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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**TRANS-TASMAN PROCEEDINGS BILL 2009**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Robert McClelland MP)

## GLOSSARY

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b>Abbreviation</b>	<b>Definition</b>
Agreement	<i>Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement 2008</i>
Hague Choice of Court Convention	<i>Hague Convention on Choice of Court Agreements 2005</i>
Crimes Act	<i>Crimes Act 1914</i>
EPNZ Act	<i>Evidence and Procedure (New Zealand) Act 1994</i>
Evidence Act	<i>Evidence Act 2006 (NZ)</i>
FCA	<i>Federal Court Act 1976</i>
FJA	<i>Foreign Judgments Act 1991</i>
FSI Act	<i>Foreign States Immunities Act 1985</i>
Hague Child Abduction Convention	<i>Hague Convention on the Civil Aspects of International Child Abduction 1980</i>
MACM Act	<i>Mutual Assistance in Criminal Matters Act 1987</i>
NZ	New Zealand
SEPA	<i>Service and Execution of Process Act 1992</i>
TPA	<i>Trade Practices Act 1974</i>
Working Group	Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement

# TRANS-TASMAN PROCEEDINGS BILL 2009

## OUTLINE

Over time, there has been a significant increase in the movement of people, assets and services between Australia and New Zealand, giving rise to the greater possibility of legal disputes with a trans-Tasman element arising. The Bill streamlines and simplifies the process for resolving a significant proportion of these disputes. It implements into Australian law the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, signed on 24 July 2008. The Bill also incorporates provisions regulating trans-Tasman legal proceedings in existing legislation, to allow a single point of reference for legal rules about how such proceedings are conducted. Companion legislation has been developed to implement the reforms in New Zealand.

The reforms in the Bill which implement the Agreement are based on the recommendations of the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement. The Working Group was established in 2003 to examine the effectiveness and appropriateness of current arrangements for the conduct of civil proceedings between Australia and NZ, including family proceedings and proceedings relating to regulatory matters. After considering submissions to its 2005 Discussion Paper, the Working Group released its final report. The Report, released publicly in December 2006, made 10 recommendations to improve mechanisms for the service of process, the taking of evidence, and the recognition of judgments in civil and regulatory matters.

The central recommendation was that a ‘trans-Tasman regime’, modelled on the Australian *Service and Execution of Process Act 1992* which regulates the conduct of proceedings between the States and Territories, be introduced between the two countries. The reforms support work being undertaken between the two countries under the umbrella of the Australia New Zealand Closer Economic Relations Agreement.

In implementing the Agreement, the Bill will:

- allow civil initiating process issued in Australian court, and some tribunal, proceedings to be served in NZ without leave
- broaden the range of NZ judgments that can be registered and enforced in Australia to include final non-money judgments, civil pecuniary penalties, and certain criminal fines for breaches of regulatory regimes
- require Australian courts to apply a new statutory test when considering whether they have jurisdiction to hear a matter or whether a NZ court would be more appropriate to determine the proceeding
- allow prescribed Australian courts to grant interim relief in support of NZ proceedings
- facilitate the greater use of technology to enable parties and lawyers to appear remotely in proceedings in the other country, and

- build on the existing cooperative evidence regime to allow subpoenas to be issued in criminal proceedings, and for subpoenas to be issued without leave of a superior court.

The Bill incorporates, with minor changes, the existing provisions of the *Evidence and Procedure (New Zealand) Act 1994* and repeals that Act. The EPNZ Act sets up a cooperative regime for the taking of evidence and service and enforcement of subpoenas between Australia and NZ.

The Bill also incorporates the provisions in Part IIIA of the *Federal Court of Australia Act 1976*, which regulate the conduct of trans-Tasman market proceedings. Such proceedings are brought under the *Trade Practices Act 1974*, which prohibits a corporation with a substantial degree of market power from taking advantage of this power to eliminate or damage competition in any market, including trans-Tasman markets. The movement of Part IIIA into the Bill will not affect the operation of the Trade Practices Act, and the special rules regarding the conduct of such proceedings will continue to apply. NZ judgments given in trans-Tasman market proceedings will be able to be recognised and enforced in Australia under the simplified regime in the Bill.

## **FINANCIAL IMPACT STATEMENT**

The proposed Bill will not have any significant financial impact.

## NOTES ON CLAUSES

### **Part 1 – Preliminary**

#### **Clause 1: Short title**

1. Clause 1 is a formal provision specifying the short title of the Bill.

#### **Clause 2: Commencement**

2. Sections 1 and 2 of the Bill will commence on the day the Act receives Royal Assent.
3. Sections 3 to 110 will commence on a day fixed by Proclamation after the entry into force of the Agreement in Australia. The Agreement provides for entry into force 30 days after notification to each other (through diplomatic channels) by the Australian and NZ Governments that respective domestic procedures for the entry into force of the Agreement are complete. However, sections 3-110 will commence on the first day after a default period of 6 months after the Agreement enters into force if the date of Proclamation is not within this time.
4. The statement in this provision that the notice is not legislative is included to assist readers. The notice is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

#### **Clause 3: Purpose of, and guide to, this Act**

5. Clause 3 is a formal provision specifying the purpose of the Act. It also specifies that provisions to implement the Agreement in NZ law are in the NZ Act, as defined.

#### **Clause 4: Definitions**

6. Clause 4 contains a number of definitions used in the Bill. The principal definitions are:

*Adjudicative function* – this definition reflects the definition used in the Agreement and is based on the definition of ‘adjudicative function’ in SEPA. A tribunal exercising an adjudicative function is to be distinguished from one exercising an investigative function (for example, conducting an enquiry), or conducting merits review of government decisions. This definition is intended to capture the ‘court-like’ functions of some tribunals, in recognition of the fact that many adjudicate disputes in essentially the same way as a court.

*Civil pecuniary penalty* – this is a subset of general civil penalties. It is a monetary fine which may be imposed according to the civil standard of proof. By way of example, civil pecuniary penalties are currently available for breaches of the restrictive trade practices provisions of the TPA, the *Australian Securities and Investments Commission Act 2001*, and the *Corporations Act 2001*.

*Entitled person* – this definition is based on the definition of ‘judgment creditor’ in the FJA. However, it has been extended to include the Crown in Right of NZ in

proceedings for compensation relating to an offence under NZ law. This is intended to allow the Crown in Right of NZ to enforce reparation or compensation orders in Australia on behalf of victims of crime, as is the practice in NZ.

*Excluded matters* – these matters mirror those in Article 3(1) of the Agreement. They are excluded from certain aspects of the Bill as they are covered by existing or proposed statutory, bilateral or multilateral cooperative arrangements, and their inclusion under the Bill could cause overlap and confusion. Australia and NZ may agree to exclude other matters of this nature from the operation of specific parts of the respective Acts. Further exclusions would be made by regulation.

*Excluded family proceeding* – this definition is carried over from the EPNZ Act. Such proceedings continue to be excluded under the equivalent NZ Act.

Proceedings in respect of an application made under the Hague Child Abduction Convention are excluded. That Convention provides a special regime designed to hear cases quickly, which could be undermined should the scheme under the Bill apply to such proceedings.

The definition also maintains the exclusion of proceedings relating to the status or property of a person who is not, or may not be able to, fully manage his or her affairs. Most States and Territories in Australia have guardianship boards or tribunals to deal with these matters. SEPA facilitates the interstate service of subpoenas within Australia, but does not facilitate the interstate service of subpoenas issued by all State and Territory guardianship bodies (depending on the constitution and operation of the body). It would be anomalous if these subpoenas could be served in NZ but not interstate within Australia.

