HIGH COURT OF AUSTRALIA

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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

SECOND 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. Whether ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) (**TTPA**), which authorise the service in New Zealand of the initiating process of a State court in civil proceedings not necessarily involving a matter within federal jurisdiction, can validly apply only to matters within federal jurisdiction, notwithstanding the appellants' concession that ss 9 and 10 are otherwise supported by the external affairs power in s 51(xxix) of the Constitution.

3. Alternatively, on the notice of contention, whether ss 9 and 10 of the TTPA should be construed as double function provisions that both create legal rights and invest federal jurisdiction described in s 76(ii) of the Constitution to determine those rights.

PART III: NOTICES OF CONSTITUTIONAL MATTER

4. The appellants issued a s 78B notice in this matter on 22 November 2022 (**CAB 194**). The Attorney-General issued a further notice on 2 February 2023.

PART IV: MATERIAL FACTS

5. The Attorney-General agrees with the summary of the background in **AS [8]-[14]**.

PART V: ARGUMENT

The nature of the asserted constraint

6. The generality of the definitions of "proceeding", "civil proceeding" and "Australian court" (s 4) make clear that ss 9 and 10 of the TTPA, read with the application provision in s 8, are intended to authorise service in civil proceedings, whether or not concerning a matter in federal jurisdiction. The extrinsic material, including the agreement and its *travaux préparatoires*, also makes this clear.[1] Subject to the constitutional issues, there is no dispute between the parties as to this construction.

7. The appellants submit that the Commonwealth Parliament does not have power to make laws with respect to the civil process of State courts outside the Commonwealth (other than under Ch III as an incident of the power to invest federal jurisdiction). Their primary submission seems to be that the Constitution, properly construed, simply does not confer that power (eg, **AS [15]**), though they recognise the possibility that the lack of power for which they contend may be "better seen as having its provenance in some implied constitutional limitation" (**AS [37]**).

8. On the appellants' argument, the absence of legislative power is said to arise from the Constitution "read as a whole" (**AS [32]**). They assert that the argument "does not depend simply upon the exclusivity of Ch III as the source of the Commonwealth's power to confer jurisdiction upon State courts", although it arises from a reading of the Constitution "with Ch III firmly in mind". It is also said to arise from reading the Constitution "having regard to" "the nature of judicial power and its significance for the government of a polity" as well as "the structure of Australian federalism".

9. Notwithstanding those submissions, the appellants expressly concede that the TTPA is supported by the external affairs power because it implements an agreement between Australia and New Zealand (**AS [4]**). That concession – which is clearly

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[1] See, eg, *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report by the Trans-Tasman Working Group* (December 2006); Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement done at Christchurch on 25 July 2008; Explanatory Memorandum for the Trans-Tasman Proceedings Bill 2009 (Cth); *Parliamentary Debates*, House of Representatives, 25 November 2009 at 12770.

correct[2] – is inconsistent with their submission insofar as it asserts the absence of an affirmative grant of legislative power.[3] The submission also overlooks that ss 9 and 10 are supported by s 51(xxix) for the further reason that they concern something external to Australia,[4] namely the service of process in New Zealand (**CA [39], CAB 177-178**).

10. In light of the above concession, the appellants' case necessarily depends on a novel constitutional implication. The threshold requirement for implying a non-textual constitutional limitation on the ambit of legislative power is that the limitation be "logically or practically necessary for the preservation of the integrity of [the constitutional] structure".[5] As such, the argument "depends on 'what … the terms and structure of the Constitution prohibit, authorise or require'".[6]

11. The implication for which the appellants contend would confine the power that s 51(xxix) would otherwise confer to the extent necessary to deny support to Commonwealth laws with respect to service outside the Commonwealth. The argument in support of such a novel implication should be rejected for three key reasons. *First*, Ch III of the Constitution – upon which the appellants rely heavily – provides no support for the asserted implication. Chapter III is relevantly concerned with the judicial power of the Commonwealth. While Ch III does not itself empower the Commonwealth Parliament to legislate with respect to the exercise of non-federal jurisdiction by State courts (appeals to the High Court aside), it does nothing to deny the Commonwealth Parliament powers to do so pursuant to s 51. The appellants' attempt to repurpose Ch III as a guardian of State judicial power is radical and wrong, it being based on a negative implication said to arise from the silence of Ch III with

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2 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

3 Construing that provision with all the generality that the words permit: see **CA [40] (CAB 178)**, citing *New South Wales v Commonwealth* (2006) 229 CLR 1 at [142]; *The Grain Pool of Western v Commonwealth* (2000) 202 CLR 479 at [16], [119]; *New South Wales v Commonwealth* (1975) 135 CLR 337 at 471 (Mason J), 497 (Jacobs J).

4 *XYZ v Commonwealth* (2006) 227 CLR 532.

5 See, eg, *Burns v Corbett* (2018) 265 CLR 304 at [94] (Gageler J), [175] (Gordon J), citing *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140 (McGinty) at 168-169 (Brennan J).

