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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**TRANS-TASMAN PROCEEDINGS AMENDMENT AND OTHER  
MEASURES BILL 2011**

EXPLANATORY MEMORANDUM

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

## **TRANS-TASMAN PROCEEDINGS AMENDMENT AND OTHER MEASURES BILL 2011**

### **GENERAL OUTLINE**

In March 2010, the Australian Parliament passed the *Trans-Tasman Proceedings Act 2010* (the Proceedings Act) and the *Trans-Tasman Proceedings (Transitional and Consequential Amendments) Act 2010* (the Transitional Act). The New Zealand Parliament passed the companion *Trans-Tasman Proceedings Act 2010* (the New Zealand Act) in August 2010. These three Acts implement 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 Agreement). This Agreement will enhance cooperation between Australia and New Zealand in civil court proceedings, enable trans-Tasman disputes to be resolved more effectively and at lower cost to businesses and individuals, and create conditions for increased trade and commerce across the Tasman.

The New Zealand Act was amended during passage to incorporate parliamentary amendments and to implement the recommendations of New Zealand's Justice and Electoral Committee. Schedules 1 and 2 of the Bill will make minor amendments to harmonise the language and structure of the Proceedings Act and the Transitional Act with the New Zealand Act, to ensure the effective operation of the cooperative scheme. It will also make some minor technical amendments to enhance the internal consistency of the Proceedings and Transitional Acts.

Schedule 3 of the Bill contains technical measures to retrospectively validate fees charged for de facto financial proceedings under the *Family Law Act 1975* for the period 1 March 2009 to 25 November 2010. After most States and Territories referred their relevant powers, jurisdiction under the Family Law Act 1975 for de facto financial matters was conferred on the Family Court of Australia (and relevant State and Territory courts) on 1 March 2009.

A technical error in the amending legislation resulted in an anomaly in the application of the fee provisions of the *Family Law Regulations 1984* to de facto financial proceedings. This error was rectified prospectively through amendments to the *Family Law Regulations 1984* that came into force on 26 November 2010.

The technical measures in Schedule 3 of this Bill ensure that the fees applying to de facto financial proceedings in the Family Court of Australia (and relevant State and Territory Courts) in the relevant period were the same as those applying to parenting matters and matrimonial financial proceedings in those courts, and de facto financial proceedings in the Federal Magistrates Court. De facto financial proceedings commenced in the Federal Magistrates Court are covered by separate fee regulations that were not affected by the technical error.

### **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, 2 and 3 of the Bill will commence on the day the Act receives Royal Assent.
3. Schedules 1 and 2 will commence immediately after the commencement of section 3 of the *Trans-Tasman Proceedings Act 2010* (Proceedings Act).
4. Schedule 3 will commence the day after this Act receives the Royal Assent.

#### **Clause 3: Schedule(s)**

5. This is a formal clause that enables the Schedules to amend the Act. It provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule, and that any other item in a Schedule has effect according to its terms. The Bill contains three Schedules.

**Schedule 1—Amendments relating to staying an Australian proceeding on forum grounds**

***Trans-Tasman Proceedings Act 2010***

**Clauses 1 to 9—Amendments to Section 19 and related provisions**

6. Section 19 of the Proceedings Act allows an Australian court to order a stay of proceedings if it is satisfied that a New Zealand court has jurisdiction to determine all the matters in dispute, and is the more appropriate court to do so.
7. During passage of the New Zealand Bill, the New Zealand Parliament removed the word ‘all’ from the equivalent provision. This was on the recommendation of New Zealand’s Ministry of Justice in its second Report to the New Zealand Parliament’s Justice and Select Committee. The amendment sought to address concerns that a party could exploit the subclause and prevent a New Zealand court from ordering a stay of proceedings by including spurious claims under a statute which only conferred power on a New Zealand court.<sup>1</sup>
8. The proposed amendments in Schedule 1 of the Amendment Bill will make similar changes to the Proceedings Act. They will also substitute throughout the Act, where appropriate, the phrase ‘matters in dispute’ with the phrase ‘matters in issue’ to address these concerns. The reference to ‘matters in dispute’ in paragraph 20(3) of the Proceedings Act, which provides a definition for the term ‘exclusive choice of court agreement’, has been maintained to ensure consistency with the wording in the equivalent provision of the New Zealand Act.

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<sup>1</sup> New Zealand Justice and Select Committee, *Trans-Tasman Proceedings Bill – Departmental report (part 2)*, 17 June 2010, page 5 (available at [http://www.parliament.nz/en-NZ/PB/SC/Documents/Advice/9/f/0/49SCJE\\_ADV\\_00DBHOH\\_BILL9696\\_1\\_A54214-Departmental-report-part-2.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Advice/9/f/0/49SCJE_ADV_00DBHOH_BILL9696_1_A54214-Departmental-report-part-2.htm)).