*Initiating document* – this includes any document by which a civil proceeding is commenced in an Australian court or tribunal, including a statement of claim.

*Judgment* – this definition is intended to be interpreted broadly and include the range of orders made by courts and tribunals. It includes both money and non-money judgments, which are defined separately.

*Liable person* – this definition is based on the definition of ‘judgment debtor’ in the FJA.

*Non-money judgment* – includes judgments which require someone to do, or refrain from doing something, for example an injunction or order for specific performance.

*Proceeding* – this definition makes it clear that a proceeding includes not only the main proceeding but also any interlocutory proceeding, for example those heard in chambers.

*Proceeds of crime legislation* – this definition lists the legislation in Australia and NZ under which proceeds of crime orders can be made. In Australia this includes both Commonwealth and corresponding State and Territory laws.

*Qualified NZ lawyer* – this definition clarifies that lawyers are entitled to practise in NZ under the *Lawyers and Conveyancers Act 2006* (NZ).

*Regulatory regime criminal fine* – Article 10 of the Agreement provides for Australia and NZ to mutually agree statutes, or parts or provisions of statutes, under which criminal fines are imposed for the purposes of recognition and enforcement in the other country. The Bill will list NZ criminal fines which are enforceable in Australia, and the NZ Bill will list Australian criminal fines which are enforceable in NZ.

The regulations will prescribe only those criminal fines which are imposed for offences under a regulatory regime that affect the effectiveness, integrity and efficiency of trans-Tasman markets, and in which both countries have a strong mutual interest.

The phrase ‘criminal fine’ rather than ‘criminal pecuniary penalty’ is used in the Bill for consistency with the Agreement.

*Submissions* – this definition is intended to be interpreted broadly to include any submissions made in a proceeding in relation to evidence, including submissions on admissibility of evidence.

*Working day* – this definition provides that, for the purposes of taking action within a specified time under in the Bill, only those days when documents can be filed in a particular Australian court or tribunal’s registry are considered working days. The number of days this allows should take into account any public holidays in the jurisdiction of that court or tribunal, or periods in which the registry may be closed (for example over the Christmas and New Year period).

#### **Clause 5: This Act binds the Crown**

7. Clause 8 provides that the Act binds the Crown. However, it does not make the Crown liable to be prosecuted for an offence.

#### **Clause 6: This Act extends to the external Territories**

8. Clause 6 provides that the Act will extend to all external Territories of Australia.

#### **Part 2 – Service in New Zealand of initiating documents issued by Australian courts and tribunals**

Part 2 implements Article 4 of the Agreement. It simplifies arrangements for serving the documents commencing a proceeding in Australia on a defendant in NZ. Most significantly, it will no longer be necessary for the plaintiff to establish a particular connection between the proceeding and Australia, or to seek leave of the court to serve documents in NZ.

#### **Division 1—Introduction**

#### **Clause 7: Guide this Part**

9. Clause 7 is a guide to Part 2 of the Bill.

## **Division 2 – Service in New Zealand of initiating documents issued by Australian courts and tribunals**

### **Clause 8: Application of this Part**

10. Clause 8 outlines the proceedings to which Part 2 of the Bill applies. It will apply to all civil proceedings in Australian courts and prescribed tribunals with the exception of a proceeding that relates wholly or partly to an excluded matter, as defined under the Bill, or an action in rem.
11. An action in rem is a proceeding relating to the title or possession of property, rather than a proceeding brought against a person. Such actions typically include maritime or admiralty proceedings brought against a ship or its cargo.
12. The provisions of Part 2 will apply to Australian tribunal proceedings prescribed by regulation. To be able to be prescribed under the regulations, the tribunal:
  - must already have been listed in the equivalent NZ regulations for the purposes of the recognition and enforcement of its orders (see Part 7), and
  - the initiating process in proceedings before that tribunal must already be able to be served overseas under its rules of procedure.

### **Clause 9: Service of initiating documents in New Zealand**

13. Clause 9 allows initiating documents issued by Australian courts and prescribed tribunals to be served in NZ under Part 2. An initiating document can be served on a defendant in NZ under this Part without requiring the leave of the court, or the plaintiff establishing a connection between the proceeding and Australia.
14. The rules of procedure regarding service in the Australian jurisdiction of issue will apply to service of the documents in NZ.
15. This Part is not intended to be exclusive. Documents can continue to be served in NZ under the procedural rules of the Australian jurisdiction of issue, or in accordance with any other arrangements for service of documents.

### **Clause 10: Effect of service under section 9**

16. Clause 10 provides that service on a defendant in NZ has the same effect, and gives rise to the same proceeding, as if it had occurred in the Australian jurisdiction of issue.

### **Clause 11: Information that must be given to the defendant**

17. To ensure a NZ defendant is aware of the implications of being served under Part 2, clause 11 requires that the initiating document contain, or be accompanied by, certain information. This is designed to be an additional safeguard for



defendants, to balance the simplified process for service of Australian initiating process in NZ.

18. The information required to be provided will be prescribed by regulation, but will include general information about the steps that the defendant may or must take, and the consequences of being served under clause 9.

#### **Clause 12: Consequences of not giving the information to the defendant**

19. Clause 12 outlines the consequences of the plaintiff failing to provide the information required under clause 11. While such a failure does not automatically invalidate the proceeding or any steps taken in relation to it, the defendant can apply to the Australian court or prescribed tribunal in which the initiating document was issued for an order to have the proceeding, or a step in it, set aside.
20. This application must be made before the defendant has taken any step in the proceeding (for example entered an appearance), and within a reasonable time after the defendant has become aware of the failure to provide the prescribed information.

#### **Clause 13: When the defendant must file an appearance**

21. Clause 13 requires a NZ defendant served with an Australian initiating document to enter an appearance in the issuing court or tribunal within a specified time. This will generally be 30 working days after the document was served on the defendant. However, if the procedural rules of the issuing Australian court or prescribed tribunal would have allowed a longer time for an appearance to be entered, this longer period will apply.
22. The clause allows the plaintiff or defendant to apply to the Australian court or tribunal of issue before the end of this period to have the time made shorter or longer. The court or tribunal can make such an order if it considers appropriate. For example, the defendant may need an extension of time to obtain legal advice, or there may be particular urgency in the matter which justifies a shortening of this period.
23. For the purposes of subclause 13(2), an ‘appearance’ is taken to mean a document filed by the defendant in response to the initiating document in the Australian court or tribunal. This document must comply with the procedural rules of that court or tribunal, and state an address for service. This address can be either in Australia or NZ, rather than having to be in the jurisdiction of the issuing court.
24. An appearance which does not comply with these requirements may still be accepted by the issuing court or tribunal.

#### **Clause 14: Defendant’s address for service**

25. Clause 14 provides that the address stated by the defendant in his or her appearance is to be treated as their address for service for the proceeding. Any other document required to be served in the proceeding, for example an amended statement of claim or affidavit, can be served on the defendant at this address. If

the defendant's address for service changes during the proceeding, the court may direct that this new address is to be the defendant's address for service.

26. Upon entering an appearance the defendant is taken to have submitted to the jurisdiction of the Australian court or tribunal hearing the proceeding. As such, documents other than initiating documents are not required to be served under Part 2, but will be served in accordance with the procedural rules of the Australian court or tribunal hearing the proceeding.

#### **Clause 15: Security for costs**

27. Clause 15 allows a defendant served with an Australian initiating document in NZ to apply to the issuing court or tribunal for an order that the plaintiff give security for the defendant's costs, and those incidental to the proceeding. The court or tribunal may make such an order, and require that the proceeding be stayed until the security is given.
28. This provision is also intended to balance the ease with which a plaintiff is able to serve documents under Part 2. It is not intended to limit or affect the power of the court or tribunal to make any other order requiring security for costs.