6 *Gerner v Victoria* (2020) 270 CLR 412 at [14] (the Court), quoting *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567. See also *Re Gallagher* (2018) 263 CLR 460 at [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [20], [39], [54] (Gleeson CJ, Gummow and Hayne JJ), [83] (Kirby J), [171] (Heydon, Crennan and Kiefel JJ).

respect to State judicial power (a silence in fact explicable on the simple basis that Ch III concerns a different topic, being the "judicial power of the Commonwealth"). *Secondly*, the appellants' argument wrongly treats s 51(xxiv) of the Constitution as some kind of "exception" to a broader lack of Commonwealth legislative power or as an exclusive source of power with respect to service of process. *Thirdly*, the appellants' reliance on the "significance [of judicial power] for the government of a polity" and "the structure of Australian federalism" is either a reformulation of the "weak" *Melbourne Corporation* argument rejected by the Court of Appeal on both merits and fairness grounds (**CA [61]-[62], CAB 183**), or an unprincipled attempt to identify a new implication based on federalism that extends beyond the *Melbourne Corporation* implication.

(i) Chapter III of the Constitution and State judicial power

The meaning of "jurisdiction" in Ch III

12. Chapter III deals with the investiture of the "judicial power of the Commonwealth". The judicial power of the Commonwealth is the power that is and must be exercised when a court is acting as the "judicial agent of the Commonwealth".[7] A court acts in such a capacity when its adjudicative authority derives either directly from the Constitution or from laws made by the Commonwealth Parliament.[8]

13. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court, other federal courts, and "in such other courts as [Parliament] invests with federal jurisdiction". Thus, the concept of federal jurisdiction is equated with the exercise of the judicial power of the Commonwealth. As Bell CJ (with whom Ward P and Beech-Jones JA agreed) correctly observed in the Court of Appeal, federal jurisdiction "is concerned with the allocation of the judicial power of the Commonwealth to particular courts or 'the authority to exercise the judicial power of the Commonwealth'" (**CA [48], CAB 180**).

14. Sections 75 and 76 of the Constitution identify nine kinds of matter in which the High Court has or may be given "original jurisdiction". Importantly, while "[f]ederal

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7 *Lorenzo v Carey* (1921) 29 CLR 243 at 252 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). See also *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 416 (Isaacs J); *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 44 (Windeyer J).

8 *Burns v Corbett* (2018) 265 CLR 304 at [72] (Gageler J).

jurisdiction is limited to authority to adjudicate a matter identified in s 75 or s 76",[9] those categories of matter are not constitutionally required to be determined in the exercise of federal jurisdiction. At least some of those categories of matter could, consistent with the Constitution, be determined in the exercise of federal or non-federal jurisdiction (for example, cases between residents of different States).[10] What renders the matters in ss 75 and 76 exclusively federal is s 39 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), which withdraws jurisdiction belonging to the States with respect to those matters and then (subject to exceptions and conditions) reinvests it as federal jurisdiction.[11] Thus, when s 77(iii) speaks of "federal jurisdiction", it is not speaking simply of authority to decide matters of the kind described in ss 75 and 76. It is speaking rather of authority to decide matters described in ss 75 and 76 that is invested by either the Constitution itself or by Commonwealth law.

15. On that understanding of "federal jurisdiction", Ch III could be relevant to the question in this appeal only if a law authorising the service of a court's process amounts to a conferral of the judicial power of the Commonwealth (and thus an investiture of "jurisdiction" in the Ch III sense). Yet clearly it does not. That was settled in *Flaherty v Girgis*,[12] which the appellants do not seek to re-open (see further below at [24]-[29]). That case holds that laws authorising the service of process are not laws that invest authority to exercise judicial power (of the Commonwealth or otherwise). Rather, they regulate or condition the exercise – with respect to particular persons – of an authority to adjudicate that is derived from some other law or the Constitution. The primary judge was correct to conclude, in terms specifically adopted by the Court of Appeal (**CA [34], [55], CAB 176, 182**), that "[s]ervice is no part of the controversy, but rather, concerned with how the proceedings to determine the controversy are commenced".

16. For the above reasons, Bell CJ was correct to draw a distinction between personal jurisdiction and both subject matter jurisdiction and federal jurisdiction. His Honour

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9 *Burns v Corbett* (2018) 265 CLR 304 at [71] (Gageler J).

10 *Burns v Corbett* (2018) 265 CLR 304 at [23] (Kiefel CJ, Bell and Keane JJ), [72], [78] (Gageler J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [25] (Gleeson CJ, Gummow and Hayne JJ).

11 *Rizeq v Western Australia* (2017) 262 CLR 1 at [6] (Kiefel CJ), [66]-[67] (Bell, Gageler, Keane, Nettle and Gordon JJ), [137] (Edelman J); *Burns v Corbett* (2018) 265 CLR 304 at [25] (Kiefel CJ, Bell and Keane JJ), [130] (Nettle J), [150], [160]-[163] (Gordon J).

12 (1987) 162 CLR 574.

said that personal jurisdiction is "something which a court may have, but that flows from the act of lawful service of process", whereas subject matter and federal jurisdiction are "'invested in' or 'conferred upon' the court in question" (**CA [50], CAB 181,** emphasis in original). Of course, the subject matter or federal jurisdiction that has been "invested" in a court can be exercised by that court with respect to a particular person only if that person has been lawfully served (or does not need to be lawfully served). Ordinarily it is service that means that the defendant is "amenable" to the exercise of the court's jurisdiction.[13] Accordingly, it is true that a court must generally "have" both subject matter jurisdiction and personal jurisdiction. But it is not true that both forms of "jurisdiction" must be "invested" by laws, for "personal jurisdiction" is not "jurisdiction" in that sense. Laws that regulate the amenability of defendants to the service of a court's writ assume the operation of, but do not purport to alter, the separate law that invests the relevant subject-matter jurisdiction in that court. Valid service is a condition of a court's authority to decide only in the limited sense that it is a precondition to the defendant being bound by the exercise of the subject matter jurisdiction that has been invested in that court.[14] That is why "[p]ersonal jurisdiction is not a constitutional concept" (**CA [52], CAB 181**).

