Trans-Tasman Court Proceedings and Regulatory Enforcement

A PUBLIC DISCUSSION PAPER BY THE TRANS-TASMAN WORKING GROUP

Attorney-General's Department (Australia) and
Ministry of Justice (New Zealand)
July 2005

Comments

The Australian Attorney-General's Department and the New Zealand Ministry of Justice would like your comments on the issues raised in this discussion paper. We also invite comment on any other significant issues (and possible solutions) on trans-Tasman court proceedings and regulatory enforcement which have not been identified in this discussion paper. Please send your written response by 4 November 2005. We may be unable to consider responses received after this date.

Please send your written comments to:

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Confidentiality

We will assume that any comments you make are not confidential and may be made public. If you want your comments, or any part of them, to be treated as 'confidential', please state this clearly, including your reasons.

All comments will be held by both the Attorney-General's Department and the Ministry of Justice. They will be subject to the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) in Australia, and the *Official Information Act 1982* (NZ) and the *Privacy Act 1993* (NZ) in New Zealand. If anyone asks to see a confidential submission, we will consider that request under the principles of these Acts.

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Part I: Introduction

Background

The relationship between Australia and New Zealand was greatly strengthened in 1983 by the Australia New Zealand Closer Economic Relations Trade Agreement (CER). CER has increased co-operation and integration between the two countries and facilitated trans-Tasman trade. Initiatives under CER include the Trans-Tasman Mutual Recognition Arrangement and the work being carried out under the Memorandum of Understanding on Business Law Co-ordination.

CER enjoys strong support from both governments. Recently, as signalled by the two Prime Ministers, the Australian Treasurer and the New Zealand Minister of Finance, the focus has moved towards creating a single economic market. Common regulatory frameworks would underpin this and a work programme covering banking systems, accounting standards, mutual recognition of securities offerings, competition and consumer protection policy is already underway.

Over time, there has been a significant increase in the movement of people, assets and services across the Tasman. At least in part, this is due to CER initiatives.

The significance of the trans-Tasman relationship is clear. For example, more than 815,000 Australians visited New Zealand in 2004. Over one million New Zealanders visited Australia in the same year. In 2004, exports of goods from Australia to New Zealand came to A$8,755m (NZ$9,713m) and from New Zealand to Australia to A$5,193m (NZ$5,760m). In the same year, Australian exports of services to New Zealand came to A$2,597m (NZ$2,881m) and New Zealand exports of services to Australia to A$1,749m (NZ$1,940m).[1] At 31 March 2004, total Australian investment in New Zealand was NZ$51.3 billion (A$44.4 billion) and total New Zealand investment in Australia was NZ$20.8 billion (A$18.0 billion).[2]

In such an environment, there is a greater possibility of disputes with a cross-border element. Closer integration of both countries' civil justice systems could help resolve these. It is also necessary for the success of other CER or single economic market initiatives.

Similarly, each country has a significant interest in promoting the effectiveness of existing regulatory regimes to ensure that limits to the reach of each country's regulatory system are not exploited and that consumers have effective redress.

The early 1990s saw some innovative reforms to the two civil justice systems under the CER umbrella. These include:

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[1] Exchange rate applied for calendar year 2004: A$1 = NZ$1.1093.

[2] Exchange rate applied for 31 March 2004: A$1 = NZ$1.1560.

- the trans-Tasman evidence regime that allows subpoenas issued by a court in one country to be served on witnesses in the other, and evidence to be taken from the other country by video link or telephone conference

- the recognition and enforcement of each other's tax judgments, and

- the recognition and enforcement of judgments from each other's lower courts.

Apart from this, Australia and New Zealand handle cross-border civil disputes involving the other country in the same way as for any other foreign country. This does not reflect the special relationship between the two countries, which have a shared common law heritage and strikingly similar justice systems. Each country also has confidence in the other's judicial and regulatory institutions. Because of this, many of the safeguards needed with more distant, dissimilar countries are unnecessary.

Further reform to create a more coherent legal framework for resolving civil disputes with a trans-Tasman element would have many benefits, including reduced costs, increased efficiency and reduced forum shopping (where a litigant tries to find the most advantageous jurisdiction in which to bring proceedings). It would build on the success of existing measures and support other current initiatives.

Terms of Reference

In 2003 the Hon John Howard MP and the Rt Hon Helen Clark MP agreed to review existing trans-Tasman co-operation in court proceedings and regulatory enforcement. They also agreed to investigate the possibility of streamlining and improving existing mechanisms, especially in areas such as service of process, taking of evidence, recognition of judgments in civil and regulatory matters and regulatory enforcement. A working group was set up to undertake this review.

The Terms of Reference agreed between Australia and New Zealand require the Working Group to '*examine the effectiveness and appropriateness of current arrangements that relate to civil (including family) proceedings, civil penalty proceedings and criminal proceedings (where those proceedings relate to regulatory matters).*

Those arrangements include:

- *investigatory and regulatory powers;*
- *service of initiating and other process;*
- *taking of evidence; and*
- *recognition and enforcement of court orders and judgments (including civil penalties and criminal fines).*

The Working Group will:

- *identify any problems that exist with the current arrangements;*

- *consider a more general scheme for trans-Tasman service of process, taking of evidence and recognition and enforcement of court orders and judgments;*
- *consider a more general scheme for trans-Tasman co-operation between regulators;*
- *undertake appropriate domestic consultation; and*
- *propose options that may be pursued.'*

Aims of Discussion Paper

This discussion paper, prepared by the Working Group:

- highlights a number of recurring problems in civil court proceedings with a trans-Tasman element and the enforcement of regulatory regimes (such as securities, competition and consumer protection law)

- discusses options to address these problems and (except for Issue 11) indicates a preferred solution

- seeks your views.

The discussion paper deals separately with civil issues (Parts II and III) and regulatory/criminal issues related to the enforcement of penal laws (Part IV). Part II is not concerned with criminal penalties, civil penalties or other punitive measures (whether or not pecuniary) sought by, or on behalf of, the State (such as by a regulator). To the extent that proposals are made for cooperation in such matters, they are addressed in Part IV. There are no proposals for inter-regulator cooperation, including the use of investigative powers in the cross-border context, in this paper because these issues have been considered in other projects (see Part IV).

Most recommendations support a single, integrated regime (described in this paper as 'the proposed trans-Tasman regime') modelled on the *Service and Execution of Process Act 1992* (Cth) (SEPA). SEPA was devised in Australia to remove many similar problems arising because of Australia's multi-jurisdiction system.

Consultation and future steps

This discussion paper is being widely circulated in Australia and New Zealand among interested parties, including Australian State and Territory governments, the judiciary, key departments and agencies, the legal profession, academics, industry groups and trade bodies.

After considering the comments received, recommendations will be made to both countries' governments.

If both governments accept the recommendations, their agreement could be recorded in a treaty or arrangement. Legislation to give effect to this agreement could then be developed. There would be further consultation on the detailed implementation of the

agreement at that stage (including, in the case of Australia, consultation with State and Territory governments).

Executive Summary

The Working Group has identified certain problems with current trans-Tasman arrangements for service of process, taking evidence and enforcing judgments in civil proceedings, civil penalty proceedings and certain criminal regulatory proceedings. The Working Group has also identified some preferred solutions.

Service and execution of civil process and judgments

Issue 1 - Recognition and enforcement of judgments

Australian and New Zealand courts have broad jurisdiction to allow service of proceedings on a defendant overseas. However, if a defendant served overseas does not submit to the court's jurisdiction, the resulting judgment may not be enforceable in the other country. This is undesirable, given the increasing movement of people, assets and services across the Tasman.

The Working Group's proposed solution is to allow initiating process in civil proceedings begun in any Australian State, Territory or Federal Court, or any New Zealand court to be served in the other country without leave. Service would have the same effect as if it had occurred in the place where the proceedings were filed.

The proposed new regime is modelled on the Australian inter-state scheme, the *Service and Execution of Process Act 1992* (Cth) (SEPA). Key elements would include the following:

- The plaintiff would not have to establish any particular connection between the proceedings and the forum to be allowed to serve the proceedings in the other country.
- The defendant could apply for a stay of proceedings on the basis that a court in the other country is the appropriate court to decide the dispute.
- A judgment from one country could be registered in the other. It would have the same force and effect, and could be enforced, as a judgment of the court where it is registered.
- A judgment could only be varied, set aside or appealed in the court of origin. The court of registration would be able to stay enforcement to let this happen.
- A judgment debtor would be notified if a judgment was registered in the other country.

