

A TRANS-TASMAN CHALLENGE: THE *ZURICH INSURANCE* LITIGATION REVIEWED

REID MORTENSEN*

The Trans-Tasman Proceedings Acts took effect in Australia and New Zealand in 2013, and since then have created a well-functioning trans-Tasman judicial area in which the process of all Australian and New Zealand courts can be served, and the judgments of all of those courts can be enforced, anywhere in New Zealand or Australia. The unquestioned jurisdiction that is given to all Australian and New Zealand courts in trans-Tasman cases is also limited only by principles of forum conveniens and the enforcement of choice of court agreements. In Zurich Insurance Company Limited v Koper ('Zurich Insurance'), the validity of the Australian rules of jurisdiction under the Trans-Tasman Proceedings Act 2010 (Cth) was challenged. The New South Wales courts and the High Court of Australia all rejected the challenge. This article is an account of the constitutional considerations that were canvassed throughout the Zurich Insurance litigation, including the possibility that a High Court majority recognised a positive constitutional implication when upholding the personal jurisdictions created by the Trans-Tasman Proceedings Act 2010 (Cth) and the recognition of a federal power to extend the jurisdiction of state courts in all international cases. It also undertakes an analysis of the private international law issues of Zurich Insurance: the clarification of the effect of the Trans-Tasman Proceedings Acts; and the unsatisfactory conclusions reached on the territorial application of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) — the issue that forced the need to consider the validity of the Trans-Tasman Proceedings Act 2010 (Cth) in the first place. In this respect, a plea is made for Australian state parliaments and courts to avoid extra-territorial overreach in the application of state legislation.

I THE TRANS-TASMAN JUDICIAL AREA

The *Trans-Tasman Proceedings Acts* were passed by the Australian and New Zealand Parliaments in 2010 to create a single judicial area in the single economic

* Professor of Law, University of Southern Queensland, Toowoomba, Australia; External Fellow, Centre for Public, International and Comparative Law, University of Queensland, St Lucia, Australia. Email: reid.mortensen@unisq.edu.au; ORCID ID: <https://orcid.org/0000-0002-6524-2401>. I thank Dr Sarah McKibbin and Dr Jeremy Patrick for comments on an early draft of this article.

market that spans the two countries.¹ In doing so, the Parliaments were giving effect to the countries' bilateral *Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement* (the 'Christchurch Agreement'), which had been signed in Christchurch in 2008.² Although implementing the *Christchurch Agreement*, the *Trans-Tasman Proceedings Acts* were modelled on the provisions of Australia's *Service and Execution of Process Act 1992* (Cth). This gives a 'long-arm jurisdiction' to any state court (including any territory court), allowing the service of its process beyond the state borders in any other place in Australia, and the enforcement of its judgments anywhere in the federation.³ Long-arm jurisdiction naturally creates potential for concurrent and related proceedings in different states' courts, but the Australian interstate scheme aims to channel the exercise of jurisdiction to the single most appropriate court in the federation (often referred to as the *forum conveniens*) — whether by a stay of proceedings in a less appropriate court;⁴ or, in the superior courts, a transfer under the *Jurisdiction of Courts (Cross-vesting) Acts* to another Australian court that is the *forum conveniens*.⁵ The *Trans-Tasman Proceedings Acts*, in a broad sense, bring the New Zealand courts into that same scheme. The initiating process of all Australian courts — federal, state and territory — can, under s 9 of the *Trans-Tasman Proceedings Act 2010* (Cth), be served in New Zealand and, under s 10, service establishes an unquestioned power in the court to adjudicate.⁶ Similarly, under the *Trans-Tasman Proceedings Act 2010* (NZ), the process of all New Zealand courts can be served on individuals and corporations in Australia. That Act also establishes the power to adjudicate.⁷ The judgments of all Australian and New

¹ *Trans-Tasman Proceedings Act 2010* (Cth); *Trans-Tasman Proceedings Act 2010* (NZ). See generally Reid Mortensen, 'A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market' (2010) 16(1) *Canterbury Law Review* 61; Reid Mortensen and Oliver Knöfel, 'The Australia and New Zealand Jurisdiction and Judgments Scheme: A Common Law Judicial Area' in Dieter Leipold and Rolf Stürner (eds), *Zeitschrift für Zivilprozess International* 369, 369–78.

² *Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013).

³ *Service and Execution of Process Act 1992* (Cth) ss 12, 15, 102, 109.

⁴ *Ibid* s 20(3). A stay made be granted on the condition that the parties subsequently litigate in the most appropriate Australian court.

⁵ See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); s 5 *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) s 5. See also *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

⁶ *Trans-Tasman Proceedings Act 2010* (Cth) ss 9–10.

⁷ *Trans-Tasman Proceedings Act 2010* (NZ) ss 13–14.

Zealand courts can be enforced anywhere in the market area,⁸ and defendants have almost no power to resist them.⁹

In prioritising which court in the trans-Tasman market area is preferred actually to hear and determine the proceedings, the *Trans-Tasman Proceedings Acts* replicate ‘the appropriate court’ assessment of the *Service and Execution of Process Act* (Cth).¹⁰ To that, they add a partial implementation of the Hague *Choice of Court Agreements Convention 2005*,¹¹ which provides that, if parties have made an exclusive choice of the courts of one of the countries for the determination of disputes between them, those courts should almost always exercise the jurisdiction to determine the proceedings.¹² Oddly, the *Trans-Tasman Proceedings Acts* also include a deeper ban on anti-suit injunctions between the courts of the two countries than exists between Australian courts.¹³

The trans-Tasman scheme therefore has three pillars. First, all courts in Australia and New Zealand have an unquestioned power to adjudicate when individuals or corporations are served anywhere in New Zealand and Australia. This is in contrast with the long-arm powers of courts under their rules of court to allow proceedings against defendants who are outside Australia and New Zealand, which technically only give a discretion to exercise jurisdiction.¹⁴ The long-arm provisions of the *Service and Execution of Process Act* (Cth) and the *Trans-Tasman Proceedings Acts* make each Australian and Zealand court *forum competens* when there is service of its process anywhere in Australia and New Zealand. Secondly, the ‘sorting provisions’ rest on principles of *forum conveniens* or the enforcement of choice of court agreements to determine the best place in the market area where jurisdiction is actually to be exercised. And thirdly, all courts’ judgments have an almost unfettered extension across the whole of the market area.

⁸ *Trans-Tasman Proceedings Act 2010* (Cth) pt 7; *Trans-Tasman Proceedings Act 2010* (NZ) pt 2 sub-pt 5.

⁹ The defences available under the common law rules of private international law are generally not available, other than that enforcement would be contrary to public policy: *Trans-Tasman Proceedings Act 2010* (Cth) ss 72(1)(a), 79; *Trans-Tasman Proceedings Act 2010* (NZ) ss 61(2)(b), 68. The public policy defence is interpreted narrowly, and has never been successful: *LFDB v SM* (2017) 256 FCR 218; *ACW v Du Bray (No 2)* [2020] FCA 994, [46]–[56] (Wigney J).

¹⁰ *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19; *Trans-Tasman Proceedings Act 2010* (NZ) ss 22–4.

¹¹ *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015).

¹² *Trans-Tasman Proceedings Act 2010* (Cth) s 20; *Trans-Tasman Proceedings Act 2010* (NZ) s 25.

¹³ *Trans-Tasman Proceedings Act 2010* (Cth) s 22; *Trans-Tasman Proceedings Act 2010* (NZ) s 28. cf *Service and Execution of Process Act 1992* (Cth) s 21; *Great Southern Loans Pty Ltd v Locator Group Pty Ltd* [2005] NSWSC 438, [74]–[78] (McDougall J).

