HIGH COURT OF AUSTRALIA

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### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **ZURICH INSURANCE PLC**

First Appellant

**ASPEN INSURANCE UK LIMITED**

Second Appellant

and

**DARIUSZ KOPER**

First Respondent

**ATTORNEY GENERAL OF THE COMMONWEALTH**

Second Respondent

# APPELLANTS' REPLY

## Part I: Certification

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

## Part II: Argument

2. Unless otherwise indicated, capitalised terms in these submissions in reply have the same meaning as in the appellants' submissions in chief filed 9 January 2023.

3. Notwithstanding what is submitted on Mr Koper's behalf at 1RS [7], in circumstances where he has not identified any Commonwealth law that might be said to alter or to bear upon either:

10 (a) the selection of the law of New Zealand as the *lex causae* in respect of any claim that he might have brought in a New South Wales court against BMX NZ arising out of the defects in the Victopia Apartments; or

(b) the existence or extent of his entitlement to relief in relation to that claim,

the possibility that such a proceeding might nonetheless have engaged federal jurisdiction has not been shown to exist otherwise than in the realm of the theoretical.

4. Crucially, neither respondent now suggests that, but for ss 9 and 10 of the TTPA, a NSW court could properly have heard and determined a claim against BMX NZ concerning a tort committed in New Zealand. The effect of those provisions, if read according to their terms, is thus to permit proceedings to be determined, including in the exercise of a State court's
20 non-federal jurisdiction, that otherwise could not be so determined.

5. The respondents' assertion that there is no constitutional impediment to this rests on two broad propositions. The first, developed by reference to *Flaherty v Girgis* (1987) 162 CLR 574, is that while the *Constitution*, specifically in Ch III, limits the power of the Commonwealth Parliament to invest State courts with the form of adjudicative authority to which the label "subject-matter jurisdiction" has been applied, ss 9 and 10, which are concerned with the service of process, do not invest any court with such authority (1RS [28]-[45]; 2RS [12]-[49]). However, this fails to recognise that "where an action is in personam and transitory, the jurisdiction of a court of unlimited jurisdiction does not depend upon subject-matter but upon the amenability of the defendant to the writ expressing the
30 Sovereign's command": *Flaherty v Girgis* at 598. The scope and reach of the judicial power exercised by State courts may thus be altered otherwise than by the investiture of what was described in *Flaherty v Girgis* (at 598) as "a new substantive jurisdiction". The question in this appeal is the extent to which, apart from s 51(xxiv) and s 77(ii) and (iii), the

Commonwealth Parliament is empowered to alter the scope and reach of that judicial power. *Flaherty v Girgis* affords little, if any, guidance in answering that question.

6. The second proposition on which the respondents rely is that to the extent that the *Constitution* denies to the Commonwealth Parliament the power to stultify the exercise of judicial power by any court, whether by entrenching heads of jurisdiction such as that conferred by s 75(v) or by means of the *Melbourne Corporation* doctrine, this does not detract from the validity of ss 9 and 10, as those provisions facilitate the exercise of State judicial power (1RS [51]; 2RS [22], [39]-[46]).

7. The logical implications of this may be tested by considering a hypothetical Commonwealth law under which service of the process of a State court upon a defendant located outside Australia would be deemed to have been validly effected if, after filing such process, the plaintiff were to do no more than to recite a prescribed verbal formula. Such a law would, on any view, be a law with respect to matters geographically external to Australia; it would not effect any investiture of jurisdiction; and it would, by relaxing all requirements pertaining to the service of process upon a foreign defendant, facilitate the exercise of State judicial power. The consequence of this last proposition, on the respondents' case, is either that the law would avoid transgressing the limit on Commonwealth legislative power recognised in *Melbourne Corporation* or that the existence of any such transgression would depend on a "fact-sensitive" inquiry into the resulting burdens on the operation of State courts (2RS [41]). And yet the law would effectively transform the Supreme Courts of the States into courts of universal jurisdiction. That the Commonwealth could so radically alter the character of the organs of State judicial power, and that the validity of such an alteration may turn on, say, the extent of any increase in the caseloads of State courts, cannot be reconciled with the recognition in *The Boilermakers' Case* (1956) 94 CLR 254 at 268 that "the constitutional sphere of the judicature of the States must be secured from encroachment". At best, the respondents' argument would permit some encroachment, but not too much, whatever that might involve; and at worst, it would recognise no basis upon which the law posited above might be held invalid.

8. This suffices to demonstrate the provenance, in entirely orthodox constitutional discourse, of the appellants' submission that except where expressly empowered to do so by s 51(xxiv) and s 77(ii) and (iii), the Commonwealth Parliament lacks the power to alter the scope or reach of State judicial power, as distinct from, say, the content of the adjectival law required to be applied in the exercise of such power. Indeed, if the heads of power in s 51 contained within them the power so to alter, there would have been no need for s 77(ii). The

combination of Ch III and s 51(xxxix) would, on that view, suffice to support any law purporting to define the extent to which the jurisdiction of any federal court was exclusive of that of State courts. The very inclusion of s 77(ii) is thus indicative of an assumption on the part of the framers of the *Constitution* that the Commonwealth may not alter the contours of State judicial power except where expressly and specifically empowered to do so. The respondents are incorrect, then, in their assertion that the position urged upon this Court by the appellants is "unprincipled" (2RS [11]) or "unsupported by the text of the *Constitution*" (1RS [21]).

9. The appellants' reliance on s 77(ii) as being reflective of the assumption stated above produces three consequences. First, it makes very clear that the appellants' case does not depend on an assertion that s 51(xxiv) abstracts from the other heads of power in s 51 the power to legislate with respect to the service of the process of State courts beyond the territorial limits of the Commonwealth. Section 51(xxiv) cannot abstract from those heads of power that which they do not otherwise comprehend or contain.

