

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

ZURICH INSURANCE COMPANY LTD & ANOR APPELLANTS

AND

DARIUSZ KOPER & ANOR RESPONDENTS

Zurich Insurance Company Ltd v Koper

[2023] HCA 25

Date of Hearing: 13 April 2023

Date of Judgment: 8 August 2023

S147/2022

ORDER

- 1. Appeal dismissed.*
- 2. The appellants pay the costs of the first respondent.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with G E S Ng for the appellants (instructed by Wotton + Kearney)

N C Hutley SC with M F Caristo and B A O'Connor for the first respondent (instructed by Piper Alderman)

S P Donaghue KC, Solicitor-General of the Commonwealth, with B K Lim and J G Wherrett for the second respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Zurich Insurance Company Ltd v Koper

Practice and procedure – Jurisdiction – Service outside Australia – Where first respondent sought leave under *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("Claims Act") to bring proceedings against appellant insurers in Supreme Court of New South Wales ("NSWSC") – Where ability of first respondent to bring proceedings under Claims Act against appellant insurers in NSWSC assumed to depend on whether notional proceedings in NSWSC could be brought against insured resident of New Zealand – Whether service of process on insured in New Zealand would have been effective by reason of ss 9 and 10 of *Trans-Tasman Proceedings Act 2010* (Cth) ("TTPA") – Whether ss 9 and 10 of TTPA have valid application to initiating document issued by State court relating to civil proceeding in State jurisdiction.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Implications from *Constitution* – Power with respect to service and execution throughout the Commonwealth of civil and criminal process – Where ss 9 and 10 of TTPA accepted to be within legislative power of Commonwealth Parliament under s 51(xxix) of *Constitution* – Whether ss 9 and 10 of TTPA invalid in application to initiating document issued by State court in relation to civil proceeding in State jurisdiction – Whether capacity of Commonwealth Parliament to alter scope and reach of State judicial power subject to implied limitation derived from ss 51(xxiv), 77(ii) and 77(iii) of *Constitution* – Whether power of Commonwealth Parliament under s 51(xxiv) of *Constitution* to make laws for service of process of State courts throughout geographical area of Commonwealth inconsistent with purported implied limitation.

Words and phrases – "authority to adjudicate", "constitutional implications", "constitutional limitation", "federal jurisdiction", "initiating document", "initiating process", "judicial power", "judicial power of the Commonwealth", "jurisdiction", "legislative power", "personal jurisdiction", "service of process", "State judicial power", "State jurisdiction", "subject-matter jurisdiction", "territorial jurisdiction", "text and structure of the *Constitution*".

Constitution, ss 51, 71, 75, 76, 77.

Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW), ss 4, 5.

Trans-Tasman Proceedings Act 2010 (Cth), ss 3, 9, 10.

1 KIEFEL CJ, GAGELER, GLEESON AND JAGOT JJ. The *Trans-Tasman Proceedings Act 2010* (Cth) ("the Trans-Tasman Proceedings Act") is designed to streamline the process for resolving civil proceedings with trans-Tasman elements¹ and to implement in Australian law the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement ("the Trans-Tasman Agreement")².

2 Article 4 of the Trans-Tasman Agreement provides, amongst other things, that "[i]nitiating 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"³ and that "[s]ervice 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"⁴. The Trans-Tasman Agreement defines "court within the territory of a Party", for Australia, to include any court of a State⁵.

3 Part 2 of the Trans-Tasman Proceedings Act, which is headed "Service in New Zealand of initiating documents issued by Australian courts and tribunals", is specifically designed to implement Art 4 of the Trans-Tasman Agreement in Australian law⁶. Within the meaning of the Act, an "Australian court" includes a court of a State⁷ and an "initiating document" in relation to an Australian court is a document by which a civil proceeding is commenced in that court or by reference to which a person becomes a party to a civil proceeding in that court⁸.

1 Section 3(a) of the Trans-Tasman Proceedings Act.

2 Section 3(c) of the Trans-Tasman Proceedings Act.

3 Article 4(1) of the Trans-Tasman Agreement.

4 Article 4(2) of the Trans-Tasman Agreement.

5 Article 1 of the Trans-Tasman Agreement (definition of "court within the territory of a Party").

6 Australia, House of Representatives, *Trans-Tasman Proceedings Bill 2009*, Explanatory Memorandum at 6.

7 Section 4 of the Trans-Tasman Proceedings Act (definition of "Australian court").

8 Section 4 of the Trans-Tasman Proceedings Act (definition of "initiating document").

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4 Key provisions within Pt 2 are ss 9 and 10. Subject to limited exceptions⁹, s 9(1) permits an initiating document issued by an Australian court that relates to a civil proceeding in that court to be served under the Part in New Zealand, without need for the court to give leave for that service and without need for the court to be satisfied that there is a connection between the proceeding and Australia. Section 9(2) qualifies the permission granted under s 9(1) by requiring the initiating document to be served in New Zealand in the same way that the initiating document is required or permitted to be served in the place of issue under the procedural rules of the Australian court. Section 10 provides that service of an initiating document in New Zealand under s 9 has the same effect, and gives rise to the same proceeding, as if the initiating document had been served in the place of issue.

