



Trans-Tasman Proceedings Bill 2009

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Law and Bills Digest Section

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Trans-Tasman Proceedings Bill 2009

Date introduced: 25 November 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 and 2: on Royal Assent; Sections 3–110: on a date to be fixed by Proclamation, but not before the Agreement between the Governments of Australia and New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement enters into force for Australia—if the provisions have not commenced within six months of the Agreement entering into force for Australia, they will commence on the day immediately after that six-month period: see **clause 2**

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Trans-Tasman Proceedings Bill 2009 (the Bill) implements the Agreement between the Governments of Australia and New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (the Agreement). The Agreement seeks to establish a regime for the conduct of court proceedings between Australia and New Zealand (the trans-Tasman regime), which aims to establish a simpler, more cost-effective and efficient way of resolving cross-border disputes.¹

Background

Policy commitment

The economic relationship between Australia and New Zealand has reportedly been close for many years, with several trans-Tasman initiatives underway, including:

- the Trans-Tasman Travel Arrangement (1973)
- the Australia New Zealand Closer Economic Relations Trade Agreement (1983)
- the Trans-Tasman Mutual Recognition Arrangement (1998), and

1. See Trans-Tasman Proceedings Bill 2009 **clause 3**.

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- the Trans-Tasman Council on Banking Supervision (2005).²

Within this context, the number of cross-border civil disputes has risen. Yet, despite the close ties and similarities in the justice systems between Australia and New Zealand, both countries generally treat such disputes as they would treat a dispute involving any other foreign country.

Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement

It was within this context that, in 2003, the then Prime Ministers of Australia and New Zealand, John Howard and Helen Clark, established the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement (the Working Group).

The Working Group's terms of reference were to examine the effectiveness and appropriateness of current arrangements relating to civil proceedings; civil penalty proceedings; as well as criminal proceedings relating to regulatory matters.³

Its membership comprised of senior officials from relevant government departments in both countries.⁴

In August 2005, the Working Group released a public discussion paper inviting comments regarding the resolution of trans-Tasman disputes and increased regulatory co-operation (the discussion paper).⁵ After considering the responses received as part of that process, the Working Group released a report in which it made several recommendations on improving the existing legal framework within which trans-Tasman civil disputes are resolved (the report).⁶ The main recommendation was to create a trans-Tasman legal regime (based on the *Service and Execution of Process Act 1992*) between Australia and

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2. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *Trans-Tasman court proceedings and regulatory enforcement: a report by the Trans-Tasman Working Group*, December 2006, p. 8. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of legal systems within Australia and between Australia and New Zealand*, November 2006, Canberra, pp. 41–43.
 3. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., p. 3.
 4. For a list of members of the Working Group, see *ibid.*, Attachment B, p. 30.
 5. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *Trans-Tasman court proceedings and regulatory enforcement: a public discussion paper by the Trans-Tasman Working Group*, July 2005, viewed 15 January 2010, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~28+July+Trans+Tasman.pdf/\\$file/28+July+Trans+Tasman.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~28+July+Trans+Tasman.pdf/$file/28+July+Trans+Tasman.pdf)
 6. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., pp. 5–7. For a list of submissions received by the Working Group, see *ibid.*, Attachment C, p. 31.

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New Zealand. Such a regime would enable initiating process in civil proceedings commenced in a court in either country to be served in the other country and would broaden the range of Australian and New Zealand judgments that could be registered and enforced in the other country.⁷ Other recommendations include greater use of teleconference and video-link technologies in remote appearances in trans-Tasman proceedings.⁸

House of Representatives committee inquiry into the harmonisation of legal systems between Australia and New Zealand

On 25 February 2005, the then Australian Attorney-General, Philip Ruddock, referred the following inquiry to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the House of Representatives Committee):

- lack of harmonisation within Australia's legal system, and
- lack of harmonisation between Australia's and New Zealand's legal systems, particularly as it relates to the impact on trade and commerce.⁹

In its report published in November 2006, the House of Representatives Committee endorsed the Working Group's suggestions in its discussion paper, which were very much the same as the recommendations made in its report. The House of Representatives Committee stated that such measures should streamline the legal systems between both countries; and reduce the costs and inconvenience associated with trans-Tasman proceedings.¹⁰