- A judgment could only be refused enforcement in the other country on public policy grounds. Other grounds such as breach of natural justice would have to be raised with the original court.

- The defendant's address for service could be in Australia or New Zealand.

- Judgments could be registered in the Federal Court of Australia, the Family Court of Australia, any Australian Supreme Court, or the New Zealand High Court, or in any inferior court in either country that could have granted relief.

Issue 2 – Final non-money judgments

Currently only final money judgments can be registered and enforced between Australia and New Zealand. Orders for specific performance or final injunctions are not enforceable in the other country. This makes the effective resolution of disputes more difficult, slower and more expensive.

The Working Group suggests that under the proposed trans-Tasman regime judgments that require someone to do, or not do, something (such as injunctions and orders for specific performance) should also be enforceable. However, some judgments would not be included, such as orders about the administration of estates and the care or welfare of children. Nor would the regime affect other bilateral and multi-lateral arrangements.

Issue 3 – Interim relief in support of foreign proceedings

Currently an Australian or New Zealand court will only grant interim relief, such as a *Mareva* injunction, pending final judgment in proceedings before that court. Interim relief cannot be obtained in one country in support of proceedings in the other. Instead proceedings seeking resolution of the main dispute need to be commenced in the court where interim relief is sought, even if it is not the appropriate court to decide the matter.

The Working Group suggests that appropriate Australian and New Zealand courts be given statutory authority to grant interim relief in support of proceedings in the other country.

Issue 4 – Enforcing tribunal orders

Decisions of tribunals in one country cannot currently be enforced in the other. However, many tribunals decide disputes in essentially the same way as a court and are widely used. The current situation therefore limits efficient and cost-effective dispute resolution.

The Working Group suggests that certain decisions of specified tribunals be enforceable in the other country. Certain tribunals could also have their proceedings served in the other country under the proposed trans-Tasman regime.

Issue 5 - Forum non conveniens rules

Australia and New Zealand apply potentially inconsistent *forum non conveniens,* or 'give way', rules to determine whether another court should decide a dispute. The Australian rules require a court to decline jurisdiction only where it is *clearly inappropriate* for it to determine the dispute. The New Zealand rules require a court to decline jurisdiction where another court is *more appropriate*. These differences can lead to inconvenience, expense and uncertainty.

The Working Group suggests a common statutory test be adopted by both countries. Proceedings in one country could be stayed if a court in the other country is appropriate to decide the dispute, taking into account a list of factors.

Trans-Tasman evidence regime and use of technology

Issue 6 - Leave requirement for trans-Tasman service of subpoenas

Under the trans-Tasman evidence regime in the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Amendment Act 1994* (NZ), a subpoena issued in one country can be served on a witness in the other with the leave of a higher court judge. Where a subpoena is issued by a lower court, a separate application must be made to a higher court before service can occur. This adds a layer of cost and complexity and can cause delay.

The Working Group suggests that lower court judges should be able to grant leave to serve a subpoena in proceedings before that lower court or a tribunal.[3]

Issue 7 - Court appearance by video link or telephone

Telephone and video link technology is used under the trans-Tasman evidence regime by witnesses and counsel. Remote appearances by parties and counsel using electronic technology could also reduce the cost and inconvenience of physically attending court in trans-Tasman litigation.

The Working Group suggests that parties seeking a stay of proceedings under the proposed trans-Tasman regime, and their counsel, should be able to appear from the other country as of right. The court would decide the technology to be used. Parties wishing to appear remotely in other situations could do so with the court's leave. Their counsel could also appear with leave, provided they have the right to appear before the court.

Provisions would be needed to give appropriate privileges, immunities and protections to those appearing remotely.

[3] In this paper, 'judge', in relation to Australia, includes a magistrate, for example, where the Federal Magistrates Court of Australia has jurisdiction over the matter.

Civil penalties, fines and subpoenas in criminal proceedings

Issue 8 - Enforcing civil pecuniary penalty orders

Civil pecuniary penalty orders imposed by a court in one country are not currently enforceable in the other. This undermines the strong mutual interest each country has in the integrity of trans-Tasman markets and the effective enforcement of each other's regulatory regimes.

The Working Group suggests that all civil pecuniary penalty orders from one country should be enforceable in the other under the proposed trans-Tasman regime. Each country could exclude particular civil pecuniary penalty regimes if it considered this appropriate.

Issue 9 - Enforcing fines for certain regulatory offences

Currently a criminal fine imposed in one country is not enforceable in the other. This is a problem where the fine is imposed under a regulatory regime that impacts on the integrity of markets and in which each country has a strong mutual interest.

The Working Group considers that certain criminal fines should be enforceable in the other country. The regime would apply to fines for offences under a regulatory regime that affects the effectiveness, integrity and efficiency of trans-Tasman markets. This would include fines under the following legislation:

Australia

Trade Practices Act 1974 (Cth)
Corporations Act 2001 (Cth)
Consumer protection and product safety legislation at State and Territory level
Occupational regulation legislation at State and Territory level

New Zealand

Commerce Act 1986
Companies Act 1993
Fair Trading Act 1986
Securities Act 1978
Securities Markets Act 1988
Takeovers Act 1993
Financial Reporting Act 1993
Credit Contracts and Consumer Finance Act 2003
Occupational regulation legislation

Such fines would be enforceable in the other country in the same way as a civil judgment debt. This should address potential concerns about one country using its fine collection powers to enforce the other's criminal sanctions.

A public policy exception to enforcement would apply. Also, criminal fines could only be registered for enforcement in a higher court.

To address concerns that the proposal would result in activities in one country being regulated in the other, there would need to be a real and substantial connection between the country imposing the fine and the conduct amounting to the offence. This could be done by specifying the circumstances under which a fine under a particular regime would be enforceable in the other country.

Issue 10 - Extending trans-Tasman subpoenas to criminal proceedings

A subpoena under the trans-Tasman evidence regime cannot be issued in criminal proceedings. If a witness is unwilling, evidence can only be obtained under less convenient procedures, such as the Mutual Assistance in Criminal Matters legislation.

The Working Group supports extending the trans-Tasman subpoenas regime to criminal proceedings. Various safeguards (such as the leave requirement) would prevent misuse.

Issue 11 - Regulator co-operation

The Working Group invites your comment on whether regulatory contexts, other than securities and competition and consumer protection, would benefit from further trans-Tasman co-operation and what form it should take.

Part II: Serving and executing civil process and judgments, and the appropriate forum for resolving disputes

Issue 1: Practical difficulties in recognising and enforcing judgments between Australia and New Zealand.

Proposed solution

Introduce a mechanism modelled on the *Service and Execution of Process Act 1992* (Cth):

- to allow civil initiating process issued out of any Australian Federal, State or Territory court to be served, without leave, in New Zealand
- to allow civil initiating process issued out of any New Zealand court to be served, without leave, in any Australian State or Territory
- for service to have the same effect and to give rise to the same proceedings as if service had occurred in the jurisdiction of issue.

Existing position

1.1 When recognising and enforcing each other's judgments, New Zealand and Australia currently treat each other in the same way as any other foreign country (with some limited exceptions).[4]

1.2 Both countries' courts have fairly liberal rules allowing initiating process in civil proceedings to be served on a defendant overseas (subject to certain leave requirements). These rules set out the necessary connection between the proceedings and that jurisdiction to permit service abroad.

1.3 However, quite different rules apply when a court is asked to recognise or enforce a judgment of a court in the other country. Such judgments will only be enforced if the other country's court is considered to have exercised proper jurisdiction over the defendant according to much narrower private international law rules.

1.4 This issue arises whenever a defendant applies to set aside the registration of a judgment under the *Foreign Judgments Act 1991* (Cth) (FJA) or the *Reciprocal Enforcement of Judgments Act 1934* (NZ) (REJA). It also arises when enforcing foreign judgments at common law. One of the grounds for setting aside registration under the FJA and REJA (reflecting the common law

[4] There are special arrangements for enforcing each other's tax judgments and lower court judgments.

requirement when enforcing foreign judgments) is that the foreign court did not have jurisdiction over the defendant.[5] Jurisdiction for these purposes is established by:

- the defendant's presence or residence in the country of the original court at the time the original proceedings were issued, or

- the defendant's submission to the original court's jurisdiction, by voluntarily appearing in the proceedings (other than to contest jurisdiction) or by agreement between the parties before the proceedings began.

