National Interest Analysis [2011] ATNIA 3

with attachment on consultation

**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

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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

Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the *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 ('the Agreement'), into force. The Agreement was signed by the Attorney-General and the New Zealand Minister of Commerce, Minister for Food Safety and Associate Minister of Justice in Christchurch on 24 July 2008.

2. Pursuant to Article 16, the Agreement will enter into force 30 days after the later date on which the Parties have notified each other in writing, through diplomatic channels, that their internal procedures necessary for its entry into force have been completed.

Overview and national interest summary

3. The objective of the Agreement is to streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs, improve efficiency and minimise existing 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.

Reasons for Australia to take the proposed treaty action

4. The Agreement builds on the longstanding relationship and close historic, political and economic ties between Australia and New Zealand developed through and evidenced by the *Australia New Zealand Closer Economic Relations Trade Agreement*, done at Canberra on 28 March 1993. This Agreement forms part of the framework established by the Closer Economic Relations Trade Agreement and will create conditions for increased trade and commerce between Australia and New Zealand by providing greater certainty about the enforcement of legal rights.

5. At present, resolving trans-Tasman legal disputes is often expensive, slow and complicated. The Agreement sets out a new regime which will simplify and harmonise civil procedure rules in Australia and New Zealand by: making better use of video and audio technology to enable cheaper, more convenient remote appearances; harmonising rules of appropriate jurisdiction; streamlining procedures for the service of documents; building on the existing cooperative evidence regime to allow subpoenas to be issued in criminal proceedings; and eliminating the expense and time involved in commencing new proceedings to enforce a judgment already obtained in the other country's courts.

6. The Agreement is based on the simple, streamlined and cost effective *Service and Execution of Process Act 1992* (Cth) model, which has resolved many of the practical difficulties with service of process and enforcing judgments between the States and Territories within Australia.

Obligations

7. The Agreement acknowledges each Party's confidence in the judicial and regulatory institutions of the other Party and affirms their shared commitment to appropriate and effective resolution of trans-Tasman civil disputes and increased regulatory cooperation.

8. The Agreement applies in the land areas, internal waters and territorial sea of each Party, but with respect to New Zealand, does not include Tokelau (Article 1).

9. Part 2 of the Agreement (Article 3 to Article 8), which deals with service of process and the recognition and enforcement of judgments in civil proceedings, applies to civil proceedings other than those concerning dissolution of marriage, enforcement of maintenance obligations and enforcement of child support obligations (Article 3.1). It allows for the enforcement of civil judgments other than those concerning: probate and the administration of estates; guardianship or management of the property of someone incapable of managing their own affairs; the care, control or welfare of a child; and orders that, if not complied with, may lead to conviction for an offence in the place where the order was made (Article 3.4). Part 2 of the Agreement also allows for the Parties to mutually agree to exclude certain types of matters covered by existing or proposed agreements or arrangements, statutory cooperative arrangements, and non-money judgments from the application of the Agreement (Article 3.2 and 3.5).

10. Article 4 of the Agreement provides for initiating processes in civil proceedings in the territory of one Party to be served in the territory of the other Party without the need to seek leave of a court, except where the initiating process relates to an action *in rem*, namely those focused on determining proprietary title to property. Article 4 also provides that a defendant may apply for a stay of proceedings, where the initiating process has been served in accordance with Article 4, on the basis that a court within the territory of the other Party is the more appropriate court.

11. Article 5 provides that, on application, final judgments issued by a court within the territory of one Party shall be registered and may be enforced by a court within the territory of the other Party subject to specific exceptions. A public policy exception to the registration and enforcement of judgments has been retained for the court where a judgment is registered in order to cater for the rare occasions where registration of the judgment would conflict with important public policy considerations in that country.

12. Article 6 allows the Parties to mutually determine a list of specified tribunals performing adjudicative functions whose decisions will be recognised and enforced within the territory of the other Party. The initiating processes of such tribunals may also, by mutual determination of the Parties, be capable of being served in the territory of the other Party.

13. Article 7 provides that nominated courts within each Party's territory shall have the same ability to grant interim relief in support of proceedings commenced in the courts within the territory of the other Party as they are able to grant in domestic proceedings.

14. Article 8 provides that the courts within the territory of one Party shall decline jurisdiction on the ground that a court within the territory of the other Party is the more appropriate forum to determine the proceedings. The Agreement also sets out the factors that each Party's courts shall consider to determine the more appropriate forum for the proceedings, such as where the Parties and witnesses live, which jurisdiction's law is to be applied and whether the Parties to the proceedings have agreed on the place or court where the proceedings should be heard. These factors do not limit the discretion of the courts to have regard to other factors. Courts within the territory of each Party shall not restrain a Party from commencing proceedings, or continuing them, in a court within the other Party's territory on the ground that it is not the appropriate forum.