#### **Part 3 – Australian courts declining jurisdiction on the grounds that a New Zealand court is a more appropriate forum**

Part 3 implements Article 8 of the Agreement, which provides for a common statutory test to apply between Australia and NZ in determining when a court in the other country should hear a dispute. It allows a person to seek a stay of proceedings in Australia on the grounds that a court in NZ is more appropriate to determine the proceeding. The factors to be taken into account when making this determination are mirrored in the NZ Bill.

#### **Division 1—Introduction**

##### **Clause 16: Guide to this part**

29. Clause 16 is a guide to Part 3.

#### **Division 2—Australian courts declining jurisdiction on grounds that a New Zealand court is more appropriate forum**

##### **Clause 17: Application to stay Australian proceeding on forum grounds**

30. Clause 17 allows a defendant in any civil proceeding in an Australian court to apply for an order staying the proceeding on the grounds that a court in NZ is the more appropriate court to determine the matter.
31. This application must be made within 30 working days of the defendant being served with the initiating document. The plaintiff or defendant may apply to the Australian court before the end of this period to have the time made shorter or longer. The court may make such an order if it considers appropriate.

### **Clause 18: Hearing on the application**

32. Clause 18 allows the Australian court to determine the application for a stay under clause 17 without a hearing, unless a specified person objects. This includes the defendant, plaintiff, or any other person who is required or permitted to be served with the defendant's application for a stay.
33. The request for a hearing must be made within 10 working days after the defendant made the application for a stay. This time may be made shorter or longer if the court considers appropriate on application by one of the people in subclause 18(2), before the end of the specified period.
34. If the defendant was served with an initiating document under clause 9 of the Bill, and wishes to appear remotely in the hearing, subclause 18(4) allows the defendant and their lawyer to do so if:
- the defendant has made the request to the Australian court to appear remotely within any time period specified by regulation, and
  - a remote appearance medium is, or can reasonably be made, available.

This is different to the general arrangements for remote appearances set out in Part 6 of the Bill.

### **Clause 19: Order of stay of proceeding**

35. Clause 19 allows an Australian court to order that the proceeding be stayed on application under clause 17 if it is satisfied that a NZ court has jurisdiction to determine all the matters in dispute between the parties, and is the more appropriate court to do so.
36. In determining whether the NZ court is more appropriate, the Australian court must take into account a number of factors in subclause 19(2)(a)-(i). The fact that the proceeding was commenced in Australia is not a relevant consideration. Australia and NZ may agree to include additional factors to be taken into account by the court. Any such factors would be prescribed by the regulations.
37. Subclause 19(2)(i) makes clear that the consideration of this list of factors is not intended to limit the discretion of the court to have regard to any other factors it considers relevant when determining the application for a stay on forum grounds.
38. The court can make an order staying the proceeding subject to conditions if it considers this would be appropriate to facilitate determination of the matters in dispute without delay or undue expense. For example, the court may stay the proceedings on the condition that the defendant undertakes to submit to the jurisdiction of the court it considers is the more appropriate forum.

### **Clause 20: Exclusive choice of court agreements**

39. If there is an agreement between the parties that designates a court or courts in NZ as the chosen court to determine the matters in dispute, clause 20 overrides the

statutory test and gives primacy to that agreement. In such cases the Australian court must stay the proceeding in favour of the chosen court in NZ, unless one of the exceptions in subclause 20(2) apply. The Australian court must not stay the proceeding in favour of a NZ court if it is the chosen court under the agreement.

40. The approach taken to choice of court agreements is consistent with the Hague Choice of Court Convention. The Working Group determined consistency with the Convention to be particularly important should either Australia or NZ ultimately decide to become a party to that Convention.
41. Subclause 20(3) provides that an exclusive choice of court agreement must have certain characteristics to override the statutory test. For example, the agreement must be in writing, and must not be an agreement in which the parties are individuals acting primarily for personal, family or household purposes, or an agreement that is a contract of employment. This is intended to exclude agreements between consumers, as well as individual and collective contracts of employment.
42. The Australian court will not have to give primacy to the agreement if it is satisfied that one of the factors in subclause 20(2)(a)-(e) apply. This includes that the agreement is null and void (under the NZ law in accordance to which it was made), giving effect to it would lead to a manifest injustice or would be manifestly contrary to public policy in Australia, or for exceptional reasons beyond the control of the parties, it cannot reasonably be performed.
43. Subclause (a) is intended to refer primarily to grounds like fraud, mistake, misrepresentation and duress. Subclauses (c) and (d) are intended to apply only in exceptional circumstances. The concept of public policy refers to the general interests of the public rather than interests of a particular individual. It is a high threshold and does not permit an Australian court to disregard a choice of court agreement simply because it would not be binding under domestic law.
44. Subclause (d) is intended to cover situations where it would not be possible to bring proceedings before the chosen NZ court. While the circumstances need not be impossible, they must be exceptional (for example where the chosen NZ court no longer exists). Subclause (e) allows an Australian court to hear a matter if the chosen NZ court has decided not to do so. This is intended to avoid the parties being without a court in Australia or NZ to hear the dispute.
45. If a choice of court agreement falls into one of the excluded categories, or does not meet prescribed requirements, it remains a factor to be taken into account by the court in determining whether to decline jurisdiction, but not a conclusive one in itself.

#### **Clause 21: How this Part affects powers of the court to stay proceeding**

46. Clause 21 provides that an Australian court can grant a stay in favour of a NZ court on forum grounds only under Part 5. This ensures that the statutory test is always applied as between Australia and NZ. An application to an Australian court for a stay on forum grounds in favour of any other foreign court continues to

be determined in accordance with any other statutory or common law principles which apply in Australia.

47. Part 5 does not affect the court's power to grant a stay of proceedings on any other ground.

#### **Clause 22: No restraint of proceedings**

48. Clause 22 prohibits an Australian court from restraining a person from commencing or taking a step in a proceeding in NZ on the grounds that the NZ court is not the appropriate forum for the proceeding.
49. Restraining a proceeding in this way is known as an anti-suit injunction. A similar but more limited prohibition of this nature applies between the States and Territories under section 21 of SEPA. The issue of anti-suit injunctions has the capacity to be used to circumvent the declining jurisdiction test, and on this basis is prohibited.

#### **Clause 23: Suspension of limitation periods**

50. Clause 23 operates to preserve any limitation period a plaintiff may have for their action which may be adversely affected by commencing their proceeding in an inappropriate court. The recommencement of the proceeding in the appropriate court is taken to be the time in which the action was commenced, rather than when the proceeding was commenced in the first court (which was deemed to be inappropriate).
51. It is intended to avoid the plaintiff being out of time to recommence the proceeding in the more appropriate court if they commence their proceeding in an inappropriate court at, or close to, the end of the limitation period for their action.
52. To avoid any possible abuse of this protection, the staying court would be able to impose a time within which the plaintiff must recommence the proceeding in the more appropriate court.

#### **Part 4—Australian courts granting interim relief in support of civil proceedings in New Zealand courts**

Part 4 implements Article 7 of the Agreement. The provisions allow certain Australian courts to grant interim relief in support of NZ proceedings to protect an applicant's rights until final judgment is given. This avoids the need for substantive proceedings seeking resolution of the main dispute to be commenced in Australia. The Australian court will retain control over the interim relief, and can protect local third parties and any other relevant local interests when deciding on the appropriate relief, if any, to grant.