Practical problems

1.5 Most practical problems in the trans-Tasman context arise when an Australian or New Zealand court refuses to recognise a judgment given in the other country because the plaintiff fails to prove that the original court had proper jurisdiction over the defendant. This is most likely to happen when the defendant was served overseas in the original proceedings and, in the absence of an appearance in response, a default judgment is entered. A default judgment entered in one country faces serious obstacles to being recognised and enforced in the other. The requirement for the court to have jurisdiction under private international law rules prevents recognition and enforcement, even if all material aspects of the dispute are connected with the country in question.

1.6 To take a practical example, Smith sells his New Zealand business to Jones before moving to Australia. Jones subsequently brings proceedings in New Zealand against Smith seeking damages for breach of contract. There is no choice of court clause in the contract. Smith is served in Australia with initiating process in the New Zealand proceedings as allowed by New Zealand law. He does not appear in those proceedings. Jones obtains a default judgment and seeks to enforce it in Australia. Smith successfully opposes enforcement on the grounds that the New Zealand court did not have jurisdiction.[6] This is because Smith was not present or resident in New Zealand at the time of service and did not voluntarily submit to the jurisdiction of the New Zealand court.

1.7 This outcome is clearly undesirable, particularly given how easily people change residence between Australia and New Zealand, and the significant movement of goods and services across the Tasman.

Options

1.8 Three options have been considered to address the problem:

- the proposed trans-Tasman regime for service of initiating process

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[5] Section 7(2)(a)(iv) of the FJA and section 6 of the REJA.

[6] It is assumed that the transaction was not effected through or at an office or place of business that Smith had in New Zealand for the purpose of section 7(3)(a)(v) of the FJA.

- a scheme based on the Brussels Model, or
- amending the FJA and the REJA to prevent registration of a judgment being set aside due to lack of jurisdiction, simply because the defendant was served in the other country and did not appear in the proceedings.

Option 1 The proposed trans-Tasman regime for service of initiating process

1.9 The proposed trans-Tasman regime would allow civil initiating process issued out of any Australian Federal court (the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia), or any State or Territory court to be served, without leave, in New Zealand. It would also allow civil initiating process issued out of any New Zealand court to be served, without leave, in any Australian State or Territory. Service would have the same effect, and give rise to the same proceedings, as if it had occurred in the place of issue. A defendant could apply for a stay of proceedings on the basis that another court is the appropriate court to hear the matter. Any resulting judgment could be registered and enforced in a court of the other country.

1.10 The proposed trans-Tasman regime is based on the *Service and Execution of Process Act 1992 (Cth)* (SEPA), which has resolved some of the practical problems of serving initiating process and enforcing judgments between States/Territories within Australia. SEPA has operated successfully within Australia for some time and is a model with which Australian litigants are familiar. Its strength is that it is simple, streamlined and cost effective. (See Appendix 1 for further information about SEPA.)

Option 2 The Brussels model

1.11 An alternative scheme might be modelled on the Brussels Regulation[7], which recently superceded the 1968 Brussels Convention.[8] The Brussels model was developed to ease enforcement of judgments between EU Member States. (See Appendix 2 for further information about the Brussels model.)

1.12 Under this model, a court's jurisdiction is determined primarily by the defendant's domicile, or by specific rules about the appropriate forum for particular types of claim. Where more than one court has jurisdiction, priority is decided by a 'first to file' rule. The resulting judgment is readily enforceable with only limited exceptions.

1.13 While this model has operated successfully in Europe for some time, the Working Group does not recommend it for use between Australia and New Zealand. It was originally designed for Member States when all were civil law

[7] The EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Council Regulation (EC) No. 44/2001 of December 22, 2000.

[8] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.

countries. Its civil law origins do not make it the best model for two countries with a shared common law heritage. Also, unlike SEPA it does not appear to offer a solution to the range of other issues discussed in this paper.

1.14 There are other difficulties with the Brussels model:

- Complex jurisdictional rules overlay the domicile rule.
- Domicile is not used in the same sense as at common law. Under this model a person (especially a company) could potentially have more than one 'domicile'.
- A jurisdictional rule based on the defendant's domicile seems unnecessary in a trans-Tasman context. It is often as convenient, and no more expensive, to travel across the Tasman as it is to travel within one's own country.
- The 'first to file' rule, which applies when more than one court has jurisdiction, is arbitrary and undesirable.

Option 3 Amend the Foreign Judgments Act and the Reciprocal Enforcement of Judgments Act

1.15 Both the FJA and the REJA could be amended to prevent a registered judgment being set aside because of lack of jurisdiction of the original court, where jurisdiction is in issue only because the defendant was outside the country of the original court.[9]

1.16 The problem with this option is that both Acts apply to other countries beyond the trans-Tasman context, although special provisions are included to address particular trans-Tasman issues. Including further trans-Tasman provisions would make both Acts more complex. This option is also only a partial solution and cannot easily be combined with other proposals. Nor does it address other limitations with the Acts.

Preferred option

1.17 The Working Group prefers Option 1, the proposed trans-Tasman regime, to address the inter-relationship between service and jurisdiction. It could easily be combined with other proposals in this paper and would have the following key features:

- Initiating process from any Australian Federal, State or Territory court, or any New Zealand court, could be served on a defendant in the other country without asking leave.

[9] Section 7(2)(a)(iv) of the FJA and section 6(1)(b) of the REJA.

- The plaintiff would not have to establish any particular connection between the proceedings and the forum before service could occur in the other country.

- The defendant could object to the proceedings being heard in the court in which proceedings were issued by applying for a stay of those proceedings. A stay could be granted if another court was the appropriate court to decide the matter. Factors to be taken into account would include where the parties and witnesses live, where the subject of the dispute was situated and the law to be applied.

- A judgment from one country could be registered in the other. A registered judgment would have the same force and effect, and be enforceable in the same way, as a judgment of the court where it is registered.

- A judgment could generally only be varied, set aside or appealed in the court where it was originally given. The court of registration could delay enforcement to allow such applications to be made to the court of origin.

Special features

(a) Notice to defendant

1.18 The Working Group believes that a judgment debtor should be notified when a judgment is registered in another jurisdiction under the proposed trans-Tasman regime.

1.19 The judgment debtor would have a set time (after receiving notice) to apply to the court where the judgment is registered, to stay enforcement. This would only be granted where the judgment debtor wishes to apply to the original court to vary, set aside or appeal the judgment. To avoid unnecessary delay, the judgment creditor could begin enforcement proceedings during the notice period. If no stay is granted, the judgment creditor could move swiftly to enforce the judgment at the end of the period.

(b) Public policy exception

1.20 At common law and under the FJA and REJA, a defendant can oppose enforcement on several grounds, such as that the judgment was obtained by fraud or in breach of rules of natural justice or that enforcement would be contrary to public policy. These grounds are not included in SEPA. Instead, concerns of this sort must be raised with the original court, which is best placed to deal with them since it heard the original action. The court of registration, however, can stay enforcement action until these matters are decided.

1.21 The question is which, if any, of these grounds should be included in the trans-Tasman regime. While there is no problem with matters such as fraud or natural justice going back to the original court (both Australia and New

Zealand would have confidence in the decision of the other's courts on these matters), public policy considerations may be more difficult. This is because there may be differences in public policy between the two countries. While a high threshold must be met for something to be 'contrary to public policy', and the courts have only rarely refused enforcement on this ground, there may be benefit in ensuring that the proposed regime does not cut across different public policy concerns in Australia and New Zealand.

1.22 For example, there is a remote possibility that an Australian court might give judgment against a New Zealand defendant for a personal injury that occurred in New Zealand, in circumstances where the New Zealand Accident Compensation Scheme applies. This scheme removes the right of someone suffering personal injury to sue in a New Zealand court. If, as seems likely, such a judgment were considered to be contrary to New Zealand public policy, the New Zealand court would not have to enforce it in New Zealand.

1.23 The Working Group therefore proposes that objections to enforcement due to fraud or breach of natural justice be heard in the original court. However, it suggests that a public policy exception to enforcement be available in the court where a judgment is registered. This would cater for those rare occasions where a judgment given in one country conflicts with important public policy considerations in the other. In most cases, of course, the original court will already have taken these considerations into account when reaching its decision. An Australian court would not, for example, as a matter of common law make an order that compelled performance in New Zealand of a contract if performance would be illegal in New Zealand (and vice versa).

(c) Appearance by defendant

1.24 Under the proposed regime, a defendant must appear in proceedings begun in the other country to defend the claim or to argue that it should be heard elsewhere. The defendant would no longer be free to ignore such proceedings. This requirement may involve extra cost and inconvenience - defendants would usually need to instruct local lawyers to appear, and may have to appear personally (for example, to give important evidence).