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

In 2007, the Australian and New Zealand Governments both agreed to implement the recommendations of the Working Group. The Agreement, based on those recommendations, was signed on 24 July 2008 by the Australian Attorney-General and New Zealand Associate Justice Minister, Robert McClelland and Lianne Dalziel.¹¹

7. Ibid., p. 3.

8. Ibid.

9. House of Representatives Standing Committee on Legal and Constitutional Affairs, op. cit., p. 2.

10. Ibid., p. 84.

11. Attorney-General's Department, *Treaty to implement trans-Tasman legal cooperation*, 23 July 2008, viewed 21 December 2009,

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The Agreement:

- allows civil proceedings from a court in one country to be served in the other without additional requirements
- extends the range of civil court judgments enforceable between the two countries—judgments could only be refused to be enforced if they conflict with public policy in the country of enforcement
- provides for interim relief to be obtained from a court in one country in support of civil proceedings in the other
- allows the regime to be extended to tribunals on a case by case basis
- adopts a common rule to apply when a dispute could be heard by a court in either country
- encourages greater use of technology for trans-Tasman court appearances
- allows enforcement of civil penalty orders across the Tasman, and
- allows fines for certain regulatory offences to be enforced across the Tasman, where there is a strong mutual interest in doing so.¹²

Committee consideration

On 27 November 2009, the Senate Standing Committee on the Selection of Bills resolved to not refer the Bill to a parliamentary committee.

As at 21 January 2010, the Standing Committee on the Scrutiny of Bills has not yet released any comments on the Bill.

Stakeholder comments

Stakeholder positions on general principles underlying the Bill's provisions can be ascertained from submissions made to the Working Group and the House of Representatives Committee inquiry.

http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_23July2008-Treatytoimprovetrans-Tasmanlegalcooperation

For a copy of the Agreement, see Department of Foreign Affairs and Trade, *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, 24 July 2008, viewed 21 December 2009, <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html> (the Agreement).

12. Attorney-General's Department, op. cit., p. 2.

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Comments regarding proposed measures will be addressed in the Main Provisions section of this Digest.

Financial implications

The Government states that the proposed measures in the Bill would not have any significant financial impact on the Commonwealth.¹³

Main provisions

The Bill is divided into 10 parts, dealing with matters including:

- service in New Zealand of initiating documents issued by Australian courts and tribunals
- Australian courts declining jurisdiction on the basis that a New Zealand court is the more appropriate forum
- Australian courts granting interim relief for civil proceedings in New Zealand courts
- issue of subpoenas in both countries
- remote appearances
- recognition and enforcement of specific judgments of New Zealand courts and tribunals in Australia
- trans-Tasman market proceedings, and
- evidence of certain New Zealand matters.

Due to the comprehensiveness of the Explanatory Memorandum, this Digest will only focus on some of those matters.

Part 2—Service, in New Zealand, of initiating documents issued by Australian courts and tribunals

Part 2 seeks to implement Article 4 of the Agreement ('Service of Process').

In particular, **clause 9** proposes that an initiating document issued by an Australian court or tribunal relating to the proceedings may be served in New Zealand without it being necessary for the Australian court or tribunal to give leave for the service, or to be satisfied that there is a connection between the proceedings in question and Australia.

It is noted that under **clauses 11** and **12**, the initiating document must include certain information, that must be given to the defendant and failure to provide the defendant with such information could result in the issuing Australian court or tribunal making an order,

13. Explanatory Memorandum, Trans-Tasman Proceedings Bill 2009, p. 3.

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on application by the defendant, to set aside the proceedings or a step taken in relation thereof. Such information, to be prescribed by regulations, would generally include information about steps that the defendant may or must take and consequences of being so served.

As it is stated in the Explanatory Memorandum:

This is designed to be an additional safeguard for defendants, to balance the simplified process for service of Australian initiating process in NZ.¹⁴

These proposals are consistent with the Working Group's recommendations about service of initiating process, which include:

A regime, modelled on the *Service and Execution of Process Act 1992* (Cth), should be introduced between Australia and New Zealand to allow:

- civil initiating process issued out of any Australian federal, State or Territory court to be served in New Zealand, and
- civil initiating process issued out of any New Zealand court to be served in any Australian State or Territory.