The provisions are based on section 25 of the *Civil Jurisdiction and Judgments Act 1982* (UK) which gives the High Court of England and Wales and Northern Ireland the power to grant interim relief in support of a wide range of proceedings in other countries.

## **Division 1—Introduction**

### **Clause 24: Guide to this Part**

53. Clause 24 is a guide to Part 4.

## **Division 2—Australian courts granting interim relief in support of civil proceedings in New Zealand courts**

### **Clause 25: Application to an Australian court for interim relief**

54. Clause 25 allows a party to any civil proceeding commenced in NZ to apply to a specified Australian court for interim relief in support of that NZ proceeding. Specified courts in Australia include the Federal Court, Family Court, Supreme Court of a State or Territory and any other court prescribed by the regulations.

55. Reference to an ‘intended party’ to a civil proceeding ‘to be commenced’ is intended to allow a party who has not yet formally commenced the main proceeding in NZ to apply for interim relief in Australia. This might occur in circumstances where, for example, action needs to be taken quickly to preserve assets from being removed from the Australian jurisdiction.

### **Clause 26: Giving of interim relief in support of a New Zealand proceeding**

56. Clause 26 gives specified Australian courts power to grant interim relief in support of a NZ proceeding if:

- it considers appropriate in the circumstances, and
- it would have had the power to, and would have done so, if a comparable proceeding to the NZ proceeding was brought before it.

57. The Australian court may make an interim orders such as a Mareva injunctions (which prevent a party removing assets from the jurisdiction or disposing of them), Anton Piller orders (which prevent a defendant destroying key material), and suppression orders (which prevent publication of a report of public court proceedings).

58. The court will not be able to grant a warrant for the arrest of property under Part 4. Warrants for the arrest of property are excluded as they are a form of interim relief under the court’s admiralty jurisdiction, which carries with it an assertion of jurisdiction to determine the merits of a proceeding.

59. For the avoidance of doubt, the NZ Bill expressly excludes discovery from the types of interim relief that can be granted by NZ courts in favour of Australian proceedings. It is not considered that orders for discovery are ‘interim relief’ in Australia as they are final orders rather than those made for a specific period of time to preserve the status quo until final judgment is given in a proceeding. It is intended that such orders, particularly discovery from non-parties, should be made by the court hearing the substantive proceeding.

60. The court will have discretion to refuse to grant interim relief if the fact that the court has no jurisdiction in relation to the NZ proceeding (other than this power to grant interim relief) makes it inexpedient to do so.
61. Clause 26(3) makes it clear that the provisions do not affect any other power of the Australian court to grant interim in support of NZ proceedings which may develop in the future.

**Clause 27: Application of Australian court procedural rules in an interim relief proceeding**

62. Clause 27 makes it clear that, for the purposes of an interim relief proceeding in Australia in support of main proceeding in NZ, the same procedural rules apply as they would if the main proceeding was being heard in Australia.

**Part 5—Subpoenas**

The provisions in this Part are taken from the EPNZ Act. They allow subpoenas requiring the giving of evidence or production of documents to be served and enforced between Australia and NZ.

**Division 1—Introduction**

**Clause 28: Guide to this Part**

63. Clause 28 is a guide to Part 5.

**Division 2—Australian subpoenas**

**Clause 29: Application of this Division**

64. Clause 29 specifies the kinds of proceedings in which an Australian subpoena may be served in NZ under the Bill, and in which courts a subpoena can be issued.
65. In addition to certain courts, clause 29 applies the Division to prescribed tribunals. A tribunal may only be prescribed in the regulations if that tribunal is a person or body authorised to take evidence on oath or affirmation under an Australian law.

**Clause 30: Service of Australian subpoenas in New Zealand**

66. Clause 30 authorises service of a subpoena in NZ, provided that service is in accordance with the requirements of the Division. The subpoena may require the person named to attend to give evidence or to produce documents at a place either in Australia or NZ. The place in NZ may be one at which evidence may be given by audio or audiovisual link from NZ.

**Clause 31: Subpoenas not to be served in New Zealand without leave**

67. Clause 31 provides that a subpoena must not be served in NZ without the leave of the Australian court in which the proceeding is being heard. However, unlike under the EPNZ Act, leave is not required to be sought from a superior

court. If the proceeding is in an Australian tribunal, leave must be given by an inferior court.

68. Subclause 31(3) makes it clear that, whatever other factors the court takes into account in deciding whether or not to grant leave to serve a subpoena, it must consider the significance of the evidence to be given, or the document to be produced, and whether this could be obtained more efficiently by other means.
69. The other matters the court may take into account may include, for example, whether better quality evidence would be obtained by personal attendance of a witness in the proceedings. However, the fact that the evidence could be obtained more efficiently by other means is not intended to mean that leave should not be granted for the subpoena to be served in NZ.
70. Subclause 31(4) provides that the court must impose a condition about the time in which a subpoena is to be served. This requirement is to ensure that the person served has a reasonable time to comply with the subpoena, or to apply for relief with respect to the subpoena. Other conditions may be imposed, but should only relate to service of the subpoena, or to the decision whether or not to grant leave, and not to unrelated matters.
71. Leave cannot be given to serve the subpoena if the person named is less than 18 years old.

### **Clause 32: How Australian subpoenas must be served in New Zealand**

72. Clause 32 requires a subpoena to be served in NZ in the same way as it would be served in the Australian jurisdiction of issue.
73. The subpoena must be accompanied by a copy of the order granting leave, a notice in the prescribed form setting out the rights and obligations of the person named in the subpoena, and information about how to apply to have the subpoena set aside.
74. The form of this notice may be prescribed either by the regulations or by the procedural rules of the court which gave leave to serve the subpoena. If there is no prescribed form, the corresponding form under the Federal Court Rules is to be used, with any necessary modifications.

### **Clause 33: Expenses of complying with Australian subpoenas**

75. Clause 33 provides that the reasonable expenses of complying with the subpoena are to be paid to the person served either at the time of service, or within a reasonable time before the person is required to comply with the subpoena.
76. The term 'expenses' is defined in clause 4, and includes costs associated with necessary travel to a place specified in the subpoena. Where a subpoena requires the production of a document, the sum may include an amount to cover the cost of sending the document from NZ to Australia. Vouchers, such as airline tickets, may be given instead of cash for the purposes of this provision.



### **Clause 34: Australian subpoenas that require production**

77. Clause 34 allows a person to produce the document or thing required under the subpoena at any registry of the NZ High Court rather than requiring it to be submitted directly to the Australian court. The document or thing must be produced at least 10 days before the date on which it is required in the Australian court that issued the subpoena.
78. This clause does not prevent a subpoena requiring or permitting that a document or thing be sent by post to the Australian court which issued the subpoena, or to an officer of the Australian court.

### **Clause 35: Applications to set Australian subpoenas aside**

79. Clause 35 allows the person named in the subpoena to apply to have it set aside. The application must be made to the court which gave leave to serve the subpoena, and must contain the applicant's address for service, which may be either in Australia or NZ.
80. The party who obtained the leave to serve the subpoena and their lawyer must be served with a copy of the application and any other documents on which the applicant seeks to rely.

