

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2012 No. 11**

Issued by Authority of the Attorney-General

*Trans-Tasman Proceedings Act 2010*

*Trans-Tasman Proceedings Regulation 2012*

Section 110 of the *Trans-Tasman Proceedings Act 2010* (Cth) (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act, implements the *Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*. The Act and the Agreement provide a comprehensive framework for handling litigation with a trans-Tasman element, which builds on existing frameworks such as that created by the *Evidence and Procedure (New Zealand) Act 1994* and the application of the *Foreign Judgments Act 1991* to New Zealand judgments.

The framework in the Act includes: streamlined procedures for serving initiating documents in New Zealand; a test, harmonised with New Zealand's test, for Australian courts declining jurisdiction on the grounds that a New Zealand court is a more appropriate forum; provisions for the taking of evidence by video or audio link; provisions for the issuing of Australian subpoenas between Australia and New Zealand; provisions that broaden the range of New Zealand judgments capable of recognition and enforcement in Australia; and procedures to enable Australian courts to grant interim relief in support of proceedings in New Zealand.

The *Trans-Tasman Proceedings Regulation 2012* (the Regulation) provides details around some of the powers provided for in the Act, such as: service of initiating documents in New Zealand; staying proceedings on forum grounds; Australian courts granting interim relief in support of New Zealand proceedings; subpoenas issued between Australia and New Zealand; remote appearances; New Zealand regulatory regime criminal fines; and the recognition and enforcement of judgments.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

All Australian State and Territory Governments and courts, the Commonwealth Treasury, the New Zealand Ministry of Justice, and the Australian federal courts were consulted on the Regulation. The Australian State and Territory Governments, in consultation with their courts, requested that the Commonwealth prescribe the additional courts and tribunals provided in this Regulation.

The Office of Best Practice Regulation were consulted on this Regulation and advised that no Regulation Impact Statement was required.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the commencement of sections 3 to 110 of the Act.

Details of the Regulation are as follows:

### ***Section 1 – Name of regulation***

Section 1 provides that the title of the Regulation is the *Trans-Tasman Proceedings Regulation 2012*.

### ***Section 2 - Commencement***

Section 2 provides that the Regulation commences on the commencement of sections 3 to 110 of the Act.

### ***Section 3 – Definition***

Section 3 provides that references in the Regulation to ‘Act’ mean the *Trans-Tasman Proceedings Act 2010* and that ‘registrable NZ judgement’ has the meaning given by section 66 of the Act. Section 3 also provides that ‘Cth’ is short for ‘Commonwealth of Australia’ and ‘NZ’ is short for ‘New Zealand’

There are no further definitions in this section so the definitions provided in the Act otherwise apply to this Regulation. The note at section 3 indicates that several words in the Regulation have the meaning given by section 4 of the Act.

The spelling of ‘judgement’ has changed from ‘judgment’ appearing in the Act. This reflects a change in drafting policy and no intended difference in meaning. This is supported by the Macquarie dictionary definition of judgement, which provides that this word carries the same meaning as judgment.

### ***Section 4 – Forms***

Section 4 provides that a reference in the Regulation to a form is a reference to the form of that number appearing in Schedule 1 of the Regulation.

### ***Section 5 – Information to be given to defendant***

Section 5 provides that an initiating document served in New Zealand under section 9 of the Act must contain or be accompanied by a notice in accordance with Form 1 in Schedule 1 of the Regulation. The Act provides in subsection 11 (1) that such a notice will be prescribed in the regulations.

### ***Section 6 – Request for hearing of stay application***

Section 6 provides that a request by a person mentioned in paragraph 18 (2) (a), (b), or (c) of the Act for a hearing to determine an application to stay Australian proceedings on forum grounds, section 17 of the Act, may be made in accordance with Form 2 of the Regulation.

### ***Section 7 – Request for remote appearance***

Section 7 provides that a request by a defendant to appear remotely in a hearing, under paragraph 18(4) (b) of the Act, may be made in accordance with Form 3 of the Regulation.

### ***Section 8 – Australian courts to which application for interim relief may be made***

Section 8 provides the additional courts to which a party to a civil proceeding commenced, or to be commenced, in a New Zealand court may apply to for interim relief in accordance with paragraph 25 (d) of the Act. The Act provides that such courts are to be prescribed in the regulations.

