



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

DARIUZ KOPER

First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

SECOND RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. No constitutional implication

2. Given the appellants' concession that ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) are laws with respect to external affairs (AS [4]), the absence of legislative power to enact those provisions that they assert could only result from drawing a novel constitutional implication (see AS [36]-[37]).
3. The novel implication alleged is that the Commonwealth Parliament lacks power to alter the scope or reach of State judicial power except where expressly empowered to do so by ss 51(xxiv), 77(ii) and 77(iii) of the Constitution. That implication is not logically or practically necessary for the preservation of the integrity of the constitutional structure, and therefore cannot be drawn: *Burns v Corbett* (2018) 265 CLR 304 at [94], [175] (**Vol 3, Tab 11**); *Gerner v Victoria* (2020) 270 CLR 412 at [14], [17] (**Vol 3, Tab 15**).
4. Chapter III deals exhaustively with the judicial power of the Commonwealth: *Boilermakers* (1956) 94 CLR 254 at 270 (**Vol 5, Tab 26**). It does not deal exhaustively with the judicial power of the States. Accordingly, no negative implication can be drawn from the silence of Ch III with respect to State judicial power, because that silence reveals only that Ch III concerns a different subject. It neither confers nor denies legislative power to alter the scope or reach of State judicial power (**CS [11]**). If heads of power found elsewhere in the Constitution support laws that alter the scope or reach of State judicial power, such laws are valid subject to the *Melbourne Corporation* limit: eg *R v Reid* [1999] 2 VR 605 at [122]-[125], [130] (**Vol 8, Tab 39**); *Campbell v Metway Leasing Ltd* (2002) 126 FCR 14 at [22]-[24], [33], [45] (**Vol 8, Tab 36**).
5. Section 51(xxiv) expressly permits the very thing that the appellants contend the Constitution "read as a whole" impliedly prevents, for it empowers the Commonwealth Parliament to "alter the reach and scope of State judicial power throughout the Commonwealth" (cf. **AS [32]**). That head of power cannot simply be dismissed as an "exception" to the novel implication for which the appellants contend. It denies the necessity for any such implication to protect the integrity of the constitutional structure, by demonstrating that it is not inconsistent with that structure for a Commonwealth law

to enable the service of State judicial process that could not otherwise have been validly served: *Flaherty v Girgis* (1987) 162 CLR 574 at 596, 598, 609 (**Vol 3, Tab 14**); *Lipohar v The Queen* (1999) 200 CLR 485 at [69] (**Vol 4, Tab 18**). There is no necessity to construe the Constitution as impliedly preventing s 51(xxix) from supporting a law that makes equivalent provision for the service of State judicial process outside Australia as that which it can validly make “throughout the Commonwealth” pursuant to s 51(xxiv).

6. The Court of Appeal correctly distinguished between personal jurisdiction, subject matter jurisdiction and federal jurisdiction (**CA [45]-[48], CAB 179-180**). Personal jurisdiction is “something which a court may have, but that flows from the act of the lawful service of process” (**CA [50], CAB 181**). It is “not a constitutional concept” (**CA [52], CAB 181**). Contrary to the appellants’ submissions, service is not indispensable to the exercise of judicial power (provided that procedural fairness is achieved through some other means): eg notice provisions in representative proceedings (**CS [20]**; cf. **Reply [12]-[13]**).

B. Notice of contention

7. The notice of contention is reached only if the Court holds, contrary to our primary submission, that ss 9 and 10 of the TTPA alter the reach and scope of State judicial power in a manner not supported by the external affairs power (**CS [47]-[57]**).
8. If the point is reached, ss 9 and 10 of the TTPA, in their operation upon the service of initiating documents issued by an Australian court, should be construed as “double function” provisions that both confer jurisdiction and also create legal rights by reference to the content of the State or Territory laws applicable to the claim contained in the initiating document, thereby engaging s 76(ii) of the Constitution and bringing the matter within federal jurisdiction: *Crosby v Kelly* (2021) 203 FCR 451 (**Vol 8, Tab 37**).

Dated: 13 April 2023



Stephen Donaghue

Brendan Lim

Jackson Wherrett