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

Report of the Law and Order Committee

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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

Recommendation

The Law and Order Committee has conducted an 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, and recommends that the House take note of its report.

We are pleased that this treaty will allow more trans-Tasman cooperation in court proceedings and regulatory enforcement. However, we think a similar agreement needs to be established to cover fines and compensation for victims. We are concerned about the possibility that people may move to Australia and thus avoid paying fines or compensation to victims from infringements or crimes committed in New Zealand. We would support the establishment of a trans-Tasman working group to investigate this matter.

Appendix A

Committee procedure

The Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement was referred to the committee on 31 July 2008.

We received advice from the Ministry of Justice and the Ministry of Foreign Affairs and Trade.

Committee members

Ron Mark (Chairperson)
Hon David Benson-Pope (Deputy Chairperson)
Chester Borrows
Martin Gallagher
Hon Darren Hughes
Simon Power
Kate Wilkinson

Appendix B

National Interest Analysis

Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement

Executive summary

1 The Australian and New Zealand Governments have agreed to implement a package of reforms recommended by the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement. 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.

2 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.

3 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.

4 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.

5 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.

6 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 arrangements.

Date and nature of proposed treaty action

7 We propose that New Zealand sign the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement ('the Agreement').

8 Under Article 16 of the Agreement, each Party is required to notify the other, through diplomatic channels, of the completion of their respective domestic procedures for entry into force of the Agreement. The Agreement will enter into force 30 days after the later of these notifications.

9 We propose to notify Australia as soon as practicable after implementing legislation has been enacted and any necessary regulations or court rules have been promulgated in New Zealand. No specific date is proposed for entry into force of the Agreement as it will depend on when both countries have completed domestic procedures such as passing legislation.

Reasons for New Zealand taking the treaty action

Background to the Agreement

10 There are a number of recurring problems in civil court proceedings with a trans-Tasman element and the enforcement of regulatory regimes in which both Australia and New Zealand have a strong mutual interest.

11 In 2003 the New Zealand and Australian Prime Ministers agreed to establish the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement ('the Working Group') to review existing trans-Tasman co-operation in court proceedings and regulatory enforcement. The Working Group, comprising officials from both countries, was also directed to investigate the possibility of streamlining and improving existing mechanisms, especially in areas such as service of process, taking of evidence, recognition of judgments in civil and regulatory matters and regulatory enforcement.

12 The Working Group released a public discussion paper in August 2005, identifying problems and proposing solutions. Overall submissions were very supportive of the Working Group's proposals. The Working Group submitted its final report to the Australian and New Zealand governments in mid December 2006. Both governments

agreed to implement the Working Group's recommendations by entering into this Agreement.

13 The Agreement is one of a number of initiatives aimed at building on the 1993 Australia New Zealand Closer Economic Relations Trade Agreement (CER) and achieving a Single Economic Market (SEM) with Australia.

Key features of current situation

14 Over time, there has been a significant increase in the movement of people, assets and services between New Zealand and Australia. These are now at very high levels:

- In the year ending January 2008, 956,411 Australians visited New Zealand, and 972,760 New Zealanders visited Australia. Around 460,000 New Zealanders live in Australia and around 63,000 Australians in New Zealand.
- In the year ending January 2008, exports of goods from Australia to New Zealand were valued at NZ$8,594 million and from New Zealand to Australia at NZ$8,212 million.
- In 2006 - 2007, New Zealand exports of services to Australia came to NZ$2,662 million and Australian exports to New Zealand came to $3,704 million.
- As at 31 March 2007, Australia was the source of $79.0 billion of investment in New Zealand and the destination of $30.1 billion of New Zealand's investment abroad.

15 This leads inevitably to a greater number of disputes involving individuals or businesses with a cross-border element. Under CER and the work around achieving a SEM with Australia, each country also has a significant interest in the effectiveness of existing regulatory regimes, such as the Commerce and Securities Acts and their Australian equivalents, to ensure that limits to the reach of each country's regulatory system are not exploited and that consumers have effective redress.