### ***Section 9 – Australian courts and tribunals to which Division 2 of Part 5 of the Act applies***

Section 9 provides the State and Territory courts which are prescribed for the purposes of Division 2 of Part 5 to the Act, which addresses Australian issued subpoenas. The Act, in paragraph 29 (1) (b), provides that such courts are to be prescribed in the regulations.

### ***Section 10 – Notice to accompany subpoena***

Section 10 provides that the notice to accompany a subpoena served in New Zealand under section 32 is Form 4 of the Regulation. Paragraph 32 (2) (b) of the Act provides that such a notice is to be prescribed in the regulations.

### ***Section 11 – Receipt of documents and things required by subpoena***

Section 11 provides the State and Territory courts that are authorised under section 44 of the Act to receive a document or other object that is required to be produced by a subpoena. The prescription of these courts is at the written request of the Governors of the relevant states, the Chief Minister of the Australian Capital Territory and the Administrator of the Northern Territory, in accordance with subsection 44 (4) of the Act.

### ***Section 12 – Remote appearances unrelated to remote evidence***

Section 12 provides the State and Territory tribunals prescribed for the purposes of Subdivision A of Division 2 of Part 6 to the Act, which addresses applications for remote appearances unrelated to remote evidence. The Act, in paragraph 47 (1) (b), provides that such courts are to be prescribed in the regulations.

### ***Section 13 – Remote appearances related to remote evidence***

Section 13 provides the State and Territory courts that are prescribed for the purposes of Subdivision B of Division 2 of Part 6 to the Act, which addresses applications for remote appearances related to remote evidence. The Act, in paragraph 49 (1) (b), provides that such courts are to be prescribed in the regulations.

### ***Section 14 – Courts and tribunals that may provide assistance to NZ courts and tribunals***

Subsection 14 (1) provides the State and Territory courts that are prescribed for the purpose of being able to assist New Zealand courts or tribunals, in accordance with paragraph 63 (2) (c) of the Act. The prescription of these courts is at the written request of the Governors of the relevant states, the Chief Minister of the Australian Capital Territory and the Administrator of the Northern Territory, in accordance with subsection 63 (2) of the Act.

Subsection 14 (2) provides the tribunal prescribed for the purpose of being able to assist New Zealand courts or tribunals, in accordance with paragraph 63 (2) (d) of the Act. The

prescription of this tribunal is at the written request of the Governor of Victoria, in accordance with subsection 63 (2) of the Act.

### ***Section 15 – Regulatory regime criminal fines***

Subsection 15 (1) provides the New Zealand legislation and legislative provisions, prescribed for the purpose of the definition of ‘regulatory regime criminal fine’ in section 4 of the Act.

Subsection 15 (2) provides that references to New Zealand legislative provisions in subsection 15 (1) include references to provisions of subordinate legislation made under a New Zealand Act in connection with, or for the purposes of, the New Zealand legislative provision.

Subsection 15 (3) provides that subsection 15 (1) of the Regulation applies even where the criminal offence contained in the New Zealand legislative provision relates to a contravention of, or fine in or calculated under, or is extended in its application or operation by, any other provision in or made under a NZ Act. This ensures that where, for example, the offence is contained in a New Zealand legislative provision prescribed in subsection 15 (1) of the Regulation, but the fine is contained in a separate New Zealand legislative provision, the offence is still prescribed as a regulatory regime criminal fine.

### ***Section 16 — Judgements that are not registrable NZ judgements***

Section 16 provides the judgements that are not registrable New Zealand judgements in accordance with paragraph 66 (2) (j) of the Regulation. This section addresses judgements that are already capable of registration or are already addressed by the cross-border insolvency regime between Australia and New Zealand.

Subparagraph 16 (a) (i) provides that a judgement is not a registrable New Zealand judgement if it relates wholly or in part to an order made by a New Zealand court under the *Insolvency (Cross-border) Act 2006* (NZ) that recognises an Australian or foreign (other than New Zealand) proceeding.

Subparagraph 16 (a) (ii) provides that a judgement is not a registrable New Zealand judgement if it relates wholly or in part to an order made by a NZ court providing a discretionary remedy in relation to an Australian or foreign proceeding, if the order is made: on or after filing an application for recognition of the proceeding and before the application is decided; or on or after recognition of the proceeding.

