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

DARIUSZ KOPER
First Respondent

ATTORNEY GENERAL OF THE COMMONWEALTH
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT

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

2. **External affairs power:** ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) (**TTPA**) are supported by the external affairs power in s 51(xxix) of the *Constitution*. The provisions are reasonably capable of being considered appropriate and adapted to implementing the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement [2008] ATNIF 12: see the Joint Book of Authorities (**JBA**) **2385-2395**. Alternatively, service of an initiating document of a State court on a person in New Zealand is a law with respect to a person, thing or matter outside Australia: see the First Respondent's submissions (**FR**) [15]-[23].

3. **No constitutional implication restricting the Commonwealth's power:** There is no implication arising from s 51(xxiv) and Ch III of the *Constitution* that means that the Commonwealth Parliament does not have power to make laws with respect to the service of initiating processes of State courts outside Australia in matters that do not arise in federal jurisdiction.

4. The appellants' arguments to the contrary are inconsistent with *Flaherty v Girgis* (1987) 162 CLR 574 (***Flaherty v Girgis***) at 596-598 (Mason ACJ, Wilson and Dawson JJ) (**JBA 643-645**); 601 (Brennan J) (**JBA 648**); 609 (Deane J) (**JBA 656**): see FR [36]-[41]. *Flaherty v Girgis* was concerned with the *Service and Execution of Process Act 1901* (Cth) (**SEPA 1901**), including ss 4 and 12 of that Act (**JBA 78-80**). In 1992, s 4 of SEPA 1901 was replaced with s 15 of the *Service and Execution of Process Act 1992* (Cth) (**SEPA 1992**) and s 12 of SEPA 1901 was replaced with s 12 of SEPA 1992 (**JBA 110-113**).

5. The correctness of *Flaherty v Girgis* has not been doubted and the appellants do not challenge it. This Court applied the reasoning in *Flaherty v Girgis* to SEPA 1992 in *Lipohar v The Queen* (1999) 200 CLR 485 at [69] (Gaudron, Gummow and Hayne JJ) (**JBA 832**) and in *Truong v The Queen* (2004) 223 CLR 122 at [78] (Gummow and Callinan JJ) (**JBA 2222**): see FR [43]. These authorities demonstrate that the subject

matter of service is different to the subject matter of substantive jurisdiction over the dispute comprehended by the process served.

6. Sections 9 and 10 of the TTPA were expressly modelled on ss 12 and 15 of SEPA 1992. They do no more than effect service of an initiating process of an Australian court on a defendant in New Zealand: FR [42]-[44]

7. **Section 77(ii) of the *Constitution* does not assist the appellants:** The implication for which the appellants contend does not arise from s 77(ii) of the *Constitution*, which provides that the jurisdiction of a federal court in certain matters shall be exclusive of the courts of the States (contra Reply [8]): see *Burns v Corbett* (2018) 265 CLR 304 at [24], [60] (Kiefel CJ, Bell and Keane JJ) (**JBA 385, 397**).

8. **The *Melbourne Corporation* principle does not assist the appellants:** It is incorrect to suggest that the implication must exist because the principle first recognised in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 would fail to stop a Commonwealth law radically altering the character of the organs of State judicial power: contra Reply [7]. There are five difficulties with the appellants' submission:

   (a) The implication would require a carve out of s 51(xxiv) and other heads of power such as the bankruptcy power in s 51(xvii).

   (b) A Commonwealth law that alters the scope and reach of the judicial power of State courts is not in itself unconstitutional: FR [51].

   (c) Any Commonwealth law that radically altered State courts would be contrary to the *Melbourne Corporation* principle. However, the appellants have not shown that ss 9 and 10 of the TTPA radically alter State courts.

   (d) The appellants have not shown that laws such as ss 9 and 10 of the TTPA could open "floodgates" in State courts.

   (e) The appellants do not suggest (and nor could they) that a Commonwealth law supported by s 51(xxiv) by itself would infringe the *Melbourne Corporation* principle.

9. **Commonwealth's notice of contention:** If the arguments made in support of the notice of contention are correct, the First Respondent could have served BMX under ss 9 and 10 of the TTPA: FR [52].

Dated: 13 April 2023

Noel Hutley | Megan Caristo | Blake O'Connor

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