Service should have the same effect and give rise to the same proceedings as if service had occurred in the jurisdiction of issue.

The regime should have the following features:

- the plaintiff would not have to establish any particular connection between the proceedings and the forum to be allowed to serve the proceedings in the other country¹⁵
...

Submissions made to the Working Group were said to be generally supportive of such proposals. However, some concerns were expressed that allowing service without leave would actually shift the burden of proving appropriateness of the chosen court from the plaintiff to the defendant.¹⁶ The Working Group responded by stating that:

... in New Zealand and several Australian jurisdictions, plaintiffs are, in many cases, not currently required to obtain leave to serve overseas (although they must then obtain leave to proceed if the defendant fails to appear). Where leave to serve is not required, there is already effectively a 'burden' on the defendant regarding the

14. Ibid., pp. 7–8.

15. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., p. 10.

16. Ibid., p. 11.

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appropriateness of the chosen court. This perceived shift, therefore, is limited in practice.¹⁷

Part 3—Australian courts declining jurisdiction on grounds that a New Zealand Court is a more appropriate forum

Part 3 seeks to implement Article 8 of the Agreement (‘Declining jurisdiction’).

Subclause 17(1) provides that a defendant in civil proceedings in an Australian court may apply for a court order staying the proceedings on grounds that a New Zealand court is the more appropriate court to determine the matter in dispute.

In determining what would be the more appropriate court to determine the matters in dispute, under **subclause 19(2)**, the Australian court must consider matters including:

- the parties’ places of residence (or principal place of business in the case of an entity)
- places of residence of likely witnesses
- where the subject matter of the proceedings is located
- any agreement between the parties as to where the matters should be determined
- the most appropriate law to apply to the proceedings, and
- the parties’ financial circumstances to the extent that the court is aware of them.

Importantly, under **subclause 20(1)**, where an exclusive choice of law agreement designates a New Zealand court to determine the matters in dispute, the Australian court must make an order staying the proceedings. However, where an exclusive choice of law agreement designates an Australian court to determine the matters in dispute, the Australian court must not make such an order.¹⁸

These proposals are consistent with the Working Group’s recommendation that the defendant should be able to apply for a stay of proceedings on the basis that the court in the other country is the more appropriate court for the proceedings.¹⁹ According to the Working Group:

17. Ibid.

18. Note, however, that **subclause 20(2)** of the Bill provides for circumstances when **subclause 20(1)** would not apply, such as where giving effect to a stay would lead to ‘manifest injustice’ or would be ‘manifestly contrary’ to Australian ‘public policy’, which refers to the general interests of the public rather than an individual: see Explanatory Memorandum, op. cit., p. 11. As to the meaning of ‘exclusive choice agreement’, see Trans-Tasman Proceedings Bill 2009 **subclause 20(3)**.

19. Attorney-General’s Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., pp. 10, 18.

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Courts would decide this issue taking into account a list of factors such as where the parties and witnesses live, and which jurisdiction's law is to be applied.

Another of the factors to be taken into account should be whether there is agreement between the parties about the court or place where proceedings should be heard. Where that agreement is exclusive (i.e. only the chosen court, and no other, has jurisdiction to decide the dispute) a court would be required to decline jurisdiction in favour of the chosen court. There would be an exception where the agreement is null and void, or inoperative (as determined by the law of the jurisdiction of the chosen court) or incapable of being performed. This approach is consistent with the 2005 *Hague Convention on Choice of Court Agreements*, a consideration that will be important if either Australia or New Zealand ultimately decide to become a Party to this Convention.²⁰

It is also stated that submissions to the Working Group expressed strong support for such a proposal.²¹

Part 4—Australian courts granting interim relief in support of civil proceedings in New Zealand courts

Part 4 seeks to implement Article 7 of the Agreement ('Interim relief').