Paragraph 16 (b) provides that a judgement is not a registrable New Zealand judgement if it relates wholly or in part to an order made by a New Zealand court under New Zealand domestic insolvency laws and commences a proceeding and appoints a representative, if the order is subject to recognition in Australia under the *Cross-Border Insolvency Act 2008*.

### ***Section 17 – Application for registration of NZ judgement***

Subsection 17 (1) prescribes Form 5 as the application form for registering a New Zealand judgement. Paragraph 67 (5) (a) of the Act provides that such application form is to be prescribed by the regulations.

Subsection 17 (2) provides how applications to register a New Zealand judgement can be lodged, in accordance with section 67 of the Act.

Paragraph 17 (2) (a) provides that if the court where the application to register the New Zealand judgement is filed is capable of receiving applications by fax or email, then the application may be filed by fax or email.

Paragraph 17 (2) (b) provides that a sealed or otherwise authenticated copy of the New Zealand judgement must be physically filed at the court in hard copy with the application, or if the application is filed by facsimile or email, then it must be filed within 15 working days after the application is filed.

### ***Section 18 – Rate of exchange***

Section 18 provides that the rate of exchange for the purposes of subsection 69 (2) of the Act, is the rate of exchange published for the conversion day by the Reserve Bank of Australia.

Section 18 also provides that ‘conversion day’ carries the meaning provided in paragraph 69 (1) (b) of the Act, that is, the working day of the Australian court before the working day of that court on which the entitled person made the application for registration.

The note at section 18 provides that the rate of exchange is published on the Reserve Bank of Australia’s website at: [www.rba.gov.au](http://www.rba.gov.au).

### ***Section 19 – Notice of registration of NZ judgement***

Subsection 19 (1) prescribes Form 6 as the notice of registration. Paragraph 73 (2) (a) of the Act provides that such notice is to be prescribed in the regulations.

Subsection 19 (2) provides, in accordance with paragraph 73 (2) (b), that the notice of registration must be given to each liable person by: delivering the notice by registered post to the liable person’s last known address; or handing the notice to the liable person.

### ***Form 1 – Notice to defendant served in NZ***

Form 1 is the notice prescribed under section 5 of the Regulation, for the purposes of subsection 11(1) of the Act. The form sets out information for the defendant to assist them in understanding the consequences of having documents served on them in New Zealand.

### ***Form 2 – Request for a hearing of defendant’s application for stay of an Australian civil proceeding***

Form 2 is the application form prescribed under section 6 of the Regulation. This application form may be used to request a hearing of the defendant’s application to stay an Australian civil proceeding.

### ***Form 3 – Request to appear remotely in the hearing of an application for stay of Australian civil proceeding***

Form 3 is the application form prescribed under section 7 of the Regulation. This application form may be used to request to appear remotely in the hearing of an application for stay of an Australian civil proceeding.

***Form 4 – Notice to accompany subpoena***

Form 4 is the notice prescribed under section 10 of the Regulation, for the purposes of paragraph 32 (2) (b) of the Act. The notice sets out information for a witness to assist them in understanding their rights and obligations arising from the subpoena that is attached to the notice.

***Form 5 – Application to register a judgement under the Trans-Tasman Proceedings Act 2010***

Form 5 is the application form prescribed under subsection 17 (1) of the Regulation, for the purposes of paragraph 67 (5) (a) of the Act. This application must be used when applying to register a New Zealand judgement in Australia under the Act.

***Form 6 – Notice to liable person of registration of a NZ judgement under the Trans-Tasman Proceedings Act 2010***

Form 6 is the notice prescribed under subsection 19 (1) of the Regulation for the purposes of paragraph 73 (2) (a) of the Act. This notice sets out information about a judgement that has been registered under the Act, for any liable person.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Trans-Tasman Proceedings Regulations 2012**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The *Trans-Tasman Proceedings Act 2010* (Cth) (the Act) provides a procedural framework for managing litigation with a trans-Tasman element. Section 110 of that Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Trans-Tasman Proceedings Regulation 2012* (the Regulation) has been created under section 110 of the Act and provides details that address various powers provided in the Act, including: service in New Zealand of initiating documents; applications to stay proceedings on forum grounds; the Australian courts prescribed for the purposes of granting interim relief in support of New Zealand proceedings; subpoenas issued between Australia and New Zealand; remote appearances; New Zealand regulatory regime criminal fines; and the recognition and enforcement of judgments.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.