



Trans-Tasman Proceedings Amendment and Other Measures Bill 2011

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Law and Bills Digest Section

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Trans-Tasman Proceedings Amendment and Other Measures Bill 2011

Date introduced: 2 March 2011

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 3 on Royal Assent and Schedule 3 on the day after Royal Assent. Schedules 1 and 2 immediately after the commencement of section 3 of the *Trans-Tasman Proceedings Act 2010*.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The main purpose of the Trans-Tasman Proceedings Amendment and Other Measures Bill 2011 (the Bill) is to amend the *Trans-Tasman Proceedings Act 2010* to more closely harmonise with provisions in its New Zealand counterpart, the *Trans-Tasman Proceedings Act 2010 (NZ)*¹ which underpin the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*.

Background

An Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement was made on 24 July 2008 (the Agreement).²

A suite of legislation, made by both the Australian and New Zealand Parliaments, will eventually implement the Agreement:

- *Trans-Tasman Proceedings Act 2010* (Trans-Tasman Proceedings Act)³

1. The text of the *Trans-Tasman Proceedings Act 2010 (NZ)* can be viewed at: http://www.legislation.govt.nz/act/public/2010/0108/latest/DLM2576223.html?search=ts_act+Trans+Tasman_resel&p=1&sr=1

2. Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, Christchurch, 24 July 2008, viewed 30 March 2011, <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html>

- *Trans-Tasman Proceedings (Transitional and Consequential Amendments) Act 2010*,⁴ and
- *Trans-Tasman Proceedings Act 2010 (NZ)* (the New Zealand Act).⁵

Article 16 of the Agreement sets out when it will enter into force. The Agreement requires each of the parties to notify the other, through diplomatic channels, of the completion of their respective domestic procedures for the entry into force of the Agreement. The Agreement will enter into force 30 days after the date of the later of these notifications.⁶ The Trans-Tasman Proceedings Act will commence on a date of Proclamation, or within a six month period beginning on the day the Agreement comes into force, whichever is the earlier.

That being the case, this Bill amends provisions of the Trans-Tasman Proceedings Act which have not yet commenced.

Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement

The National Interest Analysis accompanying the Agreement sets out its objectives in the following terms:

To streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs, improve efficiency and minimise impediments to enforcing certain judgments and regulatory sanctions. The Agreement increases certainty for trade by creating clear means in which to pursue civil litigation and will benefit both businesses and individuals involved in legal disputes across the Tasman.⁷

The Communiqué of the Standing Committee of Attorneys-General (SCAG) indicates that the implementation of the Agreement is in its final phase following the passage of the legislation in 2010 in both Australia and New Zealand. According to SCAG it is intended that the new regime will come into force in the second half of 2011.⁸

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3. S Scully, *Trans-Tasman Proceedings Bill 2009*, Bills Digest, no. 84, 2009–10, Parliamentary Library, Canberra, 22 January 2010, viewed 30 March 2011, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd084.pdf>
 4. S Scully, *Trans-Tasman Proceedings (Transitional and Consequential Amendments) Bill 2009*, Bills Digest, no. 85, 2009–10, Parliamentary Library, Canberra, 22 January 2010, viewed 30 March 2011, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd085.pdf>
 5. S Power, *Bill to improve trans-Tasman court proceedings passes first reading*, 23 March 2010, viewed 30 March 2011, <http://www.beehive.govt.nz/release/bill-improve-trans-tasman-court-proceedings-passes-first-reading>
 6. Op. cit., Article 16.
 7. Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, *National Interest Analysis* [2011] ATNIA 3, paragraph 3, viewed 10 March 2011, http://www.aph.gov.au/house/committee/jsct/9february2011/treaties/newzealand_nia.pdf
 8. Standing Committee of Attorneys-General, Communiqué, 4 -5 March 2011, Wellington, New Zealand, viewed 29 March 2011, http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_FirstQuarter_4-5March2011-Communique-StandingCommitteeofAttorneys-General

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At the hearing on the Agreement before the Joint Standing Committee on Treaties, a representative of the Attorney-General's Department summarised the key elements of the Agreement as follows:

... it will allow most initiating processes of any court in either country to be served without the need to obtain the leave of the court to do so. It provides for the registration and enforcement of most judgments of any courts in either country. It allows for the service and enforcement of certain specified tribunal decisions in either country. It permits certain courts to grant interim relief in support of court proceedings in the other country, such as, for example, a Mareva injunction for freezing assets. It applies a common test when deciding whether a court in Australia or New Zealand is the most appropriate forum to resolve disputes so that you do not end up with parallel proceedings happening in two different courts, and it allows certain specified civil penalties and criminal fines to be enforced by the courts of the other country.⁹

De Facto financial matters

Schedule 3 of the Bill validates the payment of court fees during the period 1 March 2009 to 25 November 2010. In 2008, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Family Law Amendment (De Facto Financial Matters and Other Measures) Act) was passed. This Act extended federal jurisdiction under the *Family Law Act 1975* to include the breakdown of de facto relationships (both opposite sex and same sex relationships) and associated financial matters. To implement the provisions of the Family Law Amendment (De Facto Financial Matters and Other Measures) Act it was necessary that the states refer power to the Commonwealth to enable it to legislate in this area. All states have now referred power with the exception of Western Australia. The Family Law Amendment (De Facto Financial Matters and Other Measures) Act applies in the territories because of the operation of section 122 of the Constitution.

