

REGULATORY IMPACT STATEMENT – IMPLEMENTATION OF RECOMMENDATIONS OF TRANS-TASMAN WORKING GROUP ON COURT PROCEEDINGS AND REGULATORY ENFORCEMENT

Statement of the Nature and Magnitude of the Problem and the Need for Government Action

Over time, there has been a significant increase in the movement of people, assets and services between New Zealand and Australia. For example:

- In 2006, over 900,000 Australians visited New Zealand and well over one million New Zealanders visited Australia. Almost 450,000 New Zealanders live in Australia and around 60,000 Australians in New Zealand.
- In the year to June 2006, exports of goods from Australia to New Zealand came to NZ\$7,641m and from New Zealand to Australia to NZ\$6,806m.
- In the year to September 2006, New Zealand exports of services to Australia came to NZ\$ 2,387m and Australian exports to New Zealand came to \$3,588m.
- As at 31 March 2006, total Australian investment in New Zealand was NZ\$68.7 billion and total New Zealand investment in Australia was NZ\$25.0 billion.

This leads inevitably to a greater number of disputes involving individuals or businesses with a cross-border element. Under the Australia New Zealand Closer Economic Relations Agreement and the work around achieving a Single Economic Market 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.

The Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement (the Working Group) has 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 foreign proceedings - 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 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.

Statement of the Public Policy Objective(s)

The public policy objective for trans-Tasman court proceedings is to achieve closer integration between the New Zealand and Australian civil justice systems in order to:

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

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 reach of a regulatory regime;
- avoid enforcement gaps that would otherwise exist.

Statement of Feasible Options (Regulatory and/or Non-Regulatory) That May Constitute Viable Means For Achieving the Desired Objective(s)

Option 1 - Status Quo

Currently, the relevant New Zealand rules are a mixture of statutes, including mirror New Zealand/Australian legislation, as well as common law rules and principles. The position is the same in Australia.

The *Reciprocal Enforcement of Judgments Act 1934* (REJA) (reflecting common law rules) prevents the enforcement of an Australian judgment where the defendant was served in New Zealand but did not submit to the jurisdiction of the Australian court. It also limits the Australian judgments that can be enforced in New Zealand to final money judgments. New Zealand judgments are treated similarly under the Australian *Foreign Judgments Act 1991* (Cth).

Common law principles, combined with the *Reciprocal Enforcement of Judgments Act*, prevent the enforcement of civil pecuniary penalties or criminal fines imposed by a court in another country. The same is true in Australia.

The *Evidence Amendment Act 1994* currently requires leave of a High Court Judge to serve, in Australia, a subpoena issued by the District Court. Criminal proceedings are currently excluded from the subpoena regime in this Act. The position is the same under the Australian mirror legislation.

The common law prevents interim relief being granted in support of proceedings in another country. The potentially inconsistent Australian and New Zealand forum non conveniens rules are common law rules.

The status quo is not preferred because it will not address the problems identified by the Working Group, resulting in less certainty for litigants and regulators, complexity, greater cost and less effectiveness both in trans-Tasman dispute resolution and the enforcement of regulatory regimes. These problems can only be addressed by the adoption of mirror solutions by New Zealand and Australia.

Option 2 - Amend the Reciprocal Enforcement of Judgments Act 1934 (NZ) and Foreign Judgments Act 1991 (Cth)

This option, considered by the Working Group, would involve amending the existing legislation in both countries for the enforcement of judgments to address some of the problems. The changes could prevent a registered judgment being set aside because of the lack of jurisdiction of the original court, where jurisdiction is in issue only because the defendant was outside the country of the original court. The Acts could also be amended to extend the range of enforceable judgments to non-money judgments and interim orders, and possibly civil penalty orders and certain criminal fines.

However, this proposal is not preferred because both these statutes apply to other countries beyond the trans-Tasman context, although special provisions are included to

address particular trans-Tasman issues. Including further trans-Tasman provisions would make both Acts more complex.

It would also only offer a partial solution to some problems or not enable the best solution to be adopted for others. For example, trying to deal with the problem of obtaining interim relief for a foreign proceeding could be addressed by allowing interim orders to be enforced under the REJA. However, interim relief orders tend to require ongoing judicial oversight and direction, the protection of third party interests and need to be made or changed at short notice. These needs would not be well met under the REJA model.