10. Secondly, the basis of the appellants' argument being a lack of power in the Commonwealth Parliament to alter the scope or reach of State judicial power except where such power is expressly and specifically conferred by the *Constitution*, it is incorrect to say, as the Commonwealth Attorney-General does (2RS [31]-[32]), that the logical conclusion of that argument is that the words "subject to this *Constitution*" in the chapeau of s 51 would require s 51(xxiv) to be read more narrowly than its language suggests. After all, on the appellants' case, s 51(xxiv) is an express and specific conferral of power to alter the reach of State judicial power, such that it should be given the broadest meaning that its language can accommodate.

11. And thirdly, it should also be apparent that the appellants' case does not proceed upon any premise to the effect that ss 9 and 10 should be seen as investing State courts with "jurisdiction", in the sense of the authority to decide a particular class of controversy, as distinct from the power to exert some force over the person of the defendant. If, as the appellants submit, this appeal turns on the extent of the Commonwealth's power to alter the scope or reach of State judicial power, then what is determinative is the fact that, even in respect of a claim that does not engage federal jurisdiction, ss 9 and 10 permit to be served a defendant who could not otherwise be validly served, and therefore permit to be determined a claim that could not otherwise be properly heard. In other words, ss 9 and 10 effect an alteration to the reach of State judicial power, irrespective of whether they can be said to invest any State court with jurisdiction. The emphasis placed by the respondents on

the meaning that might be ascribed to the term "jurisdiction" in a constitutional setting (1RS [28]-[42]; 2RS [12]-[16]), combined with their invocation of *Flaherty v Girgis* as an insuperable barrier to the success of this appeal, serves only to obscure this.

12. Perhaps mindful of this, the respondents attempt to reframe service and personal jurisdiction as concepts wholly separate from judicial power. This leads Mr Koper to make the startling submission that it is not an essential attribute of judicial power that decisions made in the exercise of such power are binding (1RS [47]). In a similar vein, the Commonwealth Attorney-General asserts that because the making of rules of service, when undertaken by a court, is merely incidental to the exercise of judicial power, the conditions for binding a defendant to a judicial decision are not essential to, or "part of", judicial power (2RS [21]). However, an incidental power extends to "every power and every control the denial of which would render the grant [of the principal power] ineffective": *D'Emden v Pedder* (1904) 1 CLR 91 at 110. It is thus difficult to understand how the conditions of binding a defendant can be said to be inessential to judicial power merely because the power exercised by courts in adopting rules of procedure is incidental to the exercise of judicial power.

13. One is prompted to ask whether, on the respondents' arguments, a proper outcome for the exercise of judicial power is the publication of non-binding recommendations for the resolution of disputes, or whether it is sensible to speak of judicial power being exercised in proceedings *inter partes* in relation to persons who, by reason of their location and the nature of the claims against them, can never be bound by decisions of the court purporting to exercise that power. Both these questions must be answered in the negative. As a consequence, any attempt by one polity to expand the class of persons who may be bound by judicial decisions made in the name of another polity must be seen as a purported alteration of the reach of the judicial power of that latter polity.

14. The Commonwealth Attorney-General's argument has at least the virtue of symmetry. On his argument, if the Commonwealth lacks power, apart from the grant of power in s 51(xxiv), to make laws with respect to the service of the process of State courts in proceedings that would engage their State jurisdiction, then the States similarly must lack the power to make laws with respect to such service where the relevant claim would engage federal jurisdiction. The result is that in such cases, State rules of service apply could not apply of their own force, but only as surrogate federal law, in circumstances where there is no Commonwealth to "pick them up" (2RS [23]). This last proposition is incorrect. The rules of service of a State court prescribe the limits of its territorial jurisdiction and its jurisdiction over persons. Such rules are thus amply capable of being "picked up" by the reference in s 39(2) of the

*Judiciary Act 1903* (Cth) to the limits of the jurisdictions of State courts "as to *locality*, subject-matter, or *otherwise*" (emphasis added). In any event, it may be asked why, if rules of service prescribe the conditions for binding a defendant to the outcome of an exercise of judicial power, and thus for the quelling of a controversy, it should not be for the Commonwealth alone to prescribe such conditions where the judicial power invoked is that of the Commonwealth itself.

15. As for Commonwealth Attorney-General's Notice of Contention, the following points may be made. First, the inclusion in s 10 of the TTPA of the words "as if the initiating document had been served in the place of issue" following the reference to "the same effect" and "the same proceeding" adds nothing to the Attorney-General's argument. Those words prompt one to ask what proceeding would have ensued if Mr Koper had somehow served BMX NZ in New South Wales. The answer is, amongst other things, a proceeding that would not have engaged federal jurisdiction. This may be contrasted with the kind of proceeding that would have resulted if BMX NZ had been served under s 9 of the TTPA, as understood on the Attorney-General's alternative case – namely, a proceeding that would have engaged federal jurisdiction.

16. Secondly, for the reasons outlined above, the appellants' case does not depend on ss 9 and 10 being characterised as investing State courts with (subject-matter) jurisdiction. Contrary to 2RS [56], the notion of such an investiture does not afford the Attorney-General a basis for distinguishing between, on the one hand, ss 9 and 10 and, on the other, the cognate provisions in the SEPA. That being so, if ss 12 and 15 of the SEPA do not perform the dual function of defining parties' rights and conferring jurisdiction to enforce those rights, then neither do ss 9 and 10 of the TTPA.

Dated: 27 February 2023


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