1.25 The Working Group is conscious of these concerns and considers greater use of technology could assist (see Issue 7 below – *Court appearance by video link or telephone*). Defendants and their counsel could appear by video link or telephone conference to challenge jurisdiction or venue. Such facilities could also be appropriate for other preliminary applications.

1.26 The facilities would need to be reasonably accessible either at courtrooms or private premises such as video conferencing suites. The cost of the video link or telephone conference might initially be the defendant's responsibility but could be included in any award of costs eventually made against the plaintiff. Counsel appearing for a defendant by video link or telephone conference

would need protections and immunities similar to those in the trans-Tasman evidence regime.[10]

(d) *Address for service*

1.27 The Working Group proposes that defendants be able to specify an address for service anywhere in Australia or New Zealand. This means they would not have to instruct lawyers in the other country in order to provide a suitable address for service.

(e) *Method of service*

1.28 For simplicity, the Working Group considers that the rules of the court in which the proceedings are issued concerning the method of service should apply when proceedings are served outside the jurisdiction. This is preferable to developing special rules for trans-Tasman service.

(f) *Appropriate court to register a judgment for enforcement*

1.29 The Working Group suggests that a judgment should be able to be registered in any higher court (including the Federal Court of Australia, the Family Court of Australia, the Supreme Court of an Australian State or Territory, or the New Zealand High Court), or in any lower court that could have made the decision sought in the proceedings. This would ensure flexibility and the ready availability of courts in which judgments can be registered.

(g) *Inferior courts*

1.30 Currently only judgments of certain inferior courts of the other country can be enforced under the FJA and REJA. However, the list of specified courts needs updating from time to time, and any changes must be made by Regulation or Order in Council.

1.31 As each country has confidence in the other's inferior courts, there seems to be no reason to limit the inferior courts covered by the proposed trans-Tasman regime. The Working Group therefore proposes that the regime should apply to inferior courts generally. This means, for example, that initiating process from any inferior court in either country could be served and their judgments registered and enforced, under the regime.

Other Issues

1.32 The Working Group notes that under the proposed trans-Tasman regime the defendant would have the burden of proving that another court is more appropriate. By contrast, in those situations where a plaintiff currently requires leave of a court to serve out of the jurisdiction, the plaintiff has the burden of proving either that the court where the proceedings have been filed

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[10] See the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Amendment Act 1994* (NZ).

is not clearly inappropriate (Australia) or that clearly it is the appropriate court (New Zealand)[11]. The proposed regime will therefore involve a shift in the burden of proof on this issue from the plaintiff to the defendant.

1.33 There are suggestions that commencing proceedings other than in the defendant's home jurisdiction may be causing problems under SEPA where small debts are being recovered[12]. The Working Group is interested in any difficulties being experienced with the operation of SEPA that might have implications for the operation of the proposed trans-Tasman regime.

Questions

Q1. Do you agree that service and enforcement of judgments should be addressed on a trans-Tasman basis?

Q2. Do you agree that Option 1 (the trans-Tasman regime) is the best option?

- If yes, do you have comments on the features of the proposed regime?

- If not, please explain why.

Q3. Do you prefer another option identified by the Working Group? If so, please give your reasons.

Q4. Do you prefer an option which has not been identified? If so, please give details of the option and your reasons for preferring it.

Q5. Do you agree that public policy should be a ground for not enforcing a judgment under the proposed trans-Tasman regime?

Q6. Do you agree that all other grounds for challenging a judgment should be raised in the original court?

Q7. Do you have any comments on shifting the burden of proving the appropriateness of the court from the plaintiff to the defendant?

Q8. Do you have any comments on other aspects of the operation of SEPA that might have implications for the proposed trans-Tasman regime?

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[11] This is less of an issue for New Zealand given the range of proceedings that can be served out of the jurisdiction without leave (see, for example, R 219 of the High Court Rules).

[12] For example, the Victoria Legal Aid report on "Debt Recovery Law and Procedure in Victoria" suggests that national debt collection firms engage in forum shopping to the detriment of small debtors.

Issue 2: Limits on final judgments that can be enforced

Proposed solution

Broaden the range of final judgments that can be recognised and enforced between Australia and New Zealand to include those requiring a person to do, or not do, something (eg injunctions and orders for specific performance).

The following judgments would not be included:

- orders about probate, letters of administration or the administration of an estate
- orders about the guardianship or management of property of someone who is incapable of managing his or her personal affairs or property
- orders about the care, control or welfare of a child, and
- orders that, if not complied with, may lead to conviction for an offence in the place where the order was made.

Existing position

2.1 At common law a foreign *in personam* judgment (ie a judgment that binds only the particular parties to the proceedings) can be recognised and enforced in Australia and New Zealand only if it is final and conclusive[13] and for a definite sum of money.

2.2 Under the FJA and REJA final and conclusive money judgments of certain courts of the other country can be registered and enforced across the Tasman. These Acts are capable of being extended to non-money judgments but this has never happened.

Practical problems

2.3 The current limited coverage of the FJA and REJA to money judgments only is significant as it prevents the recognition and enforcement of orders for specific performance or final injunctions. These orders are often essential to doing justice and the only practical solution to a dispute.

2.4 Take, for example, the case of a married couple in New Zealand who separate. Both parties appear in court proceedings to decide the division of their property. The New Zealand Family Court orders one party to return jewellery to the other but the person holding the jewellery moves to Australia taking it with them. The judgment about return of the jewellery cannot be registered under the FJA because it is not a money judgment. The person entitled to the jewellery therefore cannot enforce the judgment.

[13] A judgment is final and conclusive if it is *res judicata* between the parties, so the matter cannot later be contested between them in the same court.

2.5 Similarly, take the example of a business sold as a going concern, with restrictive covenants granted to the purchaser to protect the goodwill of the business in both countries. An injunction is likely to be the only appropriate means of enforcing the covenants. However, neither the FJA nor REJA allows injunctions to be enforced across the Tasman.

Options

2.6 There are three options to broaden the range of judgments that can be recognised and enforced between Australia and New Zealand.

Option 1 The proposed trans-Tasman regime encompassing a wide range of judgments

2.7 A broad range of judgments could be included in the proposed trans-Tasman regime. This would give a court jurisdiction over a defendant served anywhere in Australia and New Zealand, and would also allow for the registration and enforcement of any resulting judgments, whether they be money or non-money judgments.

2.8 This option is similar to the approach taken in SEPA, which allows a wide range of judgments to be recognised and enforced as between Australian States/Territories, including non-money judgments such as injunctions and orders for specific performance. This approach has a proven track record in Australia, is familiar to Australian litigants and is simple and cost-effective.

2.9 The Working Group is not aware of practical difficulties with enforcing non-money judgments under SEPA and would be interested to hear from those with direct practical experience. Non-money judgments usually need a higher level of control, supervision and administration than final money judgments. Also, it is possible that some non-money judgments may impact on people who have not participated in, or even been aware of, the original proceedings. Such judgments may have more impact in the trans-Tasman context than domestically within Australia. If necessary, these concerns could be addressed by allowing affected people to apply to the court of registration to stay enforcement, thereby giving them time to apply to the original court to vary or set aside the judgment.

2.10 Some non-money judgments are excluded from SEPA. These include orders:

- about probate, letters of administration or the administration of an estate
- about the guardianship or management of property of someone who is incapable of managing his or her personal affairs or property
- about the care, control or welfare of a child, and

- that, if not complied with, may lead to conviction for an offence in the State where the order was made.[14]

2.11 The Working Group considers that these orders should also be excluded from the proposed trans-Tasman regime. They mainly decide legal rights, duties, powers, capacity (or incapacity) and disabilities. They also affect people who have not been involved in the proceedings and the orders need a high level of supervision. It would be odd for such important or sensitive issues to be enforceable between Australia and New Zealand but not between States/Territories within Australia. Other exclusions from the proposed regime are discussed below under the heading '*Matters not covered by the proposed solutions to Issues 1 to 5*'.[15]

2.12 Under the common law, an Australian or New Zealand court will not, directly or indirectly, enforce a foreign public law. A recent decision in Australia has clarified aspects of the rule there.[16] However, uncertainty over its precise scope remains. The Working Group considers that the rule should not prevent the enforcement of non-money judgments under the proposed trans-Tasman regime. An example might be an injunction obtained by a regulator under a regulatory regime. The public policy exception to enforcement would be an adequate safeguard in appropriate cases. The separate issue of judgments that involve the enforcement of a penal law is dealt with in Part IV.

