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# BILLS DIGEST

Digest No. 1723

## Trans-Tasman Proceedings Bill 2009

<b>Date of Introduction:</b>	24 November 2009
<b>Portfolio:</b>	Justice
<b>Select Committee:</b>	As at 08 December, 1st Reading not held.
<b>Published: 08 December 2009</b>  Prepared by <b>John McSoriley</b> BA LL.B, Barrister  Legislative Analyst  P: (04) 471-9626 (Ext. 9626)  F: (04) 471-1250	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.  Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

### Purpose

The aim of this Bill is to implement the Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement signed in Christchurch on 24 July 2008 (the Agreement)<sup>1</sup>.

The objective of the Agreement is to streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs, improve efficiency, and minimise existing impediments to enforcing certain judgments and regulatory sanctions<sup>2</sup>.

<sup>1</sup> Trans-Tasman Proceedings Bill, 2009 No 105-1, Explanatory note, General policy statement, p. 1.

<sup>2</sup> Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement, Article 2-Objective, contained in Schedule 1 of the Bill.

## Background

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### The Working Group and the Agreement

The Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement (the Working Group) was established in 2003 by the Prime Ministers of Australia and New Zealand, the Hon John Howard MP and the Rt Hon Helen Clark MP.

The Working Group's Terms of Reference required it to *examine the effectiveness and appropriateness of current arrangements that relate to civil (including family) proceedings, civil penalty proceedings and criminal proceedings (where those proceedings relate to regulatory matters).*

In August 2005, after considering a wide range of policy and procedural issues, the Working Group released a public discussion paper inviting views on problems, options and preferred solutions about the resolution of trans-Tasman disputes and increased regulatory cooperation. The discussion paper was circulated widely and made available to the public on the websites of the New Zealand Ministry of Justice and the Australian Government Attorney-General's Department.

Having considered the responses received, the Working Group made a series of recommendations as to how the legal framework for resolving civil disputes with a trans-Tasman element might be improved. Cheaper, more efficient and less complicated dispute resolution mechanisms were felt to be of significant benefit to individuals and business in the two countries.

The Working Group's central recommendation was that a "trans-Tasman regime", modelled on the *Service and Execution of Process Act 1992* (Australia), be introduced as between the two countries. The proposed regime would allow initiating process in civil proceedings issued out of a court in Australia or New Zealand to be served in the other country, with the same effect as if service had occurred in the country of issue. Currently, a range of judgments of Australian and New Zealand courts can be registered and enforced by a court in the other country. The Working Group proposed that the range of enforceable judgments be broadened, and that judgments only be refused enforcement where they conflicted with the public policy of the other country.

The proposed trans-Tasman regime would be supported by wider use of teleconference and video link technology to enable remote appearances in trans-Tasman proceedings. The Working Group recommended that, for appearances in civil proceedings, a party in the other country (and their lawyer) be allowed to appear by telephone or video link with the leave of the court in most cases, and as of right in an application for a stay of proceedings, on the grounds that a court in the other country was more appropriate to decide the dispute.

The Working Group felt that some of its recommendations would improve regulatory enforcement between Australia and New Zealand. Civil pecuniary penalties from one country would be enforceable in the other unless specifically excluded. Criminal fines imposed for certain regulatory offences in one country would be enforceable in the other in the same way as a civil judgment debt<sup>3</sup>.

The Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement was signed in Christchurch on 24 July 2008

### The treaty examination

In its treaty examination of the Agreement, the Law and Order Select Committee stated that the Australian and New Zealand Governments had agreed to implement a package of reforms recommended by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement.

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<sup>3</sup> "[Trans-Tasman Court Proceedings and Regulatory Enforcement](#)", Report by the Trans-Tasman Working Group, Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), December 2006

The national interest analysis appended to the committee's report stated that "The reforms address problems that arise in civil court proceedings with a trans-Tasman element or that undermine the effectiveness of regulatory regimes. These problems can only be addressed by New Zealand and Australia adopting mirror solutions. Entering into a treaty with Australia is the most effective way to achieve this.

"The Agreement will:

- "Simplify the trans-Tasman service of civil court proceedings and the process of enforcing judgments across the Tasman";
- "Expand the range of enforceable judgments";
- "Improve regulatory enforcement between Australia and New Zealand by providing for the enforcement of civil pecuniary penalties and certain criminal regulatory fines";

"The objective of taking treaty action is to achieve closer integration between the New Zealand and Australian civil justice systems to:

- Make the resolution of trans-Tasman civil disputes simpler, less costly and more efficient";
- Make any remedies more effective";
- "Support the success of the trans-Tasman trade relationship".