### **Clause 36: Setting aside Australian subpoenas**

81. Clause 36 allows a subpoena to be set aside in whole or in part on application by the person named in the subpoena.
82. Clause 36(2) sets out the grounds on which an Australian subpoena served in NZ which requires a person to attend at a place in Australia must be set aside. For the purposes of clause 36(2)(b), a person's movements may be restricted due, for example, to conditions of bail or parole or obligations under a NZ order.
83. Clause 36(3) provides additional discretionary grounds on which such subpoena may be set aside, including a subpoena for the production of documents. The term 'expense' in clause 36(3)(a) is not intended to refer solely to expenses incurred by the person served, and includes the total cost of obtaining the evidence.
84. Clause 36(4) allows a court to determine an application to set aside a subpoena without a hearing if neither party to the application requests. The intention is that applications to set aside a subpoena should be determined as simply, quickly and affordably as possible.
85. If a hearing is required, clause 36(6) allows an applicant to appear remotely in that hearing without leave of the court. This provision operates subject to the provisions in Part 6 of the Bill relating to remote appearances.

### **Clause 37: Payment of expenses for complying with Australian subpoenas**

86. Clause 37 entitles a person who complies with a subpoena to be paid all reasonable expenses incurred in complying with the subpoena. These expenses

are to be paid either by the person who requested the subpoena be issued, the Commonwealth if the subpoena was issued by a federal court, or a State or Territory in any other case.

87. Clause 37(4) enables the court which issued the subpoena to make orders to ensure that the witness receives the amount of expenses which he or she is entitled.

**Clause 38: Contravening Australian subpoenas**

88. Clause 38 allows the court in which the subpoena was issued to issue a certificate to the effect that leave was given by an Australian court and the person failed to comply with the subpoena. This certificate can be used in a proceeding to punish the person for not complying with an Australian subpoena.

**Clause 39: This Division does not affect other court or tribunal powers**

89. Clause 38 makes it clear that the Division is not intended to limit any other powers of an Australian court or tribunal with respect to subpoenas.

**Division 3—New Zealand subpoenas**

**Clause 40: Application of this Division**

90. Clause 40 provides that the Division applies to subpoenas issued by a NZ court or tribunal which may be served in Australia under the NZ Evidence Act.

**Clause 41: Service of New Zealand subpoenas in Australia**

91. Clause 41 authorises service of a NZ subpoena in Australia, provided that service is in accordance with the NZ Evidence Act.

**Clause 42: Obligation to comply with New Zealand subpoenas**

92. Clause 42 imposes an obligation on a person served with a NZ subpoena in Australia to comply with that subpoena if the conditions set out in (a) - (d) are met, including that the subpoena was served in accordance with the law of NZ.

**Clause 43: Contravening New Zealand subpoenas**

93. Clause 43 provides that the penalty for not complying with a NZ subpoena is punishment for contempt of the Federal Court, unless the person served with the subpoena can establish that the contravention should be excused. The clause outlines the matters to which the Federal Court may have regard in determining whether or not a contravention should be excused.
94. Clause 43(3) provides that a certificate under the seal of a NZ court which issued the subpoena, stating that leave was given and the person failed to comply, is evidence of a contravention of clause 43.

#### **Clause 44: Documents etc. for transmission to a New Zealand court**

95. Clause 44 authorises the Federal Court and prescribed State or Territory courts or tribunals to receive documents or things required for production under a NZ subpoena.
96. The Registrar of a court at which such a document or thing is lodged must, as soon as practicable after the document is lodged, inform the Registrar of the court that issued the subpoena, and transmit the documents or things to that court.

#### **Clause 45: This Part does not affect other powers to serve subpoenas**

97. Clause 45 makes it clear that the service of a NZ subpoena on a NZ citizen in Australia need not comply with this Division.

#### **Part 6 – Remote appearances**

Part 6 implements the reforms in Article 11 of the Agreement. The Agreement aims to promote greater use of remote appearances through means such as audio and audiovisual link technology to reduce the cost and inconvenience of physically attending court in trans-Tasman litigation.

The existing EPNZ Act, to be repealed, provides for remote appearances to be made from NZ in civil or criminal proceedings in the federal court and specified Australian courts and tribunals, and for remote appearances to be made from Australia in NZ proceedings. While these provisions appear to apply to both remote appearances for the taking of evidence and the making of submissions generally, their exact scope is unclear.

The Bill clarifies that the EPNZ Act provisions apply only to evidence-related remote appearances as defined under the Bill. The reforms in the Agreement apply to any other remote appearances between Australia and NZ. They will extend to all Australian courts, and any tribunals prescribed by regulations, but will only apply for remote appearances in civil proceedings.

In NZ, the provisions implementing the Agreement are in the NZ Bill, while the EPNZ Act equivalent provisions remain in the Evidence Act.

#### **Division 1—Introduction**

##### **Clause 46: Guide to this Part**

98. Clause 46 is a guide to Part 6.

#### **Division 2—Remote appearances from New Zealand in Australian proceedings**

##### **Subdivision A – Remote appearances unrelated to remote evidence**

### **Clause 47: Application of this Subdivision**

99. Clause 47 provides that the provisions in Subdivision A apply to remote appearances made in civil proceedings in all Australian courts, and any Australian tribunals prescribed by the regulations.

### **Clause 48: Remote appearances unrelated to remote evidence**

100. Clause 48 provides for a court or tribunal in Australia to give leave for a party, their lawyer, or both, to appear remotely from NZ in a proceeding before that court or tribunal.

101. Leave can only be granted if the court or tribunal is satisfied of a number of matters, including whether the party or their lawyer can more conveniently participate in the hearing from NZ.

102. In granting leave, the court is encouraged, but not required, to specify a particular remote appearance medium to be used (either audio or audiovisual link). The court must be satisfied that the specified remote appearance medium is, or can reasonably be made, available. However, if no particular medium is specified, the applicant may choose the remote appearance medium through which to appear.

103. The court must not give leave for a party's lawyer to appear remotely from NZ unless satisfied that the lawyer is entitled to appear in the Australian court (for example by being locally registered or by virtue of the Trans-Tasman Mutual Recognition Arrangement). If a lawyer is not entitled to appear in the Australian court, they must meet two conditions:

- he or she must be a qualified NZ lawyer (as defined under the Bill), and
- the party must ordinarily reside in NZ.

This allows for a person appearing from NZ to be represented by their local lawyer in a hearing.

104. When leave is given for a NZ lawyer to appear in situations where they are not entitled to appear before that court, clause 48(4) provides that they are so entitled for the purposes of that leave.

### **Subdivision B – Remote appearances related to remote evidence**

#### **Clause 49: Application of this Subdivision**

105. Clause 49 provides that provisions regarding remote evidence apply to civil or commercial proceedings in courts and prescribed tribunals. A tribunal may only be prescribed in the regulations if that tribunal is a person or body authorised to take evidence on oath or affirmation under an Australian law.

### **Clause 50: Remote appearances related to remote evidence**

106. Clause 50 authorises an Australian court or tribunal to give leave for evidence to be taken, submissions made, and witnesses examined remotely from NZ in any civil or criminal proceeding.
107. The Australian court or tribunal cannot give this leave unless it is satisfied that the evidence can more conveniently be given remotely, and the necessary facilities for the remote appearance can be provided. This may include consideration of the availability of the witnesses, the cost of the witness attending in Australia as compared with using the audio or audiovisual link facilities, the nature of the evidence to be given and whether the credibility of the witness is likely to be an issue.
108. When leave is given for a NZ lawyer to appear in situations where they are not entitled to appear before that court, clause 50(3) provides that they are so entitled for the purposes of that leave.

### **Subdivision C – General provisions about remote appearances**

#### **Clause 51: Remote appearances by audiovisual link**

109. Clause 51 provides that evidence is not to be given remotely by audiovisual link unless both the place where the court is sitting and the place where the evidence is to be given are each equipped with audiovisual facilities that enable the persons in each place to see and hear each other.