¹⁴ The requirements for granting leave to serve process outside Australia and New Zealand or to proceed against the defendant include a *forum conveniens* analysis that is an exercise of discretion: see *Agar v Hyde* (2000) 201 CLR 552, 570 [41]–[42] (Gaudron, McHugh, Gummow and Hayne JJ), 601–2 [127]–[131] (Callinan J).

The scheme is not perfect.¹⁵ However, the trans-Tasman judicial area has functioned well in the 10 years in which it has been in place¹⁶ — so well that neither the High Court of Australia nor the Supreme Court of New Zealand has been called on to consider the terms of the scheme. That changed in 2023, when, in *Zurich Insurance Company Limited v Koper* ('*Zurich Insurance*'),¹⁷ a pillar of the scheme was challenged in the High Court of Australia. The constitutional questions raised by the *Zurich Insurance* litigation were ventilated throughout, from the trial in the Supreme Court of New South Wales,¹⁸ through to the Court of Appeal,¹⁹ and then to the High Court — with a close-to-unanimous response from every judge in the course of the litigation. In this article, those constitutional questions are considered and include the courts' clarification of implications that are *not* in the *Commonwealth Constitution*. However, requiring even greater attention are the private international law questions that were decided in a way that forced the need to decide whether ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) were constitutionally valid. They include the courts' important reflections on the nature of 'jurisdiction' and, related to that, on the territorial reach of statutes that provide for third parties to bring actions directly against insurance companies — statutes that are notoriously ambiguous. In conclusion, an account is given as to how *Zurich Insurance* clarifies the legal profile of the trans-Tasman judicial area, but also of its unwelcome approach to the extraterritorial application of statutes.

II INSURANCE CLAIMS FORUM SHOPPING

Zurich Insurance was certainly an instance of forum shopping; an effort by the representative New Zealand plaintiff, Dariusz Koper, to secure application of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ('*Claims Act* (NSW)') to recover damages from the tortfeasor's insurers for a tort that had occurred in New Zealand. Koper represented another 198 owners of units in Victopia Apartments in Auckland who, along with Victopia's body corporate, successfully sued KNZ International Co Ltd and Brookfield Multiplex

¹⁵ The *forum conveniens* principles are a standard means of restricting forum shopping, but the principal kind of trans-Tasman forum shopping — New Zealanders shopping for personal injuries damages in Australian state courts — is not properly addressed by the scheme: Reid Mortensen, 'Woodhouse Reprised: Accident Compensation and Trans-Tasman Integration' (2013) 9(1) *Journal of Private International Law* 1. The unique ban on anti-suit injunctions also weakens the power of the sorting provisions to prevent concurrent proceedings in different courts.

¹⁶ The *Trans-Tasman Proceedings Acts* for both countries commenced on 11 October 2013.

¹⁷ (2023) 97 ALJR 614 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ) ('*Zurich Insurance HCA*').

¹⁸ *Koper v Zurich Insurance plc* [2021] NSWSC 1587 (Rein J) ('*Zurich Insurance NSWSC*').

¹⁹ *Zurich Insurance plc v Koper* (2022) 110 NSWLR 380 (Bell CJ, Ward P and Beech-Jones JA) ('*Zurich Insurance NSWCA*').

Constructions (NZ) Ltd for defective manufacture of the Victoria Apartments.²⁰ KNZ was Victoria's developer and Multiplex was its builder; both were New Zealand companies. This was therefore a purely New Zealand case. Although the defendants paid some of the judgment, more than NZD23 million was left unpaid by Multiplex when it entered liquidation.

Multiplex was insured for its losses with several foreign insurance companies, including Zurich Insurance plc, incorporated in Ireland, and Aspen Insurance UK Limited, incorporated in the United Kingdom. The insurance policy was expressly governed by 'the law of the Commonwealth of Australia', and the parties to the policy agreed to 'submit to the exclusive jurisdiction of any competent Court in the Commonwealth of Australia'.²¹ Although Aspen conducted business in New South Wales, Zurich had no business presence anywhere in Australia or New Zealand. To secure complete recovery for these losses, the unit owners sought to proceed directly against Multiplex's insurers.

The problem for the unit owners was that, despite the original proceedings having been purely internal to New Zealand, the provision for direct actions against insurers in the *Law Reform Act 1936* (NZ) would not support their claim.²² The New Zealand courts had interpreted the *Law Reform Act* as having no extraterritorial effect.²³ In *Body Corporate 326421 v Auckland Council* ('*Body Corporate 326421*')²⁴ — a case again involving Multiplex, Zurich and other foreign insurance companies — the insurance policy also provided for Australian governing law and the exclusive jurisdiction of Australian courts. In the New Zealand High Court, Gilbert J held that the *Law Reform Act* did not apply because the insurers were not resident in New Zealand.²⁵ The reasoning in *Body Corporate 326421* rested in part on the absence of a New Zealand court's competence over a foreign-resident defendant and the likelihood that its judgment could not be enforced against them.²⁶ Under the *Trans-Tasman Proceedings Act 2010* (NZ), this conclusion would have differed had the defendant been in Australia,²⁷ but *Body Corporate 326421* itself did not involve Australian insurers.²⁸

In *Zurich Insurance*, the application of the *Claims Act* (NSW) promised more. The *Claims Act* (NSW) is modelled on the *Law Reform Act 1936* (NZ), but has been

²⁰ *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511.

²¹ *Zurich Insurance* NSWSC (n 18) [9] (Rein J).

²² *Law Reform Act 1936* (NZ) s 6.

²³ Maria Hook and Jack Wass, *The Conflict of Laws in New Zealand* (Lexis Nexis, 2020) 23–4.

²⁴ [2013] NZHC 753 ('*Body Corporate 326421*') (Gilbert J).

²⁵ *Ibid* [23] (Gilbert J).

²⁶ *Ibid* [25]–[26] (Gilbert J).

²⁷ Gilbert J's decision in *Body Corporate 326421* (n 24) followed the Supreme Court of New Zealand's decision in *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] 3 NZLR 713 (Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ) ('*Ludgater*'), where the defendant was located in Australia. However, *Ludgater* was decided before the *Trans-Tasman Proceedings Act 2010* (NZ) came into force.

²⁸ The circumstances of *Body Corporate 326421* (n 24) were essentially the same in *McCullagh v Underwriters Severally* [2015] NZHC 1384 (Wylie J).

updated and interpreted with slight differences — although the differences were significant for the litigation in *Zurich Insurance*. In Australia, only the territories have legislation of a comparable kind.²⁹ If it was applied, the *Claims Act* (NSW) would enable the unit owners to avoid the losses they would suffer as unsecured creditors in the New Zealand liquidation of Multiplex. However, the New Zealand courts' understanding of the *Claims Act* (NSW) meant that the unit owners would actually have to litigate in New South Wales. The New Zealand courts were unlikely to apply the New South Wales statute even if, as is possibly the case under New Zealand law, a New Zealand court were to conclude that the direct recovery from an insurer was a question of contract that was governed by Australian law in accordance with Multiplex's insurance policy.³⁰ In *Body Corporate 326421*,³¹ Gilbert J had concluded that the predecessor to the *Claims Act* (NSW)³² (which used similar language to it) was expressed in self-limiting terms. It conferred powers on a court in New South Wales to give leave to approve a direct action against an insurance company. A New Zealand court was therefore not empowered under the Act to grant leave to approve an action against the insurer.³³ In substance, Gilbert J had held that, regardless of the effect of New Zealand's choice of law rules, the predecessor to the *Claims Act* (NSW) was 'procedurally unenforceable' in New Zealand courts.³⁴ He reached that understanding without making any reference to the New South Wales courts' own interpretation of the Act. Nevertheless, the New South Wales Court of Appeal had already reached the very same conclusion in *Chubb Insurance Company of Australia Ltd v Moore* ('*Chubb*'):³⁵ 'the preferable approach is to treat [the *Claims Act* (NSW)] as applying to all claims brought in a court of New South Wales, and as not applying to a claim brought in a court that is not a court of New South Wales'.³⁶

Although an insurance policy governed by Australian law and proroguing the exclusive jurisdiction of Australian courts does not necessarily direct litigation on the policy into the New South Wales courts, Aspen's business presence in New South Wales made it a sensible jurisdictional choice in Australia for the unit

²⁹ *Civil Law (Wrongs) Act 2002* (ACT) ss 206–9; *Law Reform (Miscellaneous Provisions) Act* (NT) ss 26–9; Ian Enright and Robert Merkin, *Sutton on Insurance Law* (4th ed, Thomson Reuters, 2015) vol 1, 875–7.