Under **clause 25**, an existing or intended party to civil proceedings in a New Zealand court may apply to the following Australian courts for interim relief (but not a warrant for the arrest of property) in support of the New Zealand proceedings:

- the Federal Court of Australia
- the Family Court of Australia
- a State or Territory Supreme Court, and
- any other Australian court prescribed by regulations.

According to the Explanatory Memorandum:

This avoids the need for substantive proceedings seeking resolution of the main dispute to be commenced in Australia. The Australian court will retain control over the interim relief, and can protect local third parties and any other relevant local interests when deciding on the appropriate relief, if any, to grant ...

Reference to an 'intended party' to a civil proceeding 'to be commenced' is intended to allow a party who has not yet formally commenced the main proceeding in NZ to apply for interim relief in Australia. This might occur in circumstances where, for

20. Ibid., p. 18.

21. Ibid.

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example, action needs to be taken quickly to preserve assets from being removed from the Australian jurisdiction ...²²

Under **subclause 26(1)**, the Australian court may provide such relief if:

- it considers that it would be appropriate to do so, and
- if it had the power to do so, it would have given such relief in similar proceedings commenced in the Australian court.

However, under **subclause 26(2)**, the Australian court may refuse to give such relief if it considers that it has no jurisdiction in relation to the New Zealand proceedings' subject matter and it would therefore be inexpedient to do so.

According to the Explanatory Memorandum:

The Australian court may make an (sic) interim orders such as a Mareva injunctions (which prevent a party removing assets from the jurisdiction or disposing of them), Anton Piller orders (which prevent a defendant destroying key material), and suppression orders (which prevent publication of a report of public court proceedings).

The court will not be able to grant a warrant for the arrest of property under Part 4. Warrants for the arrest of property are excluded as they are a form of interim relief under the court's admiralty jurisdiction, which carries with it an assertion of jurisdiction to determine the merits of a proceeding.

For the avoidance of doubt, the NZ Bill expressly excludes discovery from the types of interim relief that can be granted by NZ courts in favour of Australian proceedings. It is not considered that orders for discovery are 'interim relief' in Australia as they are final orders rather than those made for a specific period of time to preserve the status quo until final judgment is given in a proceeding. It is intended that such orders, particularly discovery from non-parties, should be made by the court hearing the substantive proceeding.²³

This approach is consistent with the Working Party's comments:

We recommend that appropriate Australian and New Zealand courts (ie those in the country where the order will have effect and which are competent to grant the relief sought) be given statutory authority to grant interim relief in support of proceedings in the other country. The range of eligible interim orders would not be limited, so could include *Mareva* injunctions, *Anton Piller* orders and suppression orders, where the court considers such relief to be appropriate.

22. Explanatory Memorandum, op. cit., pp. 12–13.

23. Ibid., p. 13.

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This option appears both practical and effective. It would mean that the court in the country where the interim relief is sought would retain control over that interim relief. That court can protect local third parties and any other relevant local interests when deciding on the appropriate relief, if any, to grant.²⁴

Submissions to the Working Group were also supportive of such proposals.²⁵

Part 5—Subpoenas

Part 5 contains provisions allowing subpoenas to be served and enforced between Australia and New Zealand.

Division 2 of **Part 5** deals with Australian subpoenas. Under **clause 29**, Division 2 provisions apply to subpoenas issued in proceedings in:

- a federal court
- a state or territory court prescribed by regulations, or
- an Australian tribunal prescribed by regulations.

It is noted that regulations must not prescribe a tribunal unless it is a person or body legally authorised to take evidence on oath or affirmation.

However, under **clause 31**, where proceedings are in an Australian court, the subpoena must not be served in New Zealand without leave of the court. Similarly, where proceedings are in an Australian tribunal, the subpoena must not be served in New Zealand without leave of an inferior Australian court.²⁶ In deciding whether to give leave, the court must consider:

- the significance of the evidence to be given or produced by the named person, and
- whether the evidence could be obtained by alternative means without significantly greater expense and with less inconvenience to the named person.

This leave requirement is consistent with stakeholders' submissions made to the Working Group and the Working Group's own comments.

24. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., p. 16.

25. Ibid.

26. For the definitions of 'inferior Australian court' and 'superior Australian court', see Trans-Tasman Proceedings Bill 2009 **clause 4**.