Referral of powers over the property rights of de facto couples has been on and off the political agenda for some time. It was raised in 1976 during meetings of the Australian Constitutional Convention by then NSW Attorney-General who unsuccessfully suggested the Convention should resolve that powers over the property rights of de facto couples should be referred to the Commonwealth. A similar suggestion was made by the Constitutional Commission in 1988 and in subsequent fora and reports.¹⁰

The Attorney-General noted that:

A technical error in the amending legislation resulted in an anomaly in the application of the fee provisions of the Family Law Regulations 1984 to de facto financial proceedings. This affects fees

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9. K Moore (Assistant Secretary, Justice Policy Branch, Attorney-General's Department), Evidence to the Joint Standing Committee on Treaties, Treaties referred on 16 November 2010 and tabled on 9 and 10 February 2011, *Hansard*, 28 February 2011, TR11, viewed 29 March 2011, <http://www.aph.gov.au/hansard/joint/commtee/J13633.pdf>
 10. M Neilsen, *Family Law Amendment (De Facto Financial Matters and other Measures) Bill 2008*, Bills Digest, no. 9, 2008-09, Parliamentary Library, Canberra, 25 August 2008, p. 4, viewed 28 March 2011, <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd009.pdf>

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paid on de facto financial matters between 1 March 2009 and 26 November 2010. The Family Law Regulations 1984 were amended from this latter date to enable the fees to be properly collected...

The measures in Schedule 3 of this Bill would retrospectively correct the anomaly and ensure that the fees applying to de facto financial proceedings were the same as those applying to matrimonial financial proceedings and parenting matters in the relevant period.¹¹

Committee consideration

The Senate Selection of Bills Committee resolved at its meeting on 24 March 2011 not to refer the Bill to a committee.¹²

The Senate Standing Committee for the Scrutiny of Bills drew attention to the retrospective nature of Schedule 3 of the Bill in relation to fees charged under the *Family Law Act 1975* for the period 1 March 2009 to 25 November 2010.

The Committee commented that it 'has been advised that these amendments will ensure that the legislation reflects the situation originally intended (and which is currently being used) for the application of the relevant fee provisions'.¹³ The Committee made no further comment on these items.

The Joint Committee on Treaties is currently considering the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement. The Agreement was tabled in Parliament on 9 February 2011. At the time of writing the Digest on the Bill, the Committee had not released its report. The Committee is required to 'inquire into and report on matters that arise from treaties, National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament'.¹⁴

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11. R McClelland, 'Second reading speech: Trans-Tasman Proceedings Amendment and Other Measures Bill 2011', House of Representatives, *Debates*, 2 March 2011, p. 2027, viewed 28 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-03-02%2F0007%22>
 12. Senate Selection of Bills Committee, *Report no. 3 of 2011*, 24 March 2011, viewed 28 March 2011, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2011/rep0311.pdf
 13. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest no. 3 of 2011*, 23 March 2011, viewed 28 March 2011, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2011/d03.pdf>
 14. Joint Standing Committee on Treaties website, viewed 30 March 2011, <http://www.aph.gov.au/house/committee/jsct/9february2011/index.htm>

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Financial implications

The Explanatory Memorandum states that the proposed Bill will not have any significant financial impact.¹⁵

Key provisions

Schedule 1—amendments relating to staying an Australian proceeding on forum grounds

Items 1–9 amend existing sections 3 and 16, subsections 17(1), 19(3) and 20(3) and paragraphs 19(1)(a), 20(1)(a) and 20(2)(e) of the Trans-Tasman Proceedings Act to remove the reference to ‘matters in dispute’ and substitute ‘matters in issue’ to harmonise more closely with the language of the New Zealand Act.

Items 6 and 7 amend existing paragraph 19(1)(a) and subsection 19(3) to remove the word ‘all’ in relation to ‘all matters in dispute’. This accords with a recommendation of the New Zealand Ministry of Justice in Part 2 of its advice to the New Zealand Parliament’s Justice and Electoral Select Committee report on the Bill which stated:

Subclause (1)(a) requires the New Zealand court to be satisfied that an Australian court has jurisdiction to determine **all** the matters in issue between the parties to the proceeding before it grants a stay on forum grounds. There is the risk that a party might exploit this by including a spurious claim under a statute which only confers power on a New Zealand court so an Australian court would have no jurisdiction. This would undermine the intent of this provision as the New Zealand court would be unable to stay the proceeding even if Australia was the more appropriate court to determine all the other issues in dispute. We propose the removal of the word “**all**” to address this risk.¹⁶

