JJ) citing *Flaherty v Girgis* (1987) 162 CLR 574 at 598, 603, 609 and *Lipohar v The Queen* (1999) 200 CLR 485 at [69] (Gaudron, Gummow and Hayne JJ), [166] (Kirby J).

46 See *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603.

48. As to the meaning of "judicial power", in *Rizeq v Western Australia* the plurality explained that "judicial power" derives its essential character "from the unique and essential function that [it] performs by quelling controversaries about legal rights and legal obligations through ascertainment of facts, application of law and exercise, where appropriate, of judicial discretion".[47] Read together, the passages reproduced above from *Ah Yick v Lehmert* and *Rizeq v Western Australia* make clear that when s 77(iii) speaks of "investing any court of a State with federal jurisdiction" it is speaking of investing a court with the "authority to exercise the judicial power of the Commonwealth" to quell a controversy.

49. The appellants' submission about judicial power is also inconsistent with the reasoning in *Flaherty v Girgis* summarised at [42]. That reasoning makes clear that service of an initiating document on a defendant does not quell the underlying controversy between a plaintiff and a defendant. Service of an initiating document cannot therefore be an attribute of judicial power.

50. The *second* matter relates to some of the authorities upon which the appellants seek to rely. Specifically:

    50.1. The observations of Latham CJ in *Peacock v Newtown Marrickville and General Co-operative Building Society (No 4) Ltd* reproduced at AS [22] do not assist the appellants. The observations were not directed to the Commonwealth Parliament's power to make laws with respect to the service of State court processes in matters outside federal jurisdiction. Read in context, the observations are that the Commonwealth Parliament's power to confer federal jurisdiction on State Courts with respect to matters in ss 75 and 76 of the *Constitution* would allow the Commonwealth Parliament to confer federal jurisdiction with respect to only particular persons, localities or amounts involved. So, for example, a Commonwealth law could validly confer jurisdiction on a State District Court to alter the obligations of parties under a contract if the value of the contract is within a particular range and even if the value exceeds a jurisdictional limit set by a State law.[48]

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47 *Rizeq v Western Australia* (2017) 262 CLR 1 at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ) referring to *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ).

48 See *Peacock v Newtown Marrickville and General Co-operative Building Society (No 4) Ltd* (1943) 67 CLR 25 at 38-39 (Latham CJ)

50.2. The observations of Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*[49] reproduced at AS [28] are similarly of no assistance. Read in context, their Honours were explaining that a conferral of jurisdiction by one State on the courts of another State will be of no effect unless the law of the latter State gives effect to the conferral.[50] The observations do not suggest that the Commonwealth Parliament "does not have power to alter the reach and scope of State judicial power" (contra AS [28]). Any such suggestion is inconsistent with ss 38 and 39 of the Judiciary Act, which are supported by 77(ii) and 77(iii) of the *Constitution*, and which (among other things) have the effect of excluding the jurisdiction of State courts where the High Court has original jurisdiction or where original jurisdiction can be conferred on it.[51] There is nothing in the context of their Honours' remarks to indicate they were casting any doubt on the validity of ss 38 and 39 of the Judiciary Act.

50.3. Finally, when read in its context, the statement from *The Boilermakers' Case* reproduced at AS [31] does not assist the appellants. Properly understood, the statement is not concerned with "the judicial power of any polity within the federation" (contra AS [31]). It is only concerned with making clear that the Commonwealth Parliament's power to give a court power to exercise Commonwealth judicial power is confined to its powers in Ch III. [52]

(ii) The implication does not arise from the structure of the Constitution

51. Nor is the implication necessary to protect any aspect of "Australian federalism" (contra AS [32]). There are already at least four limitations on Commonwealth power that negate the need for such an implication. Those limitations are: *first*, the Commonwealth's power to vest federal jurisdiction is confined to the powers conferred by ss 76 and 77 of the *Constitution*.[53] *Second,* the Commonwealth Parliament does not have power to alter the constitution or organisation of a State court; rather, it must take State courts as it finds them when it vests them with federal

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49 (1999) 198 CLR 511.

50 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, [106]-[108].