#### **Clause 52: Remote appearances by audio link**

110. Clause 52 provides that evidence is not to be given remotely by audio link, such as by telephone, unless the place where the court is sitting and the place where the evidence is to be given are each equipped with audio facilities that enable the persons in each place to hear each other.

#### **Clause 53: Costs of remote appearances from New Zealand**

111. Clause 53 authorises the Australian court or tribunal to order another person to pay costs connected with taking evidence or making a submission by audio or audiovisual link. This may either be initially, or by way of subsequent reimbursement.
112. Generally the person who wishes evidence to be taken or a submission made from NZ will be responsible for having all the necessary arrangements made and for meeting the associated costs.

#### **Clause 54: Powers of Australian courts in New Zealand**

113. Clause 54 permits an Australian court to exercise all its powers that NZ law permits it to exercise with respect to remote appearances. The NZ law will enable the Australian court to exercise NZ powers similar to those which this Bill enables a NZ court to exercise in Australia.

### **Division 3 – Remote appearance from Australia in New Zealand proceedings**

#### **Clause 55: People in Australia appearing remotely in New Zealand proceedings**

114. Clause 55 authorises a person in Australia to make a remote appearance in a proceeding in a NZ court or tribunal if it is in accordance with the NZ Act or the NZ Evidence Act.

#### **Clause 56: Powers of New Zealand courts and tribunals in Australia**

115. Clause 56 authorises a NZ court to exercise any of its powers in relation to a remote appearance by a person in Australia, except its power to punish a person for contempt or to enforce its judgments or process.

116. The effect of this clause is that NZ law regulates the practice and procedure followed when remote appearance is made by a person in Australia in a proceeding in a NZ court.

#### **Clause 57: Orders of New Zealand courts and tribunals**

117. Clause 57 provides examples of the types of orders the NZ court or tribunal may make that in relation to a remote appearance by a person in Australia. It is not intended to limit clause 56.

#### **Clause 58: Enforcement of orders of New Zealand courts and tribunals**

118. Clause 58 imposes an obligation to comply with an order of a NZ court made under clause 57 and that such orders may be enforced by the Federal Court as if it had been made by that court.

119. A person who fails to comply with an order may be punished for contempt of the Federal Court unless he or she establishes that the failure should be excused.

#### **Clause 59: Remote appearance place in Australia is part of the New Zealand court or tribunal**

120. Clause 59 provides that the place from which a remote appearance by a person in Australia is being made is taken to be part of the NZ court or tribunal hearing the matter.

#### **Clause 60: Privileges, protections and immunities of participants in New Zealand proceedings**

121. Clause 60 confers certain protections and immunities on people appearing remotely from Australia in a NZ proceeding, including judges, barristers, solicitors and witnesses.

#### **Clause 61: Contempt of New Zealand courts or tribunals**

122. Clause 61 was included in the EPNZ Act but has been amended in the Bill in accordance with Commonwealth drafting policy. It provides that it is an offence

for a person to engage in particular conduct at a place in Australia where a remote appearance is being made in an NZ proceeding.

123. The fault element of intention applies to both physical elements of conduct and result in clause 61(2)(b), (3)(b) and (4)(b). The maximum penalty for an offence under this clause is 2 years imprisonment or 120 penalty units, or both. This is designed to allow the court maximum flexibility in determining the appropriate penalty according to the seriousness of the offence.

#### **Clause 62: New Zealand courts and tribunals may administer oath or affirmation in Australia**

124. Clause 62 authorises a NZ court to administer an oath or affirmation to a witness in Australia for the purpose of obtaining evidence remotely.
125. Section 35 of the *Crimes Act 1914*, which relates to false evidence, is applied by the clause to evidence given under such an oath or affirmation.

#### **Clause 63: Assistance to New Zealand courts and tribunals**

126. Clause 63 authorises an officer of particular Australian courts and tribunals to be present and facilitate the proceedings at the place where a witness is giving evidence remotely, if requested by the NZ court or tribunal. No order, direction or other formality is required.

### **Part 7 – Recognition and enforcement in Australia of specified judgments of New Zealand courts and tribunals**

#### **Division 1—Introduction**

##### **Clause 64: Guide to this Part**

127. Clause 64 is a guide to Part 7.

#### **Division 2 – Recognition and enforcement in Australia of specified judgments of New Zealand courts and tribunals**

##### **Clause 65: When registrable NZ judgments are enforceable in Australia**

128. Clause 65 provides that a judgment which falls within the scope of the Bill can only be enforced in Australia under this Bill, and only if it is registered in accordance with clause 68.
129. This clause operates to prevent a person from seeking to have a NZ judgment within the scope of the Bill registered and enforced in Australia in any other way, for example under the common law.

##### **Clause 66: Meaning of *registrable NZ judgment***

130. Clause 66 outlines the range of NZ judgments able to be registered under the Bill. This includes money and non-money judgments.

131. Certain orders from certain NZ tribunals are also registrable if they are prescribed in the regulations. To be prescribed the order of the tribunal must be made in connection with the performance of an adjudicative function, and its orders must be enforceable without an order of a court (regardless of whether it is required to be filed in a court for enforcement purposes).
132. The regulations will prescribe specific NZ tribunals, and the types of orders or decisions of those tribunals which will be registrable in Australia.
133. Registrable NZ judgments also include certain judgments given in criminal proceedings, including those which require the payment of compensation or reparation to an injured party, or those which impose a regulatory regime criminal fine.
134. A number of types of judgments, and judgments relating to specific matters, are excluded in clause 66(2). A number of the excluded types of judgments such as orders about probate, guardianship, and orders about welfare of children, mirror the non-money judgments excluded from SEPA. They are excluded from registration between the States and Territories of Australia under SEPA primarily because they generally require a high level of supervision which is unsuitable to require of a court simply registering the judgment.
135. Any NZ civil pecuniary penalties which are not intended to be enforceable in Australia can be excluded by regulation. The regulations can also exclude NZ judgments relating to other matters, for example those which are governed by existing statutory regimes.

#### **Clause 67: Application to register NZ judgments**

136. Clause 67 outlines the requirements for applying to have a NZ judgment registered, and to which Australian court an application should be made. Special arrangements and conditions apply to the registration of civil pecuniary penalties, criminal fines and market judgments.

##### *Standard judgments*

An application to register a standard registrable NZ judgment may be made to any superior court in Australia, whether or not that court would have had jurisdiction to hear a comparable proceeding in Australia, or make a judgment of that kind in Australia. This is intended to ensure ready availability of courts in Australia in which judgments can be registered, and to give an entitled person under a NZ judgment seeking to enforce their judgment in Australia greater certainty about the court to which he or she should apply.

A standard judgment may also be registered in an inferior court. However such an application may be made only if that court has the power to give the relief that is in the judgment (for example, a money judgment of a certain value).

##### *Civil pecuniary penalties*

NZ judgments which impose a civil pecuniary penalty can be registered in any superior court in Australia. An application can also be made to an inferior court if



that court has the power to impose civil pecuniary penalties in Australia of the same value imposed by the NZ judgment.

#### *Criminal fines*

An application to register a NZ judgment which imposes a prescribed criminal fine can only be made to a superior court in Australia. This limitation is due to the sensitivity of enforcing criminal fines.

#### *Market judgments*

The Bill maintains arrangements formerly in the FCA by providing that a market judgment can only be registered in the Federal Court. If the judgment is a market judgment it must be treated in that way for the purposes of registration, even though it may impose a civil pecuniary penalty or a criminal fine.