³⁰ Hook and Wass (n 23) 469. Alternative classifications that could affect the applicable law in a cross-border claim in New Zealand are tort and property. See also *Ludgater* (n 27).

³¹ *Body Corporate 326421* (n 24).

³² *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6.

³³ *Body Corporate 326421* (n 24) [25].

³⁴ Kirby J coined the term 'procedurally unenforceable' where, because a statute designates 'a specified tribunal' in state X as the exclusive forum for claims of a nominated kind, those claims may not be enforceable by courts in state F even when state X's law would apply through the application of state F's choice of law rules. The courts of state F are still not a 'specified tribunal' under state X's law: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 548–9 [116]–[117]. See also *Tolofson v Jensen* [1994] 3 SCR 1022, 1049 (La Forest J).

³⁵ *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 (Emmett and Ball JJ; Bathurst CJ, Beazley P and Macfarlan JA agreeing) ('*Chubb*').

³⁶ *Ibid* [204].

owners' litigation.³⁷ More importantly, the *Claims Act* (NSW), with equivalent legislation only in the federal territories, made New South Wales the only Australian state in which the unit owners could escape the losses that would be suffered through Multiplex's liquidation. They therefore commenced proceedings in the New South Wales Supreme Court, where Rein J accepted that, subject to two issues, the conditions for a direct action against Zurich and Aspen were satisfied and leave could be given for the unit owners to sue them.³⁸ These two issues raised the *forum competens* and the sorting provisions of the *Trans-Tasman Proceedings Act 2010* (Cth). The issue relating to the *forum competens* provisions ended up in the High Court of Australia.

Rein J did the hard work in *Zurich Insurance* by resolving the insurance questions that, ultimately, led to the need to decide a constitutional point. It is worth setting out his analysis because the issues that linger after the High Court's decision in *Zurich Insurance* rest more on its treatment of the *Trans-Tasman Proceedings Act 2010* (Cth) and the *Claims Act* (NSW) than they do on the ultimate constitutional question.

The insurance questions related to the territorial application of the *Claims Act* (NSW), and Rein J treated that as depending on the 'central concern on which the legislation is shown to "hinge"'.³⁹ He thought that the 'hinge' was 'the enforcement mechanism' of the *Claims Act* (NSW) — its provision for enforcing a claim against an insurer 'as if' the claim were one against the insured.⁴⁰ Rein J rejected the argument that the hinge was merely commencing proceedings in New South Wales against an insurer.⁴¹ He would have concluded, had he been free to do so, that the *Claims Act* (NSW) had a broad territorial operation and that it should be available when: the event giving rise to liability arose in New South Wales; the insured was located in New South Wales; the insured would suffer damage in New South Wales; the insurer was located in New South Wales; or the insurance policy prorogued the jurisdiction of the New South Wales or Australian courts.⁴² However, he considered that he was bound to follow the Court of Appeal's decision in *Chubb*,⁴³ that neither the location of the insurer nor the proroguing of jurisdiction in the insurance policy could be used to define the territorial reach of the predecessor to the *Claims Act* (NSW).⁴⁴ Rein J therefore returned to the 'hinge' on which the *Claims Act* (NSW) turned, and held that 'the Court in *Chubb* must be taken to have meant that the underlying claim against the

³⁷ The parties did not quibble about any difference between the law or courts of 'Australia' and 'New South Wales': *Zurich Insurance* NSWSC (n 18) [70].

³⁸ *Ibid* [10]–[11].

³⁹ *Ibid* [36], applying *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, 159–60, 162 (French CJ and Gummow, Hayne, Kiefel and Bell JJ).

⁴⁰ *Zurich Insurance* NSWSC (n 18) [39], [41], [72].

⁴¹ *Ibid* [74].

⁴² *Ibid* [70].

⁴³ *Chubb* (n 35); see *Zurich Insurance* NSWSC (n 18) [72].

⁴⁴ *Zurich Insurance* NSWSC (n 18) [70].

insured ... had to be one brought in New South Wales or one that could properly have been brought in New South Wales'.⁴⁵

This takes us to the *Trans-Tasman Proceedings Act 2010* (Cth). The New South Wales Supreme Court's personal jurisdiction over Zurich and Aspen was unquestioned. The appellants had by contract submitted to the exclusive jurisdiction of Australian courts and, further, Aspen had a business presence in New South Wales.⁴⁶ However, according to Chubb and Rein J, that would not define the territorial reach of the *Claims Act* (NSW). The question was whether the New South Wales court would have had jurisdiction to hear 'notional proceedings' between the Victopia unit owners and Multiplex,⁴⁷ which was not even involved in the New South Wales proceedings. And, as the insured Multiplex was a New Zealand corporation, that would depend on whether the New South Wales court would have had long-arm jurisdiction over Multiplex under ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth).⁴⁸

Rein J held that the New South Wales court would have had jurisdiction in these notional proceedings — the claim for defective manufacture that was actually determined in the New Zealand High Court — and expressly held that jurisdiction under the *Trans-Tasman Proceedings Act 2010* (Cth) was not limited to cases with a trans-Tasman element.⁴⁹

That being so, the judge therefore had to address the most legally significant question raised in *Zurich Insurance* — the argument that ss 9 and 10, the *forum competens* provisions of the *Trans-Tasman Proceedings Act 2010* (Cth), were unconstitutional and invalid, and so could not have given the New South Wales court jurisdiction to deal with the notional proceedings relating to the underlying claim. He also dismissed this argument, and this was the single point that was subject to the subsequent appeals.

Rein J's decision, that the *Claims Act* (NSW) applied if the underlying claim was one brought in New South Wales or that could properly have been brought in New South Wales, must be taken to have settled the question of the territorial application of the Act,⁵⁰ although there remains a policy question whether it still gives the *Claims Act* (NSW) an extraterritorial reach that is too extensive.⁵¹ It was unquestioned in the New South Wales Court of Appeal,⁵² and again in the High Court of Australia by Kiefel CJ and Gageler, Gleeson and Jagot JJ.⁵³ However, a minority in the High Court comprising Gordon, Edelman and Steward JJ dissented

⁴⁵ Ibid [74].

⁴⁶ Ibid [69].

⁴⁷ Ibid [11]. See *Zurich Insurance* HCA (n 17) 625–6 [52] (Gordon, Edelman and Steward JJ).

⁴⁸ *Zurich Insurance* NSWSC (n 18) [87]–[89].

⁴⁹ Ibid [89].

⁵⁰ Ibid [74].

⁵¹ See below nn 125–142 and accompanying text.

⁵² *Zurich Insurance* NSWCA (n 19).