16 The Working Group identified a range of problems that arise in civil proceedings with a trans-Tasman element or that undermine the effectiveness of various regulatory regimes in each country. It is difficult to determine the scale of each of these problems but anecdotal evidence suggests a sufficient number of disputes are affected by one or more of these problems to warrant action. The problems include:

- Service of process and recognition and enforcement of judgments - Although New Zealand and Australian courts have jurisdiction to allow service of proceedings on a defendant overseas, if that defendant does not submit to the court's jurisdiction, the resulting judgment may not be enforceable in the other country. This gives the defendant an incentive to ignore the proceedings, knowing they are safe from enforcement action.
- Final non-money judgments - Currently only final money judgments are enforceable across the Tasman. Orders requiring someone to do, or not do, something are not. Instead, new proceedings to obtain this relief must be started in the other country.

- Interim relief in support of proceedings in the other country - Interim relief, such as a Mareva injunction (an order freezing assets), cannot be obtained in one country in support of proceedings in the other. Instead proceedings seeking resolution of the main dispute must be commenced in the court where interim relief is sought, even if it is not the appropriate court to decide the matter. This involves unnecessary cost, delay and inconvenience.
- Enforcing tribunal orders - Decisions of tribunals in one country cannot be enforced in the other. To achieve an enforceable result, the plaintiff might have to bring court proceedings instead or bring new tribunal proceedings in the other country.
- Declining jurisdiction - Australia and New Zealand apply potentially inconsistent forum non conveniens or 'give way' rules to determine which country's courts should decide a dispute. This could lead to neither court giving way to the other, leading to a race to judgment, rather than the appropriate court being decided on a more principled basis.
- Leave requirement for trans-Tasman subpoenas - Under the existing trans-Tasman evidence regime, a subpoena (a summons to a witness to give evidence) issued in one country can be served on a witness in the other with the leave of a higher court judge. Where a subpoena is issued by a lower court, a separate application must be made to a higher court for leave. This causes delay and unnecessary expense.
- Trans-Tasman subpoenas in criminal proceedings - A subpoena under the trans-Tasman evidence regime cannot be issued in criminal proceedings. If a witness is unwilling, evidence can only be taken under less convenient procedures such as the Mutual Assistance in Criminal Matters legislation.
- Enforcing civil penalty orders - Civil pecuniary penalties imposed in one country are not enforceable in the other.
- Enforcing criminal fines for certain regulatory offences - A criminal fine imposed in one country is not enforceable in the other due to sovereignty concerns. Being unable to enforce fines for certain regulatory offences in the other country undermines the integrity of trans-Tasman markets in which each country has a strong mutual interest.

17 These problems can only be addressed by the adoption of mirror solutions in New Zealand and Australia. Entering into a treaty with Australia is the most effective way of achieving this outcome. It ensures that there is a binding obligation on both parties to maintain the agreed mirror solutions. It is also necessary to meet Australian constitutional requirements.

18 The Agreement will simplify the trans-Tasman service of civil court proceedings and the process for enforcing court judgments across the Tasman. It will also expand the range of enforceable judgments to include non-money judgments. The Agreement will also improve regulatory enforcement between Australia and New Zealand by providing for the enforcement of civil pecuniary penalties and certain criminal regulatory fines.

Policy objectives

19 The Government's policy objective in taking the treaty action is to achieve closer integration between New Zealand and Australian civil justice systems in order to:

- make resolution of civil disputes with a trans-Tasman element simpler, less costly and more efficient;
- make any remedies more effective; and
- support the success of the Australia/New Zealand trade relationship.

20 A further objective is to improve the enforcement of various regulatory regimes in which both countries have a strong mutual interest, to:

- reduce incentives for people to move themselves or their assets to the other country to put them beyond the reach of a regulatory regime; and
- avoid enforcement gaps that would otherwise exist.

Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand

Advantages of treaty action

21 There are a number of advantages to New Zealand from entering into the Agreement with Australia.

22 The Agreement will streamline processes for resolving trans-Tasman disputes, enabling better use of the courts and for court orders to be more effectively enforced. This will improve outcomes from the court system.

23 The Agreement will improve the integrity of New Zealand and Australia's regulatory regimes. Improved regulatory enforcement will extend the reach of regulatory schemes to ensure people cannot evade their responsibilities by moving themselves or their assets to the other country. Enabling civil penalties and certain criminal sanctions to be enforced across the Tasman will help ensure current and future CER and SEM initiatives, such as the Trans-Tasman Mutual Recognition of Securities Offerings, are fully effective. In addition, measures in the Agreement could help deal with difficulties facing cross-border provision of services and pave the way for expanding the scope of the Trans-Tasman Mutual Recognition Arrangement.