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Submissions to the Working Group were said to have been overwhelmingly supportive of retaining the leave requirement and of lower court judges being able to grant leave.²⁷

The Working Group, itself, regarded retaining the leave requirement as an ‘important safeguard’.²⁸ According to the Working Group:

The requirement for a witness to answer an overseas subpoena and appear in person before an overseas court (or at least appear by video or telephone link) is potentially more burdensome than a requirement to appear before a domestic court. There is also potential for misuse to harass or deliberately inconvenience a witness. The leave requirement therefore protects against the inappropriate use of a subpoena against a witness in the other country.²⁹

The Working Group also recommended that judges of lower courts should be allowed to grant leave to serve a trans-Tasman subpoena in civil proceedings in that court or a tribunal, as additional costs, inconvenience and delay may occur by having always to apply to higher courts.³⁰

In the Bill, it is also noted that a person’s reasonable expenses of complying with a subpoena would be payable to that person under **clause 33**. According to **clause 37**, if the subpoena was issued at the request of a person, the expenses must be paid by that person, else:

- where the subpoena was issued by a federal court—expenses would be payable by the Commonwealth
- otherwise—expenses would be payable by the state or territory where the subpoena was issued.

Under **subclause 35(1)**, the named person may apply for the subpoena to be set aside. The Australian court may set aside a subpoena under **clause 36**.

There are certain circumstances set out in **subclause 36(2)** when the court must set aside a subpoena:

- if the subpoena requires someone to attend at a particular place in Australia and the court is satisfied that:
 - the person cannot travel
 - the person is facing certain other legal proceedings in Australia, or

27. Attorney-General’s Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., p. 20.

28. Ibid.

29. Ibid.

30. Ibid.

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- the court is satisfied that the person's movements are legally restricted and the person cannot comply with the subpoena.

The court may also set aside a subpoena under **subclause 36(3)** if the court is satisfied of certain matters such as:

- the evidence to be given by the person named in the subpoena could be satisfactorily obtained by other means without incurring significantly greater expense, or
- complying with the subpoena would cause the person hardship or serious inconvenience.

Division 3 of **Part 5** deals with New Zealand subpoenas.

Clause 41 provides that New Zealand subpoenas may be served on a person in Australia in accord with the *Evidence Act 2006* (NZ).

While it is noted that there is no provision in the Bill itself for New Zealand subpoenas to be set aside, **subclause 42(2)** provides that a person's right under New Zealand law to apply for the subpoena to be set aside remains unaffected. Such applications may be made to the High Court of New Zealand, where leave had been given for the subpoena to be served.³¹

Part 6—Remote appearances

Part 6 seeks to implement Article 11 of the Agreement ('Remote appearances').

Division 2 of **Part 6** relates to remote appearances from New Zealand in proceedings in an Australian court or prescribed Australian tribunal.³²

Subdivision A deals with remote appearance by a party or the party's lawyer where the appearance is unrelated to evidence in the proceedings. Under **clause 48**, the Australian court or tribunal may give leave for such remote appearances only when it is satisfied that:

- the party or the party's lawyer could participate more conveniently in the hearing from New Zealand
- if the court or tribunal intends to specify a remote appearance medium, such medium is or can reasonably be made available

31. See *Evidence Act 2006* (NZ) section 160 (setting aside of a New Zealand subpoena served in Australia). It is also noted that **subclause 35(2)** of the Bill provides that an application to set aside an Australian subpoena, served in New Zealand, must be made to the Australian court that gave leave for the subpoena to be served.

32. Note, again, that regulations must not prescribe a tribunal unless it is a person or body legally authorised to take evidence on oath or affirmation.

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- if the court or tribunal does not intend to specify a remote appearance medium, remote appearance mediums are or can reasonably be made available, and
- it is appropriate to give leave.

Importantly, under **subclause 48(3)**, if a party's lawyer is not entitled to appear before the court or tribunal, the court or tribunal can only give leave if satisfied that the lawyer is a qualified New Zealand lawyer and the party either resides or—if the party is not an individual—the party has its principal place of business in New Zealand. Under **subclause 48(4)**, once leave is given, a qualified New Zealand lawyer otherwise not entitled to appear before the court or tribunal is entitled to practise as a legal practitioner in relation to that leave.