5 The question which arises for determination in this appeal is whether ss 9 and 10 of the Trans-Tasman Proceedings Act have valid application to an initiating document issued by a State court that relates to a civil proceeding in a matter in State jurisdiction as distinct from a civil proceeding in a matter within federal jurisdiction invested in that court by a Commonwealth law enacted under s 77(iii) of the *Constitution*. The appeal is by special leave from a judgment of the Court of Appeal of the Supreme Court of New South Wales (Bell CJ, Ward P and Beech-Jones JA)¹⁰ which dismissed an appeal by leave from an interlocutory judgment of a judge of the Equity Division of that Court (Rein J)¹¹.

6 For the reasons which follow, ss 9 and 10 of the Trans-Tasman Proceedings Act validly apply in accordance with their terms to any initiating document issued by a State court relating to any civil proceeding in that court. That is so irrespective of whether the proceeding is in a matter in federal jurisdiction or in a matter in State jurisdiction. The primary judge and the Court of Appeal were correct so to hold. The appeal must therefore be dismissed.

The procedural context

7 The question for determination in the appeal has arisen in a somewhat roundabout way. The procedural context is as follows.

9 See s 8(1) and (2) of the Trans-Tasman Proceedings Act.

10 *Zurich Insurance PLC v Koper* (2022) 368 FLR 420.

11 *Koper v Zurich Insurance PLC* [2021] NSWSC 1587.

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8 The first respondent ("Mr Koper") is the registered proprietor of a residential unit in the Victopia Apartments situated in Auckland, New Zealand. The Victopia Apartments were designed and constructed by Brookfield Multiplex Constructions (NZ) Ltd ("BMX NZ"). BMX NZ was incorporated in New Zealand and has never had any assets or any presence in Australia. The appellants ("the Insurers") were insurers of BMX NZ under a program of professional indemnity insurance.

9 Mr Koper, as representative of other registered proprietors of units within the Victopia Apartments, commenced proceedings in the High Court of New Zealand against BMX NZ seeking damages in respect of defects in the design and construction of the building. Those proceedings were concluded by a judgment of the High Court of New Zealand awarding damages against BMX NZ in an amount of some NZ\$53 million¹². BMX NZ subsequently went into liquidation, leaving a substantial portion of the judgment outstanding.

10 Thereafter, and again as representative of other registered proprietors of units within the Victopia Apartments, Mr Koper brought proceedings against the Insurers in the Supreme Court of New South Wales seeking leave to bring substantive proceedings against the Insurers in that Court under s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("the Claims Against Insurers Act").

11 Section 4 of the Claims Against Insurers Act creates a statutory entitlement for a claimant, to whom an insured person has a contractual liability in respect of which the insured person is entitled to be indemnified by an insurer, to recover the amount of the indemnity payable pursuant to the terms of the relevant contract of insurance from the insurer in proceedings before a New South Wales court. In proceedings under that section, "the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person". Section 5 provides that "[p]roceedings may not be brought, or continued, against an insurer under section 4 except by leave of the court in which the proceedings are to be, or have been, commenced".

12 Having regard to s 12(1)(b) of the *Interpretation Act 1987* (NSW), according to which "a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales", the primary judge construed s 4 of the Claims Against Insurers Act as making the entitlement of a claimant to recover against an insurer in proceedings

12 *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511.

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before a New South Wales court "hinge"¹³ on the underlying claim against the insured person being one which the claimant brought or could have brought in proceedings before a New South Wales court¹⁴. That construction of s 4 was common ground between the parties in the Court of Appeal¹⁵ and in this Court. The appeal has therefore provided no occasion to examine its correctness or otherwise.

13 The consequence of that construction was that the entitlement of Mr Koper, as representative of other registered proprietors of units within the Victopia Apartments, to bring proceedings against the Insurers before the Supreme Court of New South Wales under s 4 of the Claims Against Insurers Act depended on whether Mr Koper could have brought in proceedings in the Supreme Court of New South Wales the claims against BMX NZ which Mr Koper in fact brought in the earlier proceedings in the High Court of New Zealand. Those notional proceedings in the Supreme Court of New South Wales being in pursuit of claims by Mr Koper against BMX NZ in tort, the ability of Mr Koper to have brought them depended in turn on whether BMX NZ could have been served with originating process issued by the Supreme Court of New South Wales¹⁶.

14 BMX NZ having no presence in Australia, it was the common assumption of the parties that nothing in the *Uniform Civil Procedure Rules 2005* (NSW) would have authorised service on BMX NZ in New Zealand of an originating process issued by the Supreme Court of New South Wales in the notional proceedings. That being so, the primary judge framed the critical issue for determining whether leave should be granted to Mr Koper to bring proceedings against the Insurers under s 4 of the Claims Against Insurers Act as being whether service on BMX NZ in New Zealand of an originating process issued by the Supreme Court of New South Wales would have been effective by operation of ss 9 and 10 of the Trans-Tasman Proceedings Act¹⁷.