15. Article 9 provides that civil pecuniary penalties within the territory of one Party shall be enforceable in the courts within the territory of the other Party as a civil judgment debt. The Agreement provides that a civil pecuniary penalty may, by mutual agreement, be excluded from enforcement on the basis that the civil pecuniary penalty regime is inconsistent with the public policy of the Party seeking to exclude it.

16. Article 10 allows the Parties to mutually determine a list of statutes or statutory provisions allowing fines to be imposed for criminal offences under regulatory regimes which affect the effectiveness, integrity and efficiency of trans-Tasman markets. Where such fines are imposed by a court within the territory of one Party they will be enforceable in the courts within the territory of the other Party.

17. Article 11 provides for remote appearances in the territory of the Party that is not hearing the civil proceeding with leave of the court hearing the proceeding. Where a Party is seeking a stay of civil proceedings, that Party has a right to appear remotely without leave of the court.

18. Article 12 provides for subpoenas issued in criminal proceedings to be served in the territory of the other Party and for inferior courts to issue subpoenas in proceedings before it without leave being sought from a superior court.

19. Article 13 provides that the Parties will resolve any disputes arising out of the Agreement amicably and expeditiously through consultation or negotiation.

Implementation

20. Giving effect to the Agreement requires amendments to Australian and New Zealand law. The *Trans-Tasman Proceedings Act 2010* (Cth) and the corresponding New Zealand *Trans-Tasman Proceeding Act 2010* (NZ) which implement the Agreement have been passed by the respective Parliaments but will not commence until after the Agreement has entered into force. In Australia, regulations under the *Trans-Tasman Proceedings Act 2010* need to be made and in New Zealand, Orders in Council need to be developed. The relevant Australian and New Zealand court rules also need to be amended.

Costs

21. The only costs arising from acceding to the Agreement are those relating to the amendment of the relevant laws in each jurisdiction. For Australia, these costs will be met from within existing resources.

Regulation impact statement

22. In 2007 this proposal was self-assessed by the Australian Attorney-General's Department. The Office of Best Practice Regulation, Department of Finance and Deregulation has been consulted about the Agreement and confirms that a Regulation Impact Statement is not required.

Future treaty action

23. Article 14 of the Agreement provides that any amendments agreed by the Parties shall enter into force 30 days after the date of the later notification by which the Parties notify each other that their domestic requirements for the entry into force of the amendments have been fulfilled. Any such amendment would be subject to Australia's domestic treaty-making process, including tabling and consideration by the Joint Standing Committee on Treaties.

Withdrawal or denunciation

24. Article 15 of the Agreement provides that either Party may at any time give notice in writing through diplomatic channels to the other Party of its decision to terminate the Agreement. The termination is to take effect on a date to be agreed by the Parties in writing. In the absence of such agreement, the Agreement will terminate on the later of any date specified in the notice as the date on which the termination is to be effective or the date of one year after the date on which the notice was received.

Contact details

Private International Law Section
Access to Justice Division
Attorney-General's Department.

ATTACHMENT ON CONSULTATION

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CONSULTATION

Preliminary

25. In 2003, the Prime Ministers of Australia and New Zealand established a Working Group co-chaired by the Australian Attorney-General's Department and the New Zealand Ministry of Justice to review existing trans-Tasman cooperation in the field of civil proceedings. In addition to staff from the Attorney-General's Department and the New Zealand Ministry of Justice, the Working Group included officials from the Departments of Prime Minister and Cabinet (Australia and New Zealand), the Ministry of Foreign Affairs (New Zealand), the Department of Foreign Affairs and Trade (Australia), the Ministry of Economic Development (New Zealand) and the Department of the Treasury (Australia).

26. In July 2005, the Australian Attorney-General wrote to the Attorney-General of each State and Territory, providing a pre-release copy of the discussion paper for consideration and on 1 August 2005, the Working Group publicly released a discussion paper that identified a range of existing issues with trans-Tasman arrangements for managing cross-border litigation and sought public views. Submissions to the Working Group were received from:

<u>Australia</u>

- Law Society of New South Wales;
- Emeritus Professor JLR Davis, Australian National University;
- Dr Andrew Cannon, Deputy Chief Magistrate and Senior Mining Warden for South Australia;
- Law Council of Australia;
- Attorney-General's Department of New South Wales;
- DLA Phillips Fox, Solicitors;
- Clayton Utz, Solicitors;
- Australian Securities and Investment Commission;
- Department of Justice, Northern Territory;
- Family Court of Australia;
- Federal Court of Australia;
- Australian Competition and Consumer Commission;
- Department of Justice, Victoria;
- Dr Reid Mortensen, Reader in Law, University of Queensland;