## **Schedule 2—Other amendments**

### ***Trans-Tasman Proceedings Act 2010***

#### **Clauses 1, 2 and 3—Amendments to Section 4**

9. Clauses 1, 2 and 3 will amend the definitions of *entitled person*, *criminal proceeding* and *excluded matter*.
10. Paragraph (b) of the definition of *entitled person* in the Proceedings Act only refers to judgments in proceedings for ‘compensation’. However, paragraph 66(1)(c) of the Act, which provides one definition for the term ‘registrable NZ judgment’, refers to judgments in such matters imposing not only compensation, but also damages or reparation. To ensure internal consistency, and to avoid the unintentional narrowing in scope of paragraph 66(1)(c), the proposed amendments will include a reference to damages or reparation in the definition.
11. Similarly, paragraph (d) of the definition of *criminal proceeding* currently refers to judgments in proceedings for compensation. To ensure internal consistency, the proposed amendments will include a reference to damages or reparation in the definition.
12. Subparagraph (b)(ii) of the definition of *excluded matter* includes an incorrect reference to New Zealand’s *Interpretation Act 1999*. This will be amended to refer to New Zealand’s *Property (Relationships) Act 1976*.

#### **Clause 4—Subsection 8(3)**

13. Subsection 55(1) currently provides that Part 2 of the Act, which deals with the service of initiating documents, will apply in relation to tribunals if the tribunal is prescribed by regulations. Subsection 55(3) interlinks the regulations with the New Zealand Act by providing that, before the tribunal can be listed in the regulations, it must be declared under the New Zealand Act to be an Australian court. The reference to ‘Australian court’ in this context is misdescribed in the Proceedings Act and requires amendment.
14. The proposed amendments will substitute the phrase ‘the New Zealand Act to be an Australian court for the purposes of subpart 5 of Part 2 of that Act’ with ‘section 55 of the New Zealand Act to be a tribunal to which subpart 5 of Part 2 of that Act applies’.

#### **Clauses 5 and 6—Amendments to Section 20**

15. Subsection 20(1) of the Proceedings Act gives primacy to the parties’ choice of court.
16. Subsection 20(2) creates certain exceptions to this general rule and enables an Australian court to consider several factors when determining whether it should override the parties’ choice and stay proceedings before it. The proposed amendments will ensure that if the Australian court is the chosen forum under a choice of court agreement, it will only be able to stay the proceeding if the agreement between the parties is null and void under Australian law.
17. The amendments will bring this provision in line with the equivalent provision of the New Zealand Act (subsection 45(2)).

### **Clauses 7—Amendments to Section 26**

18. Clause 7 will repeal subsection 26(2).
19. Subsection 26(1) of the Proceedings Act allows specified Australian courts to grant interim relief in support of New Zealand proceedings where it is considered appropriate and, if similar proceedings were commenced before it, they would have had the power to grant, and would have granted, interim relief.
20. Subsection 26(2) provides that an Australian court may refuse to grant interim relief if it considers it has no jurisdiction over the subject matter (other than the power to grant interim relief), and for that reason it would be inexpedient to do so.
21. An unintended consequence of subsection 26(2) may be to give greater significance to issues of jurisdiction and expediency than is necessary, resulting in applicants for interim relief facing an unintended additional hurdle. As the court will have already considered issues of jurisdiction and expediency when assessing whether it is appropriate to grant relief under paragraph 26(1)(a), the Amending Bill will repeal subsection 26(2).
22. The equivalent provision in the New Zealand Act (section 32) is in similar terms.

### **Clause 8—Amendment to Subsection 56(2)**

23. Section 56 provides that a New Zealand court or tribunal can exercise certain powers in Australia when a person is appearing remotely from Australia in a New Zealand proceeding.
24. To remove any doubt that subsection 56(2) provides that New Zealand law only applies to the decision to allow the person to appear remotely in Australia, the proposed amendment will clarify that New Zealand law would apply to the entire remote appearance.
25. The equivalent provision in the New Zealand Act is section 45(2) which is in similar terms to subsection 56(2) as amended.

### **Clauses 9 and 10—Amendments to Subparagraphs 61(1)(b)(i) and (ii)**

26. Section 61 of the Proceedings Act provides that it is an offence for a person to engage in specified conduct at a place in Australia from which a remote appearance is being made in a New Zealand proceeding. This includes assaulting or intentionally threatening, intimidating or insulting certain participants in the proceeding, such as a judge or a witness.
27. Parties to the proceeding are not currently protected by this provision. The proposed amendments will ensure they come within the ambit of section 61.
28. The equivalent provision in the New Zealand Act is section 50 which is in similar terms to section 61 as amended.