13 Compare *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 162 [36].

14 *Koper v Zurich Insurance PLC* [2021] NSWSC 1587 at [74]-[75].

15 See *Zurich Insurance PLC v Koper* (2022) 368 FLR 420 at 424 [13]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 499 [10].

16 See *Laurie v Carroll* (1958) 98 CLR 310 at 322-323; *Gosper v Sawyer* (1985) 160 CLR 548 at 564-565; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 517 [13].

17 *Koper v Zurich Insurance PLC* [2021] NSWSC 1587 at [75].

5.

15 The issue so framed for the purposes of the Claims Against Insurers Act was the context in which the Insurers argued, first before the primary judge and again before the Court of Appeal, that service on BMX NZ in New Zealand of an originating process issued by the Supreme Court of New South Wales in the notional proceedings by Mr Koper against BMX NZ would not have been effective for the reason that ss 9 and 10 of the Trans-Tasman Proceedings Act have no valid application to an initiating document issued by a State court in relation to a civil proceeding in State jurisdiction.

16 The argument proceeded before the primary judge and the Court of Appeal on the uncontested premise that the notional proceedings by Mr Koper against BMX NZ in the Supreme Court of New South Wales would not have been in a matter within federal jurisdiction and would not have come within federal jurisdiction merely by virtue of service of an originating process in reliance on ss 9 and 10 of the Trans-Tasman Proceedings Act. The Attorney-General of the Commonwealth, who intervened and was joined as a party in the Supreme Court, sought to contest that premise by notice of contention filed in the appeal to this Court, but only contingently: the contention being that "if" ss 9 and 10 of the Act confer jurisdiction on a court then the jurisdiction conferred must be federal jurisdiction. For reasons which will become apparent, the contingency does not arise. The contention can therefore be put to one side and the premise that the notional proceedings have been in a matter in State jurisdiction can continue to be accepted.

17 Rejecting the constitutional argument of the Insurers, the primary judge granted the leave Mr Koper sought under s 5 of the Claims Against Insurers Act. Endorsing the reasoning of the primary judge, the Court of Appeal upheld that decision.

The argument of the Insurers

18 On the appeal to this Court, the Insurers reprised the nub of the argument they made unsuccessfully to the primary judge and to the Court of Appeal.

19 The Insurers did not contest the holding of the Court of Appeal¹⁸ that ss 9 and 10 of the Trans-Tasman Proceedings Act are properly characterised as laws with respect to "external affairs" within the legislative power of the Commonwealth Parliament under s 51(xxix) of the *Constitution*. Each of ss 9 and 10 of the Act answers the description of a law with respect to external affairs on the basis that it is reasonably capable of being considered appropriate and adapted

18 *Zurich Insurance PLC v Koper* (2022) 368 FLR 420 at 430 [39].

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to implementing Art 4 of the Trans-Tasman Agreement¹⁹. Each also answers that description on the distinct basis that its subject-matter is something geographically external to Australia, being the service of documents in New Zealand²⁰. The Insurers also accepted that s 51(xxix) is not to be read down to exclude service of a State court process outside Australia by reference to s 51(xxiv) or any other source of Commonwealth legislative power²¹.

20 The Insurers similarly did not contest the rejection by the Court of Appeal²² of their separate argument to the effect that ss 9 and 10 of the Trans-Tasman Proceedings Act infringe the implied constitutional limitation on the capacity of the Commonwealth Parliament to interfere with the functioning of State governmental institutions recognised in *Melbourne Corporation v The Commonwealth*²³. They have never suggested infringement of s 106 of the *Constitution*²⁴.

21 Before this Court, as before the primary judge and the Court of Appeal, the Insurers argued for recognition of a hitherto unrecognised implied constitutional limitation on the capacity of the Commonwealth Parliament. The constitutional limitation for which they argued was that the Commonwealth Parliament lacks legislative power to "alter the scope and reach of State judicial power", except to the extent that it is expressly empowered to do so by s 51(xxiv), s 77(ii) or s 77(iii) of the *Constitution*.

22 To develop that argument, the Insurers started with the early observation of Griffith CJ in *Ah Yick v Lehmert*²⁵ "that judicial power is an attribute of sovereignty which must of necessity be exercised by some tribunal, that that tribunal must be constituted by the sovereign power, and that the limits within which the judicial power is to be exercised by the tribunal must be defined". From there they

19 See *Victoria v The Commonwealth* (1996) 187 CLR 416 at 487.

20 See *XYZ v The Commonwealth* (2006) 227 CLR 532 at 538-539 [10], 551 [44]-[45].

21 See *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 103-104 [142], 127 [219]-[221].

22 *Zurich Insurance PLC v Koper* (2022) 368 FLR 420 at 434-435 [57]-[64].