New Zealand

• Promina Group Limited;
• Office of the Privacy Commissioner;
• Bell Gully, Solicitors;
• Commerce Commission;
• Australia New Zealand Leadership Forum's Trans-Tasman Competition and Consumer Issues Working Group;
• Reserve Bank of New Zealand;
• Telecom New Zealand Limited;
• Dr Elsabe Schoeman, Senior Lecturer, Faculty of Law University of Auckland;
• New Zealand Law Society Civil Litigation and Tribunals, Criminal Law and Commerical and Business Law Committees;
• New Zealand Law Society Family Law Section's International and Property Relationship Committees;
• New Zealand Law Commission;
• Professor Mark Henaghan, Dean of Law, University of Otago;
• Ministry of Economic Development and Ministry of Consumer Affairs Takeovers Panel;
• The Honourable Justice David Baragwanath;
• Schnauer and Co, Barristers and Solicitors;
• Ministry of Transport.

27. The Working Group report and outcomes were discussed at the Standing Committee on Attorneys-General (SCAG) meeting in November 2005.

28. On 13 December 2006 the Working Group released its final report and on 25 May 2007 the Australian and New Zealand Governments announced their intention to implement the reforms proposed by the Working Group by initially entering into a bilateral treaty between the two countries.

State and Territory and SCAG consultation on the Agreement

29. SCAG was regularly updated on the progress of the Agreement. Progress on the Agreement was on the agenda and discussed at the following SCAG meetings: 26-27 July 2007; 27-28 March 2008; 16-17 April 2009.

30. In May 2008, the draft Agreement was circulated to all State and Territory Attorneys-General for comment. In May 2008, teleconferences were conducted with interested State and Territory officials to discuss the draft text of the Agreement and answer any questions. The Agreement was also considered by relevant State and Territory courts, the ACT Parliamentary Counsel and the Chair of the Joint Rules Advisory Committee.

31. General support for the Agreement was received from States and Territories. Where required, comments made by States and Territories were incorporated into the text of the Agreement.

32. In October 2009, exposure draft legislation giving effect to the Agreement was provided to all the States and Territories for consultation. Where required, comments made by States and Territories were incorporated into the text of the Bill.

33. In November 2010, the Australian Attorney-General's Department commenced consultation with the States and Territories in relation to further implementation of the Agreement. These consultations are ongoing.

Australia and New Zealand Consultations

34. Regular consultation occurred between the Australian Attorney-General's Department, the Australian Department of Foreign Affairs and Trade, the Australian Department of the Prime Minister and Cabinet, the Australian Department of the Treasury, the New Zealand Ministry of Justice and the New Zealand Ministry of Foreign Affairs and Trade on the draft terms of the Agreement. The Australian Taxation Office and the Australian Director of Public Prosecutions were also consulted on aspects of the proposed Agreement before the text was finalised.

35. In April and May 2008 the Australian Department of the Prime Minister and Cabinet, the Australian Department of Foreign Affairs and Trade and the Australian Department of the Treasury approved the draft text of the Agreement.

36. The Federal Executive Council approved the text of the Agreement on 17 July 2008.

37. The New Zealand House of Representatives Law and Order Select Committee conducted an International Treaty examination of the Agreement in June 2008 and recommended that the House of Representatives take note of its report that the National Interest Analysis was adequate.

38. In 2009, the New Zealand Ministry of Justice was regularly consulted on the draft legislation giving effect to the agreement. Where required, comments made by New Zealand were incorporated into the text of the Bill.

39. In November 2010, the Australian Departments of: Finance and Deregulation; Treasury; Foreign Affairs and Trade; Agriculture, Fisheries and Forestry; Infrastructure and Transport; and the Civil Aviation and Safety Authority were consulted about the inclusion of specific regulatory regime criminal fines within the trans-Tasman scheme.

40. Regular consultation on implementation continues to occur between the Australian Attorney-General's Department and the New Zealand Ministry of Justice.

Commonwealth-State-Territory Standing Committee on Treaties

41. In March 2008, September 2008, July 2009 and September 2010 the Agreement was listed on the Schedule of Treaties sent to representatives on the Commonwealth-State-Territory Standing Committee on Treaties.

Federal Court consultation

42. In October 2009, exposure draft legislation giving effect to the Agreement was provided to the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia. Where required, comments made by these courts were incorporated into the text of the Bill.

43. Consultation on implementation continues to occur between the Australian Attorney-General's Department and the courts.

Public consultation

44. In October 2009, exposure draft legislation giving effect to the Agreement was provided to a range of academics, legal practitioners and legal organisations, a number of which provided submissions in response to the 2005 Working Group discussion paper. Where required, comments made by those consulted were incorporated into the text of the Bill.

45. Targeted consultation on implementation continues to occur between the Australian Government and the public.