17. The distinction between laws investing authority, and laws regulating the exercise of that authority, is important. The Commonwealth has no power to invest federal jurisdiction otherwise than in the matters that are described in ss 75 and 76 of the Constitution. As the appellants point out (**AS [31]**), the Commonwealth Parliament is not "at liberty to turn from Ch III … when it makes a law giving judicial power".[15] But, as the appellants accept (**AS [27]**), the Commonwealth does have power to regulate the exercise of non-federal jurisdiction (including, most obviously, pursuant to s 51(xxiv)). The difference reflects the fact that Ch III is limiting in respect of laws investing federal jurisdiction (ie the judicial power of the Commonwealth), but that it is not limiting in respect of Commonwealth laws regulating the exercise of jurisdiction derived from elsewhere. The constitutional limitation on laws of that second kind are found not in Ch III but rather (as discussed in more detail below) in

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[13] *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1 at [117] (Leeming JA).

[14] *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at [14]-[17] (French CJ, Gummow, Hayne and Crennan JJ). See also Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, 2020) 175.

[15] *Boilermakers' Case* (1955) 94 CLR 254 at 270 (emphasis added).

the requirement that they be supported by a head of power and in the *Melbourne Corporation* doctrine.

18. There can therefore be seen to be two fundamental errors in the appellants' arguments. The first is their slide from the absence of any conferral of power in Ch III to alter the scope or reach of State judicial power (which may be accepted, subject only to s 77(ii)) to the proposition that this absence supports a negative implication that prohibits a Commonwealth law from altering the scope or reach of such State judicial power, even when that Commonwealth law is supported by a head of power outside Ch III. That argument involves a slide because the negative implications that arise from Ch III depend on the proposition that Ch III deals exhaustively with the judicial power of the Commonwealth (leaving no room for any other source of law to address that subject matter).[16] That proposition provides no foundation for a negative implication with respect to State judicial power, for that is a topic that Ch III does not address (let alone address exhaustively) except in the particular topics dealt with by s 73(ii) and s 77(ii).

19. The second fundamental error in the appellants' argument is the elision between what is necessary for the effective exercise of judicial power and what is part of the "judicial power of the Commonwealth". It simply does not follow from the proposition that, generally speaking, "there can be no exercise of judicial power, at least in respect of actions *in personam*, without personal jurisdiction" (**AS [20]**, emphasis added) that personal jurisdiction is an "essential attribute" of judicial power (**AS [20]**). Indeed, the appellants have not identified a single instance, in the many authorities in which Justices of this Court have attempted to provide a working definition of the concept, where service has been identified as an essential attribute of judicial power.

20. In the absence of any supporting authority, the appellants point to the need for a decision rendered in the exercise of judicial power to be "binding" upon the parties to the dispute (**AS [18]**). It can readily be accepted that the ability to render a decision which is enforceable, and therefore "binding of its own force",[17] is essential to

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[16] *Boilermakers' Case* (1955) 94 CLR 254 at 270 (emphasis added). To the extent that it affects State courts, it does so only to protect their suitability to exercise the judicial power of the Commonwealth: eg *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[17] *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at [31] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); see also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267-268 (Deane,

judicial power. However, service is not indispensable to the rendering of such a decision. Not even actual notice is an invariable requirement, it being "not unknown for judicial decisions to determine the rights of people who were unaware of their existence".[18] Thus, some exercises of authority to decide, such as that involved in the grant of *ex parte* relief, do not depend on service at all.[19] Similarly, representative proceedings routinely bind group members who were not served, but who were rather merely sought to be notified according to a court-supervised notice procedure.[20]

21. That service is not an essential attribute of judicial power is consistent with the way this Court has characterised the power to make rules of court authorising service. In *R v Davison*,[21] Dixon CJ and McTiernan J said that "a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power is that of making procedural rules of court". Consistently with that view, the appellants accept that the Commonwealth Parliament can make rules governing service for courts when exercising federal jurisdiction pursuant to the legislative power incidental to its power to invest such courts with federal jurisdiction, either under s 77(iii) alone or in combination with s 51(xxxix) (**AS [22]-[23]**). In other words, the appellants accept that the power to make rules of service can be incidental to the conferral of adjudicative authority on the relevant court (as opposed to part of that adjudicative authority).

22. Furthermore, acceptance of the proposition that Ch III can support the conferral of incidental power to make laws relating to service does not imply that Ch III is the exclusive source of power to make laws relating to service. That is true even with respect to service in matters involving federal jurisdiction, and it is even more obviously true with respect to non-federal jurisdiction. In an attempt to demonstrate otherwise (ie that service must be exclusively regulated by Ch III), the appellants posit an "extreme" law, being a law prohibiting an alien or a constitutional corporation from serving an officer of the Commonwealth with the process of this

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Dawson, Gaudron and McHugh JJ); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [44] (Kirby J); *Harris v Caladine* (1991) 172 CLR 84 at 101-102 (Brennan J).