23 (1947) 74 CLR 31.

24 Compare *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 575.

25 (1905) 2 CLR 593 at 603.

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advanced the general proposition that "it would be inconsistent with the nature of judicial power" so described "if the scope and reach of the judicial power of one polity, including as defined by the rules of service of its courts, were capable of being altered by an exercise of legislative power by another polity".

23 The Insurers continued their argument by portraying s 51(xxiv), s 77(ii) and s 77(iii) of the *Constitution* as provisions which "qualify, but do not wholly displace" the general proposition with which they started: s 51(xxiv) by empowering the Commonwealth Parliament to make laws for the service throughout the geographical area of the Commonwealth of the civil and criminal process of State courts; s 77(ii) by empowering the Commonwealth Parliament to make laws defining the extent to which the jurisdiction of any federal court is to be exclusive of that invested in State courts; and s 77(iii) by empowering the Commonwealth Parliament to invest any State court with federal jurisdiction and thereby implicitly also contemplating power on the part of the Commonwealth Parliament to make laws for the service of the civil and criminal process of State courts in relation to matters in federal jurisdiction.

24 Taking the general proposition with which they started and adjusting that general proposition to accommodate the qualifications which they acknowledged, the Insurers derived the conclusion that "while, in relation to matters that would not engage federal jurisdiction, the Commonwealth Parliament may make laws with respect to the service throughout the Commonwealth of the process of State courts, it lacks power to make laws with respect to the service of such process outside the territory of the Commonwealth".

25 What rational constitutional purpose might conceivably be served through the creation of a constitutional structure which simultaneously conceded to the Commonwealth Parliament power to make laws for the service of process of State courts throughout the geographical area of the Commonwealth but denied to the Commonwealth Parliament power to make laws for the service of process of State courts beyond the geographical area of the Commonwealth, the Insurers did not explain. None is apparent.

Rejection of the argument of the Insurers

26 Constitutional implications, as Brennan CJ emphasised in *McGinty v Western Australia*²⁶, "exist in the text and structure of the Constitution" such that "[n]o implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure". His Honour endorsed the

26 (1996) 186 CLR 140 at 168.

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following statement of Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*²⁷:

"It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure."

27 That approach to constitutional implications was unanimously taken up and applied in *Lange v Australian Broadcasting Corporation*²⁸. It was said in *Gerner v Victoria*²⁹ to be "now well settled".

28 Being wholly structural, the implied constitutional limitation on the capacity of the Commonwealth Parliament for which the Insurers argued is therefore incapable of being recognised unless demonstrated to be logically or practically necessary for the preservation of the integrity of the constitutional structure.

29 The implied constitutional limitation on the capacity of the Commonwealth Parliament for which the Insurers argued fails to meet that threshold requirement for recognition. Indeed, the limitation would rest on foundations which are in truth contradicted by the constitutional structure.

30 The Attorney-General of the Commonwealth correctly pointed out in oral argument that it is not correct to start (as did the Insurers) with a general conception of the nature of the relationship of polities within a federation and then to treat (as did the Insurers) express provisions of the *Constitution* as exceptions to that general conception. That would be to revert to a mode of constitutional analysis rejected more than a century ago in *The Engineers' Case*³⁰. The essential problem

27 (1992) 177 CLR 106 at 135.

28 (1997) 189 CLR 520 at 566-567.

29 (2020) 270 CLR 412 at 422 [14]. See also *Burns v Corbett* (2018) 265 CLR 304 at 355 [94].

30 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

with that long-rejected mode of analysis is the problem which was exposed in *Gerner v Victoria*³¹: "federation is not a 'one size fits all' proposition"; "the kind of federation that is created depends on the text and structure of its constitutive instrument"; and "the legal nature and effect of the federation established by the *Constitution* can be known only from the terms and structure of the *Constitution* itself". Constitutional construction starts by reference to the terms and structure of the *Constitution* in the same way as statutory construction starts by reference to the terms and structure of the applicable statute. Of course, the text and structure of the *Constitution* are to be understood within the totality of its legal and historical context.

31 To start the analysis in the orthodox manner, by reference to the terms and structure of the *Constitution*, is to appreciate immediately that the general proposition about the supposed "scope and reach" of the "judicial power" of a polity in a federation, upon which the Insurers founded their argument, involves a conflation of concepts which the *Constitution* itself treats as distinct.

32 Chapter III of the *Constitution* refers in s 71 to "[t]he judicial power of the Commonwealth"; it says nothing in terms about the judicial power of a State. Nevertheless, it refers in ss 71 and 77(iii) to "federal jurisdiction", being authority to exercise the judicial power of the Commonwealth conferred by s 75 or by a law made by the Commonwealth Parliament under s 76 or s 77(i) or (iii). And it refers in s 77(ii) to State jurisdiction (which it describes as "jurisdiction ... which belongs to or is invested in the courts of the States"), being correspondingly authority to exercise the judicial power of a State conferred by a State Constitution or by a law made by a State Parliament³².