⁵³ *Zurich Insurance* HCA (n 17) 618–19 [12].

on this point. They disagreed with Rein J that he was bound to follow *Chubb*,⁵⁴ and seemed to endorse his preferred broad reading of the territorial reach of the *Claims Act* (NSW).⁵⁵ Even to that broad reading, Gordon, Edelman and Steward JJ added an extension: the *Claims Act* (NSW) would apply if ever the insured or the insurer was within the personal jurisdiction of the New South Wales court.⁵⁶ That could potentially mean that the *Claims Act* (NSW) would also apply if: the insurer was located in New South Wales; the insurer had prorogued the jurisdiction of the Australian courts; or the New South Wales court had long-arm jurisdiction over the insurer under its *Rules of Court* because there were grounds for service of an insurer that was located outside Australia and New Zealand.⁵⁷ The New South Wales court did have personal jurisdiction over both insurers that were litigating, because Zurich and Aspen had prorogued jurisdiction under the insurance policy's choice of court agreement, and Aspen had a business presence in the State.⁵⁸ Further, the New South Wales court had jurisdiction under its *Rules of Court* allowing service outside Australia and New Zealand in a claim for contribution or indemnity.⁵⁹ The existence of personal jurisdiction over the insurers would secure application of the *Claims Act* (NSW). It is an unwelcome interpretation of the statute's territorial reach, to which we will return.⁶⁰ But, as a result, Gordon, Edelman and Steward JJ thought there was really no need to consider the validity of ss 9 and 10 because the *Claims Act* (NSW) applied even if the New South Wales court had not been a *forum competens* in notional proceedings against the insured.⁶¹

There was a second issue that Rein J had to address before granting leave for the unit owners to sue the insurers directly. This was Zurich's argument that it would 'involve an intrusion' into the administration of Multiplex's liquidation in New Zealand if the New South Wales court allowed the insurers to be sued directly in New South Wales, especially when they could not be sued directly in New Zealand. Accordingly, a 'residual discretion' should be exercised not to allow the direct action against the insurers.⁶² In short, the Victopia unit owners should not recover directly from the insurers because that would give them a practical preference over Multiplex's other creditors that was not available to the unit owners in the liquidation in New Zealand.⁶³ Here Rein J also dismissed all of Zurich's submissions, holding among other things that there was no reason why Zurich should benefit by escaping both the effect of Multiplex's liquidation in New

⁵⁴ Ibid 626 [54].

⁵⁵ See above n 42 and accompanying text.

⁵⁶ *Zurich Insurance* HCA (n 17) 626 [55].

⁵⁷ Ibid 626 [56].

⁵⁸ See *ibid*.

⁵⁹ Ibid 626 [55]. See *Uniform Civil Procedure Rules 2005* (NSW) sch 6 cls (g)–(h).

⁶⁰ See below nn 125–142 and accompanying text.

⁶¹ Ibid [54].

⁶² *Zurich Insurance* NSWSC (n 18) [11].

⁶³ Ibid [38].

Zealand and direct actions by the unit owners in New Zealand and New South Wales.⁶⁴ Significantly, he also noted that Zurich had not made an application under the *Trans-Tasman Proceedings Act 2010* (Cth) for a stay of the proceedings against it on the ground that a New Zealand court was the more appropriate court — the *forum conveniens* — for deciding the claim.⁶⁵ Indeed, Rein J thought that, in asking the New South Wales court to exercise this residual discretion to refuse leave under the *Claims Act* (NSW), Zurich's approach to the second issue appeared to be a backdoor application for a stay.⁶⁶ He therefore thought that, in not making an application for a stay, the insurers were trying to evade the *Trans-Tasman Proceedings Act 2010* (Cth) because this would also enable them to avoid the application of its other sorting provision for the enforcement of exclusive choice of court agreements.⁶⁷ Given the terms of the insurance policy, this sorting provision would have seen the litigation against Zurich locked into an Australian court.⁶⁸ However, even putting the *Trans-Tasman Proceedings Act 2010* (Cth) to one side, Rein J was prepared to grant leave for the direct action against Zurich because, in the insurance policy, Multiplex and Zurich had prorogued the exclusive jurisdiction of an Australian court.⁶⁹

III THE VALIDITY OF THE *TRANS-TASMAN PROCEEDINGS ACT 2010* (Cth)

The validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) is central to the success of the whole trans-Tasman judicial area. The reasons for challenging the constitutionality of these provisions related only to the competence of the state courts, as opposed to federal and territory courts. If successful, the challenge would have led to the untenable situation in which New Zealand courts were *forum competens* for all matters in which their writs were served on defendants in Australia, and in which federal and territory courts might still be *forum competens* when service was effected in New Zealand, but in which the busiest courts in the market area — the Australian state courts — had lost any parallel jurisdictions. Further, the validity of state court judgments rendered when assuming jurisdiction under ss 9 and 10 since 2013, when the *Trans-Tasman Proceedings Act 2010* (Cth) commenced, could also have been in doubt.⁷⁰

⁶⁴ Ibid [142].

⁶⁵ *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19.

⁶⁶ *Zurich Insurance NSWSC* (n 18) [142].

⁶⁷ *Trans-Tasman Proceedings Act 2010* (Cth) s 20.

⁶⁸ *Zurich Insurance NSWSC* (n 18) [142].

⁶⁹ Ibid.

⁷⁰ See above n 16. It should be recognised that it is possible that, had it become necessary, Australian state parliaments could try to salvage the scheme by uniform legislation providing for state

There were two aspects of the *Commonwealth Constitution* that had to be considered in the challenge: the federal power to support the *Trans-Tasman Proceedings Act 2010* (Cth); and any implied limitation on that federal power that might arise because ss 9 and 10 extended the jurisdiction of state courts.

A *The External Affairs Power*

The question of a federal power to support ss 9 and 10 was straightforward. The parties accepted that the external affairs power in s 51(xxix) of the *Commonwealth Constitution* would have supported these sections, unless there were relevant limitations on the exercise of the power.⁷¹ Rein J did not even consider the external affairs power.⁷² Bell CJ delivered the judgment in the Court of Appeal, with Ward P and Beech-Jones JA agreeing in full. Again, the question of the support of the external affairs power did not need much attention. Bell CJ simply noted that the *Trans-Tasman Proceedings Act 2010* (Cth) gave effect to the *Christchurch Agreement*,⁷³ and related to service of process outside Australia. It was therefore a valid implementation of Australia's treaty obligations and, in addition, concerned matters that were external to Australia.⁷⁴ The High Court similarly relied on those aspects of the external affairs power to support the *Trans-Tasman Proceedings Act 2010* (Cth). Kiefel CJ, Gageler, Gleeson and Jagot JJ said that:

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 to implementing [the *Christchurch Agreement*]. 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 Zealand.⁷⁵

courts to have and exercise jurisdiction over defendants in New Zealand, although there would be a question of their constitutional power to do so if some subject-matter connection with the state was not included. A similar exercise was undertaken when it was recognised after *Gould v Brown* (1998) 193 CLR 346 and *Re Wakim: Ex parte McNally* (1999) 198 CLR 511 ('*Wakim*') that Australian federal courts could not receive state jurisdictions under the *Jurisdiction of Courts (Cross-vesting Act) 1987* (Cth), but uniform Federal Courts (State Jurisdiction) Acts were passed in every state in 1999 to render valid any federal court judgments made under the cross-vesting scheme: *Federal Courts (State Jurisdiction) Act 1999* (NSW); *Federal Courts (State Jurisdiction) Act 1999* (Qld); *Federal Courts (State Jurisdiction) Act 1999* (SA); *Federal Courts (State Jurisdiction) Act 1999* (Tas); *Federal Courts (State Jurisdiction) Act 1999* (Vic); *Federal Courts (State Jurisdiction) Act 1999* (WA). This process of salvage was upheld as constitutionally valid in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629.

⁷¹ *Zurich Insurance* NSWSC (n 18) [91].

⁷² *Ibid* [91].

⁷³ *Zurich Insurance* NSWCA (n 19) 391 [39]; see above n 2 and accompanying text.