18 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [22] (Gleeson CJ).

19 See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [38] (French CJ).

20 There are other analogous regimes, eg, s 66 of the *Native Title Act 1993* (Cth).

21 (1954) 90 CLR 353 at 369 (emphasis added), quoted with approval in *Harrington v Lowe* (1996) 190 CLR 311 at 324 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

Court (**AS [21]**). But that "extreme" example is misconceived. To the extent that service is the manner in which the Court's jurisdiction is to be invoked, then the "practical operation" of the appellants' imagined law might be to deny to this Court the ability to exercise jurisdiction and thus enforce the limits set by Parliament on executive decision-making. Such a law would be invalid for the specific reason that it is inconsistent with s 75(v) of the Constitution.[22] However, the fact that the Constitution impliedly prohibits laws that stultify the exercise of federal jurisdiction provides no support for an asserted constraint on the power of the Parliament to make laws that facilitate the exercise of State judicial power, particularly with respect to defendants outside Australia.

23. Acceptance of the appellants' submission that service is either part of investing jurisdiction, or exclusively incidental to investing jurisdiction (such that it can be done only pursuant to Ch III), would compel the further erroneous conclusion that State law cannot provide for service of process in federal matters (for that could only be done outside Ch III). On that view, a State service law would, in its operation on federal matters, be contrary to Ch III or inconsistent with ss 38 and 39 of the Judiciary Act. It would follow that, in every federal matter litigated in a State court since 1903, service attempted within the State (i.e. pursuant to State law) was ineffective. That problem is not overcome by ss 39(2) or 79 of the Judiciary Act. Section 39(2) observes the jurisdictional limits of State courts when investing federal jurisdiction, but does not in terms pick up State service laws and apply them as federal law. Section 79 operates only on courts "exercising" federal jurisdiction. If, as the applicants submit, service is indivisible from jurisdiction, then laws authorising service would not be capable of being picked up by s 79 because they apply at a time before the relevant court is "exercising" federal jurisdiction.

The decision in Flaherty v Girgis

24. The reasoning and result in *Flaherty v Girgis*[23] are irreconcilable with the proposition that service is part of the exercise of judicial power that follows. In that case,

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[22] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [46]. See also *Bodrudazza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) ("… a law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure").

[23] (1987) 162 CLR 574 at 598 (Mason ACJ, Wilson and Dawson JJ).

Mason ACJ, Wilson and Dawson JJ stated:[24]

> [T]here is a distinction to be drawn between territorial jurisdiction and jurisdiction over the subject matter of the action, the latter being determined otherwise than by the rules governing service …
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> … [J]urisdiction 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 aside, is derived from federal law that it will be exercising federal jurisdiction in determining the matter.

25. The Court held that, even when service is effected pursuant to a federal Act, "the consequences flow, not from the federal Act [authorising service], but from the law of the place out of which service is effected".[25] Similarly, Deane J said that, once service had been effected pursuant to a Commonwealth law, "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".[26] That reasoning plainly separates the operation of a law regulating service from the exercise of judicial power that can take place following service.

26. Of these passages, Gummow J said that they illustrate that the "legislative derivation" of the amenability of a defendant to the court's process (on the one hand) and of the subject-matter of actions entertained by the court (on the other) "may be quite distinct".[27] Thus, a defendant brought before a court by processes provided for by federal law may nonetheless be dealt with in the exercise of State jurisdiction.[28] That is how it can properly be said of s 51(xxiv) that it is "a power to be exercised in aid of the functions of the State and [it] does not relate to what otherwise is a function of the Commonwealth".[29] It is also consistent with the observation of Gummow and Hayne JJ in *Re Wakim* upon which the appellants rely (**AS [28]**) that "[w]hat gives courts the authority to decide a matter is the law of the polity of the courts concerned".[30]

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[24] (1987) 162 CLR 574 at 598 (emphasis added).

[25] (1987) 162 CLR 574 at 596 (Mason ACJ, Wilson and Dawson JJ).

[26] *Flaherty v Girgis* (1987) 162 CLR 574 at 609.

[27] *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [44].

[28] *Truong v The Queen* (2004) 223 CLR 122 at [78] (Gummow and Callinan JJ).

[29] *Mok v DPP (NSW)* (2016) 257 CLR 402 at [10] (French CJ and Bell J), citing *Aston v Irvine* (1955) 92 CLR 353 at 364.

[30] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [108].

27. The reasoning in *Flaherty v Girgis* is consistent with *Renton v Renton*,[31] in which the relevant State court exercised federal diversity jurisdiction even though service was effected under a State Act. It is consistent with the fact that authority to decide in *ex parte* proceedings, representative proceedings, and others does not depend on service at all. It also underpins a more workable relationship between service and authority to decide, given that federal jurisdiction might not be engaged until after service has been effected (if, eg, a defendant raises a defence deriving from federal law).

28. The appellants do not seek leave to reopen *Flaherty v Girgis*, and indeed accept that it is correct (**AS [51]**). They accept that ss 9 and 10 of the TTPA "do[] not effect an investiture of jurisdiction, in the sense of conferring authority to adjudicate upon a particular subject matter" (**AS [26]**). Yet they seek to avoid the logic of *Flaherty v Girgis* by submitting 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" (**AS [25]**). For the reasons above, however, if ss 9 and 10 of the TTPA do not confer authority to adjudicate upon a particular subject matter, then they do not confer judicial power (of the Commonwealth or otherwise). Chapter III therefore provides no support for the lack of power for which the appellants contend. Instead, it has nothing to say about the scope of the Parliament's powers under s 51 to make laws authorising service of process.