Schedule 2—other amendments

Division 2 of Part 2 of the Trans-Tasman Proceedings Act deals with the service in New Zealand of initiating documents issued by Australian courts and tribunals. In particular, Division 2 relates to a civil proceeding commenced in an Australian court and a civil proceeding commenced in an

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15. Explanatory Memorandum, Trans-Tasman Proceedings Amendment and Other Measures Bill 2011, p. 1, viewed 17 March 2011, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4531_ems_1ba731b1-0c92-43c8-92f7-b0c2390ad7fe/upload_pdf/352835.pdf;fileType=application%2Fpdf
 16. Ministry of Justice, *Trans-Tasman Proceedings Bill: departmental report, part 2*, 17 June 2010, paragraph 20, p. 5, viewed 10 March 2011, http://www.parliament.nz/en-NZ/PB/SC/Documents/Advice/9/f/0/49SCJE_ADV_00DBHOH_BILL9696_1_A54214-Departmental-report-part-2.htm

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Australian tribunal, as long as the tribunal's procedural rules permit an initiating document relating to the proceeding to be served outside Australia, and the tribunal is prescribed by the regulations.

Similarly, Subpart 5 of Part 2 of the New Zealand Act provides for the recognition and enforcement in New Zealand of specified judgments of Australian courts and tribunals. In particular, section 55 of the New Zealand Act will apply in relation to tribunals if the tribunal is declared by the Governor-General.

Item 4 of Schedule 2 to the Bill amends existing subsection 8(3) of the Trans-Tasman Proceedings Act to link the regulations to the requirements of section 55 of the New Zealand Act. The effect of the amendment is that before a tribunal can be listed in Australian regulations it must first be 'declared' under section 55 of the New Zealand Act.

Existing paragraph 20(1)(b) provides that an Australian court must not by order stay proceedings if it is satisfied that the exclusive choice of court agreement designates the Australian court to determine the matter despite an application under section 17 (to stay Australian proceedings on forum grounds). **Item 6** inserts **proposed subsection 20(2A)** which provides that paragraph (1)(b) does not apply if an Australian court considers the exclusive choice of court agreement is null and void under Australian law.

Existing section 26 is concerned with giving interim relief in support of a New Zealand proceeding. **Item 7** repeals subsection 26(2). That subsection currently provides that an Australian court could refuse interim relief if it considered that it had no jurisdiction in relation to the subject matter of the New Zealand proceeding. The Explanatory Memorandum refers to an unintended consequence arising from this subsection by giving 'greater significance to issues of jurisdiction and expediency than is necessary, resulting in applicants for interim relief facing an unintended additional hurdle'.¹⁷ It further notes that the court will have already considered the issues of jurisdiction and expediency under paragraph 26(1)(a). By repealing subsection 26(2) the provisions of section 26 will harmonise more closely with the equivalent section, section 32, in the New Zealand Act.

Existing section 61 of the Trans-Tasman Proceedings Act deals with contempt of New Zealand courts or tribunals. Subsections 61(1) and (2) provide that a person who is making a remote appearance from Australia in a proceeding in a New Zealand court or tribunal commits an offence if they assault someone, or use threats, intimidation or insults. **Items 9 and 10** insert **proposed subparagraphs 61(1)(b)(ia) and 61(2)(b)(iia)** to expand the list of persons against whom such offences may be committed.

Division 2 of Part 7 of the Trans-Tasman Proceedings Act deals with the recognition and enforcement in Australia of specified judgments of New Zealand courts and tribunals. Existing section 66 deals with the meaning of '**registrable New Zealand judgment**'. **Item 11** amends existing subsection 66(4)

17. Explanatory Memorandum, p. 5.

to include an additional criterion that if the judgment imposes a civil pecuniary penalty it must not be prescribed by the regulations as a judgment of a New Zealand tribunal.

Schedule 3—validation of certain court fees

The purpose of clause 1 in Schedule 3 of the Bill is to validate payments of court fees made under the *Family Law Act 1975* in relation to de facto financial proceedings during the period of 1 March 2009 to 25 November 2010. Payments of court fees to the Federal Magistrates Court are not affected. It was intended to impose fees under the Family Law Regulations 1984 for de facto financial proceedings. However due to a technical error concerning amendments made to the *Family Law Act 1975*, the definition of ‘financial and Part VII proceedings’ was not updated.

Concluding comments

Trans-Tasman Agreement

This Bill is fine tuning certain parts of the existing (but as yet, not commenced) legislation in order to harmonise more closely with its counterpart New Zealand legislation prior to the Agreement coming into force.

De Facto financial proceedings

It was necessary to validate the court fees paid in relation to de facto financial proceedings for the period stipulated in the Bill (1 March – 25 November 2010) and which were originally intended to be imposed by the Family Law Regulations 1984. The payment of these fees was not effective due to a technical error that occurred in 2009 when amendments were made to the *Family Law Act 1975*. The error has since been rectified prospectively by amendments to the Family Law Regulations 1984 in 2010, which came into force on 26 November 2010.

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