⁷⁴ See the aspects of *Commonwealth Constitution* s 51 (xxix) as analysed in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 528 (Mason CJ), 548–77 (Brennan J), 599–602 (Deane J), 658–61 (Toohey J).

⁷⁵ *Zurich Insurance* HCA (n 17) 619–20 [19].

Gordon, Edelman and Steward JJ effectively agreed with this, merely holding that the *Trans-Tasman Proceedings Act 2010* (Cth) was enacted under the external affairs power.⁷⁶

B *Implied Limitations on the External Affairs Power?*

It was Zurich's claim that there was an implied constitutional limitation on federal power to legislate for the jurisdiction of state courts that was the point of the challenge. Zurich argued that ss 9 and 10 were invalid because it was implicit that Chapter III of the *Commonwealth Constitution* prohibited the federal Parliament from extending the service of state court process to places outside Australia.⁷⁷ The argument proceeds like this: although the *Service and Execution of Process Act* (Cth)⁷⁸ is in substance replicated in the *Trans-Tasman Proceedings Act 2010* (Cth), the two statutes are supported by different federal powers with different capacities to invest a court with federal jurisdiction. The *Service and Execution of Process Act* (Cth) is supported by s 51(xxiv) of the *Constitution*, which provides that the federal Parliament may make laws for the service and execution of state court process and judgments 'throughout the Commonwealth'. In contrast, the *Trans-Tasman Proceedings Act 2010* purports to be supported by s 51(xxix).⁷⁹ Chapter III of the *Constitution* is limited to investing state courts with the federal jurisdictions that are set out in Chapter III,⁸⁰ and that does not include the service of process under the *Trans-Tasman Proceedings Act 2010* (Cth).⁸¹ Zurich argued that all federal powers *other than* s 51(xxiv) were subject to Chapter III. That included the external affairs power in s 51(xxix). As a result, the federal Parliament was expressly empowered to provide for service 'throughout the Commonwealth' of state court process; service being how, at common law, the jurisdiction of courts is established. However, apart from s 51(xxiv), the federal Parliament could only confer jurisdiction on state courts in matters listed in Chapter III and — as litigation between New Zealanders, or between Australians and New Zealanders, is not a matter listed in Chapter III — the federal Parliament could not enact ss 9 and 10.⁸²

⁷⁶ Ibid 625 [49].

⁷⁷ Ibid 620 [24]. There was another constitutional argument that was raised only in the Court of Appeal. This invoked the doctrine of *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, that the federal Parliament cannot legislate so as to impose a special disability or burden on the exercise on state powers such that the state's ability to function as a government is curtailed. Zurich argued that it was for the state to determine what was heard in its own state courts. Bell CJ dismissed this argument as 'ambitious' and 'weak': *Zurich Insurance NSWCA* (n 19) 396–7 [59]–[62].

⁷⁸ See above nn 3–4 and accompanying text.

⁷⁹ See above nn 71–76 and accompanying text.

⁸⁰ See the subject-matter jurisdictions set out in the *Commonwealth Constitution* ss 75–6.

⁸¹ *Zurich Insurance NSWSC* (n 18) [91].

⁸² Ibid.

No court and no judge accepted this argument at any point in the *Zurich Insurance* litigation but, given the significance of Australia's commitment to the *Christchurch Agreement*, Zurich was always battling uphill. The High Court addressed the argument more directly by reference to fundamental principle. Kiefel CJ and Gageler, Gleeson and Jagot JJ stated:

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.⁸³

From that point, all judges considered what was meant by 'federal jurisdiction' in Chapter III.⁸⁴ Focusing on the term 'jurisdiction' itself, the judgments variously distinguish 'personal', 'territorial' and 'subject-matter' jurisdiction. Kiefel CJ, Gageler, Gleeson and Jagot JJ's account is worth repeating. They defined 'personal jurisdiction' as:

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 party. The amenability of a person to the service of process is a standard, albeit not invariable, 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.⁸⁵

Gordon, Edelman and Steward JJ added 'territorial jurisdiction' to this: 'the territory over which the court's power extends'.⁸⁶ The importance of this in the constitutional context is that personal jurisdiction — 'amenability to the service of process' — does not direct what either federal or state jurisdiction amounts to.⁸⁷ Quoting Bell CJ's decision in the Court of Appeal, the majority restated that '[p]ersonal jurisdiction is not a constitutional concept'.⁸⁸ However, this does not preclude the federal Parliament from legislating for personal jurisdiction. If a federal or state court is invested with federal jurisdiction under Chapter III, Parliament can provide for the service of the court's process as a matter incidental to the vesting of the federal subject-matter jurisdiction in question.⁸⁹ The

⁸³ *Zurich Insurance* HCA (n 17) 620 [25].

⁸⁴ In the New South Wales courts, see *Zurich Insurance* NSWSC (n 18) [94]–[128] (Rein J); *Zurich Insurance* NSWCA (n 19) 393–4 [48]–[49] (Bell CJ).

⁸⁵ *Zurich Insurance* HCA (n 17) 622 [34].

⁸⁶ *Ibid* 625 [48].

⁸⁷ *Ibid* 622 [34].

⁸⁸ *Ibid*; *Zurich Insurance* NSWCA (n 19) 394 [52].

⁸⁹ *Zurich Insurance* HCA (n 17) 622–3 [35]. That is, in the exercise of the incidental power: *Commonwealth Constitution* s 51(xxxix).

Commonwealth Constitution expressly provides for the service of state court process or personal jurisdiction throughout Australia in s 51(xxiv), without the creation of a new subject-matter jurisdiction⁹⁰ and, it may be observed, thereby extends the state court's territorial jurisdiction. Kiefel CJ, Gageler, Gleeson and Jagot JJ then up-ended Zurich's argument by looking to s 51(xxiv) to help conclude that providing for the personal jurisdiction of state courts in the exercise of state jurisdiction was 'wholly consistent with the structure of the *Constitution*'.⁹¹ The same could be validly done in the *forum competens* provisions of the *Trans-Tasman Proceedings Act 2010* (Cth).⁹² It is possible to read this as an inference, and one explicitly drawn from constitutional structure. The observation suggests that, rather than there being a negative implication that the *Commonwealth Constitution* prohibits the federal Parliament from extending state personal and territorial jurisdictions beyond Australia, there could be a positive implication in the structure of the *Commonwealth Constitution* that federal legislation can create extraterritorial personal and territorial jurisdictions for state courts.

Gordon, Edelman and Steward JJ agreed that Chapter III dealt only with subject-matter jurisdiction.⁹³ They found no need to explore the question of any negative implication prohibiting laws for the service of process outside s 51(xxiv). Sections 9 and 10 did not engage the subject-matter jurisdiction of Chapter III; they provided a federal law for service of process that, if leading to the subsequent exercise of subject-matter jurisdiction, did not necessarily mean that that was an exercise of a federal jurisdiction.⁹⁴

C Zurich Insurance *and the Commonwealth Constitution*

The decisions on the constitutional points in *Zurich Insurance* lead to three observations. The first two relate to implications in the *Constitution*, and especially in Chapter III. First, in reaching the conclusion that ss 9 and 10 were valid, the High Court addressed the circumstances in which it is possible to recognise an implied constitutional limitation on, what would otherwise be, the legitimate exercise of federal power. It is on this point that the justices divided. The majority regarded implications as structural, and that an implication in the *Commonwealth Constitution* would be recognised if it was 'logically or practically necessary for the preservation of the integrity of the constitutional structure'.⁹⁵ In contrast, Gordon, Edelman and Steward JJ required more than the necessary

⁹⁰ *Zurich Insurance* HCA (n 17) 623 [36].

⁹¹ *Ibid* 623 [37].