Subdivision B deals with remote appearances where the appearance is evidence-related. **Clause 50** is a similar provision to **clause 48**, enabling evidence to be given, witnesses to be examined and submissions to be made from New Zealand in certain circumstances.

The Australian Government states that:

The Australian court or tribunal cannot give this leave unless it is satisfied that the evidence can more conveniently be given remotely, and the necessary facilities for the remote appearance can be provided. This may include consideration of the availability of the witnesses, the cost of the witness attending in Australia as compared with using the audio or audiovisual link facilities, the nature of the evidence to be given and whether the credibility of the witness is likely to be an issue.³³

Subdivision C contains general provisions regarding remote appearances. Under **clauses 51** and **52**, a person must not appear remotely from New Zealand by audiovisual or audio links unless the place where the court or tribunal is sitting in Australia and the place in New Zealand where the remote appearance would be made, are properly equipped with facilities enabling people at both places to hear (and, where there is audiovisual link—see) each other.

In addition, costs orders may be made for payment of expenses incurred in connection with the remote appearance under **clause 53**.

Division 3 of **Part 6** relates to remote appearances from Australia in proceedings commenced in a New Zealand court or tribunal.

According to **clause 55**, a remote appearance in Australia in New Zealand proceedings is authorised if it is in accord with the *Trans-Tasman Proceedings Act 2009* (NZ) and the *Evidence Act 2006* (NZ).

33. Explanatory Memorandum, op. cit., p. 20.

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Clauses 56 and **57** allow the New Zealand court or tribunal to exercise any of its powers (except powers to punish for contempt; and to enforce or execute its judgments or process) and make certain orders in Australia for the purposes of the remote appearance. Importantly, **subclause 56(2)** provides that the New Zealand law applying to the New Zealand proceedings also applies to the New Zealand court or tribunal's practice/procedure in allowing a person to appear remotely from Australia.

Participants in New Zealand proceedings, such as judges, legal practitioners, parties and witnesses, are given privileges, protections and immunities under **clause 60**.

Clause 61 sets out offences for particular conduct engaged in at a place in Australia where a remote appearance is being made in New Zealand proceedings. The maximum penalty for these offences is two years' imprisonment or 120 penalty units (or both).³⁴ It is stated in the Explanatory Memorandum that:

This is designed to allow the court maximum flexibility in determining the appropriate penalty according to the seriousness of the offence.³⁵

These proposals relating to remote appearances are also consistent with the Working Group's recommendations:

In order to reduce the cost and inconvenience of physically attending court in trans-Tasman litigation, we recommend that parties seeking a stay of proceedings under the proposed trans-Tasman regime, and their lawyer, should be able to appear from the other country as of right. The court should decide the technology to be used ...

... lawyers without the right to appear before the court in question should be allowed to appear by video link or telephone conference with the leave of the court. The court could refuse leave in situations where it was apparent that lawyers were circumventing the TTMRA [Trans-Tasman Mutual Recognition Arrangement] requirements (eg appearing without a satisfactory reason for a client resident in the place where the court is, or making multiple appearances on unrelated proceedings before the same court). Although a lawyer might not be registered in the jurisdiction where the court is situated, the court would still have effective sanctions to control their conduct. These would include declining leave to appear in future, making a complaint to the professional regulator in the lawyer's home jurisdiction and sanctions for contempt.

Statutory provisions would be needed to give appropriate privileges, immunities and protections to those appearing remotely.³⁶

34. A penalty unit means \$110: *Crimes Act 1914* section 4AA.

35. Explanatory Memorandum, op. cit., p. 22.

36. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., p. 22.