137. Consistent with the FJA, an application to register must be made within 6 years after the date of the judgment. If the judgment has been appealed, the 6 year time period runs from date of the last judgment.
138. Clause 67(5) allows the entitled person to apply to the Australian court before the end of the 6 year period for an extension of time in which to register the judgment. The court can make such an order if it considers appropriate.
139. The regulations under this clause may prescribe requirements for an application such as the form it should take, or a specific way to file the application with the court.

#### **Clause 68: Registration of NZ judgments**

140. Clause 68 requires an Australian court to register a NZ judgment upon an application under clause 67.

#### **Clause 69: Currency in which NZ judgments are registered**

141. If a NZ money judgment is expressed in a foreign currency, clause 69 allows it to be registered by the Australian court in that currency upon the request of the entitled person.
142. In the absence of a request from the entitled person, the judgment is to be registered for an equivalent amount in Australian currency. Similar to currency conversion arrangements under the FJA, the amount in Australian dollars is calculated in accordance with the exchange rate two working days prior to the application to register the judgment. The regulations will prescribe the rate of exchange on that day.

#### **Clause 70: Money judgment partly satisfied when entitled person applies for registration**

143. Clause 70 provides that if a judgment has already been partly satisfied at the time it is registered, only the balance remaining payable can be registered by the court.

### **Clause 71: Judgments only some provisions of which are registrable**

144. Clause 71 recognises that a single judgment may deal with different matters and grant different kinds of relief, some of which may not be registrable under Part 7. For example, a judgment may require the payment of a sum of money (a registrable provision) but also include an order relating to the care of a child (excluded under clause 66(2)).
145. The effect of the clause is that any provisions which are not registrable are effectively severed, and the registrable provisions of that judgment are taken to be registrable as if they were a separate judgment. In this way a judgment may be registered to the extent that it contains registrable provisions.

### **Clause 72: Setting aside registration**

146. Clause 72 allows a liable person to apply for the registration of a NZ judgment to be set aside. The liable person must make this application within 30 working days of being given notice of the registration of the judgment, unless the court has granted an extension of time.
147. The judgment can only be set aside on limited grounds under Part 7, and must not be set aside on any other grounds.
148. The judgment must be set aside if its enforcement in Australia would be contrary to public policy. Under general private international law principles, a judgment may be contrary to public policy if it was obtained in a manner inconsistent with the law of the country of registration (for example by distress or undue influence), or is founded on a law that is unacceptable to the country of registration. This is intended to be a high threshold.
149. Registration must also be set aside if the judgment was given in an action where the subject matter was immovable property, or the judgment was in an action in rem where the subject matter was movable property, if the property in question was not situated in NZ at the time of the proceeding. This preserves the private international rule that a court generally has no power to determine matters of title to, or possession of, immovable property situated outside the jurisdiction of the court.

### **Clause 73: Notice of registration**

150. Clause 73 requires an entitled person to give a notice of the registration of a NZ judgment in an Australian court to every liable person under the judgment. Notice must be given within 15 working days, and in the form and manner prescribed by the regulations. The entitled person can apply for an extension of this time, which can be granted if the court considers appropriate.
151. The entitled person can move to enforce the judgment as soon as notice is given.
152. A failure to provide the relevant notice is not fatal to the enforcement of the judgment. However, if an entitled person does not provide the notice, they must wait 45 working days to enforce it in the Australian court. The period of 45

working days includes the 15 working days in which the entitled person has to give the notice, plus the 30 working days a liable person has to make an application to set aside the registration of the judgment (under clause 72), or stay enforcement (under clause 76).

#### **Clause 74: Effect of registration and notice of registration**

153. Clause 74 provides that the NZ judgment, once registered, has the same force and effect, and gives rise to the same proceeding by way of enforcement, as if the judgment were given by the Australian court in which it is registered.

154. This is subject to the 45 working day period if notification of registration has not been given.

#### **Clause 75: Restriction on enforcing registered NZ judgments**

155. Clause 75 provides that a NZ judgment registered in an Australian court is only enforceable if at that time it is also capable of being enforced in another NZ court or tribunal.

#### **Clause 76: Stay of enforcement of registered NZ judgment so that the liable person can appeal it**

156. Clause 76 allows the registering court to stay enforcement of the NZ judgment in Australia for a liable person to challenge the original judgment in NZ. The liable person must make an application to stay enforcement within 30 working days, unless the court grants an extension of this time.

157. To avoid the enforcement of the judgment being frustrated unnecessarily, a stay granted under this clause must be made subject to the liable person making an application to challenge the original judgment in NZ expeditiously. The court may attach any other conditions it considers appropriate, for example that security be given by the liable person.

158. This clause is not intended to affect any power the Australian court would otherwise have to stay enforcement of the NZ judgment on any other grounds if the judgment was issued in a domestic Australian proceeding.

#### **Clause 77: Costs and expenses of enforcement of registered NZ judgments**

159. Clause 77 enables an entitled person to recover costs and expenses reasonably incurred in the registration or enforcement of a NZ judgment. However, this entitlement applies only to the same extent as would be recoverable if a similar or analogous judgment was given in Australia.

#### **Clause 78: Interest on registered NZ judgments**

160. Clause 78 provides that interest on a sum of money under a NZ judgment is payable at the same rate in Australia as would be applicable in the original NZ court or tribunal.

161. The entitled person is required to satisfy the Australian court of the amount payable before it is can be recovered.

**Clause 79: Private international law does not affect enforcement of registered NZ judgments**

162. Clause 79 makes it clear that certain rules of private international law in Australia which may operate to prevent recognition and enforcement of certain NZ judgments do not affect the operation of the Part.

163. For example, a NZ judgment cannot be refused recognition and enforcement on the grounds that to do so would involve the direct or indirect enforcement of a foreign public or revenue law, or because the judgment imposes a civil pecuniary penalty or criminal fine which would not ordinarily be enforceable in Australia.

**Part 8—Trans-Tasman market proceedings**

Part 8 provides special rules for the conduct of trans-Tasman market proceedings formerly in Part IIIA of the FCA. Trans-Tasman market proceedings are proceedings brought under the *Trade Practices Act 1974* which prohibit a corporation with a substantial degree of market power from taking advantage of this power to eliminate or damage competition in any market.

**Division 1—Introduction**

**Clause 80: Guide to this Part**

164. Clause 80 is a guide to Part 8.

**Division 2— Federal Court exercising jurisdiction in New Zealand**

**Clause 81: Federal Court sitting etc. in NZ**

165. Clause 81 enables the Federal Court to order that an Australian market proceeding be conducted at a place in NZ if it is satisfied the proceeding could be more conveniently or fairly be conducted or continued there. An order of this nature may be subject to conditions. The Court may also give judgment when sitting in NZ.

166. The Federal Court may exercise its powers in NZ, subject to NZ law, for the purposes of Australian proceedings. NZ law will enable the Federal Court to exercise in NZ powers similar to those which this Bill will enable the High Court of NZ to exercise in Australia.

**Clause 82: New Zealand lawyers entitled to practise in the Federal Court in New Zealand**

167. Clause 82 confers on a person entitled to practise as a barrister, solicitor or both before the High Court of NZ, a right to practise as a barrister, solicitor or both in an Australian market proceeding.

### **Clause 83: Injunctions in relation to New Zealand conduct**

168. Clause 83(1) authorises the Federal Court in an Australian market proceeding to grant an injunction restraining a person from engaging in conduct or requiring a person to do an act or thing, in NZ. This order can be enforced in NZ under the equivalent NZ Bill despite the fact that it may be an interim injunction and otherwise unenforceable.