⁹² *Ibid* 623 [38]. That is, in the exercise of the incidental power: *Commonwealth Constitution* s 51(xxxix).

⁹³ *Zurich Insurance* HCA (n 17) 624–5 [47]–[48].

⁹⁴ *Ibid* 625 [51].

⁹⁵ *Ibid* 621 [28].

direction of the constitutional structure: they required the structure of the *Commonwealth Constitution* ‘always [to be] considered together with the text’.⁹⁶ Here, the minority was adamant that the High Court had repeatedly and unanimously insisted on reference to both constitutional text and structure when considering whether an implication affecting the operation of federal power could be made.⁹⁷ In this respect, the weight of authority seems to support the minority’s position.⁹⁸ The two approaches led to the same outcome in *Zurich Insurance*; the *forum competens* provisions of the *Trans-Tasman Proceedings Act 2010* (Cth) were valid. However, the significance of the difference may lie in Kiefel CJ, Gageler, Gleeson and Jagot JJ’s justification of a federal power to provide for the extraterritorial personal and territorial jurisdictions of state courts. According to the majority, this was ‘wholly consistent with the structure of the *Constitution*’.⁹⁹ It would be more tenuous to suggest that the text of s 51(xxiv) might also have something to do with the recognition of this power to legislate, as it is limited to the *interstate* service of state civil process.

Secondly, the High Court has previously found negative implications that affect courts’ jurisdictions in Chapter III. In *Re Wakim; Ex parte McNally* (*‘Wakim’*),¹⁰⁰ the High Court concluded that, in providing for federal jurisdiction to be invested in federal courts created by the federal Parliament, Chapter III imports a negative implication that the Parliament cannot provide for federal courts to receive state jurisdictions. The effect was to pull down much of the Cross-vesting Acts,¹⁰¹ and to confound cooperative arrangements for the exercise of subject-matter jurisdictions between state and federal courts. *Zurich Insurance* might recognise a positive implication about extending state jurisdictions in the constitutional structure, but it does not add to the jurisdictional confusion that was initiated in *Wakim*.

⁹⁶ Ibid 624 [44].

⁹⁷ See *ibid*.

⁹⁸ See Jeffrey Goldsworthy, ‘Implications in Language, Law and the Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150, 170–82; Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23(3) *Melbourne University Law Review* 668, 674–5; Jeremy Kirk, ‘Constitutional Implications (I): Nature, Legitimacy, Classification, Examples’ (2000) 24(3) *Melbourne University Law Review* 645, 664–8; Jeremy Kirk and Adrienne Stone, ‘The Freedom of Political Communication since *Lange*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 1, 3–5; Nicholas Aroney, ‘Commentary’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 21, 22–7; Jeremy Kirk, ‘Constitutional Implications (II): Doctrines of Equality and Democracy’ (2001) 25(1) *Melbourne University Law Review* 24, 49–52; Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28(3) *University of New South Wales Law Journal* 842, 844–5.

⁹⁹ *Zurich Insurance* HCA (n 17) 623 [37].

¹⁰⁰ *Wakim* (n 70).

¹⁰¹ Invalidating *Jurisdiction of Courts (Cross-vesting Act) 1987* (Cth) s 9(2), the important provision by which state jurisdictions were received for federal and territory courts.

The third observation is that the recognition that the service of state civil process outside Australia is supported by s 51(xxix) potentially has far reaching consequences for the international jurisdiction of state courts. Putting the *Trans-Tasman Proceedings Act 2010* (Cth) to one side, state courts' personal jurisdiction over defendants who are located outside Australia is given by the relevant state rules of court. There are questions about the constitutionality of most of these rules of court, particularly when they claim personal jurisdiction on the basis of a connection with 'Australia' but not necessarily with the state in question.¹⁰² The explicit recognition of federal power to provide for the service of state court process outside Australia would seemingly cure those lingering constitutional questions over state legislative power. *Zurich Insurance* suggests that there is federal power to set uniform rules of court for the state courts. Further, it would not require a treaty to support the legislation under s 51(xxix), as Bell CJ in the Court of Appeal and the High Court majority explicitly recognised that the *forum competens* pillar of the *Trans-Tasman Proceedings Act 2010* (Cth) was supported by the aspect of s 51(xxix) that enables the federal Parliament to legislate for matters outside Australia.¹⁰³ To reiterate Kiefel CJ, Gageler, Gleeson and Jagot JJ's conclusion:¹⁰⁴

Each of ss 9 and 10 of the Act answers the description of a law with respect to external affairs ... on the distinct basis that its subject matter is something geographically external to Australia ...

Presumably, then, *Zurich Insurance* supports the possibility of more general provision through federal legislation for the service of state process anywhere outside Australia.

IV BREAKDOWN

A *The Trans-Tasman Proceedings Acts Clarified*

The *Zurich Insurance* litigation helps to clarify the constitutional profile of the trans-Tasman judicial area, to the extent that it relies on Australian legislation. The *forum competens* provisions are valid. They are properly classified as granting

¹⁰² There must be some connection with the state for state legislation to be within its constitutional power, and the rules of court are state subordinate legislation. That itself creates constitutional problems for those rules, despite the decision of the Victorian Court of Appeal in *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580 (Niall, Hargrave and Emerton JJA): see Andrew Dickinson, 'In Absentia: The Evolution and Reform of Australian Rules of Adjudicatory Jurisdiction' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 13, 43; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 5th ed, 2023) 37–8.

¹⁰³ See nn 74–76, and accompanying text.

¹⁰⁴ *Zurich Insurance* HCA (n 17) 619–20 [19].

only a long-arm personal jurisdiction to Australian courts, and so they extend the territorial jurisdiction of state courts — as well as of federal and territory courts. If it ever became necessary to determine the validity of the service of process in a particular set of proceedings under ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth), that is a question that would arise in federal jurisdiction.¹⁰⁵ However, so far as a state court is concerned, that is also the likely point at which its federal jurisdiction ends. From that point onward, a state court may exercise any subject-matter jurisdiction with which it is already invested, whether that arises under a state or federal law.¹⁰⁶ And further, as Rein J clarified, that is a plenary exercise of the state court's existing subject-matter jurisdictions. If service of process was effected in New Zealand, there is no requirement that the proceedings must also have a trans-Tasman element before the Australian court had subject-matter jurisdiction to determine them.¹⁰⁷ It was quite within the competence of a New South Wales court to determine litigation that was exclusively between New Zealand plaintiffs and New Zealand defendants, and which related to a tort that occurred in New Zealand.¹⁰⁸ It also means that there is, within the trans-Tasman market area, ample opportunity for a litigant to sue in the most advantageous forum for its claim. In *Zurich Insurance*, this trans-Tasman personal jurisdiction enabled the unit owners to secure a direct action against Multiplex's insurers that was probably only available to them in New South Wales.

That allows an exorbitant personal and territorial jurisdiction to every court in the single economic market. It is the sorting provisions that bring the exercise of that jurisdiction into proportion.¹⁰⁹ In *Zurich Insurance*, the courts confirmed that the sorting provisions of the *Trans-Tasman Proceedings Acts* are engaged independently of how personal jurisdiction is assumed by the Australian or New Zealand court. Rein J was evidently annoyed that Zurich had submitted that he should exercise a 'residual discretion' not to allow the Victopia unit owners to sue the insurers directly, on the ground that it would interfere with the ranking of Multiplex's creditors under the New Zealand law that governed its liquidation.¹¹⁰ The legitimate approach, if there was a more appropriate court in New Zealand with jurisdiction to decide the question, was to apply for a stay of the proceedings under the *Trans-Tasman Proceedings Act 2010* (Cth).¹¹¹ This would then also have to confront the Act's provision that an Australian court 'must not ... stay the proceeding, if satisfied that an exclusive choice of court agreement designates an

¹⁰⁵ This distinction was reached by Rein J and Bell CJ by reference to the High Court's decision on the *Service and Execution of Process Act 1901* (Cth) in *Flaherty v Girgis* (1987) 162 CLR 574: see *Zurich Insurance NSWSC* (n 18) [123]; *Zurich Insurance NSWCA* (n 19) 389–90 [30].