"In addition, taking treaty action would improve the enforcement of particular regulatory regimes in which both countries have a strong mutual interest. This would reduce incentives for people to move themselves or their assets to the other country to put them beyond reach of a regulatory regime. It would also avoid enforcement gaps that would otherwise exist.

"The advantages of New Zealand entering into the Agreement include improved outcomes from the court system. It will improve the integrity of New Zealand and Australia's regulatory regimes, through improved regulatory enforcement. This will support current and future CER and Single Economic Market initiatives. This, in turn, combined with greater predictability in the resolution of trans-Tasman legal disputes, will help reduce barriers to trade.

"There are no significant disadvantages to New Zealand of entering into the Agreement. If New Zealand does not enter into the Agreement, however, it will not benefit from the streamlined processes for resolving trans-Tasman disputes and the improved integrity of trans-Tasman regulatory solutions.

"The clearer, simpler regime for resolving trans-Tasman disputes will benefit both businesses and individuals through reduced costs, more efficient court proceedings and more effective remedies. However, those who can currently avoid having an Australian judgment enforced against them in New Zealand will face the cost of meeting their obligations under the new arrangement"<sup>4</sup>.

## The need for the Bill

"The Bill is an important step towards closer integration of the Australian and New Zealand civil justice systems. It contains procedural reforms to simplify and reduce the cost of resolving trans-Tasman disputes. It will also improve the effectiveness of any remedies awarded. The result should increase clarity and certainty for trans-Tasman litigants. This, in turn, will help support and increase the success of the trans-Tasman trade relationship"<sup>5</sup>.

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<sup>4</sup> [International treaty examination of the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement](#), Law and Order Committee, House of Representatives, 2009

<sup>5</sup> Trans-Tasman Proceedings Bill, 2009 No 105-1, Explanatory note, General policy statement, p. 2.

"The Bill will also improve regulatory enforcement across the Tasman. This will support current and future regulatory co-operation initiatives under the CER [the 1983 Australia and New Zealand Closer Economic Relations Trade Agreement] and SEM [Single Economic Market] umbrellas"<sup>6</sup>.

## Main Provisions

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This is a highly complex, intricate and technical Bill. The following is a very general summary of its provisions.

### Commencement

The Bill's Parts and schedules are to come into force on a date appointed by the Governor-General by Order in Council (*Clause 2*).

#### *Comment*

"The reason for this is to allow commencement ... on or after the entry into force of the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement (the Agreement) ... and ... in co-ordination with the corresponding Australian Act"<sup>7</sup>.

### Trans-Tasman proceedings

#### Service in Australia of civil proceedings commenced in New Zealand

In relation to civil proceedings commenced in a New Zealand court or tribunal (where the tribunal's procedural rules allow it or the Governor-General has declared by Order in Council that the appropriate provision applies to the tribunal), the Bill provides that an "initiating document" for the proceeding may be served in Australia in the same way that the document is required or permitted, under the procedural rules of the New Zealand court or tribunal, to be served in New Zealand. The Bill provides exceptions to this as follows:

- a civil proceeding that relates wholly or partly to an "excluded matter" ;
- a civil proceeding that relates wholly or partly to an action in rem; or
- a civil proceeding in a New Zealand tribunal not subject to this provision.

An initiating document for the proceeding may be served in Australia but must be served in the same way that the document is required or permitted, under the procedural rules of the New Zealand court or tribunal, to be served in New Zealand. Such service in Australia of an initiating document has the same effect as if the initiating document had been served in New Zealand (*Part 2, Subpart 1, Clauses 13-21*).

"Initiating document", "excluded matter" and "action in rem"

The Bill defines the term "Initiating document" as " ... a document:

- by which a civil proceeding is commenced in a New Zealand court or tribunal; or
- by reference to which a person becomes a party to a civil proceeding in a New Zealand court or tribunal (*Part 1, Clause 5(1), definition of "initiating document"*).

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<sup>6</sup> Ibid.

<sup>7</sup> Trans-Tasman Proceedings Bill, 2009 No 105-1, Explanatory note, Analysis, p. 5.