#### **Clause 11—Amendment to Subsection 66(4)**

29. Section 66 of the Proceedings Act defines ‘registrable New Zealand judgment’ for the purposes of the Act.
30. Paragraph 66(1)(b) provides that certain judgments of a New Zealand tribunal that are prescribed by the regulations are a ‘registrable New Zealand judgment’. Subsection 66(4) provides additional criteria for prescribing these judgments under the regulations. Currently, a judgment of a New Zealand tribunal cannot be prescribed unless it is made in connection with the performance of an adjudicative function, and it is enforceable without an order of the court. The proposed amendment will add an additional requirement that the judgment must not impose a civil pecuniary penalty.
31. The equivalent New Zealand provision is section 74. This section was amended during the passage of the New Zealand Act to exclude judgments of Australian tribunals that impose civil pecuniary penalties.

#### ***Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010***

#### **Clause 12—Amendment to Item 2 of Schedule 1**

32. Item 2 of Schedule 1 of the Transitional Act provides that Part 3 of the Proceedings Act, which deals with Australian courts declining jurisdiction, only applies to civil proceedings commenced on or after the commencement of that Act.
33. The proposed amendment will allow Part 3 of the Proceedings Act to apply to civil proceedings commenced before this time, in certain circumstances. This amendment will ensure parity between the transitional arrangements in the Australian and New Zealand Acts.

## **Schedule 3 – Validation of certain court fees**

### **Clause 1: Validation of court fees for de facto financial proceedings**

34. Clause 1 provides that court fees are taken to have been payable for de facto financial proceedings in circumstances where they would have been payable if, at all times during the relevant period, references in the *Family Law Regulations 1984* to ‘financial or Part VII proceedings’ had included a reference to ‘de facto financial proceedings’. The Clause applies to de facto financial proceedings instituted in a court (other than the Federal Magistrates Court) under the *Family Law Act 1975* in the relevant period. The ‘relevant period’ is defined in Clause 2 as the period between 1 March 2009 and 25 November 2010.
35. Fees were intended to be imposed through the *Family Law Regulations 1984* but this was not effective due to a technical error in amendments to the *Family Law Act 1975*, which did not update the definition of ‘financial and Part VII proceedings’ to include de facto financial proceedings. The fees charged under the *Family Law Regulations 1984* relied on the definition of ‘financial and Part VII proceedings’ in the *Family Law Act 1975*, and therefore did not previously impose fees for de facto financial proceedings. As the error had not been identified, court registries, consistent with the Government’s intention, charged the fees as if they applied to de facto financial proceedings in the relevant period.
36. There were several amendments to the *Family Law Regulations* relevant to court fees over the relevant period. However, the use of the term ‘financial and Part VII proceedings’ in describing the relevant fees is consistent over the period. Consequently, separate validation for each form of the regulations over the relevant period is not required.
37. From 1 November 2010, Regulation 16 of the *Family Law Regulations 1984* allows for the deferral of court fees in certain circumstances. Fees will apply to de facto financial proceedings initiated in the relevant period where the relevant fee was paid or payable in relation to the relevant period. This means that fees that were payable in the relevant period but were deferred are also covered by Clause 1.
38. Clause 1 does not apply to proceedings initiated in the Federal Magistrates Court as those proceedings are covered by separate fee regulations which were not affected by the technical error. Fees applied to de facto financial proceedings in the Federal Magistrates Court under the *Federal Magistrates Regulations 2000* throughout the relevant period.

### **Clause 2**

39. Clause 2 defines relevant terms used in Clause 1. It provides that ‘de facto financial proceedings’ means any of the proceedings mentioned in paragraphs (a) to (f) of the definition of ‘de facto financial cause’ in subsection 4(1) of the *Family Law Act 1975*. This is consistent with the relevant part of the definition of ‘eligible financial or parenting proceedings’ set out in Regulation 3 of the *Family Law Regulations 1984* since 26 November 2010.



40. Clause 2 also provides that relevant period means the period that starts on 1 March 2009 and ends on 25 November 2010. Jurisdiction under the *Family Law Act 1975* for de facto financial proceedings was conferred on the Family Court of Australia (and relevant State and Territory courts) on 1 March 2009. A technical error in the amending legislation resulted in an anomaly in the application of the fee provisions of *Family Law Regulations 1984* to de facto financial proceedings. This error was rectified through amendments to the *Family Law Regulations 1984* that came into force on 26 November 2010.