### **Clause 84: Service of injunctions and other judgments in New Zealand**

169. Clause 84 authorises, subject to the procedural rules of the Federal Court, service in NZ of an Australian injunction or other Australian market proceeding judgment.

### **Division 3—High Court of New Zealand exercising jurisdiction in Australia**

#### **Clause 85: High Court of New Zealand sitting in Australia etc.**

170. Clauses 85 permits the High Court of NZ to conduct or continue a NZ market proceeding, and give judgment in that proceeding, in Australia.

171. ‘NZ market proceeding’ is defined in clause 85(2) and includes any interlocutory orders sought in relation to the market proceeding.

172. Clause 85(4) permits the High Court of NZ when sitting in Australia to exercise in Australia all the powers it has when sitting in NZ, except its powers to punish a person for contempt, and to enforce or execute its judgments or process. For example the High Court may direct that the proceeding be conducted or continued in private.

173. Clause 85(6) provides that the *Judicature Act 1908* (NZ) and the NZ High Court Rules apply to the practice and procedure of that court in a NZ market proceeding conducted or continued in Australia.

174. An order of the NZ court must be complied with. Contravention of such an order is taken to be contempt of the Federal Court, and punishable accordingly unless the person shows that the contravention should be excused.

#### **Clause 86: Privileges, protections and immunities of participants in NZ market proceedings**

175. Clause 86 confers certain protections and immunities on people when the High Court of NZ sits in Australia, including judges, barristers and solicitors and witnesses.

#### **Clause 87: New Zealand High Court may administer oath etc. in Australia**

176. Clause 87 authorises the High Court of NZ to administer, in accordance with its practice and procedure, an oath or affirmation to a witness in Australia participating in a NZ market proceeding.

177. Evidence given in this way is taken to be testimony given in a judicial proceeding for the purposes of section 35 of the Crimes Act.

**Clause 88: Service of injunctions and other judgments in Australia**

178. Clause 88 authorises the service in Australia of a NZ injunction or other NZ market proceeding judgment.

**Division 4—Taking of evidence by the Federal Court for the High Court of New Zealand**

**Clause 89: Taking of evidence by the Federal Court**

179. Clause 89 permits the High Court of NZ to request the Federal Court to obtain evidence for it for the purposes of a NZ market proceeding.

180. It enables the Federal Court to make an order to provide for obtaining the evidence requested by the High Court of NZ.

181. Any person required to give testimony for use in NZ has the same entitlement to the payment for expenses and loss of time as a witness before the Federal Court.

**Clause 90: Privilege of witnesses**

182. Clause 90 provides that the Federal Court may not require a person to give evidence under section 89 that he or she could not be compelled to give in the NZ market proceeding.

**Clause 91: This Division does not affect other Australian laws**

183. Clause 91 provides that Division 4 is not intended to affect any other law in force in Australia with respect to obtaining evidence.

**Division 5—Miscellaneous**

**Clause 92: Jurisdiction of the Federal Court under this Part**

184. Clause 92 confers jurisdiction on the Federal Court in matters arising under Part 8. Subject to section 75 of the Constitution, this jurisdiction is exclusive of the jurisdiction any other courts.

185. Prosecutions for offences against Part 8 may be brought only in the Federal Court.

**Clause 93: Contempt of the High Court of New Zealand**

186. An offence for contempt was included in the FCA. In moving the provision into this Bill it has been amended in accordance with Commonwealth drafting policy, and to be consistent with similar offences in the Bill (for example clause 33). It provides that it is an offence for a person to engage in particular conduct at a sitting of the High Court of NZ in an NZ market proceeding.

187. The fault element of intention applies to both physical elements of conduct and result with respect to threatening, intimidating and insulting a person. The maximum penalty for an offence under this clause is 2 years imprisonment or 120 penalty units, or both. This is designed to allow the court maximum flexibility in determining the appropriate penalty according to the seriousness of the offence.

#### **Clause 94: Reciprocal arrangements for use of court facilities**

188. Clause 94 authorises the Chief Justice of the Federal Court to make arrangements with the Chief Justice of NZ for the purposes of giving effect to Part 8. A range of matters may be the subject of arrangements including the use of courtrooms, registry facilities and court staff.

### **Part 9—Evidence of certain New Zealand matters**

#### **Division 1—Introduction**

##### **Clause 95: Guide to this Part**

189. Clause 95 is a guide to Part 9.

#### **Division 2—Evidence of certain New Zealand matters**

##### **Clause 96: Application of this Part**

190. Clause 96 outlines the proceedings to which Part 9 of the Bill applies. It will apply to all proceedings in Australian courts, prescribed tribunals or other authorised bodies.

##### **Clause 97: Matters of law**

191. Clause 97 provides that proof is not required about the provisions and commencement of any NZ laws, including Proclamations.

##### **Clause 98: Evidence of New Zealand official instruments**

192. Clause 98 provides that evidence of an official instrument made by the Governor-General in Council of NZ may be adduced by producing a copy or extract purporting to have been certified to be a true copy or extract by the Clerk of the Executive Council of NZ, or NZ Minister.

##### **Clause 99: Evidence of New Zealand acts of state**

193. Clause 99 enables evidence of a treaty or other act of state of NZ to be produced in a number of ways.

**Clause 100: Evidence of public documents admissible in New Zealand under New Zealand Acts**

194. Clause 100 provides that a public document that is admissible in NZ may be admissible in Australia to the same extent, and for the same purpose, in certain circumstances.

**Clause 101: Evidence of other New Zealand public documents**

195. Clause 101 provides that where a public document is admissible in evidence in NZ without proof of the seal, stamp or signature that authenticates it, or of the judicial or official character of the person who appears to have signed it, the document is admissible to the same extent and for the same purpose without such proof in Australia.

**Clause 102: Evidence of New Zealand documents of a public nature**

196. Clause 102 provides that if a NZ document is of such a public nature as to be admissible in evidence in NZ on its mere production, the same may be taken to occur in Australia in certain circumstances. For example, if it is a copy or extract purporting to be certified as a true copy or extract by a NZ officer who certifies that he or she has custody of it.

**Clause 103: This Part does not affect other Australian laws**

197. Clause 103 provides that Part 9 does not affect any other means of giving evidence of the matters referred in the Part under any other Australian law.

**Part 10—Miscellaneous**

**Division 1—Introduction**

**Clause 104: Guide to this Part**

198. Clause 104 is a guide to Part 10.

**Division 2—Miscellaneous**

**Clause 105: Jurisdiction of federal courts**

199. This clause confers jurisdiction on federal courts for matters arising under the Bill.

**Clause 106: References to repealed New Zealand Acts**

200. Clause 106 provides that any reference to a NZ Act is a reference to any Act that modifies or repeals that Act.



**Clause 107: Interaction with the *Foreign States Immunities Act 1985***

201. This clause is included to avoid any doubt that the Bill operates subject to the FSI Act. The FSI Act sets out the procedures relevant to legal action in Australian courts against foreign states. The Bill will not apply to such proceedings.

**Clause 108: Interaction with the *Mutual Assistance in Criminal Matters Act 1987***

202. This clause is included to avoid any doubt that the Bill operates in parallel with the MACM Act. That Act enables certain forms of international assistance in criminal matters to be provided or obtained by Australia.

203. It is intended that the Bill enhance the current arrangements between Australia and NZ for the taking of evidence in criminal matters rather than be precluded by the operation of the MACM Act.

**Clause 109: Court rules**

204. Clause 109 provides that any rules prescribed for giving effect to the Bill must not be inconsistent with the Bill or the regulations.

**Clause 110: Regulations**

205. This clause allows regulations to be made prescribing matters required or permitted by the Bill, or matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.