Option 3 - Legislation based on the Brussels model

This option, also considered by the Working Group, would involve enacting new legislation modelled on the Brussels Regulation that operates in the European Union. The Brussels model was developed to ease the enforcement of civil judgments between EU Member States. Mirror legislation would be required in Australia too.

Under the Brussels model, a court's jurisdiction is determined primarily by the defendant's domicile or by specific rules regarding particular types of claim. Where more than one court has jurisdiction, priority is decided by a 'first to file' rule. Judgments are readily enforceable, with only limited exceptions.

This option is not preferred. It was originally designed for EU Member States when all were civil law countries. Its civil law origins do not make it the best model for two countries with a shared common law heritage. It would also not offer a solution to the range of problems that have been identified. Other difficulties include:

- Complex jurisdictional rules overlay the domicile rule.
- A person, especially a company, can have more than one 'domicile' so that more than one court has jurisdiction. In that case, the "first to file" rule determines priority.
- A rule based on the defendant's domicile is unnecessary in a trans-Tasman context.
- The 'first to file' rule is arbitrary and undesirable, leading to a race to the courthouse.

Option 4 - Preferred option – Trans-Tasman Proceedings Bill

Under this option, New Zealand and Australia would need to enact mirror legislation to implement the Working Group's recommendations for reform. It would be broadly modelled on the Service and Execution of Process Act 1992 (Cth) (SEPA) that has successfully resolved similar problems between States and Territories within Australia.

The features of the Bill would include:

Service of process and recognition and enforcement of judgments - Civil proceedings from any New Zealand court can be served in any Australian State or Territory, and vice versa. The regime would have the following additional elements:

- the plaintiff would not have to show any particular connection between the proceedings and the forum to serve the proceedings in the other country
- the defendant could apply for a stay of proceedings on the basis that a court in the other country is the more appropriate court for the proceeding

- a judgment from one country could be registered in the other. It would have the same force and effect, and be enforceable as a judgment of the registering court
- a judgment could only be varied, set aside or appealed in the court of origin
- a judgment could only be refused enforcement by a court in the other country on public policy grounds.

Final non-money judgments - The range of final judgments that can be recognised and enforced between Australia and New Zealand would be extended to those requiring a person to do, or not do, something (eg injunctions and orders for specific performance). There would be certain exclusions, such as orders about the administration of estates or the care or welfare of a child. These sorts of orders are not covered by SEPA.

Interim relief in support of foreign proceedings - Appropriate New Zealand and Australian courts would be given statutory authority to grant interim relief in support of proceedings in the other country's courts. New Zealand could extend this to other countries as well.

Enforcing tribunal orders - Certain orders, or orders in certain types of proceedings, made by specified tribunals, would be recognised and enforced between Australia and New Zealand. The particular tribunals, proceedings and orders to which the regime would apply would be prescribed by subordinate legislation on a case by case basis.

Declining jurisdiction - A statutory test would be adopted between Australia and New Zealand to allow a person to seek a stay of proceedings in one country on the grounds that a court in the other country is the more appropriate forum for the proceeding.

Leave requirement for trans-Tasman service of subpoenas - Under the trans-Tasman evidence regime, a lower court judge would be able to grant leave to issue a trans-Tasman subpoena in civil proceedings before that court or before a prescribed tribunal.

Enforcing civil pecuniary penalty orders - A civil pecuniary penalty order made in one country would be enforceable in the other as a civil judgment. Either country could exclude particular pecuniary penalty regimes in the other country.

Enforcing fines for certain regulatory offences - Fines imposed in one country for criminal offences under certain regulatory regimes would be enforceable in the other, in the same way as civil judgment debts. Only fines for offences under a regulatory regime that affects the effectiveness, integrity and efficiency of trans-Tasman markets and in which both countries have a strong mutual interest would be included, as the strong mutual interest outweighs the usual sovereignty concerns against enforcement. There would be a list of those fines included in the scheme.

Extending trans-Tasman subpoenas to criminal proceedings - Subpoenas in criminal proceedings should be able to be served across the Tasman with the leave of a judge.

Statement of the Net Benefit of the Proposal, Including the Total Regulatory Costs (Administrative, Compliance and Economic Costs) and Benefits (Including Non-Quantifiable Benefits) Of the Proposal, and Other Feasible Options

Government

The proposed regime will streamline processes for the resolution of trans-Tasman disputes. This will enable better use to be made of the courts and for court orders to be more effectively enforced, thereby improving outcomes from the courts system. There will be some administrative costs associated with:

- Enabling judgments to be registered in the District Court, not just the High Court.
- An increase in the number of Australian judgments registered for enforcement in New Zealand and additional court applications resulting from the proposals.