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Submissions to the Working Group were said to be generally supportive of the idea to make greater use of technology but some submissions raised the question of who should bear the costs of doing so.³⁷ The Working Group noted that:

... although costs (which should reduce over time as technology improves and becomes more widespread) would initially be the responsibility of the party applying to appear remotely, those costs could be factored into any award of costs eventually made against the other party.³⁸

In relation to the costs associated with remote appearances, **clause 53** of the Bill simply provides that where a person appears remotely in New Zealand under the Bill, the Australian court may make such orders as it considers appropriate for payment of expenses connected with the remote appearance. On the contrary, it is noted that **subclause 39(1)** of the Trans-Tasman Proceedings Bill 2009 (NZ) provides that:

Unless the New Zealand court or tribunal otherwise orders, the costs involved in the party, the party's counsel, or both participating in hearings by using a remote appearance medium, under leave given under section 35, must be paid by the applicant for that leave.

Part 7—Recognition and enforcement in Australia of specified judgments of New Zealand courts and tribunals

Part 7 sets out provisions allowing specified judgments of New Zealand courts and tribunals to be enforced in Australia.

Under **clause 65**, a registrable New Zealand judgment must be registered in an Australian court under **clause 68** before it can be enforced in Australia.³⁹ Judgments not considered to be registrable are set out in **subclause 66(2)**, including:

- orders under proceeds of crime legislation
- orders related to the granting of probate, letters of administration, or the administration of a deceased person's estate
- orders related to the guardianship or care of people incapable of managing their financial affairs, and
- orders relating to the care, control or welfare of children.

Under **clause 72**, an Australian court in which a New Zealand judgment is registered must set aside that registration if:

37. Ibid., p. 21.

38. Ibid.

39. As to the meaning of 'registrable NZ judgment', see Trans-Tasman Proceedings Bill 2009 **subclause 66(1)**.

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- the court is satisfied that enforcing the judgment would be contrary to public policy in Australia
- the judgment was registered in contravention of the provisions in the Bill, or
- both the subject matter of the proceedings in which the judgment was given was immovable property or the judgment was given in proceedings *in rem* where the subject matter was moveable property; and such property was not located in New Zealand at the time of the proceedings.⁴⁰

It is noted that:

Under general private international law principles, a judgment may be contrary to public policy if it was obtained in a manner inconsistent with the law of the country of registration (for example by distress or undue influence), or is founded on a law that is unacceptable to the country of registration. This is intended to be a high threshold.

Registration must also be set aside if the judgment was given in an action where the subject matter was immovable property, or the judgment was in an action *in rem* where the subject matter was movable property, if the property in question was not situated in NZ at the time of the proceeding. This preserves the private international rule that a court generally has no power to determine matters of title to, or possession of, immovable property situated outside the jurisdiction of the court.⁴¹

Under **clause 76**, an Australian court in which a New Zealand judgment is registered may, subject to conditions, order that enforcement proceedings for that judgment in the Australian court:

- not commence until a specified time or event, or
- be stayed for a specified time.

Conditions include:

- the liable person applies to set aside, vary or appeal against the judgment to a New Zealand court or tribunal having the power to grant such application within a specified time
- the liable person prosecutes the application expeditiously, and

40. The term, 'proceedings *in rem*' refers to proceedings where what is in dispute is the title to or interests in specific property located within the court's jurisdiction. This is contrasted with 'proceedings *in personam*', in which claims are made against a person involving disputes about rights affecting either a particular person or group of people: see Oxford Reference, *A dictionary of law*, viewed 21 January 2010, http://www.oxfordreference.com/views/SUBJECT_SEARCH.html?subject=s12&authstatus code=200

41. Explanatory Memorandum, op. cit., p. 25.

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- any other conditions that the Australian court deems appropriate (such as conditions that relate to the giving of security).

Reasonable costs incurred in registering and enforcing New Zealand judgments in Australia are recoverable under **clause 77** to the same extent as what would be recoverable for a similar/analogous Australian judgment.

The provisions in the Bill relating to recognising and enforcing certain New Zealand court and tribunal judgments in Australia are generally consistent with the Working Group recommendations that:

- a judgment from one country could be registered in the other. It would have the same force and effect, and could be enforced, as a judgment of the court where it is registered
- a judgment could only be varied, set aside or appealed in the court of origin. The court of registration would be able to stay enforcement to allow this to happen ...
- a judgment could only be refused enforcement in the other country on public policy grounds. Other grounds, such as breach of natural justice, would have to be raised with the original court ...