51 See *Burns v Corbett* (2018) 265 CLR 304 at [24]-[26] (Kiefel CJ, Bell and Keane JJ).

52 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1965) 94 CLR 254 at 280 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

53 *Rizeq v Western Australia* (2017) 262 CLR 1 at [59] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Ruhani v Director of Police* (2005) 222 CLR 489 at [4]-[5] (Gleeson CJ).

jurisdiction.[54] *Third*, the Commonwealth Parliament's power in s 51(xxxix) to make laws with respect to "matters incidental to the execution of any power vested by [the] Constitution in the Parliament … or in the Federal Judicature", has been "closely confined".[55] It has been held not to support Commonwealth laws: (a) conferring State judicial power on a State court;[56] (b) conferring non-judicial power on State courts;[57] (c) accepting conferral of State judicial power on a federal court;[58] and (d) denying conferring of State judicial power on a State tribunal that is not a court.[59] *Fourth*, the Commonwealth Parliament lacks power to make a law "directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments".[60] To the extent that a Commonwealth law authorising the service of an initiating document of a State court in a matter that did not arise in federal jurisdiction at the time of service threatened "Australian federalism" (which seems highly improbable and which is denied), that law is likely to be inconsistent with the limitations that have already been recognised to exist on the powers of the Commonwealth Parliament.

PART VI THE COMMONWEALTH'S NOTICE OF CONTENTION

52. The first respondent supports the notice of contention filed by the Commonwealth as it would mean that ss 9 and 10 of the TTPA are constitutionally valid.

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54 See, eg, *Forge v ASIC* (2006) 228 CLR 45 at [61] (Gummow, Hayne and Crennan JJ) referring to *Le Mesurier v Connor* (1929) 42 CLR 481 at 496, 498 (Knox CJ, Rich and Dixon JJ); *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554 (Latham CJ); *Peacock v Newtown Marrickville & General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37 (Latham CJ); *Russell v Russell* (1976) 134 CLR 495 at 516 (Gibbs J), 530 (Stephen J), 535 (Mason J), 554 (Jacobs J); *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 74 (Brennan J).

55 See *Burns v Corbett* (2018) 265 CLR 304 at [93] (Gageler J) citing *Le Mesurier v Connor* (1929) 42 CLR 481 at 497 (Knox CJ, Rich and Dixon JJ); cf *Rizeq v Western Australia* (2017) 262 CLR 1 at [90]-[91] (Bell, Gageler, Keane, Nettle and Gordon JJ).

56 See *Williams v Hursey* (1959) 103 CLR 30 at 88-89 (Taylor J) and 113 (Menzies J); see further *Burns v Corbett* (2018) 265 CLR 304 at [93] (Gageler J).

57 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152 (the Court); see further *Burns v Corbett* (2018) 265 CLR 304 at [93] (Gageler J).

58 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [111], [114]-[120] (Gummow and Hayne JJ); see further *Burns v Corbett* (2018) 265 CLR 304 at [93] (Gageler J).

59 See further *Burns v Corbett* (2018) 265 CLR 304 at [93] (Gageler J).

60 *Fortescue Metals v The Commonwealth* (2013) 250 CLR 548 at [130] (Hayne, Bell and Keane JJ) see also [6] (French CJ), [145] (Crennan J), [229] (Kiefel J).

PART VII ESTIMATE OF ORAL ARGUMENT

53. The first respondent estimates he will need 45 minutes to present his argument.

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IN THE HIGH COURT OF AUSTRALIA
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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 SUBMISSIONS OF THE FIRST RESPONDENT

Pursuant to paragraph 3 of *Practice Direction No.1 of 2019*, the first respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	**Description**	**Version**	**Provisions**
Constitutional provisions			
1.	*Constitution*	Current	ss 51(xiii), 51(xiv), 51 (xxiv), 51(xxix) Ch III
Statutory provisions			
2.	*Judiciary Act 1903* (Cth)	Compilation No 47	ss 38, 39, 78B

No.	Description	Version	Provisions
3.	*Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW)	Current	ss 4, 5
4.	*Service and Execution of Process Act 1901* (Cth)	Compilation incorporating amendments up to *Companies (Miscellaneous Amendments) Act 1981* (Cth)	ss 4, 12
5.	*Service and Execution of Process Act 1992* (Cth)	Compilation prepared on 10 September 2009	ss 12, 15
6.	*Trans-Tasman Proceedings Act 2010* (Cth)	Compilation No 2	ss 3, 4, 8, 9, 10