Option 2 Foreign Judgments/Reciprocal Enforcement of Judgments Acts

2.13 This option involves activating the non-money judgment provisions of the FJA and REJA. Provisions were included in each of these Acts to support a future trans-Tasman scheme for enforcing non-money judgments, but no such scheme was ever finally agreed or put in place.

2.14 It would be relatively easy to implement this option, as the statutory framework is already in place. The relevant courts, the type of proceedings and the kinds of non-money judgments would have to be decided and then specified by Regulation or Order in Council. Injunctions and orders for specific performance could easily be included.

2.15 The main problem with this option is that the basic structure of the FJA and REJA is not appropriate for a trans-Tasman scheme. Also it may result in other countries, without the same close economic relationship, requesting

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[14] This does not include injunctions, the breach of which is punishable as a civil contempt. See Nygh, *Conflict of Laws in Australia* (7th edition, 2002, Lexis Nexis Butterworths, Australia) paragraph 11.10.

[15] We propose that no special provision be made for recognising and enforcing undertakings to a court. These may be enforced by contempt and similar proceedings in the country where they were given. Also, unless the range of permissible undertakings exactly matched the range of orders qualifying under the proposed trans-Tasman regime, enforcing undertakings across the Tasman might have the same effect as enforcing orders excluded from recognition and enforcement under the regime.

[16] *Robb Evans v European Bank* [2004] NSWCA 82 in which the Supreme Court of New South Wales held that regulatory regimes designed to compensate victims (defrauded credit card holders) are not excluded under that rule.

similar arrangements for enforcing judgments. The Working Group therefore does not consider this the best option for trans-Tasman reforms.

Option 3 The Brussels model

2.16 A broad range of judgments (including injunctions, orders for specific performance and restitution of property) can be enforced under the Brussels model.

2.17 This model could easily accommodate the enforcement of non-money judgments across the Tasman. However, it is not the preferred option for the reasons noted in relation to Issue 1.

Preferred option

2.18 The Working Group considers that non-money judgments requiring someone to do, or not do, something should be enforceable across the Tasman. Consistent with the preference for the proposed trans-Tasman regime in response to Issue 1, the Working Group favours including non-money judgments under that regime.

Questions

Q9. Do you agree that non-money judgments should be enforced across the Tasman?

Q10. Are there non-money judgments, other than those mentioned, that should be excluded from enforcement? If so, please explain why.

Q11. Are you aware of any practical difficulties with enforcing non-money judgments under SEPA?

Issue 3: Interim orders not available in support of foreign proceedings

Proposed solution
Appropriate Australian and New Zealand courts should be given authority to grant interim relief in support of proceedings in the other country's courts.

Existing position

3.1 At common law in Australia and New Zealand, a court can grant interim relief only where this is needed to protect an applicant's rights until final judgment is given in proceedings before that court.[17] This means there are two requirements for such relief:

- There must be an underlying substantive cause of action that can be decided in the proceedings.[18]
- The court must have jurisdiction to grant final relief against the defendant. This raises difficult issues where the defendant is overseas.[19]

3.2 Courts have therefore been unwilling to grant interim relief in support of proceedings in a foreign court.

3.3 The issue of interim relief in one country in support of proceedings in another is addressed in Europe under the Brussels Regulation and the Lugano Convention. Applications can be made to a court for temporary protective relief, even if another Member State's court has jurisdiction over the substantive dispute. In the United Kingdom, section 25 of the *Civil Jurisdiction and Judgments Act 1982* (UK) was passed to give effect to this. The Act was later extended to allow interim relief for a wider range of proceedings, including those begun in non-Member States, or those whose subject matter is outside the scope of the Brussels Regulation.[20]

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[17] *Siskina (Cargo Owners) v Distos SA ('Siskina')* [1979] AC 210, as approved in *Australian Competition and Consumer Commission v Chaste Corporation and Others* (No. 1) [2003] 127 FCR 418 at paras 22 and 61.

[18] The reason given in *Mercedes Benz AG v Leiduck* was that the applicable rule of court under which service of process abroad is permitted in cases where an injunction is sought, 'is confined to originating documents which set in motion proceedings designed to ascertain substantive rights' (*Mercedes Benz AG v Leiduck* [1996] 1 AC 284, per Lord Mustill at 302).

[19] Note that an interlocutory injunction may not be granted against a foreign defendant who has not been validly served in proceedings and been given opportunity to challenge the court's purported assumption of jurisdiction (*Altertext Inc v Advanced Data Communications Ltd* [1985] 1 All ER 395; *ANZ Grindlays Bank plc v Hussain Salaheh Hussein Abdul Fattah* (1991) 4 WAR 296). See also *Cook Industries v Galliher* [1979] Ch 439 in which an *Anton Piller* order was made for execution in Paris against a defendant who had entered an appearance in English proceedings.

[20] See the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997, No 302).

Practical problems

3.4 The current inability to obtain interim relief in support of proceedings across the Tasman causes difficulty where the defendant or relevant assets are outside the jurisdiction of the court hearing the substantive claim. Interim orders are only available with any certainty within the jurisdiction in which the substantive claim is to be heard. A party would need to begin substantive proceedings in the other jurisdiction if they wanted to obtain interim relief there even if it is not the appropriate place to decide the matter. Unnecessary cost, inconvenience and delay results from such duplicate proceedings.

3.5 Take the example of matrimonial property proceedings in Australia. Before the hearing begins, the party wanting property transferred to them discovers that the other party has transferred a large sum of money to New Zealand. There is concern that the money will disappear before a final judgment is given. A *Mareva* injunction[21] issued by the Australian Family Court cannot be enforced in New Zealand to freeze assets there, if the person threatening to remove the money is not subject to the court's jurisdiction. Likewise, the New Zealand courts cannot issue a *Mareva* injunction because there are no substantive proceedings in New Zealand.

Options

Option 1 Allow interim relief in support of proceedings in the other country

3.6 This essentially involves adopting the UK approach. Statutory authority would be given to appropriate Australian and New Zealand courts to grant *Mareva* injunctions and other interim relief in support of substantive proceedings in the other country.[22] As in the UK, the statute could provide for extension to enable interim relief in relation to proceedings in other countries also. This option seems both practical and effective. It means that a court in the place where the order will have effect retains control over the interim relief. That court can protect local third parties and any other relevant local interests when deciding on appropriate relief.

Option 2 The FJA/REJA model

3.7 The range of orders that can be recognised and enforced between Australia and New Zealand under the FJA and REJA could be widened to include interim orders, such as *Mareva* injunctions. This could be done through the non-money judgment provisions already available under both Acts (but not implemented).

3.8 However, this has disadvantages and the FJA/REJA legislation has its own limits. More importantly, interim relief requires judicial oversight and

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[21] A *Mareva* injunction prevents a party from removing assets out of the jurisdiction or disposing of assets within the jurisdiction to frustrate enforcement of a judgment.

[22] The range of eligible interim orders may also include, for example, *Anton Piller* orders (to prevent a defendant from destroying key material) and suppression orders (to prevent publication of a report of public court proceedings, including identifying particulars of a party or witness).

discretion, which would not be available under a model where enforcement is based on the registration of judgments. Registering judgments is often as cumbersome as seeking interim relief direct from a local court. It is also important to protect people other than the parties who are affected in the place where the order is to be enforced. Furthermore, interim relief orders often need to be made or changed at short notice. None of these concerns is easily accommodated under this model.

Option 3 The SEPA model

3.9 The range of judgments and other orders that can be recognised and enforced under SEPA includes interim orders such as *Mareva* injunctions. However, the streamlined approach to registration and enforcement of judgments under SEPA means that the court where the judgment is registered for enforcement would have no discretion and little oversight. Also, the particular problems outlined under Option 2 apply equally to a trans-Tasman model based on SEPA.

Preferred option

3.10 The Working Group supports Option 1 to allow a court to grant interim relief in support of proceedings in the other country, given the level of comfort and confidence each country has in the other's legal system. It also suggests that consideration be given to allowing the regime to extend to other countries.

Questions

Q12. Do you agree that an Australian or New Zealand court should be able to grant interim relief in support of proceedings in the other country? If not, please explain why.

Q13. Do you agree that the ability to grant interim relief should be able to be extended to proceedings in other countries? Please provide details.

Q14. Do you have concerns about particular forms of interim relief included in the proposed scheme?