29. Finally, contrary to **AS [25]**, there is nothing "telling" in the absence of any suggestion in *Flaherty v Girgis* that the Commonwealth might legislate so as to "extend the territorial jurisdiction of State courts" other than in reliance on s 51(xxiv). Any question as to the competence of the Commonwealth Parliament to rely on the external affairs power to authorise the service of process overseas simply did not arise in that case.

(ii) The relevance of s 51(xxiv)

30. The appellants submit that the lack of Commonwealth legislative power to alter the reach and scope of State judicial power is subject to three "qualifications" (**AS [29]**). One of those "qualifications" is the grant of legislative power in s 51(xxiv) to make laws with respect to the service and execution "throughout the Commonwealth" of

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[31] (1918) 25 CLR 291. See Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, 2020) 193.

the civil and criminal process and the judgments of the courts of the States. In other words, the appellants concede that the implication for which they contend does not limit s 51(xxiv), meaning that they accept that the Constitution permits Commonwealth legislation altering the reach and scope of State judicial power throughout the Commonwealth.

31. Each of the grants of power in s 51 of the Constitution is expressed to be "subject to this Constitution". If there is an implied constitutional limitation of the kind asserted by the appellants, on ordinary principles s 51(xxiv) would therefore be subject to it. However, as the appellants could not plausibly contend for that result (which would deprive s 51(xxiv) of any operation), they are forced into the contorted submission that the phrase "subject to this Constitution" means different things for different heads of power: ie that those words "should not be understood as mechanically dictating that that limitation should operate upon s 51(xxiv) in precisely the same way as it operates upon, say, s 51(xxix)" (**AS [37]**).

32. That argument does not merely involve an "accommodation" of s 51(xxiv) (**AS [36]**). That description is inapt, because the effect of the argument is that s 51(xxiv) permits the very thing that the Constitution "read as a whole" is said impliedly to prevent. The suggested "accommodation" would render the phrase "subject to this Constitution" meaningless insofar as the asserted constitutional implication is concerned in respect of laws passed pursuant to s 51(xxiv), while the phrase would operate with its full force in respect of all the other heads of power. A coherent rationale that might explain such an arbitrary reading of the Constitution is not identified.

33. Further, the appellants provide no reason why s 51(xxiv) should be read as an exception that substantially consumes the implied constitutional constraint for which the appellants contend, rather than as a powerful indicium that the implication for which they contend does not exist.[32] The only suggested reason for treating s 51(xxiv) as an exception that permits Commonwealth laws altering the reach and scope of State judicial power is that it deals specifically with the topic of service, while other heads of power do not. But that rationale simply highlights that, although the appellants deny it (**AS [34]**), they are in truth inviting the Court to read down

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[32] Cf *Gerner v Victoria* (2020) 270 CLR 412 at [17] (the Court).

other heads of power by reference to s 51(xxiv). That invitation was rejected by the Court of Appeal, on the correct basis that it is inconsistent with fundamental principles of constitutional interpretation (**CA [40]-[42], CAB 178**).

34. Overlap between different heads of power is entirely unexceptional.[33] In *Russell v Russell*,[34] in response to an argument that the marriage power was "diminished" by s 51(xxii), Mason J said that a head of power "should be accorded a full operation according to its terms, unrestricted by dubious implications drawn from the existence of another grant of legislative power touching an associated subject matter", and that "[t]here is no inherent reason for supposing that the legislative powers conferred by the Constitution are mutually exclusive".[35] That is the orthodox analysis. As such, many cases illustrate that limits on the ambit of one head of power do not restrict the ambit of other heads of power unless those limits are, in truth, restrictions that affirmatively impose a prohibition.[36] Limitations that merely mark the extent of an affirmative grant of power do not detract from other heads of power. An example is s 51(xxxv), which concerns conciliation and arbitration only of industrial disputes "extending beyond the limits of any one State". That does not limit other powers, which can validly support laws that may be characterised as laws with respect to conciliation and arbitration of merely intrastate industrial disputes, if those laws are also characterised as laws with respect to some other head of power (eg defence or trading corporations).[37]

35. It is true that certain affirmative prohibitions such as "other than State banking" (s 51(xiii)) and "other than State insurance" (s 51(xiv)) must be observed for any law that is properly characterised as a law with respect to banking or insurance, even if the law also has another character.[38] The requirement for "just terms" in s 51(xxxi)

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[33] For example, the prevailing interpretation of the external affairs powers has been reached notwithstanding the fact that that interpretation is broad enough to swallow entire grants of power conferred by other paragraphs of s 51, such as para (x), concerning fisheries beyond territorial limits, and para (xxx), concerning relations with Pacific islands: see *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 471 (Mason J), 497 (Jacobs J).

[34] (1976) 134 CLR 495 at 539 (Mason J).

[35] *Russell v Russell* (1976) 134 CLR 495 at 539 (Mason J).