33 These constitutional references to federal jurisdiction and State jurisdiction are to the authority of a court to adjudicate, the difference between them lying in the source of the authority. The reference to jurisdiction in the context of federal jurisdiction is to the authority of a court to adjudicate a "matter" within one or more of the nine categories enumerated in s 75 and s 76³³, the term "matter" referring not to a legal proceeding "but rather [to] the subject matter for determination in a

31 (2020) 270 CLR 412 at 422 [14].

32 *Rizeq v Western Australia* (2017) 262 CLR 1 at 22 [50], quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

33 *Rizeq v Western Australia* (2017) 262 CLR 1 at 22-23 [51].

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legal proceeding"³⁴, and the enumerated categories of matter being identified "by such characteristics as identity of parties (s 75(iii), (iv)), remedy sought (s 75(v) ...), content (... s 76(i)), and source of the rights and liabilities which are in contention (ss 75(i), 76(ii))"³⁵. The equivalent reference in the context of State jurisdiction, although not confined to the authority of a court to adjudicate a "matter"³⁶, is correspondingly to the authority of a court to exercise State judicial power with respect to a subject-matter the adjudication of which is authorised under a State Constitution or under a law made by a State Parliament. The reference to "jurisdiction" in neither case is to a legal proceeding within which adjudication occurs. The constitutional conception of "jurisdiction" is accordingly that which is often referred to as subject-matter jurisdiction³⁷.

34 In respect of neither federal jurisdiction nor State jurisdiction is a dimension of the constitutional conception of "jurisdiction" that which is sometimes referred to as "territorial jurisdiction"³⁸ and sometimes referred to as "personal jurisdiction"³⁹: being the amenability of a person to the service of process as a precondition to the making of a binding adjudication in a legal proceeding to which that person is a party⁴⁰. The amenability of a person to the service of process is a

34 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

35 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 585 [50], quoting *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 653.

36 See *Burns v Corbett* (2018) 265 CLR 304 at 347 [71] and the cases there cited.

37 eg *Flaherty v Girgis* (1987) 162 CLR 574 at 598; *Lipohar v The Queen* (1999) 200 CLR 485 at 514 [69].

38 eg *Gosper v Sawyer* (1985) 160 CLR 548 at 565; *Flaherty v Girgis* (1987) 162 CLR 574 at 598; *Lipohar v The Queen* (1999) 200 CLR 485 at 514 [69].

39 eg *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 969 [57]; 405 ALR 402 at 416.

40 See *Lipohar v The Queen* (1999) 200 CLR 485 at 517 [79]; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 960-961 [7]; 405 ALR 402 at 404 and the cases there cited. See generally Leeming, *Authority to Decide*, 2nd ed (2020) at 175-177 [6.1].

standard, albeit not invariable⁴¹, procedural precondition to the exercise by a court of authority to adjudicate on a subject-matter within federal jurisdiction or State jurisdiction. But amenability to the service of process does not define federal jurisdiction. Nor does it define State jurisdiction. Pithily stated in the language of Bell CJ explaining the decision under appeal: "Personal jurisdiction is not a constitutional concept."⁴²

35 Subject to the *Constitution*, including subject to such imperatives and constraints concerning the provision of procedural fairness as are implicit in the nature of judicial power, the service of process in proceedings involving the exercise of federal jurisdiction vested in a federal court or a State court can be seen to be both an implied incident of the judicial power of the Commonwealth referred to in s 71 of the *Constitution* (on the basis that "[t]he judicial power, like all other constitutional powers, extends to every authority or capacity which is necessary or proper to render it effective"⁴³) and within the legislative power of the Commonwealth Parliament under s 51(xxxix) of the *Constitution* as a matter incidental to the execution of the Commonwealth judicial power vested in those courts by a law made under s 76 or s 77(i) or (iii) of the *Constitution*⁴⁴. For the purposes of s 51(xxxix), service of process of a court exercising federal jurisdiction can be understood as an aspect of "the procedure and the practice to be observed in relation to Federal jurisdiction"⁴⁵ even though service of process might not in every other context be described as "a mere matter of the practice or procedure observed by the particular court in the exercise of its jurisdiction"⁴⁶.

41 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 27 [22]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 348 [38].

42 *Zurich Insurance PLC v Koper* (2022) 368 FLR 420 at 433 [52].

43 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 579 [118].

44 See *The Queen v Davison* (1954) 90 CLR 353 at 369; *Harrington v Lowe* (1996) 190 CLR 311 at 324.

45 *The Commonwealth v Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69 at 105. See *Gosper v Sawyer* (1985) 160 CLR 548 at 558, referring to *H C Sleigh Ltd v Barry Clarke & Co Ltd* [1954] SASR 49 at 51-53.

46 *Gosper v Sawyer* (1985) 160 CLR 548 at 565. See also at 558-559.