Issue 4: Tribunal orders not enforceable between Australia and New Zealand

Proposed solution

Certain decisions of certain tribunals should be recognised and enforced between Australia and New Zealand under the trans-Tasman regime proposed for court orders. Proceedings of some tribunals could also be served in the other country.

Existing position

4.1 The FJA and REJA only apply to certain 'courts' of the other country, not tribunals.[23] The position is similar at common law. Tribunal orders of one country are therefore not enforceable in the other.

Practical problems

4.2 Many tribunals in Australia and New Zealand decide disputes in much the same way as a court.[24] Their decisions can often be put into effect without being confirmed by a court or any additional procedures. Some tribunals have streamlined procedures which allow them to resolve disputes more cheaply and quickly than traditional courts. As a result, the public use them widely. Perhaps the best known tribunal in New Zealand is the New Zealand Disputes Tribunal.[25] In Australia, at the State or Territory level, tribunals such as the Victorian Civil and Administrative Tribunal (VCAT) handle disputes about purchase and supply of goods and services, discrimination, domestic building works, guardianship and administration, residential and retail tenancies, and consumer credit. For constitutional reasons, Commonwealth tribunals are not relevant to this discussion.

4.3 If orders of widely used tribunals in one country cannot be enforced in the other, plaintiffs may have to bring court proceedings instead (if the court decision can be enforced in the other country). However, this would increase the cost of resolving disputes. If court proceedings are not available, tribunal proceedings would have to begin from scratch in both countries (instead of enforcement proceedings only in the second country). This would also give rise to unnecessary cost and delay.

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[23] This is to be contrasted with the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Amendment Act 1994 (NZ)* which can be extended to tribunals specified by Regulation or Gazette Notice. A tribunal, for this purpose, is one authorised to take evidence on oath or affirmation. None has so far been specified.

[24] A comprehensive register of Australian tribunals is maintained by the Council of Australasian Tribunals. See http://www.coat.gov.au/index.htm. There is a list of New Zealand tribunals at www.justice.govt.nz/tribunals/.

[25] Disputes Tribunals have jurisdiction over claims up to $7,500 (or up to $12,000 by agreement) in contract, quasi-contract or tort.

Options

Option 1 Extend the proposed trans-Tasman regime to tribunal orders

4.4 Tribunal orders could be included in the proposed trans-Tasman regime following the SEPA model, which also applies to tribunals that exercise an adjudicative function. Tribunal decisions can be recognised and enforced between Australian States/Territories provided they are enforceable without a court order.[26] It is irrelevant that the tribunal order must be registered or filed in a court to be enforced. SEPA also allows tribunal proceedings of a certain type and connection to the jurisdiction of issue to be served between States/Territories.[27]

4.5 There are likely to be benefits from applying the proposed trans-Tasman regime to certain tribunals. However, given the number and variety of tribunals in each country, the Working Group prefers a more cautious approach than that suggested for lower courts (under Issues 1 and 2). It suggests extending the scheme only to selected tribunals and specified orders of those tribunals. This would allow each country to decide its level of comfort with particular tribunals of the other country on a case by case basis. With that safeguard, the same rules that relate to enforcing court decisions could apply to tribunal decisions that are covered by the regime.[28] Each tribunal (and its qualifying orders) could be specified by Regulation or Order in Council, allowing for changes over time.

4.6 A tribunal would only be included in the regime if it exercises an adjudicative function and its orders do not need a court order before they can be enforced. The Working Group welcomes your comment on whether any other criteria should apply. For example, since tribunals often have more relaxed rules about service,[29] should this affect whether they can be included?

4.7 Some tribunals do not allow initiating process to be served outside the jurisdiction. The Working Group does not intend the proposed regime to allow service in the other country where this is not already allowed, as this may not always be appropriate. It therefore proposes that tribunals must additionally be designated to allow initiating process to be served in the other country under the proposed regime, in the same way as a court. The question of which tribunals are covered by the regime for service purposes, and which tribunals are covered for enforcement purposes, can then be addressed separately.

4.8 The Working Group is interested in views on whether special rules for trans-Tasman service should be developed for those tribunals designated for service

[26] See the definition of 'judgment' in SEPA.

[27] Section 48 of SEPA.

[28] Under SEPA, tribunals must meet initial criteria before proceedings can be served, whereas no such requirements are set for courts, only the procedures for applying for a stay of proceedings.

[29] Such as allowing documents to be served by leaving them with others at the defendant's place of residence.

purposes. These would apply instead of more relaxed service rules that may apply domestically.

Option 2 The FJA/REJA model

4.9 The FJA and REJA could be amended to cover orders from certain tribunals, as for lower courts. However, for the reasons above (see Issues 1, 2 and 3), the Working Group does not favour the FJA/REJA model.

Preferred option

4.10 The Working Group favours Option 1, that the proposed trans-Tasman regime extend to recognising and enforcing certain decisions of certain tribunals and, where appropriate, allow service of tribunal proceedings in the other country.

Questions

Q15. Should the trans-Tasman regime apply to certain tribunals and certain orders of those tribunals? If not, please give your reasons.

Q16. What criteria should a tribunal satisfy before it can be included in the regime?

Q17. What criteria should its decisions satisfy before being included?

Q18. Should the trans-Tasman regime allow the proceedings of some tribunals to be served in the other country?

- If yes, should special rules be developed for trans-Tasman service of tribunal proceedings? Please give your reasons.
- If not, please give your reasons.

Issue 5: Different common law principles of *forum non conveniens*

Proposed solution

A common statutory test, based on the SEPA model, should be adopted between Australia and New Zealand to allow a person served with proceedings under the proposed trans-Tasman regime to seek a stay of proceedings if the proceedings have not been started in the appropriate forum.

Existing position

5.1 As a matter of private international law, different *forum non conveniens* principles apply at common law in Australia and New Zealand. Forum non conveniens rules are essentially the 'give-way' rules that courts apply to determine which court should hear a dispute. New Zealand applies the test stated by the House of Lords in *Spiliada Maritime Corp. v Cansulex Ltd*[30] (*Spiliada*). *Spiliada* requires a court to decline jurisdiction where there is a more appropriate forum for the trial of the action. On the other hand, Australia usually applies the test adopted by the High Court in *Voth v Manildra Flour Mills Pty Ltd*[31] (*Voth*). *Voth* requires the court to decline jurisdiction only where it is clearly an inappropriate court to decide the dispute. *Voth* is narrower than *Spiliada* in that it only requires the court to consider its own appropriateness to determine the proceedings rather than undertake a comparative exercise with other foreign courts.

5.2 There seems little reason for the courts of each country to apply different, possibly inconsistent, tests to decide jurisdiction. More importantly, it leads to practical problems, given the frequency of trans-Tasman disputes.

Practical problems

5.3 Sometimes two separate claims may be brought at the same time in both countries dealing with the same issues or questions of fact. Applying different *forum non conveniens* rules may mean that neither court is prepared to give way to the other. The Australian court might refuse a stay because it does not consider that Australia is a clearly inappropriate forum (the *Voth* test). A New Zealand court might also refuse to decline jurisdiction because it considers New Zealand to be the more appropriate forum (the *Spiliada* test).

5.4 This is precisely what occurred in *Gilmore v Gilmore*,[32] a case involving matrimonial property proceedings which were heard at the same time in both countries. The case was about the division of property located in New Zealand. Neither court would stay the proceedings before it. Fortunately the

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[30] *Spiliada Maritime Corp. v Cansulex Ltd.* [1987] AC 460.

[31] *Voth v Manildra Flour Mills Pty Ltd* (1990) 97 ALR 124.

[32] In Marriage of *Gilmore* (1993) 110 FLR 311 (Family Court of Australia) and *Gilmore v Gilmore* [1993] NZFLR 561 (NZ High Court).

parties settled their dispute so that a 'race to judgment' did not happen. Otherwise, the party who first obtained judgment would have had the practical advantage of being able to enforce the judgment in the other country.

5.5 The increasing level of trade, commerce, tourism and people moving between the two countries is likely to lead to increased trans-Tasman litigation. This in turn will lead to further inconvenience, cost and uncertainty if the potentially conflicting application of these different tests is not resolved.

Options

5.6 The Working Group proposes that, as between themselves, Australia and New Zealand adopt a common statutory test for deciding which court should 'give way' to the other. The SEPA-based trans-Tasman regime lends itself to this. SEPA allows a defendant to apply for a stay of proceedings if the court of another State with jurisdiction is the appropriate court to decide the matters in issue. A list of factors is taken into account including where the parties and witnesses live, and the law to be applied.[33] This statutory test replaces the *forum non conveniens* rules between Australian States/Territories.