[36] *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at [127] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[37] *Pidoto v Victoria* (1943) 68 CLR 87 at 101 (Latham CJ); *Work Choices Case* (2006) 229 CLR 1 at [128] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[38] *Bourke v State Bank of New South Wales* (1990) 170 CLR 276; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369.

is another example of a restriction which, of its nature, impliedly reduces the content of other grants of power. Significantly, however, some heads of power do authorise laws providing for the acquisition of property otherwise than on just terms,[39] highlighting the great care that must be taken before concluding that the scope of one head of power can be read as cutting down other heads of power.

36. Section 51(xxiv) does not contain any affirmative prohibition of the above kind. Rather, it is akin to s 51(xxxv), in that it confers a specific affirmative power the extent of which is limited by the words "throughout the Commonwealth". Those words limit only s 51(xxiv). They do not connote any restriction that would prohibit laws with respect to service and execution outside of the Commonwealth where those laws are supported by some other head of power. As Bell CJ observed in the Court of Appeal, in a proposition that the appellants accept "may well have been correct", "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**).

37. The difficulty with the appellants' argument is illustrated by the fact that they would have to accept that the words "throughout the Commonwealth" in s 51(xxiv) do not impliedly limit the legislative power conferred by Ch III to invest federal jurisdiction in State courts (or the incidental legislative power to regulate service in such matters). Otherwise, there would be no power to authorise overseas service even in matters involving federal jurisdiction. Yet if s 51(xxiv) does not impliedly detract from that power, there is equally no reason to suppose that it impliedly limits s 51(xxix).

38. Finally, the appellants' treatment of s 51(xxiv) as a kind of "exception" to a broader prohibition on Commonwealth power proceeds from a parochial view of the Australian constitutional project that is inappropriate to the construction of the heads of power. There is no doubt that s 51(xxiv) aided the project of uniting the colonies in a nation. But that was not an entirely inward-looking project. The Constitution also called forth a nation with an outward-looking perspective. For Sir Henry Parkes, "[o]ne great end … of a federated Australia is that it must of necessity secure for Australia a place in the family of nations, which it can never attain while it is split up into separate colonies".[40] In pursuit of that "great end", the national polity was

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[39] *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160.

[40] Quoted in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 255 (Deane J).

endowed with express power to legislate with respect to external affairs. There is no reason to treat the external affairs power as being in any way narrower in scope or objective than s 51(xxiv), and thus no reason why that power should not contain within it a similar operation to that which is conceded to s 51(xxiv) within Australia.

(iii) The reliance on the significance of judicial power for a polity and federalism

39. The appellants' reliance on federalism is a thinly veiled variation of the *Melbourne Corporation* submission that was rejected by the Court of Appeal and properly abandoned in this Court (**CA [62], CAB 183**).

40. In the Court of Appeal, the *Melbourne Corporation* argument was rejected not only on its merits, but also because it would have been unfair to allow the appellants to raise it for the first time on appeal given the factual nature of the argument (**CA [60]-[61]**). As recorded in the Court of Appeal's reasons, at that stage of the proceedings the appellants submitted that the TTPA, insofar as it applies to State courts exercising non-federal jurisdiction, was invalid because it effects a "significant" curtailment or interference with the exercise of State constitutional power (**CA [58], CAB 182-183**). The "significance" was said to lie in the circumstance that the law effects "such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities".

41. In its submissions in this Court, rather than raise the fact-sensitive argument that the TTPA "curtails" or "interferes" with State courts to an impermissible degree, the appellants make the blunter submission that there is a constraint on Commonwealth legislative power – separate from and additional to the "principle of federalism enunciated in *Melbourne Corporation*"[41] – prohibiting laws which "alter the reach or scope" of State judicial power (**AS [15], [26], [28], [35]**). That constraint would invalidate not only laws that on factual analysis could be shown to impair the continuing existence of the States as bodies politic (as *Melbourne Corporation* requires), but any "alteration" of the "reach or scope" of State judicial power. That is an implication said to be based on federalism, but advanced without sufficient

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[41] *O'Donoghue v Ireland* (2008) 234 CLR 599 at [12] (Gleeson CJ). See also *Spence v Queensland* (2019) 268 CLR 355 at [6] (Kiefel CJ, Bell, Gageler and Keane JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 210 (Gaudron J).

attention to "the legal nature and effect of the federation established by the Constitution".[42]

42. No principled reasoning supports such an implied limitation. At Federation, State courts became part of an integrated federal judicial system.[43] At that time, "everything adjusted".[44] Thereafter, State Parliaments no longer had exclusive control over the jurisdiction of State courts (which could now be invested with additional jurisdiction by the Commonwealth Parliament pursuant to s 77(iii) of the Constitution). In addition, legislative power with respect to the service of process of State courts became concurrent. The appellants accept this with respect to service "throughout the Commonwealth" (s 51(xxiv)), but strain to deny any equivalent power externally (s 51(xxix)). However, once it is recognised that the principle of federalism can accommodate Commonwealth laws concerning the service of process of State courts within the Commonwealth, it is very difficult to see why it cannot similarly accommodate such laws concerning the service of such process outside Australia (that being a topic that would appear to have less federal ramifications than the regulation of service within Australia).

