

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

## Introduction

- 10.1 The proposed agreement is part of the framework established by the *Australia New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA) [1993] and is designed to remove uncertainties about the enforcement of legal rights on civil proceedings between Australia and New Zealand.<sup>1</sup>
- 10.2 Currently, resolution of trans-Tasman legal disputes can be time consuming, expensive and complex. The Agreement aims to streamline the resolution process of civil proceedings by making consistent the civil procedure rules in Australia and New Zealand, in particular, by:
- allowing for the service and enforcement of certain specified tribunal decisions in either country;
  - permitting certain courts to grant interim relief in support of court proceedings in the other country;

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<sup>1</sup> *National Interest Analysis* (NIA) [2011] ATNIA 3, Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, done at Christchurch on 24 July 2008 [2008] ATNIF 12, paras 3–4.

- applying a common test when deciding whether a court in Australia or New Zealand is the most appropriate forum to resolve disputes;
  - allowing certain specified civil penalties and criminal fines to be enforced by the courts of the other country;<sup>2</sup> and
  - allowing for remote appearances and representation by local legal representatives using video and audio technologies.<sup>3</sup>
- 10.3 The Agreement is based on Australia's *Service and Execution of Process Act 1992*, which has resolved practical difficulties in resolution of court proceedings between Australian States and Territories.<sup>4</sup> It is also the product of extensive consultation between the two governments and relevant agencies, which formed a Working Group for consideration in 2003, and has been scrutinised in draft form by legal experts and the public in both nations.<sup>5</sup>
- 10.4 The Committee was informed that this agreement can be expected to benefit businesses, and individuals, by reducing costs and improving efficiency for trade and commerce across the Tasman. Mrs Karen Moore of the Attorney-General's Department stated:
- In 2009, two-way bilateral investment between the two countries totalled \$110 billion and it continues to increase annually. The greater movement of people, assets and services across the Tasman also increases the prospects for litigation with a trans-Tasman element. The implementation of the agreement should reduce the time and costs involved in such litigation.<sup>6</sup>

## Matters for resolution

- 10.5 Australia and New Zealand have close historic, political and economic ties, and a high inter-nation migration rate supporting frequent trans-Tasman interactions for family and business purposes. Despite this

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2 Mrs Karen Moore, Attorney-General's Department, *Transcript of Evidence*, 28 February 2011, p. 10.

3 Attorney-General's Department, *Supplementary Submission 2.1*; NIA, para. 6.

4 NIA, para. 6.

5 The Working Group's discussion paper was released in 2005, and its report tabled in 2006. A draft agreement followed in 2008, and supporting legislation in 2009. See NIA Consultations, paras 25–28, 32.

6 *Transcript of Evidence*, 28 February 2011, p. 10.

strong relationship, Australia and New Zealand operate as separate nations, within distinct legal systems. This creates particular problems for those doing business, especially where disputes arise that need judicial resolution.

- 10.6 The Attorney General's representative Mr Thomas Johns advised that complications occur because Australia and New Zealand treat each other as foreign nations when negotiating legal matters, and then apply local interpretations:

...there are quite complex private international rules that would apply to these transnational litigation proceedings and tests, for example, that would apply in Australia would apply differently in New Zealand to some of the questions that arise in transnational litigation between the two countries. Service, for example, is one of the issues that we obviously address in this agreement and proceedings on that are much more complicated at the moment because there are no formal arrangements between New Zealand and Australia... in regard to service.<sup>7</sup>

- 10.7 The proposed agreement aims to provide a formal framework, complementary to the ANZCERTA, that will simplify and harmonise civil procedure rules so that the Australian and New Zealand legal systems can operate more seamlessly.<sup>8</sup>

- 10.8 A key initiative under the Agreement is the application of the common test to determine which jurisdiction should deal with a matter. At present, there are two different tests dealing with the jurisdiction of the court, and whether a court should exercise the jurisdiction over a matter. This introduces complexity and uncertainty for parties unsure how the court might find on a particular matter.<sup>9</sup>

- 10.9 Another matter to be addressed was mutual recognition of professional qualifications to support remote court appearances.<sup>10</sup> The Attorney-General's Department confirmed that while legal frameworks for mutual recognition exist,<sup>11</sup> the proposed agreement would allow

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7 *Transcript of Evidence*, 28 February 2011, p. 11.