¹⁰⁶ *Zurich Insurance NSWSC* (n 18) [123]; *Zurich Insurance NSWCA* (n 19) 393–5 [45]–[55].

¹⁰⁷ *Zurich Insurance NSWSC* (n 18) [88]–[89].

¹⁰⁸ *Ibid* [89].

¹⁰⁹ See above nn 10–13 and accompanying text.

¹¹⁰ See above nn 63–68 and accompanying text.

¹¹¹ *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19.

Australian court as the court to determine those matters'.¹¹² In considering the notional proceedings for the purposes of the *Claims Act* (NSW), the New South Wales court would have had personal jurisdiction over the New Zealand corporation Multiplex under the *Trans-Tasman Proceedings Act 2010* (Cth). However, its personal jurisdiction over Zurich and Aspen was established on different grounds. The New South Wales court's jurisdiction over Zurich and Aspen had been prorogued precisely by the kind of choice of court agreement that would preclude a stay in favour of a New Zealand court, with Aspen also being within the court's in-state common law jurisdiction by reason of its business presence in New South Wales.¹¹³ However, the reasoning reinforces that the sorting provisions of the *Trans-Tasman Proceedings Act 2010* (Cth) are solely applicable whenever the alternative forum is a New Zealand court. They do not require the Australian court's personal jurisdiction in the proceedings to have been assumed under the *Trans-Tasman Proceedings Act 2010* (Cth).

The analysis undertaken in *Zurich Insurance*, especially in Rein J's judgment, also highlights the internal asymmetry of the jurisdiction of courts in the trans-Tasman judicial area. That asymmetry already existed within the Australian scheme, largely because of the role that the *Jurisdiction of Courts (Cross-vesting) Acts* play in the scheme. The cross-vesting scheme provides sorting provisions for the Australian scheme through the system of transfers between superior courts to the *forum conveniens* in Australia.¹¹⁴ Importantly, it also provides an extensive investing of the subject-matter jurisdictions of federal, state and territory courts in the state and territory supreme courts¹¹⁵ but, because of other implied limitations that are recognised in Chapter III of the *Commonwealth Constitution*,¹¹⁶ only the jurisdiction of the territory supreme courts in the federal courts.¹¹⁷ State jurisdictions cannot flow to the federal courts. Hence, within the Australian scheme, the state and territory courts occupy an advantageous position relative to the federal courts in the possession and exercise of subject-matter jurisdictions.

The background litigation to *Zurich Insurance* reinforces that the Australian state (and territory) courts also enjoy an advantage over the New Zealand courts when it comes to the application of other Australian states' statutes. As had its predecessor, the *Claims Act* (NSW) introduces limits of procedural enforceability by which the powers to approve a third party's direct action against an insurer are given only to New South Wales courts.¹¹⁸ The New South Wales Court of Appeal in

¹¹² Ibid s 20(1)(b).

¹¹³ *Zurich Insurance* NSWSC (n 18) [142].

¹¹⁴ See above n 5 and accompanying text.

¹¹⁵ *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 4(1); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) s 4(1) and equivalent legislation in other states and territories.

¹¹⁶ See above nn 70 and 100 and accompanying text.

¹¹⁷ *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 4(2).

¹¹⁸ See above nn 30–36; *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ss 3–4.

Chubb,¹¹⁹ and later the New Zealand High Court in *Body Corporate 326421*,¹²⁰ had interpreted the predecessor to the *Claims Act* (NSW) as conferring powers only on a court in New South Wales to give leave to approve a direct action. In New Zealand, the court was therefore unable to approve a direct action against the insurer even if New Zealand choice of law rules had the New South Wales statute applying to the claim.¹²¹ That is not a limitation on the powers of the other state supreme courts in Australia, in which the subject-matter jurisdiction of the New South Wales Supreme Court is invested and its procedures are available to them.¹²² Procedural enforceability is cross-vested.¹²³ Accordingly, under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), the Supreme Court of Victoria could consider the *Claims Act* (NSW) ‘exactly as if it were the Supreme Court of New South Wales sitting “on circuit” in Victoria’.¹²⁴ The Victorian Court would have power to approve a direct action against an insurer if the question were to come before it when New South Wales provided the applicable law.

B *The Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW): Territorial Application*

An unsatisfactory outcome of the *Zurich Insurance* litigation was the courts’ approaches to the question of the territorial application of the *Claims Act* (NSW). The question is of broader relevance than the New South Wales statute itself as the Australian Capital Territory and the Northern Territory have comparable legislation.¹²⁵ These are in the older form of the *Claims Act* (NSW)’s predecessor and, so, the *Law Reform Act 1936* (NZ).¹²⁶ This legislation is famously ‘silent as to the sphere of its intended territorial operation’,¹²⁷ and ‘ambiguity may be its only clear feature’.¹²⁸

However, in *Zurich Insurance*, Rein J accepted that the Court of Appeal’s understanding in *Chubb* of the territorial reach of the predecessor to the *Claims Act* (NSW) applied equally to the *Claims Act* (NSW) itself.¹²⁹ As Rein J’s approach to the *Claims Act* (NSW) is the position that forced the need to consider the constitutional validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth), it must be treated as having been accepted by the Court of Appeal and the majority in the

¹¹⁹ *Chubb* (n 35) [204].

¹²⁰ *Body Corporate 326421* (n 24) [25].

¹²¹ *Ibid.*

¹²² *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) ss 4(3), 11(1)(c).

¹²³ See, eg, *Re DEF and Protected Estates Act 1983* (2005) 192 FLR 92, 103–4 [27]–[30] (Campbell J).

¹²⁴ Gavan Griffith, Dennis Rose and Stephen Gageler, ‘Choice of Law in Cross-Vested Jurisdiction: A Reply to Kelly and Crawford’ (1988) 62(9) *Australian Law Journal* 698, 701.

¹²⁵ *Civil Law (Wrongs) Act 2002* (ACT) ss 206–9; *Law Reform (Miscellaneous Provisions) Act* (NT) ss 26–9. See above nn 22–29 and accompanying text.

¹²⁷ *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692, 696 [6] (Bell P) (‘DRJ’).

¹²⁸ *McMillan v Mannix* (1993) 31 NSWLR 538, 542 (Kirby P).

¹²⁹ *Zurich Insurance* NSWSC (n 18) [72]; see also *Chubb* (n 35) [197]–[205].

High Court. It can therefore also be considered the likely approach to the provisions for direct actions against insurers in the two territories.

This is not a satisfactory position. Rein J's approach and the broader approach of Gordon, Edelman and Steward JJ in the High Court rest on the same problem. They both rely, at least as an alternative determinant of the statute's territorial application, on the personal jurisdiction of the court to determine the statute's territorial reach, and this means that the statute can apply to people who, and circumstances that, have no connection with the state. In Rein J's approach, and that of *Chubb*, the *Claims Act* (NSW) applies when the court had or would have had personal jurisdiction in 'the notional proceedings' — the underlying claim that was or could be brought by the plaintiff against the *insured*.¹³⁰ In the High Court minority's approach, this was accepted as sufficient for the *Claims Act* (NSW) to apply, but it would also apply when the court merely had jurisdiction in the plaintiff's proceedings against the *insurer*.¹³¹

There are logical and, possibly, constitutional problems with this. In *Zurich Insurance*, Rein J rejected the idea that the *Claims Act* (NSW) would apply simply because the plaintiff had sued the insurer in New South Wales,¹³² yet it seems equally difficult to justify its application when the insured is just notionally exposed to litigation there. In both approaches that have the Act applying when there is personal jurisdiction over the insured or insurer, the application of the Act is hinged on the mere bringing or — as in *Zurich Insurance* itself — the imagining of proceedings in New South Wales.