43. No authority supports the submission that federalism produces an implied limitation on Commonwealth power over and above that identified in *Melbourne Corporation* and the cases that have applied it. Indeed, the proposition that the Commonwealth Parliament cannot make laws which "alter the reach or scope" of State judicial power is contrary to authority. For example, in *R v Reid*,[45] the Victorian Court of Appeal (Winneke P, Buchanan and Chernov JJA) upheld the constitutional validity of s 20(2) of the *Foreign Evidence Act 1994* (Cth), which modified the hearsay rule in respect of foreign material in State courts exercising State jurisdiction. The Court held that the legislation was supported by the external affairs power, and "[did] not purport to alter the nature of State courts or to turn them into different tribunals" so as to constitute a substantial interference with the exercise of State judicial power.[46]

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42 *Gerner v Victoria* (2020) 270 CLR 412 at [14] (the Court).

43 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103 (Gaudron J), 112, 114-115 (McHugh J), 137-139 (Gummow J).

44 *Burns v Corbett* (2018) 265 CLR 304 at [72] (Gageler J).

45 [1999] 2 VR 605.

46 *R v Reid* [1999] 2 VR 605 at [128]-[129].

44. In addition, in *Campbell v Metway Leasing Ltd*,[47] the Full Federal Court upheld the constitutional validity of s 60 of the *Bankruptcy Act 1966* (Cth), which provided that an action commenced by a person who subsequently becomes a bankrupt was stayed upon his or her becoming a bankrupt (including actions in State courts exercising State jurisdiction). In a submission bearing some similarity with that made in the present case, the appellants submitted that s 60 was invalid because "the Supreme Court of New South Wales' practice and procedure is a function of government, and is such a function that is excluded from the operation of Federal law".[48] The Court (Spender, RD Nicholson and North JJ) rejected that submission, holding that "[p]roviding for the continuance or termination of such litigation is an exercise of the bankruptcy power [in s 51(xvii) of the Constitution], and not an interference with courts before whom persons who become bankrupt are parties to litigation".[49] That is, the Full Court saw no difficulty with the Commonwealth Parliament relying on a head of power outside Ch III to make a law staying the exercise of State jurisdiction.

45. The appellants submit that "there is no analogy to be drawn" between the TTPA and the legislation considered in *Reid* (**AS [27]**). They contend that "it is one thing for the Commonwealth … 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 would not". The submission is surprising, for a "direction" of the former kind (which is conceded to be valid) has greater implications for the independence of the States than the latter. In any event, federal principles have nothing to say about the validity of a law regulating of the service of the process of Australian courts externally to Australia and in accordance with international treaties, that being *par excellence* a subject-matter within Commonwealth power.

46. For the above reasons, this Court should not accept that there is any relevant constraint on Commonwealth legislative power arising from "principles of federalism" other than the *Melbourne Corporation* principle, which the appellants now concede has not been infringed.

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47 (2002) 126 FCR 14.

48 *Campbell v Metway Leasing Ltd* (2002) 126 FCR 14 at [24].

49 *Campbell v Metway Leasing Ltd* (2002) 126 FCR 14 at [45].

PART VI: NOTICE OF CONTENTION

47. Strictly in the alternative to his primary submissions, the Attorney-General contends that the validity of ss 9 and 10 of the TTPA should be upheld on a different basis. Neither court below found it necessary to determine this alternative point, having accepted the primary argument (**PJ [128], CAB 136; CA [64], CAB 184**).

48. The alternative submission is that, if ss 9 and 10 of the TTPA would expand a State court's authority to decide in the sense exclusively regulated by Ch III of the Constitution, then those provisions nonetheless validly operate with respect to all civil proceedings in an Australian court (as defined in the TTPA). That is because, on that construction, they operate to create legal rights by reference to the content of State and Territory law and, by conferring jurisdiction to adjudicate those rights, confer federal jurisdiction as described in s 76(ii) of the Constitution.

49. This Court has long recognised that "it is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature".[50] The relevant principles are those stated in *Ruhani v Director of Police* (2005) 222 CLR 489 and applied in *Crosby v Kelly* (2012) 203 FCR 451. This Court refused special leave to appeal from the latter decision on the basis that the decision was "correct" and consistent with the reasoning in *Ruhani*.[51]

50. In *Ruhani*, the *Nauru (High Court Appeals) Act 1976* (Cth) (the **Appeal Act**) provided for "appeals" from the Supreme Court of Nauru to this Court. The Appeal Act was construed to "operate[] by reference to a law other than Commonwealth law" and to "pick up" the law of Nauru as the law to be applied in determining rights and liabilities under the Appeal Act. The Appeal Act, by the one provision, served the double function of both creating the rights and providing the remedy.[52] So construed, and consistently with s 76(ii) of the Constitution, it validly conferred original jurisdiction on the High Court in matters arising under the Appeal Act.

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[50] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166 (Dixon J). See also *Hooper v Hooper* (1955) 91 CLR 529 at 535-536 (the Court).

[51] *Kelly v Crosby* [2013] HCATrans 17 (French CJ, Hayne and Crennan JJ). While it does not have precedential value, that expression of view "is of persuasive value": *Palmer v Ayres* (2017) 259 CLR 478 at [59] (Gageler J), citing *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [52], [112], [119].

[52] *Ruhani* (2005) 222 CLR 489 at [8] (Gleeson CJ), [64]–[66] (McHugh J), [111]–[118] (Gummow and Hayne JJ).

