



Trans-Tasman Proceedings (Transitional and Consequential Provisions) Bill 2009

Sharon Scully
Law and Bills Digest Section

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Trans-Tasman Proceedings (Transitional and Consequential Provisions) Bill 2009

Date introduced: 25 November 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: Unless otherwise stated, most provisions will commence at the time that section 3 of the proposed *Trans-Tasman Proceedings Act 2009* commences—namely, on a day to be fixed by proclamation on or after the entry into force of the relevant Agreement between Australia and New Zealand, or six months and one day after the Agreement enters into force (whichever occurs first).

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 purpose of the Trans-Tasman Proceedings (Transitional and Consequential Provisions) Bill 2009 (the Transitional and Consequential Bill) is to address transitional and consequential matters relating to the Trans-Tasman Proceedings Bill 2009 (the Principal Bill).

In doing so, the Transitional and Consequential Bill:

- repeals the *Evidence and Procedure (New Zealand) Act 1994* (the EPNZ Act), and
- amends various other Acts, including the *Federal Court of Australia Act 1976* (the Federal Court Act).

Warning:

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Background

The Transitional and Consequential Bill relates to the Principal Bill. Therefore, for background information, including the policy commitment behind both Bills, please refer to the Bills Digest for the Principal Bill.¹

Committee consideration

On 27 November 2009, the Senate Standing Committee on the Selection of Bills resolved to not refer the Transitional and Consequential 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 Transitional and Consequential Bill.

Position of significant interest groups

Comments regarding the general principles underlying the provisions in the Principal Bill have been addressed in the Main Provisions section of the Digest relating to the Principal Bill.²

Financial implications

According to the Government, the proposed measures in the Transitional and Consequential Bill will not have any significant financial impact.³

Main provisions

The Transitional and Consequential Bill has three Schedules.

Schedule 1

Schedule 1 contains provisions relating to how Parts 2–9 of the proposed *Trans-Tasman Proceedings Act 2009* (the Principal Act) would apply.

Item 1 proposes that Part 2 of the Principal Act would apply to:

- civil proceedings commencing on or after the day on which section 3 of the Principal Act commences (commencement), or

1. S Scully, *Trans-Tasman Proceedings Bill 2009*, Bills digest, no. 84, 2009–10, Parliamentary Library, Canberra, 2010.

2. Ibid.

3. Explanatory Memorandum, *Trans-Tasman Proceedings (Transitional and Consequential Provisions) Bill 2009*, p. 1.

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- civil proceedings commencing before commencement, if not all of the initiating documents for the proceedings have been served before commencement.⁴

Item 2 proposes that Part 3 of the Principal Act would apply to civil proceedings commenced in an Australian court on or after commencement.

Item 3 proposes that Part 4 of the Principal Act would apply to civil proceedings commenced or to be commenced in a New Zealand court on or after commencement.

Item 4 proposes that Part 5 of the Principal Act would generally apply to subpoenas issued before, on or after commencement. However, if a court had given leave under section 9 of the EPNZ Act for the subpoena to be served in New Zealand before commencement, Division 2 of Part 5 of the Principal Act would not apply to the subpoena (see also **item 2** of **Schedule 2** below).

Item 5 proposes that Part 6 of the Principal Act would generally apply to remote appearances made on or after commencement, irrespective of when the proceedings (in which the remote appearance is made) commenced. However:

- if the purpose of the remote appearance is to give evidence or make submissions, and
- before commencement, the court directed that the evidence be given or submissions be made by video link or by telephone from New Zealand under section 25 of the EPNZ Act,

Division 2 of Part 6 of the Principal Act would not apply to that remote appearance (see also **item 2** of **Schedule 2** below).

Item 6 proposes that Part 7 of the Principal Act would apply to judgments given on or after commencement, irrespective of when the proceedings in which the judgment was given commenced.

Item 7 proposes that Part 8 of the Principal Act would apply to proceedings commencing on or after commencement.

Item 8 proposes that Part 9 of the Principal Act would apply to proceedings commencing before, on or after commencement.

4. As to when section 3 of the proposed *Trans-Tasman Proceedings Act 2009* commences, see *Trans-Tasman Proceedings Bill 2009* clause 2. Essentially, section 3 will commence on a day to be fixed by proclamation on or after the entry into force of the relevant Agreement between Australia and New Zealand, or six months and one day after the Agreement enters into force (whichever occurs first).

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Schedule 2

Part 1 of Schedule 2 comprises the repeal of the EPNZ Act under **item 1** and consequential savings provisions under **item 2**.