Secondly, it has potential to see the application of the *Claims Act* (NSW) in circumstances that have no connection with New South Wales. There was a connection with New South Wales in *Zurich Insurance* — Aspen's presence in the State and, although it could include the other states and territories, the governing law and choice of court agreement in the insurance policy. However, in both Rein J's and the High Court minority's approaches, it is recognised that the personal jurisdiction that is needed for the *Claims Act* (NSW) to apply includes long-arm jurisdiction — without reference to discretionary restraints on its exercise. The notional proceedings for Rein J, the Court of Appeal and the High Court majority relied on ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth); the actual underlying proceedings had no connection whatsoever with New South Wales. Gordon, Edelman and Steward JJ invoked the long-arm jurisdiction available to the New South Wales Supreme Court under its *Rules of Court* to show that, in addition to the common law jurisdictions that existed, there were other grounds of personal jurisdiction over the insurers.¹³³

¹³⁰ *Zurich Insurance* NSWSC (n 18) [70].

¹³¹ *Zurich Insurance* HCA (n 17) 626 [54]–[56].

¹³² *Zurich Insurance* NSWSC (n 18) [74].

¹³³ *Zurich Insurance* HCA (n 17) 626 [55].

And thirdly, that last aspect of Gordon, Edelman and Steward JJ's judgment reveals circular reasoning in their conclusion that the application of the *Claims Act* (NSW) could hinge on long-arm jurisdiction. The very question being decided was whether the *Claims Act* (NSW) was enforceable, but that could apparently depend on personal jurisdiction arising under the *Rules of Court* when there was an 'indemnity in respect of a liability enforceable by a proceeding in court'.¹³⁴ Therefore, personal jurisdiction can only arise under this Rule of Court when there is at least an arguable case that there is an indemnity in respect of a liability that is enforceable under the *Claims Act* (NSW), but the *Claims Act* (NSW) is only be enforceable because this Rule of Court gives the personal jurisdiction on which its application is hinged. That is bootstrapping, and illogical.

The potential application of the *Claims Act* (NSW) in circumstances that have no connection with New South Wales inevitably raises a constitutional question about the Act. Limitations on state legislative power require a statute's application to have a real connection with the state, even if a remote or general one, for the statute to be valid.¹³⁵ Alternatively, in New South Wales, the absence of a connection may see the statute read down.¹³⁶ Having a statute's application hinge on the availability of a long-arm personal jurisdiction, however, means that application may have no connection with the state. The *Service and Execution of Process Act* (Cth) can make a state court *forum competens* in proceedings in which all of the circumstances took place in another state, and all of the litigants were located there. Similarly, the *Trans-Tasman Proceedings Act 2010* (Cth) can make a state court competent in proceedings in which all of the circumstances took place, and all of the litigants were located, in New Zealand. In these proceedings, the state court can be *forum competens* because the extension of personal and territorial jurisdiction to matters that have no connection with the state is supported, respectively, by s 51(xxiv) and, as held in *Zurich Insurance*, by s 51(xxix) of the *Commonwealth Constitution*. Those federal powers do not support the application of the New South Wales *Claims Act* (NSW) in the exercise of the state court's subject-matter jurisdiction. That must be supported independently by the state's own constitutional powers.¹³⁷

Alternatives to Rein J's and the High Court minority's approaches by no means destroy the *Claims Act* (NSW). In no court did the Act's 'silence as to location' see serious attention given to the *Interpretation Act 1987* (NSW), s 12,

¹³⁴ *Uniform Civil Procedure Rules 2005* (NSW) sch 6 cl(h)(ii).

¹³⁵ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1, 22–3 [7]–[10] (Gleeson CJ), 34 [48]–[51] (Gaudron, Gummow and Hayne JJ); *DRJ* (n 127) 692, 696–7 [2]–[9] (Bell P), 723–5 [128]–[134] (Leeming JA).

¹³⁶ See, eg, *Hitchcock v Pratt* (2010) 79 NSWLR 687 (Brereton J).

¹³⁷ This analysis bypasses the long-arm jurisdictions that arise under the *Uniform Civil Procedure Rules 2005* (NSW) that, like equivalent rules of court in most other states, claim *inter alia* that a state Supreme Court may hear proceedings that have a connection with 'Australia' but not necessarily with the state. The constitutional problems for those Rules are noted at n 102 and accompanying text.

which brings the state's statutes within its own territorial limits, and which allow it to be read down to give it a constitutionally valid territorial application.¹³⁸ Even the more traditional approach of subjecting the application of a statute to choice of law rules,¹³⁹ rather than the approach taken in *Zurich Insurance* of the statute overriding them,¹⁴⁰ could still have seen the *Claims Act* (NSW) applied. A direct action against an insurer has been treated as a question of quasi-contract, which would have seen New South Wales law apply in accordance with the governing law of the insurance policy.¹⁴¹ The alternative method of classifying the underlying claim would, however, have seen New Zealand law applied as it was the law of the place where the tort occurred.¹⁴² This would render the *Claims Act* (NSW) inapplicable, and legitimately so if Australian law were to consider an action of this kind to be tortious.

In *Zurich Insurance*, all of the judges usefully sharpened the conceptual distinction between personal, territorial and subject-matter jurisdiction — distinctions that were important to explain the validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) and which are significant in many areas of the law. The complications revealed with the territorial reach of the *Claims Act* (NSW) emerge only by a failure to maintain those distinctions in treating the subject-matter jurisdiction of the Act as conditional only on the personal and territorial jurisdiction of the courts. In effect, this gives the legislation a larger territorial application than the territorial jurisdiction of the court, because it is not subject to any geographical restraints on the exercise of jurisdiction, such as those found in the sorting provisions of the *Service and Execution of Process Act* (Cth) and the *Trans-Tasman Proceedings Act 2010* (Cth).¹⁴³ *Zurich Insurance* should nevertheless be welcomed, especially since it supports the integrity of the trans-Tasman judicial area and its distinctive approach to securing proportionate personal jurisdictions for participating state courts. It should be expected that state parliaments and courts together be as equally proportionate in the territorial claims they make for the application of their statutes.

¹³⁸ DRJ (n 127) 709–10 [67]–[77] (Leeming JA); cf *Zurich Insurance* NSWSC (n 18) [65].

¹³⁹ *Barcelo v Electrolytic Zinc Company of Australasia Ltd* (1932) 48 CLR 391, 428 (Dixon J); *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600–1 (Dixon J); DRJ (n 127) 722 [125]–[126], 725–6 [139]–[141] (Leeming JA).

¹⁴⁰ Rein J would not accept that, if the chosen governing law was that of a place other than New South Wales, the *Claims Act* would also be have to be excluded: *Zurich Insurance* NSWSC (n 18) [70].

¹⁴¹ *Plozza v South Australian Insurance Co Ltd* [1963] SASR 122 (Hogarth J); *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 22 FLR 473 (Bray CJ, Bright and Zelling JJ); Dimity Kingsford-Smith and Gregory Burton, 'Recent Problems with Characterization of Statutory Rights in the Conflict of Laws' (1980) 9(1) *Sydney Law Review* 190, 191–202.

¹⁴² *Ryder v Hartford Insurance Co* [1977] VR 257 (Jenkinson J); cf *Li Lian Tan v Durham* [1966] SASR 143, 149 (Chamberlain J).

¹⁴³ See above nn 4–5 and 10–12 and accompanying text.