These costs will not be significant. Third party fees will offset some of the costs of enforcing judgments or court applications. The costs of extending the scheme to particular tribunals will be considered at the time of the decision to prescribe that tribunal.

The improved integrity of New Zealand and Australia's regulatory regimes is a substantial benefit. Improved regulatory enforcement will extend the reach of regulatory schemes to ensure that people cannot evade their responsibilities by moving themselves or their assets to the other country. The proposals will help ensure that current and future CER and Single Economic Market initiatives, such as the Trans-Tasman Mutual Recognition of Securities Offerings, are fully effective because civil penalties and criminal sanctions can be enforced across the Tasman. The proposal could help deal with difficulties facing cross-border provision of service and pave the way for expanding the scope of the Trans Tasman Mutual Recognition Arrangement.

There will also be reduced costs for regulatory and enforcement agencies that can take action under the simplified processes. An example might be a regulator that seeks an injunction under a regulatory regime and wishes to enforce that across the Tasman.

Private Individuals and Business

The proposed regime will deliver substantial benefits to both individuals and businesses involved in a trans-Tasman dispute through a clearer and simpler regime for the resolution of those disputes. The proposals 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 wider range of judgments).

On the other hand, some individuals or businesses who could have avoided having an Australian judgment enforced against them in New Zealand because they chose to take no part in the proceedings or the final court order was not for the payment of money, will no longer be able to do so. These people will face the cost of meeting their obligations under the new arrangements.

For businesses, simpler processes and increased certainty surrounding the effective trans-Tasman enforcement of remedies granted by a court will help encourage business transactions with those based in Australia. Improved regulatory enforcement may allow the Government to enter into more trans-Tasman initiatives, thereby creating a more seamless trans-Tasman business environment. In turn this reduces compliance costs thereby creating further incentives for trans-Tasman trade. The benefits in this area are likely to be significant.

There will be no compliance costs for business arising from these proposals.

Society

There is an overall benefit to society in greater civil justice co-operation between New Zealand and Australia. The regime will assist where a trans-Tasman dispute is heard by a court and may also encourage resolution of disputes without recourse to the courts because enforcement gaps have been closed. Better trans-Tasman dispute resolution and enhanced enforcement of regulatory regimes will have a significant impact on the Australia/New Zealand relationship to the mutual benefit of both countries. They will play a crucial part in the success of CER and SEM initiatives such as streamlined trans-Tasman insolvency procedures and the mutual recognition of financial intermediaries.

Statement of Consultation Undertaken

Stakeholder Consultation

The Working Group consulted on its proposals prior to finalising its recommendations. It issued a public discussion paper canvassing the problems and proposed solutions and 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. Thirty-two submissions were received (15 from Australia and 17 from New Zealand). Overall these were very supportive of the proposals, some even suggesting that integration of the two systems could go further.

Some submissions raised concerns that allowing the plaintiff to serve proceedings in the other country without demonstrating a connection with the forum shifts the burden of proving the appropriateness of the chosen court from the plaintiff to the defendant. However, the perceived shift is limited in practice as service is already allowed overseas without leave of the court in many cases.

Concerns were also raised about large companies centralising their debt recovery and not commencing proceedings in a small debtor's home jurisdiction. There is already potential for this to occur under SEPA. There is, however, little concrete evidence of a problem under SEPA and no reason to think it would be more acute under a trans-Tasman regime. If evidence of a significant problem emerges in future, parallel reforms could be considered for SEPA and the trans-Tasman regime.

If the proposals are implemented, stakeholders will be consulted further when preparing the implementing legislation.

Government Departments/Agencies Consultation

The Working Group sent copies of the discussion paper to a wide range of government departments and agencies. In addition, there were meetings with agencies such as the Commerce and Securities Commission.

The Ministry of Economic Development, Ministry of Foreign Affairs and Trade, Department of the Prime Minister and Cabinet, Ministry of Consumer Affairs, Ministry of Health, Inland Revenue Department, Crown Law and the Treasury have been consulted in the preparation of the Cabinet paper.

No significant concerns were raised.