24 There will also be reduced costs for regulatory and enforcement agencies that can take action under the simplified processes.

25 In addition to the benefits set out above, the Agreement will help to contribute to the success of CER. It will also reduce barriers to trade by creating greater predictability around resolving legal disputes and supporting the effective operation of CER and SEM initiatives.

Disadvantages of treaty action

26 There are no significant disadvantages to New Zealand of entering into the Agreement. No direct costs are incurred. There will be some administrative costs, which are set out below in the section "The costs to New Zealand of compliance with the treaty".

Disadvantages of not taking treaty action

27 Not entering into the Agreement with Australia will mean that New Zealand will not benefit from the streamlined processes for resolving trans-Tasman disputes and the improved integrity of trans-Tasman regulatory regimes. These benefits can only be obtained by the adoption of mirror solutions in New Zealand and Australia. An Agreement ensures that there is a binding obligation on both parties to maintain the agreed mirror solutions. It is also necessary to meet Australian constitutional requirements.

Legal obligations which would be imposed on New Zealand by the treaty action, the position for reservations to the treaty, and an outline of any dispute settlement mechanisms

28 By taking treaty action, New Zealand will be legally obliged to:

- allow trans-Tasman service of civil proceedings;
- recognise and enforce final money and non-money judgments issued by an Australian court;
- allow its courts to grant interim relief in support of proceedings commenced in Australia;
- establish, with Australia, a common statutory test to be used by the courts to decide whether to decline jurisdiction. The test is whether a court in the other country is the more appropriate forum to determine the proceeding;
- allow District Courts to issue trans-Tasman subpoenas for proceedings before that court or a prescribed tribunal without leave being sought from the High Court;
- allow courts to issue trans-Tasman subpoenas in criminal proceedings and to recognise equivalent Australian subpoenas;
- allow parties or their legal representatives in New Zealand to appear remotely (eg by video-link or telephone conference) before an Australian court, or parties or their legal representatives to do so from Australia before a New Zealand court, when certain criteria are met;
- enforce civil pecuniary penalties imposed by Australian courts as a civil judgment debt (unless New Zealand and Australia have agreed to exclude a specific civil pecuniary penalty regime from enforcement);
- enforce fines imposed for certain criminal offences that New Zealand and Australia have agreed to enforce;
- extend service and judgment enforcement procedures to such Australian tribunals as may be agreed between New Zealand and Australia.

29 Reciprocal obligations will apply to Australia.

30 The Agreement does not provide for reservations or declarations.

31 Article 13 deals with consultation. It provides that disputes shall be resolved amicably and expeditiously by consultation or negotiation between the Parties.

Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation

32 Legislation is required to implement New Zealand's obligations under the Agreement and will provide for the matters outlined in paragraph 28. The arrangements, which will create a single unified regime for the service of civil court proceedings and enforcement of judgments as between Australia and New Zealand, depend on mirror legislation being enacted in both Australia and New Zealand. In addition, the recognition and enforcement of Australian judgments is currently dealt with under the Reciprocal Enforcement of Judgments Act 1934. The Reciprocal Enforcement of Judgments Act will need to be amended to exclude Australian judgments.

33 A regulatory impact statement was prepared in March 2007 when the Government decided to implement the Working Group's recommendations. That document canvassed potential options, based on those considered by the Working Group. The preferred option was for Australia and New Zealand to enact mirror legislation to implement the Working Group's recommendations. The Agreement has been drafted to reflect this option.

34 Subject to the Agreement being presented to the House of Representatives for examination by select committee, the implementing legislation will take the form of a Trans-Tasman Proceedings Bill. The Bill is expected to contain approximately 50 clauses of medium complexity. Consequential amendments to other legislation such as the Evidence Act 2006, the Reciprocal Enforcement of Judgments Act 1934 and the High Court Rules will also be required. Regulations will be required to bring the implementing legislation into force and to prescribe things such as the regulatory criminal offences to be covered by the enforcement arrangements.