5.7 A consequence of adopting this test is that the Australian *Voth* test would be replaced by the broader 'more appropriate court' test in proceedings involving a New Zealand party.

5.8 This proposal would not limit the jurisdiction of courts (or transfer jurisdiction between Australia and New Zealand), or a plaintiff's freedom to begin proceedings, but it would provide appropriate mechanisms for staying proceedings to enable the defendant to object to the forum if he or she wished.

5.9 For a number of reasons the Working Group does not propose the transfer of proceedings between Australia and New Zealand, as an alternative to a stay. These reasons include the administrative complexity and cost, as well as constitutional limits under Australian law. An application for a stay is most likely to be made relatively early in the proceedings so few steps, if any, should have to be repeated.

5.10 The Working Group suggests one of the factors to be taken into account in considering whether to grant a stay should be whether there is any agreement between the parties about the court or place where proceedings should be heard. These agreements, known as 'choice of court agreements', can be exclusive (where only the chosen court, and no other, has jurisdiction to

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[33] Section 20, SEPA. However, section 20 does not apply to a proceeding in which the Supreme Court of a State is the court of issue. At domestic level within Australia, section 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) provides for the transfer of proceedings in federal jurisdiction between a State or Territory Supreme Court, State Family Court, the Federal Court or Family Court if it appears to the court in which the proceeding is pending that '*it is more appropriate that the relevant proceeding be determined by that [other] Court*'. (Equivalent State and Territory cross-vesting legislation contains transfer provisions in similar form. However, since the High Court decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, it is clear that the legislation cannot operate to transfer proceedings in State, as opposed to federal, jurisdiction to the Federal Court or the Family Court.)

decide particular disputes) or non-exclusive (where the chosen court has jurisdiction but other courts may too). Exclusive choice of court agreements are generally effective in both countries, although the courts have a discretion not to uphold them.

5.11 The existence of a choice of court agreement would, under this proposal, be a factor to be considered in applying the statutory test. Where the parties have agreed on an exclusive forum, the courts are likely to continue to give that choice significant weight, with the result that the choice will almost always be effective. However, there will be circumstances where these agreements should not be effective. An example would be where, in a particular situation, a country does not allow such agreements to exclude the jurisdiction of local courts.

5.12 The Working Group therefore seeks views on whether it would be helpful to provide courts with additional guidance by adding an element to the proposed statutory test. This could require that where the parties have an exclusive choice of court agreement, the court must decline jurisdiction in favour of the chosen court unless the agreement is null and void, inoperative or incapable of being performed.

5.13 The Working Group also notes that a convention on exclusive choice of court agreements has been developed by the Hague Conference on Private International Law. This may need to be taken into account in the proposed regime, if Australia and New Zealand each ultimately decide to become bound by the convention.

5.14 The proposal does not address the related problem of having different jurisdictions applying different 'choice of law' rules. These rules decide the substantive law that applies to the proceedings. In some areas of law, choice of law rules tend to favour the law of the forum.[34] Because of this, the outcome of proceedings may vary depending on where the dispute is decided. Plaintiffs may select a court to exploit this to their advantage. However, making the *forum non conveniens* rules consistent, as proposed, should significantly reduce trans-Tasman forum shopping. This is because one factor to be taken into account in deciding the appropriate court is the law to be applied in the proceedings. Achieving uniform outcomes would require either harmonisation of Australian and New Zealand laws or harmonisation of choice of law rules. Neither is proposed in this paper. The Working Group suggests this be left for future progressive reform.

5.15 A related matter concerns the granting of anti-suit injunctions. These are available at common law to prevent abuse of the court's processes, to protect their integrity once they have begun or where bringing proceedings in a foreign court would be vexatious or oppressive. Under SEPA, anti-suit injunctions cannot be granted on the ground that the court issuing proceedings is not the appropriate forum. This prevents people getting around SEPA on

[34] See Nygh, *Choice of Law Rules and Forum Shopping in Australia* Public Law Review 6 (1995) at 245.

forum grounds, because, as noted above, provision is made for a stay to be granted to resolve the forum question. The Working Group proposes that the limit on anti-suit injunctions on forum grounds be carried over to the proposed trans-Tasman regime. However, it seeks your views on whether courts should keep the power to grant anti-suit injunctions on other grounds.

Preferred option

5.16 The proposed Option integrates well with the proposed trans-Tasman regime recommended for Issues 1 to 4.

Questions

Q19. Do you agree that Australia and New Zealand should adopt a common statutory test instead of the current, potentially inconsistent, forum non conveniens rules?

Q20. Should that common statutory test be based on the SEPA model, which provides a mechanism to stay proceedings not begun in the appropriate forum?

Q21. Should the existing position between Australia and New Zealand be changed to prevent the issue of anti-suit injunctions on grounds relating to forum?

Q22. Do you think that common statutory test should require a court to decline jurisdiction in favour of the chosen court where there is an exclusive choice of court agreement, unless the agreement is null and void, inoperative or incapable of being performed?

Matters not covered by proposed solutions to Issues 1 to 5.

Actions in rem and the Moçambique rule

The Working Group proposes that the suggested solutions to Issues 1 to 5 apply only to actions *in personam* (those that only bind the parties to the action, including those commenced by a regulator), rather than actions *in rem* (which focus on the property in dispute and bind third parties as well).

The Working Group does not propose to address the *Moçambique* rule. This rule means that a court has no jurisdiction over questions about title to, or possession of, immovable property (mainly land and, in Australia, also intellectual property[35]) situated outside the jurisdiction.[36] There are several exceptions to the rule. One exception is that a court can deal with claims about enforcing contractual or personal obligations, or those that are otherwise binding in equity.[37] The *Moçambique* rule has been acknowledged to be difficult to justify except on historical grounds, and neither logical nor satisfactory in the result it produces.[38]

The *Moçambique* rule has already been abolished in New South Wales and partly removed in the ACT. However, it still applies in federal jurisdiction and is applied in other Australian States/Territories and also in New Zealand. Its varying application within Australia makes it premature to recommend its outright abolition between Australia and New Zealand. Consequently, there will be some limits under the proposed trans-Tasman regime on the ability of the more appropriate court to grant full relief, depending on the extent to which this rule applies. The rule will be of lessening importance, however, as domestic reforms progressively abolish it.

Miscellaneous existing schemes

The Working Group considers that certain areas of existing statutory co-operation between the two countries should be excluded from the proposed regime. So too should matters covered by existing or proposed multi-lateral conventions, in order to avoid unnecessary overlap.

Both Australia and New Zealand have family legislation dealing with dissolution of marriage, enforcing maintenance and child support obligations, care, custody and guardianship of children, and adoption.[39] This legislation provides, among other things, for the recognition of overseas orders about foreign adoption and the dissolution of marriage. It also gives effect to multilateral conventions on matters

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[35] *Potter v Broken Hill Proprietary Co Ltd* [1905] ALR 357; *Tyburn Productions Ltd v Conan Doyle* [1990] 1 All ER 909.

[36] *British South Africa Co v Companhia de Moçambique* [1893] AC 602, first accepted in Australia by the High Court in *Potter v Broken Hill Proprietary Co Ltd* [1905] ALR 357 and affirmed most recently in *Atkinson v Atlas Investments Ltd* [2004] NSWSC 63.

[37] *Dagi v Broken Hill Proprietary Company Ltd (No. 2)* [1997] I VR 428, at 433 - 434.

[38] *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508 at 543 – 544.

[39] The *Family Law Act 1975* (Cth) in Australia and in New Zealand the *Family Proceedings Act 1980*, *Child Support Act 1991*, the *Guardianship Act 1968* and the *Adoption Act 1955*.

such as child abduction (*Hague Convention on the Civil Aspects of International Child Abduction 1980*). Between Australia and New Zealand, specific regimes cover child support and child protection orders.[40] Given the specialist nature of these matters, the need for regular court supervision and the level of existing multilateral and bilateral arrangements, the Working Group does not propose new additional arrangements between Australia and New Zealand at this stage.

However, it does propose that final orders for the settlement of matrimonial or relationship property disputes be recognised and enforced between Australia and New Zealand under the proposed trans-Tasman regime.

Each country has legislation dealing with insolvency, winding-up and bankruptcy proceedings that provides, where appropriate, for the recognition of overseas liquidators. Consideration is also being given to adopting the UNCITRAL model law on cross-border insolvency. Given the amount of existing and possible future statutory involvement in these areas, the Working Group proposes that orders under these regimes be excluded from the current proposals.