The term "excluded matter" means all or any of the following:

- the dissolution of a marriage;
- the enforcement of an obligation under Australian law to maintain a spouse or a de facto partner (within the meaning of the Acts Interpretation Act 1901 (Australia));
- the enforcement of an obligation under New Zealand law to maintain a spouse, civil union partner, or de facto partner;
- the enforcement of a child support obligation;
- an arrangement or matter declared by an Order in Council to be an arrangement or matter excluded from the operation of subparts 1 and 5 of Part 2 of the Bill (*Part 1, Clause 5(1), definition of "excluded matter"*).

An "In rem action" is an action concerning specific property (either land or another thing), rather than against a person (an "in personam" or personal action). The action is usually concerned with the ownership of the property. In the current law, an in rem action is usually heard in the jurisdiction where the property (for example, the land concerned) is itself located<sup>8</sup>.

Declining jurisdiction in NZ where the Australian court is the more appropriate forum

The Bill provides that a defendant in a civil proceeding commenced in a New Zealand court after the commencement of the Bill may apply to the court for an order staying a proceeding on the grounds that an Australian court is the more appropriate court for the proceeding, and the court may grant the order if it is satisfied that an Australian court:

- has jurisdiction to determine all the matters in issue between the parties to the proceeding; and
- is the more appropriate court to determine those matters, taking into account that
  - the places of residence of the parties or, if a party is not an individual, its principal place of business;
  - the places of residence of the witnesses likely to be called in the proceeding;
  - the place where the subject matter of the proceeding is situated;
  - generally, any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be instituted (i.e. an exclusive choice of court agreement usually has determinative effect);
  - the law that it would be most appropriate to apply in the proceeding;
  - whether a related or similar proceeding has been commenced against the defendant or another person in a court in Australia;
  - the financial circumstances of the parties, so far as the New Zealand court is aware of them; and
  - any other matters (other than the fact that the proceeding was commenced in New Zealand) that the New Zealand court considers relevant.

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<sup>8</sup> see: Peter Spiller, "Butterworth's New Zealand Law Dictionary", 6th edition, LexisNexis, Wellington, 2005, p. 140, definition of "in rem".

The Bill prohibits a New Zealand court from restraining a person (for example, by an anti-suit injunction) from commencing a proceeding in an Australian court on the grounds that the Australian court is not the appropriate forum for the proceeding and from restraining a party to a proceeding before an Australian court from taking a step in that proceeding on the grounds that the Australian court is not the appropriate forum for the proceeding. Limitation periods are suspended for claims made earlier in stayed proceedings in Australian courts where a claim is made in a proceeding commenced in an Australian court (the Australian proceeding) that is later stayed by an order of the Australian Court made under the Australian Act on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue between the parties to the proceeding. A limitation period may also be suspended if the claim is to be made again in a proceeding to be commenced in a New Zealand court (the New Zealand proceeding) after the staying of (and, if applicable, before any deadline stated in the condition of that order staying) the Australian proceeding. For the purposes of every applicable limitation period or defence under New Zealand law, the New Zealand proceeding is to be treated as commencing at the time the Australian proceeding commenced (*Part 1, Subpart 2, Clauses 22-29*).

#### Interim relief in support of civil proceedings in Australian courts

The Bill provides that a party or intended party to a civil proceeding commenced in an Australian court may apply for interim relief (other than for excluded interim relief such as an interim payment, discovery, or a warrant of arrest of property (e.g. a ship) against which an action or counterclaim *in rem* is brought, or certain relief under the Evidence Act 2006) to the High Court or another New Zealand court declared by an order to be subject to the provision and the court may grant the interim relief if the court considers it appropriate to give the interim relief in support of the Australian proceeding and the court, if a proceeding similar to the Australian proceeding had been commenced in the court, would have had power to give the interim relief in the similar proceeding and would have in fact given the interim relief in the similar proceeding (*Part 2, Subpart 3, Clauses 30-32*).

#### Remote appearances and remote evidence

The Bill makes detailed provision for remote appearances unrelated to remote evidence (remote evidence is covered in the Evidence Act 2006). The Bill allows parties and their lawyers to appear remotely in proceedings in the other country by allowing a party and the party's lawyer to appear remotely (by audiovisual link, telephone, or other technology, called in the Bill a "remote appearance medium") with the leave of the court (*Part 2, Subpart 4, Clauses 33-48*).