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36 Subject again to the *Constitution*, including subject again to such imperatives and constraints concerning the provision of procedural fairness as are implicit in the nature of judicial power, the service of process in proceedings involving the exercise of jurisdiction by a State court is also within the legislative power of the Commonwealth Parliament under s 51(xxiv) of the *Constitution*. That is so whether the jurisdiction that is to be exercised by the State court is federal jurisdiction or State jurisdiction. As expounded in *Flaherty v Girgis*⁴⁷, s 51(xxiv) "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": "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".

37 Far from constituting an exception to a general rule pursuant to which it is inconsistent with the nature of State judicial power for the reach of the process of a State court in a proceeding in State jurisdiction to be extended by Commonwealth legislation, s 51(xxiv) of the *Constitution* demonstrates that for Commonwealth legislation to extend the reach of the process of a State court in a proceeding in State jurisdiction is wholly consistent with the structure of the *Constitution*. Section 51(xxiv) "is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each State in every other State [and Territory]"⁴⁸. The very existence of s 51(xxiv) is sufficient to deny the existence of the structural implication for which the Insurers argued.

Conclusion

38 Sections 9 and 10 of the Trans-Tasman Proceedings Act are within the legislative power of the Commonwealth Parliament under s 51(xxix) of the *Constitution*. They have valid application to an initiating document issued by a State court in relation to a civil proceeding in State jurisdiction no less than they have valid application to an initiating document issued by a State court in relation to a matter in federal jurisdiction.

39 The appeal must be dismissed. Mr Koper's costs of the appeal must be paid by the Insurers.

47 (1987) 162 CLR 574 at 598. See also *Lipohar v The Queen* (1999) 200 CLR 485 at 514 [69]; *Truong v The Queen* (2004) 223 CLR 122 at 156 [78].

48 *Aston v Irvine* (1955) 92 CLR 353 at 364. See also *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at 500-501 [23].

40 GORDON, EDELMAN AND STEWARD JJ. The facts and circumstances of the present appeal are set out in the reasons of the other members of the Court ("the Joint Reasons"). So are the provisions of the applicable federal and State legislation. We agree that the appeal must be dismissed. We write separately to address three matters: constitutional implications, the so-called "constitutional conception of 'jurisdiction'" and, finally, the premise on which this appeal was argued.

Constitutional implications

41 In *Australian Capital Television Pty Ltd v The Commonwealth* ("ACTV")⁴⁹, in a passage quoted with approval by Brennan CJ in *McGinty v Western Australia*⁵⁰, Mason CJ said:

"It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure."

42 Contrary to how that statement is applied in the Joint Reasons, Mason CJ was saying little more than that the process of constitutional interpretation is not mechanistic or literalist. The meaning conveyed by the words of the *Constitution* may be deeper and more nuanced than that which is revealed by the attribution of singular dictionary meanings to particular words.

43 An implication that is derived from the structure of the *Constitution* will also depend upon the text of the *Constitution*. Contrary to what is said in the Joint Reasons, this Court in *Lange v Australian Broadcasting Corporation*⁵¹ and *Gerner v Victoria*⁵² did not endorse an approach of categorising constitutional implications as either "textual" or "structural". Rather, in *Lange* this Court said of implications arising from the notion of representative government that "[s]ince *McGinty* it has been clear, if it was not clear before, that the Constitution

49 (1992) 177 CLR 106 at 135.

50 (1996) 186 CLR 140 at 168-169.

51 (1997) 189 CLR 520.

52 (2020) 270 CLR 412.

gives effect to the institution of 'representative government' only to the extent that the text *and* structure of the Constitution establish it"⁵³. And in *Gerner* the Court said that it is now "well settled that what the *Constitution* implies depends on 'what ... the terms *and* structure of the Constitution prohibit, authorise or require'"⁵⁴. That is, the notion of necessity referred to by Mason CJ in *ACTV* is not a threshold requirement, it simply "reflects the need for *any* implication to be 'securely based' in the text *and* structure of the *Constitution*"⁵⁵.

44 The structure of the *Constitution* is part of the context that is always considered together with the text. There is no doubt that the recognition of some implications will rely more heavily upon the text of the *Constitution* than upon its structure or other context. Recognition of other implications may rely more heavily upon structure or other contextual matters. But this Court was not confused in its unanimous decisions in *Lange* and *Gerner* by insisting upon the presence of both text and structure in the process of recognising implications. No implication is ever recognised independently of the text and structure of the *Constitution* or other contextual matters.

45 The need for *any* implication to be "securely based" in the text *and* structure of the *Constitution* – the notion of necessity – may be easier to establish, for example, in relation to an "explicature from the requirement of direct choice" in ss 7 and 24 of the *Constitution* where the implication arises from "the expressed words in their context"⁵⁶ than where those sections, together with ss 64 and 128, are seen only as giving rise to an implication which "give[s] effect only to what is inherent in the text and structure of the Constitution"⁵⁷. And, as has been recognised, there is a particular need for caution when the asserted implication

53 (1997) 189 CLR 520 at 566-567 (emphasis added), citing *McGinty* (1996) 186 CLR 140 at 168, 182-183, 231, 284-285.