Economic, social, cultural and environmental costs and effects of the treaty action

Economic

35 Entering into the Agreement with Australia will have significant economic benefits. Closer integration of both countries' civil justice systems will help resolve disputes with a trans-Tasman element. This will support CER and the movement towards creating a trans-Tasman Single Economic Market. The Agreement will also reduce barriers to trade.

36 The Agreement will have economic benefits for both businesses and individuals involved in a trans-Tasman dispute through a clearer and simpler regime for the resolution of those disputes. It should lead to:

- reduced costs (simpler service rules, obtaining interim relief without filing substantive proceedings);

- more efficient court proceedings (lower court judge able to give leave to issue a subpoena in proceedings before that court, enforcement of trans-Tasman judgments only refused on public policy grounds); and
- more effective remedies (ability to enforce a wider range of judgments).

37 On the other hand, some individuals or businesses who can currently avoid having an Australian judgment enforced against them in New Zealand will no longer be able to do so. These people will face the cost of meeting their obligations.

Social, cultural or environmental

38 There are no social, cultural or environmental effects rising from the Agreement.

The costs to New Zealand of compliance with the treaty

39 There will be no direct costs resulting from compliance with the Agreement. There will be some administrative costs associated with:

- enabling judgments to be registered in the District Court, not just the High Court; and
- an increase in the number of Australian judgments registered for enforcement in NZ and additional court applications resulting from the proposals.

40 These costs will not be significant and can be met within existing departmental baselines. Third party fees will offset some of the costs of enforcing judgments or court applications.

41 There will be no compliance costs for businesses arising from the Agreement.

Completed or proposed consultation with the community and parties interested in the treaty action

42 The Agreement is based on the recommendations of the Working Group. The Working Group consulted extensively on its proposals prior to finalising its recommendations. It issued a public discussion paper in August 2005 canvassing the problems and proposed solutions. The discussion paper indicated that if the proposals were ultimately accepted by both governments, that agreement could be recorded in a treaty or arrangement. Letters soliciting submissions were sent to the main stakeholders including the judiciary, legal and accounting professions, industry and consumer bodies, academics and Australian and New Zealand Government departments and bodies as well as the Australian State and Territory Governments. Over one hundred letters were sent to stakeholders in New Zealand. Te Puni Kōkiri was consulted during the Working Group process to confirm whether there were any specific concerns for Māori and none were identified.

43 32 submissions were received, 15 from Australia and 17 from New Zealand. These were from the judiciary, law firms, companies, legal academics, the New Zealand Law Society, government departments and bodies (including, from New Zealand, the Ministries of Economic Development, Consumer Affairs and Transport, the Commerce Commission, Takeovers Panel, Office of the Privacy Commissioner, and the Law

Commission). Overall submissions on the discussion paper were very supportive of the Working Group's proposals. The Working Group submitted a report with its final recommendations to the New Zealand and Australian Governments in December 2006.

44 The Ministry of Foreign Affairs and Trade, the Ministry of Economic Development, Ministry of Consumer Affairs, Ministry of Health, Inland Revenue Department and the Treasury have been consulted on and support the proposed treaty action. Department of Prime Minister and Cabinet has been informed.

Subsequent protocols and/or amendments to the treaty and their likely effects

Amendments

45 Article 14 deals with amendments to the Agreement. Amendments must be agreed by the Parties and enter into force by each Party notifying the other through diplomatic channels that the domestic procedures necessary for entry into force have been completed. An amendment enters into force 30 days after the last notification. Any decision to amend the Agreement would be on a case by case basis and subject to the usual domestic approval process.

Withdrawal or denunciation provision in the treaty

46 Article 15 deals with termination of the Agreement. To terminate the Agreement one Party must give the other notice of its decision in writing through diplomatic channels. Once notice is given, the Agreement will terminate on a date to be agreed by the Parties in writing. In the absence of such an agreement, the Agreement will terminate on the later of the termination date specified in the notice of termination or the date 1 year after the date on which notice was received.

47 The Parties would take into account the impact on litigation with a trans-Tasman element when determining a notice period.

48 Any proceedings taken by persons in reliance on the Agreement commenced up to the date of the Agreement's termination may be completed in accordance with the Agreement.

49 Any decision to terminate the Agreement would be subject to the usual domestic approval process.

Adequacy statement

The Ministry of Justice has determined that this National Interest Analysis is adequate.