#### Recognition and enforcement in New Zealand of specified Australian judgments

The Bill provides for the enforcement of Australian judgments in New Zealand, increasing the range from final money judgments (at present enforceable) to include final non-money judgments. However, only judgments registered in a New Zealand court may be enforced. The Bill sets out the circumstances when an Australian judgment is registrable. Such circumstances include:

- the judgment is a final and conclusive judgment that is given in a civil proceeding by an Australian court; or
- the judgment is a final and conclusive judgment that is given in a civil proceeding by an Australian tribunal declared by the Governor-General by Order in Council under Clause 51(1)(a) to be a tribunal to which Subpart 5 of the Bill applies and the judgment is an order declared under Clause 51(1)(b) to be an order to which Subpart 5 applies; or
- the judgment is a final and conclusive judgment that is given in a criminal proceeding by an Australian court and the judgment is a requirement to pay an injured party a sum of money by way of compensation, damages, or reparation; or
- the judgment is a final and conclusive judgment that is given in a civil proceeding or a criminal proceeding by an Australian court and the judgment is an order (subject to specified circumstances) for the payment of certain expenses incurred by a witness (as defined) in

complying with an Australian subpoena (as defined) served on the witness in New Zealand or are incurred by a person in connection with the taking of remote evidence; or

- the judgment is a final and conclusive judgment that is registered in an Australian court under the Foreign Judgments Act 1991 (Australia).

The Bill sets out a list of types of judgments which are not registrable Australian judgments.

Examples of such non-registrable judgments include a judgment which wholly or partly:

- relates to an excluded matter; or
- is a non-money judgment of a kind that is declared by an order under Clause 50(3) to be excluded from recognition and enforcement under Subpart 5 of the Bill; or
- is a judgment (other than one imposing a civil pecuniary penalty) given in an Australian trans-Tasman market proceeding (but a judgment of that kind is a registrable Australian judgment for the purposes of Subpart 5 by virtue of Subpart 6 - see below); or
- is a judgment (including one given in an Australian trans-Tasman market proceeding) imposing a civil pecuniary penalty (but a judgment of that kind is a registrable Australian judgment for the purposes of Subpart 5 by virtue of Subpart 7 - see below) ; or
- is an order under proceeds of crime legislation; or
- is an order relating to the granting of probate or letters of administration or the administration of the estate of a deceased person; or
- is an order relating to the guardianship or care of a person who is incapable of managing his or her personal affairs; or
- is an order relating to the management of the property of a person who is incapable of managing that property; or
- is an order relating to the care, control, or welfare of a child; or
- is an order that, if contravened by a person to whom it is directed, will make the person liable to conviction for an offence in the place where it was made; or
- is a judgment given before the commencement of the Bill (even if the judgment is, at any time, registered in an Australian court under the Foreign Judgments Act 1991 (Australia)) (*Part 2, Subpart 5, Clauses 49-67*).

#### New Zealand judgments given in Australian trans-Tasman market proceedings

The Bill requires a judgment to be treated for the purposes of Subpart 5 of the Bill as a registrable Australian judgment if the judgment is given in an Australian trans-Tasman market proceeding and does not impose a civil pecuniary penalty (but a judgment given in an Australian trans-Tasman market proceeding and that imposes a civil pecuniary penalty is a registrable Australian judgment for those purposes by virtue of subpart 7 -see below) (*Part 2, Subpart 6, Clauses 65-67*).

#### Australian judgments imposing civil pecuniary penalties

The Bill requires a judgment to be treated for the purposes of Subpart 5 as a registrable Australian judgment if the judgment is given by an Australian court in a civil proceeding (including an Australian trans-Tasman market proceeding) and imposes a civil pecuniary penalty and is not a kind of judgment imposing a civil pecuniary penalty that is declared by an Order in Council to be excluded from recognition or enforcement under Subpart 5 of the Bill (*Part 2, Subpart 7, Clauses 68 and 69*).

## Australian judgments imposing regulatory regime criminal fines

The Bill requires a judgment to be treated for the purposes of Subpart 5 the Bill as a registrable Australian judgment if the judgment is given by an Australian court in a criminal proceeding and imposes a fine for certain criminal offences under Australian legislation and that is declared by an Order in Council to be a regulatory regime criminal fine and which complies with conditions prescribed by an Order in Council (*Part 2, Subpart 8, Clauses 70 and 71*).

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