54 (2020) 270 CLR 412 at 422 [14] (emphasis added), quoting *Lange* (1997) 189 CLR 520 at 567.

55 *Burns v Corbett* (2018) 265 CLR 304 at 383 [175] (emphasis added), citing *ACTV* (1992) 177 CLR 106 at 134-135, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453 [389] and *McCloy v New South Wales* (2015) 257 CLR 178 at 283 [318]; cf *Burns* (2018) 265 CLR 304 at 355 [94].

56 *Ruddick v The Commonwealth* (2022) 96 ALJR 367 at 397 [146]-[147]; 399 ALR 476 at 511-512, citing *McGinty* (1996) 186 CLR 140 at 170.

57 *Lange* (1997) 189 CLR 520 at 567.

extends beyond the content of any term of the *Constitution*⁵⁸. But there are not two different types of implication which are subject to different rules. Properly understood, this is all that Mason CJ could have been saying in *ACTV*⁵⁹ when his Honour spoke of implications that were "structural" rather than "textual".

Jurisdiction

46 There is no single "constitutional conception of 'jurisdiction'" if by that it is suggested that the word "jurisdiction" has the same meaning and application whenever it is used in the *Constitution* generally or in Ch III in particular.

47 As "'jurisdiction' bears many meanings, it is very often qualified"⁶⁰. When used as a constitutional expression in Ch III, it is qualified either expressly or by necessary implication – "original" jurisdiction, "appellate" jurisdiction, "belongs to" jurisdiction, "admiralty and maritime" jurisdiction and "federal" jurisdiction⁶¹. Three – original jurisdiction, appellate jurisdiction and admiralty and maritime jurisdiction – are constitutional expressions which do not refer to the authority to decide (the primary meaning of jurisdiction in a legal context) but to the subject matter of a controversy within the court's authority. "Federal jurisdiction" in Ch III is different. It is used in two senses: in ss 71, 77 and 79 to refer to the source of the court's authority to decide, being the judicial power of the Commonwealth as opposed to that of a State⁶²; and elsewhere in

58 See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 154, 156; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 190 [11].

59 (1992) 177 CLR 106 at 135. See also *McGinty* (1996) 186 CLR 140 at 168-169.

60 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 5.

61 "Jurisdiction" is also used in a broader sense elsewhere in the *Constitution*: see, eg, s 111.

62 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 30; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 570 [3]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 68-69 [99]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349 [24]; *Rizeq v Western Australia* (2017) 262 CLR 1 at 48 [127]; *Burns* (2018) 265 CLR 304 at 347 [71], 365 [124], 378 [159]-[160], 391 [196]-[197]. See also Dixon, "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590 at 607; Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 6-7.

Ch III to refer to the subject matter of the controversy over which the court has authority.

48 None of that detracts from the further proposition that for a court to have authority to decide a matter, there must be a subject matter dimension of jurisdiction (the exercise of judicial power which resolves a justiciable controversy of a kind within the court's limits), a territorial dimension of jurisdiction (the territory over which the court's power extends) and a personal dimension of jurisdiction (the persons bound by the exercise of that judicial power and who are amenable to its exercise). Chapter III is *not* concerned with the process of vesting or conferral of personal jurisdiction, other than to the extent addressed in respect of the Commonwealth and the States in s 75(iii), (iv) and (v).

49 The *Trans-Tasman Proceedings Act 2010* (Cth) ("the *TTPA*"), enacted under s 51(xxix) of the *Constitution*, is not concerned with federal jurisdiction, and does not confer, or engage, federal jurisdiction upon a proceeding, in the sense of either authority to decide the proceeding or the subject matter of the proceeding. It provides no more than that an initiating document of a proceeding issued in an Australian court may be served in New Zealand consistent with the service rules of the Australian court in which the proceeding was instituted⁶³. That is, it deals with the personal dimension of jurisdiction.

50 The *TTPA* expressly preserves three important aspects: under s 10, service of an initiating document in New Zealand under s 9 "has the same effect" and "gives rise to the same proceeding" as if the initiating document had been served in the place of issue; under ss 17 and 19, a defendant in a civil proceeding in an Australian court may apply for, and the court may order, a stay of the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue and such application relevantly must be made within 30 working days of the defendant being served – in this context, s 20 addresses exclusive choice of court agreements; and under s 21(2), it expressly provides that other than on forum grounds, Pt 3 of the *TTPA* "does not affect any power of the Australian court to stay the proceeding *on any other grounds*" (emphasis added), which includes abuse of process, vexation and the like.