The scheme should not apply to certain existing statutory co-operation arrangements or matters covered by existing or proposed multi-lateral arrangements, such as dissolution of marriage or enforcing maintenance and child support obligations.⁴²

The enforcement of certain tribunal judgments is also consistent with the Working Group's statement that:

We recommend that certain decisions or decisions in certain types of proceedings of specified tribunals should be enforceable in the other country. The initiating process in certain types of proceedings before specified tribunals could also be served in the other country under the proposed trans-Tasman regime ...⁴³

It is stated that on the issue of enforcing tribunal orders, submissions expressed a broad range of views. These views generally supported expanding the enforceability of tribunal orders, but concerns were expressed about which tribunals would be included.⁴⁴

It is noted that **paragraph 66(1)(b)** provides that a judgment is a registrable judgment if (among other things), the judgment is a final and conclusive judgment given in a civil proceeding in a New Zealand court or tribunal that is prescribed by the regulations. It

42. Attorney-General's Department (Australia) and Ministry of Justice (New Zealand), *a report by the Trans-Tasman Working Group*, op. cit., pp. 10–11.

43. *Ibid.*, p. 17.

44. *Ibid.*, pp. 16–17.

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could be argued that this requirement for a tribunal to be prescribed by the regulations is consistent with the Working Group's caution that:

To ensure the appropriateness of particular arrangements, we recommend that tribunals be added to the regime on a case by case basis, by subordinate legislation.

For decisions to be eligible to be prescribed for enforcement purposes, a tribunal should be exercising an adjudicative function and its orders should be enforceable without an order of a court. We consider that, to be prescribed for service purposes under the trans-Tasman regime, service of the initiating process of that tribunal overseas should already be possible under existing law.

A detailed assessment of the way a tribunal works, its rules of procedure and processes and the nature of the orders it makes will be required when that tribunal is considered for inclusion under the scheme. Consultation with interested parties on specific issues relevant to the inclusion of a particular tribunal in the regime would also be important.⁴⁵

Part 8—Trans-Tasman market proceedings

Part 8 sets out special rules about Australian and New Zealand proceedings relating to the trans-Tasman market.⁴⁶ In general:

Trans-Tasman market proceedings are proceedings brought under the *Trade Practices Act 1974* which prohibit a corporation with a substantial degree of market power from taking advantage of this power to eliminate or damage competition in any market.⁴⁷

Division 2 of **Part 8** is about Australian market proceedings. Under **clause 81**, the Federal Court of Australia may make an order that an Australian market proceeding may be conducted or continued in New Zealand if it is satisfied that the proceeding could be more conveniently or fairly conducted or continued there. Under **clause 82**, qualified New Zealand lawyers would be entitled to act as legal practitioners in such a proceeding before the Federal Court of Australia sitting in New Zealand.

Division 3 of **Part 8** is about New Zealand market proceedings. Under **clause 85**, the High Court of New Zealand would be able to conduct or continue such proceedings in Australia, exercising certain powers for those purposes. **Clause 86** would give judges, legal practitioners, parties and witnesses specific privileges, protections and immunities in these proceedings.

45. Ibid.

46. As to the meaning of 'Australian market proceeding', see Trans-Tasman Proceedings Bill 2009 **subclause 81(2)**. As to the meaning of 'NZ market proceeding', see *ibid.*, **subclause 85(2)**.

47. Explanatory Memorandum, *op. cit.*, p. 27.

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Division 4 of Part 8 would enable the Federal Court of Australia to obtain evidence for New Zealand market proceedings in the New Zealand High Court. This includes making orders related to:

- examination of witnesses
- production of documents or things
- inspection, photograph, preservation, custody or detention of property
- taking samples of any property, and
- carrying out experiments on or with property.⁴⁸

It is noted that under **clause 90**, a person cannot be compelled to give evidence in Australia under **clause 89** that the person could not be compelled to give in the New Zealand proceeding itself.

Concluding comments

The Bill appears to be consistent with both the Agreement and recommendations made by the Working Group, reflecting the Australian Government's underlying policy commitment.

48. See Trans-Tasman Proceedings Bill 2009 **subclause 89(4)**.

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