8 NIA, para. 5.

9 Mr Thomas Johns, Attorney-General's Department, *Transcript of Evidence*, 28 February, 2011, p. 11.

10 Mrs Moore and Mr Johns, Attorney-General's Department, *Transcript of Evidence*, 28 February 2011, p. 12.

11 Under the *Trans-Tasman Mutual Recognition Act 1997* (Cth) and the *Trans-Tasman Mutual Recognition Act 1997* (NZ). *Supplementary Submission 2.1*, p. [3].

representatives not registered where the court is proceeding to seek leave to appear remotely if registered where their client resides, and to appear remotely without leave on stay of proceedings.<sup>12</sup>

- 10.10 The Agreement will also simplify processes for servicing subpoenas for civil matters, necessitating the repeal of Australia's *Evidence and Procedure (New Zealand Act) 1994* and the *Evidence Act 2006 (NZ)* to avoid duplication on commencement.<sup>13</sup>

## Obligations

- 10.11 The Agreement builds on the existing co-operative regime between Australia and New Zealand covering the taking of evidence and associated court procedures, and applies to the land and sea of each party (except Tokelau).<sup>14</sup>
- 10.12 Each Party is to recognise the other's judicial and regulatory institutions, and commit to resolution of transnational civil disputes and regulatory corporation. Obligations are set out in five parts, containing 15 articles:
- Part 2 – deals with application of the service process and recognition and enforcement of judgments in civil proceedings. It also sets out exclusions, including on family law, child welfare matters, cases involving power of attorney, or where an order not complied with may lead to a conviction (Articles 3 to 8);
  - Part 3 – requires mutual recognition for enforcement of civil pecuniary penalty orders (Article 9) and enforcement of fines (Article 10);
  - Part 4 – covers remote appearances in civil proceedings (Article 11) and the issue and service of subpoenas (Article 12); and
  - Part 5 – covers consultation over disputes, and sets out mechanisms for treaty amendment, termination and entry into force (Articles 13 to 15 respectively).
- 10.13 With regard to the high level of travel and migration across the Tasman, the Committee established that current obligations applying to family law related matters are excluded from the purview of the Agreement.

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12 *Supplementary Submission 2.1*, p. [4].

13 *Supplementary Submission 2.1*, p. [1].

14 Article.1.

- 10.14 Department representatives informed the Committee that co-operation between Australia and New Zealand on these matters is largely governed by international obligations, including those under the Hague Agreements on child abduction and child maintenance to which both nations are party.<sup>15</sup>

## Implementation

- 10.15 The Agreement will enter into force 30 days after the date that the Parties have notified each other of the completion of their respective domestic procedures for compliance with this Agreement.<sup>16</sup>
- 10.16 Australia's *Trans-Tasman Proceedings Act 2010* and the corresponding *New Zealand Trans-Tasman Proceeding Act 2010* (NZ) which implement the Agreement have been passed in each Parliament but will not commence until after the Agreement has entered into force.<sup>17</sup>
- 10.17 Regulations and Orders in Council under each Act must be developed, as appropriate in each jurisdiction, and court rules amended. In Australia the costs of implementation will be met within existing resources.<sup>18</sup>
- 10.18 Department representatives advised the Committee that legislation to implement the Agreement is now almost finalised in both countries, with regulations and amendments to court rules currently being prepared in consultation with stakeholders.<sup>19</sup>

## Conclusion

- 10.19 The Committee considers that the proposed agreement on court proceedings and regulatory enforcement is a proper recognition of the strong trade and other ties that exists between Australia and New Zealand. It is the product of high level negotiations between the two nations, close consultation between relevant government agencies and
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15 Mr John and Mrs Moore, Attorney-General's Department, *Transcript of Evidence*, 28 February 2011, pp. 11-12.

16 Article 16, NIA, para. 2

17 NIA, para. 2.

18 NIA, para. 20.

19 Mrs Moore, Attorney-General's Department, *Transcript of Evidence*, 28 February 2011, p. 11.

authorities, and has been subject to appropriate independent scrutiny to limit possible unintended consequences.

- 10.20 The Committee notes that enabling legislation for the Agreement is largely in place. The Committee supports the ratification of the treaty as a timely development in Trans-Tasman relations.

### **Recommendation 12**

**The Committee supports the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement* and recommends binding treaty action be taken.**