51 Put in different terms, ss 9 and 10 of the *TTPA* do not confer or engage the subject matter dimension of jurisdiction. They are concerned with the personal dimension of jurisdiction. Sections 9 and 10 do not constitute the Supreme Court of New South Wales as the "judicial agent of the Commonwealth" in the exercise

63 *TTPA*, s 9.

of judicial power⁶⁴. On the contrary, under the leave requirements of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("the *Claims Act*"), the factum or hinge is the institution of a proceeding in the Supreme Court of New South Wales. The circumstance that a process is provided by federal law for service in New Zealand of a proceeding instituted in a State court (namely, ss 9 and 10 of the *TTPA*) does not render the subsequent State curial processes an exercise by the State court of federal jurisdiction. "[N]o federal jurisdiction is exercised merely by reason of th[e] antecedent federal processes" provided by the *TTPA*⁶⁵.

"Notional proceeding" necessary?

52 This appeal, like the appeal in the Court below, was argued by all parties on the premise that in order to find whether Mr Koper could be granted leave under s 5 of the *Claims Act* to bring the proceeding against the insurers under s 4 of that Act, it was necessary to determine whether, notionally, Mr Koper could properly have commenced proceedings against the builder – the insured – in the Supreme Court of New South Wales. Relying on that premise, the parties proceeded on the basis that the relevant question was whether ss 9 and 10 of the *TTPA* could have been relied on by Mr Koper to notionally bring the builder before that Court.

53 The parties proceeded on that premise because, at trial, Rein J determined it to be the relevant question as to the application of s 4 of the *Claims Act*. His Honour so concluded because, in his view, the Court of Appeal of the Supreme Court of New South Wales in *Chubb Insurance Co of Australia Ltd v Moore*⁶⁶ should be understood to have held that, for the purposes of s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) ("the *LRMPA*") – which was the progenitor to ss 4 and 5 of the *Claims Act* – the underlying claim against the insured had to be one brought in New South Wales or one that could properly have been brought in New South Wales and because the New South Wales Law Reform

⁶⁴ *Lorenzo v Carey* (1921) 29 CLR 243 at 252.

⁶⁵ *Truong v The Queen* (2004) 223 CLR 122 at 156 [78], citing *Flaherty v Girgis* (1987) 162 CLR 574 at 598, 603, 609 and *Lipohar v The Queen* (1999) 200 CLR 485 at 514 [69], 551 [166]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 November 2009 at 12770; Australia, House of Representatives, *Trans-Tasman Proceedings Bill 2009*, Explanatory Memorandum at 7.

⁶⁶ (2013) 302 ALR 101.

Commission's 2016 Report on s 6 of the *LRMPA*⁶⁷ ("the Report"), which annexed a draft Bill that was to be adopted without amendment by the New South Wales Parliament when it enacted the *Claims Act*, "so clearly ... embraced" *Chubb*'s conclusions.

54 However, before making those observations, his Honour had held that the *Claims Act* should (absent the impact of *Chubb*) be interpreted as requiring a New South Wales connection and that therefore the *Claims Act* applies "if the claim against the insured, *or the insurer*, has a New South Wales connection because either: (1) the event giving rise to liability occurred in New South Wales or because the insured is located in New South Wales or will suffer damage in New South Wales; or (2) the insurer is resident in New South Wales, or the insurance policy issued is governed by New South Wales law or at least Australian law" (emphasis added). *Chubb* did not address the *Claims Act*, which is in different terms to its progenitor⁶⁸, and a fair reading of the Report's two relevant references to *Chubb*⁶⁹ and the Minister's second reading speech introducing the Bill which became the *Claims Act*⁷⁰ do not compel adoption of the premise upon which this appeal was ultimately argued.

55 Rule 11.4 of the *Uniform Civil Procedure Rules 2005* (NSW) ("the UCPR") relevantly provides that an "[o]riginating process may be served outside of Australia without leave in the circumstances referred to in Schedule 6", which circumstances relevantly include: "(g) when any relief is sought against any person domiciled or ordinarily or habitually resident in Australia (whether present in Australia or not)"; and "(h) when any person outside of Australia is – (i) a necessary or proper party to a proceeding properly brought against another person served or to be served (whether within Australia or outside Australia) under any other provision of these rules, or (ii) a defendant to a claim for contribution or indemnity in respect of a liability enforceable by a proceeding in the court".

67 New South Wales Law Reform Commission, *Third Party Claims on Insurance Money: Review of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946*, Report No 143 (2016).

68 See *Chubb* (2013) 302 ALR 101 at 142-144 [197]-[206].

69 Report at 20 [2.62], 42 [4.59].

70 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2017 at 14-15.

In this case, the exclusive jurisdiction clause in the applicable insurance contract described the exclusive place of jurisdiction as the Commonwealth of Australia and it was common ground that one of the insurers was resident in the jurisdiction and was thus properly served in New South Wales. Accordingly, both para (g) (in respect of Aspen Insurance UK Ltd, the second appellant) and para (h) (in respect of Zurich Insurance Company Ltd, the first appellant) of Sch 6 to the UCPR were satisfied such that, on the proper approach to the *Claims Act* identified by Rein J, Mr Koper could proceed with his claim against the insurers.