Item 2 proposes that despite the proposed repeal of the EPNZ Act, the EPNZ Act would continue to apply in specified circumstances, including:

- if a court had given leave under section 9 of the EPNZ Act for a subpoena to be served in New Zealand before commencement, the EPNZ Act (as in force immediately before its repeal) would continue to apply in relation to that subpoena (see also **item 4 of Schedule 1** above), and
- if before commencement, a court directed that evidence be taken or submissions be made by video link or by telephone from New Zealand under section 25 of the EPNZ Act, the EPNZ Act (as in force immediately before its repeal) would continue to apply in relation to the taking of that evidence or making of those submissions (see also **item 5 of Schedule 1** above).

Part 2 of Schedule 2 contains provisions proposing amendments to the Federal Court Act consequential to the commencement of the Principal Act.

In particular, **item 4** proposes to repeal Part IIIA of the Federal Court Act, as provisions regulating trans-Tasman market proceedings would have been relocated to Part 8 of the Principal Act.⁵

Items 3 and 5–8 propose to amend various provisions of the Federal Court Act as a consequence of the proposed repeal of both the EPNZ Act and Part IIIA of the Federal Court Act.

Item 9 proposes savings provisions relating to amendments proposed in **Part 2 of Schedule 2**. These savings provisions are:

- Part IIIA of the Federal Court Act (as in force immediately before its repeal) would continue to apply to proceedings commenced before commencement—note, however, that Division 5 of Part IIIA would not apply in relation to a judgment given on or after commencement
- court rules made for the purposes of paragraphs 59(2)(y) and 59(2)(za)–(ze) of the Federal Court Act (see **item 8 in Schedule 2 Part 2** above) would continue to apply in relation to proceedings commenced before commencement, and

5. Part IIIA of the Federal Court Act currently deals with the conduct of trans-Tasman market proceedings brought under the *Trade Practices Act 1974*.

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- regulations made under section 60 of the Federal Court Act, for the purposes of Part IIIA of that Act, would continue to apply in relation to proceedings commenced before commencement.

Part 3 of Schedule 2 contains provisions proposing amendments to the following Acts:

- *Defence Force Discipline Act 1982*
- *Family Law Act 1975*
- *Federal Magistrates Act 1999*
- *Foreign Judgments Act 1991*
- *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act 2009* (on the basis that the Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008 (Identity Crimes and Other Measures Bill) is passed and assented to)
- *Service and Execution of Process Act 1992*, and
- *Trans-Tasman Proceedings Act 2009* (on the basis that the Principal Bill is passed and assented to).⁶

In general, these proposed amendments are consequential to the proposed repeal of the EPNZ Act and the commencement of the Principal Act.

In particular, **items 21** and **22** propose to amend **paragraph 5(8)(d)** and **subsection 5(10)** of the *Foreign Judgments Act 1991* by omitting New Zealand from the application of Part 2 (Reciprocal Enforcement of Judgments) of that Act—note that, under Part 7 of the Principal Bill, registrable New Zealand judgments would be recognised and enforced in Australia. However, under **item 23**, **paragraph 5(8)(d)** and **subsection 5(10)** of the Foreign Judgments Act (as in force immediately before their repeal) would continue to apply to judgments given before commencement.

Note that **items 27** and **28** propose to amend **subclauses 62(2)** and **87(2)** of the Principal Act by inserting the word ‘federal’ before ‘judicial proceedings’. These proposed provisions currently state that where a New Zealand court or tribunal (**clause 62**) or the High Court of New Zealand sitting in Australia (**clause 87**) receives evidence on oath or affirmation, such evidence is, for the purposes of section 35 of the *Crimes Act 1914* (Aust), testimony given in a judicial proceeding.⁷

6. It is noted that the Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Bill 2008 was introduced on 3 December 2008 and is still before the Senate.

7. Section 35 of the Crimes Act relates to giving false evidence. It currently provides that a person who, in any judicial proceeding (or with the intention to institute any judicial proceeding), intentionally gives false testimony about any material matter in that proceeding will be guilty of an indictable offence with a maximum penalty of five years imprisonment.

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The Government states that the proposed amendments to the Principal Act seek to be consistent with amendments to the administration of justice offences in the Crimes Act proposed by the Identity Crimes and Other Measures Bill and would only commence if item 22 of Schedule 2 of the Identity Crimes and Other Measures Bill commences.⁸ Given this pre-requisite, arguably, it would be more appropriate for the amendments to be contained in the Transitional and Consequential Bill rather than the Principal Bill.

Concluding comments

Given the various commencement proposals for the Principal Bill, it would be necessary to ensure that transition to the new trans-Tasman regime is effective and flexible. It appears that the provisions proposed in the Transitional and Consequential Bill would achieve this.

8. Explanatory Memorandum, op. cit., p. 7.

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