51. In *Crosby v Kelly*, a similar analysis was applied to s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), which provided that the Federal Court may "exercise jurisdiction (whether original or appellate) conferred on that court by a provision … of a law of the Australian Capital Territory … relating to cross-vesting of jurisdiction". The law of the ACT relating to cross-vesting was the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT). Section 4(1) of that Act said that the Federal Court had jurisdiction in relation to "ACT matters" (as defined). The ACT Act did not itself confer jurisdiction on the Federal Court as the literal words of s 4(1), and also s 9(3) of the Commonwealth Act, seemed to suggest. Rather, s 9(3) was construed as creating legal rights by reference to the content of ACT law and also as conferring jurisdiction with respect to the determination of those rights.[53] The "search for a second law … was misplaced".[54]

52. Of course, where Commonwealth law creates rights, even by reference to another body of law, it must be supported by a head of Commonwealth legislative power. In *Ruhani*, the law was supported at least by the external affairs power and by s 51(xxx). In *Crosby v Kelly*, the law was supported by s 122 of the Constitution.

53. Applied to the present case, ss 9 and 10 of the TTPA (on this alternative limb of the argument) can be construed as having the double function of creating new legal rights by reference to State and Territory laws and also conferring jurisdiction to adjudicate those rights. Although (on this construction) those provisions would create new legal rights by reference to State laws that, in their full operation, might not of themselves be supportable by a head of Commonwealth legislative power, the provisions do so only to the extent that they attach consequences to the act of serving initiating process in New Zealand conformably with the Trans-Tasman Agreement. They are therefore laws at least with respect to external affairs.

54. The appellants accept that, consistent with *Ruhani* and *Crosby*, the Commonwealth Parliament could confer federal jurisdiction upon State courts to determine claims against New Zealand defendants and extend the reach of the writs of those courts to New Zealand in respect of such claims (**AS [44]**). However, they submit that ss 9 and 10 of the TTPA cannot be construed as such a law for two reasons.

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[53] *Crosby v Kelly* (2012) 203 FCR 451 at [35]–[37] (Robertson J); see also at [1] (Bennett J) and [2] (Perram J).

[54] *Crosby v Kelly* (2012) 203 FCR 451 at [39] (Robertson J).

55. *First*, the appellants submit that the text of ss 9 and 10 "does not accommodate" the dual function construction. They emphasise the language in s 10 of service having "the same effect" or giving rise to "the same proceeding", but gloss over the words, "as if the initiating document had been served in the place of issue". The appellants' point seems to be that a proceeding arising under the TTPA will not literally be the same proceeding as one that does not arise under the TTPA. So much may be accepted. But the deeming language of "*as if*" accommodates the construction that the TTPA itself creates a federal simulacrum of the rights existing under State law.

56. *Secondly*, the appellants submit that Pt 2 of the TTPA was modelled on SEPA, and that it has never been accepted that the result of effecting service under SEPA is that the ensuing proceeding engages federal jurisdiction (**AS [51]**). On this alternative limb of the argument, however, the premise is that the Court must have concluded that s 10 of the TTPA does invest jurisdiction. *Flaherty v Girgis*, which the appellants accept was "correctly decided", held that the predecessor to SEPA did not invest jurisdiction. Accordingly, for this limb of the argument to be reached, s 10 of the TTPA must be performing a function fundamentally different from the function performed by s 12 of SEPA. That would be a basis for "ascribing to that language in one statute a meaning different from that which it bears in the other" (**AS [51]**).

57. It should be noted for completeness that s 105 of the TTPA confers jurisdiction on "a federal court in relation to any matter arising under this Act (other than Part 8)". That express conferral of jurisdiction on a federal court would not deny the somewhat more implicit conferral of jurisdiction on State courts by ss 9 and 10. That is because the conferral of jurisdiction by ss 9 and 10, if there be one, arises from the attachment of legal consequences to the act of service in New Zealand. It is at most a more specific conferral of jurisdiction that is not inconsistent with the generality of s 105.

PART VII: ESTIMATED TIME

58. The second respondent estimates that up to 1 hour will be required for oral argument.

Dated 3 February 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 SECOND RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the second respondent sets out below a list of the constitutional provisions and statutes referred to in his submissions.

No	Description	Version	Provision(s)
Commonwealth			
1.	*Commonwealth Constitution*	Current	ss 51(x), (xiii), (xiv), (xvii), (xxii), (xxiv), (xxix), (xxx), (xxxi), (xxxv) and (xxxix), 71, 75, 76, 77(ii) and (iii), 122, Ch III

2.	*Bankruptcy Act 1966* (Cth)	11 March 2002 – 31 December 2002	s 60
3.	*Foreign Evidence Act 1994* (Cth)	9 April 1994 – 10 November 1999	s 20(2)
4.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 49, 18 February 2022 – present)	ss 38, 39, 79
5.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth)	1 June 2012 – 1 December 2016	s 9(3)
6.	*Native Title Act 1993* (Cth)	Current (Compilation No. 47, 25 September 2021 – present)	s 66
7.	*Nauru (High Court Appeals) Act 1976* (Cth)	As made (4 July 2008 – 18 February 2022)	-
8.	*Service and Execution of Process Act 1992* (Cth)	Current (Compilation No. 19, 11 May 2018 – present)	s 12
9.	*Service and Execution of Process Act 1901* (Cth)	1 July 1982 – 20 December 1990	-
10.	*Trans-Tasman Proceedings Act 2010* (Cth)	Current (Compilation No. 2, 1 September 2021 – present)	ss 4, 8, 9, 10, 105
State and Territory			
11.	*Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT)	Current (1 January 2011 – present)	s 4(1)