Proposals in this paper also do not extend to the statutory schemes of co-operation between Australia and New Zealand, such as that prohibiting the misuse of market power in a trans-Tasman market under section 46A of the *Trade Practices Act 1974* (Cth) and section 36A of the *Commerce Act 1986* (NZ).

Questions

Q23. Do you agree with these additional proposed exclusions from the trans-Tasman regime?

Q24. Are there other proceedings or orders that you think should be excluded? If so, please explain why.

[40] In Australia see, for example, the *Child Support (Assessment) (Overseas-Related Maintenance Obligations) Regulations 2000*. In New Zealand, see the *Child Support (Reciprocal Agreement with Australia) Order 2000* and Part 3A of the *Children, Young Persons and Their Families Act 1989.*

Part III: Trans-Tasman evidence regime and use of technology

Introduction to trans-Tasman evidence regime

The trans-Tasman evidence regime is found in the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Amendment Act 1994* (NZ). It has two components:

- subpoenas issued by a court in one country can be served on a witness in the other. (A subpoena is a document that requires a person to give evidence, or produce a document or thing, or both.) The witness can be required to travel to give the evidence in the other country, or to give the evidence from their own country by video link or telephone.

- evidence can be taken, or submissions made, from the other country by video link or telephone.

The regime applies to a range of courts in each country.[41] It can also be extended to certain tribunals as if they were courts. However, to date, no tribunals have been included.

A subpoena can be issued in any proceeding other than criminal or family proceedings.[42] However, it can only be served in the other country with the leave of a judge of a higher court.[43] Factors taken into account in granting leave include the importance of the evidence and whether it could be obtained in another way without significantly greater cost and with less inconvenience to the witness.

A witness on whom a trans-Tasman subpoena has been served can apply to set it aside. The application is made to the court which granted leave to serve the subpoena. The subpoena can be set aside if, for example, complying with it would cause hardship or serious inconvenience. If the witness must give evidence in person in the other country, a subpoena can be set aside where the witness does not have travel documents or may be prosecuted for a criminal offence in that country or could be detained there to serve a sentence.

If the person giving evidence agrees, evidence can be taken or submissions heard by video link or telephone in any proceeding (including criminal proceedings).

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[41] Under the Australian legislation, the Australian courts to which the regime applies are a federal court or a prescribed State or Territory court. Different State or Territory courts are prescribed for different purposes. The New Zealand legislation applies to any New Zealand court.

[42] New Zealand has amended the Evidence Amendment Act 1994 to remove the exclusion of family proceedings. This amendment will only come into force if Australia makes a mirror amendment. Australia is currently considering the possibility of a mirror amendment.

[43] In Australia, if the proceeding is in a higher court, the leave of a judge of that court is required. If the proceeding is in a lower court, then the leave of the Federal Court, or the Supreme Court of the relevant State or Territory is required. In New Zealand, leave of the High Court is required.

Issue 6: Leave requirement for trans-Tasman service of subpoenas

Proposed solution

Keep the leave requirement for issuing subpoenas under the trans-Tasman evidence regime to protect against inappropriate use of the regime.

Allow a judge of the relevant lower court to grant leave to issue a trans-Tasman subpoena in civil proceedings before that lower court (or tribunal).

Existing position

6.1 Subpoenas cannot be served under the trans-Tasman evidence regime without the leave of a judge of a higher court.

Practical problems

6.2 The existing position requires a separate leave application to a higher court for proceedings before a lower court. This increases cost and complexity, as well as potential delay.

6.3 Ten years after the evidence regime began, it is timely to reconsider if there is still a need for a higher court judge to grant leave before a subpoena issued by a lower court can be served in the other country.

Preferred option

6.4 The leave requirement protects against the inappropriate use of a subpoena against a witness in the other country. It was considered an important safeguard when the regime was originally introduced and the idea of serving a subpoena in another country was relatively new. The Working Group agrees that leave of a judge should be required but questions the need for a higher court judge to grant leave for all subpoenas.

6.5 The requirement for a witness to answer an overseas subpoena and appear in person before an overseas court (or at least appear by video or telephone link) is more burdensome than a requirement to appear before a domestic court. There is also potential for misuse to harass or deliberately inconvenience a witness. This may be more likely in family proceedings or criminal proceedings (see Part IV below). However, the possibility exists in any kind of litigation. The Working Group proposes that the leave requirement for issuing a subpoena under the trans-Tasman evidence regime be kept to protect against inappropriate use of the regime.

6.6 However, the Working Group considers that something should be done to address the cost, inconvenience and delay that may occur by having to apply to a higher court. It therefore proposes that leave to serve a trans-Tasman subpoena in civil proceedings should be able to be granted by a judge of a lower court in proceedings before that lower court, or before a tribunal.

Questions

Q25. Do you agree that the leave requirement should be kept?

Q26. Do you agree that the leave of a lower court judge, rather than a higher court judge, should be required for proceedings before a lower court?

Q27. Do you agree that the leave of a lower court judge, rather than a higher court judge, should be required for proceedings before a tribunal (assuming some tribunals are included under the trans-Tasman subpoena regime)?

Issue 7: Court appearance by video link or telephone

Proposed solution

An applicant for a stay of civil proceedings under the proposed trans-Tasman regime, and their counsel, should have the right to appear remotely, with the court deciding whether this is done by telephone or video link.

For other court appearances in civil proceedings, a party residing in the other country should be allowed to appear by telephone or video link with leave of the court. Their counsel would also be able to appear remotely with leave, provided they have the right to appear before that court.

Existing position

7.1 Although the Federal Court of Australia and the New Zealand High Court have jurisdiction to take evidence from any overseas country by video link or other technology,[44] between Australia and New Zealand the taking of evidence and making of submissions in this way is governed by the trans-Tasman evidence regime.

7.2 The trans-Tasman evidence regime provides that counsel in the place from which evidence is to be given or submissions made, are entitled to examine, cross-examine or re-examine a witness whose evidence is being given by video link or telephone. Counsel can also make submissions by video link or telephone. Participants in those proceedings (judge, barrister, solicitor and witnesses) are given the same privileges, protection and immunity in connection with evidence taken or submissions received by video link or telephone as would be available in the country from which the evidence is being taken, or the submissions received.

Practical problems

7.3 The trans-Tasman evidence regime uses technology to reduce the need for witnesses to travel to the other country to give evidence. However, the extent to which this option is available for other appearances is not clear. Although the trans-Tasman evidence regime applies to the taking of evidence and the making of submissions, the Working Group is only aware of it being used where witnesses are giving evidence.

7.4 More widespread use could be made of technology to enable remote court appearances in civil proceedings by parties and counsel. This would be a practical way of reducing the cost and inconvenience of physical attendance at court in trans-Tasman litigation. This has already been proposed in Issue 1 as

[44] Sections 47A and 47B of the *Federal Court of Australia Act 1976* (Cth) and Rule 496 of the High Court Rules (NZ).

a way of dealing with applications for a stay of proceedings where proceedings are served in the other country.

Preferred option

7.5 The Working Group sees benefits in a regime specifically allowing parties and counsel to appear by video link or telephone, as well as witnesses.[45] The existing trans-Tasman evidence regime would then be confined to proceedings in which the technology is used for witnesses giving evidence.

7.6 The Working Group proposes that parties applying for a stay of proceedings under the proposed trans-Tasman regime should be able to appear from the other country using video link or telephone. However, it considers that the court should decide the particular technology on a case by case basis, taking into account matters such as the nature of the appearance and the relative availability of different technologies.

7.7 The Working Group would also like the proposed regime to facilitate greater use of technology for other court appearances in trans-Tasman civil litigation. However, the court should approve the use of technology in each particular situation to make sure it is appropriate. A range of factors would need to be taken into account, including convenience and cost, the nature of the appearance and the availability of the technology.

7.8 Where a party wishes to appear in person, the Working Group proposes that they be able to do so remotely, using video or audio technology, with leave of the court. However, the more likely situation is that a party will not want to appear remotely in person but by counsel. If counsel are to appear more regularly by video link or telephone, there may be potential to cut across current arrangements for regulating the legal profession, and the operation of the trans-Tasman mutual recognition regime. The current trans-Tasman evidence regime was implemented prior to the trans-Tasman mutual recognition arrangement.

7.9 Mutual recognition enables counsel registered in one place to obtain registration in another without having to satisfy additional local requirements. Without registration under the mutual recognition regime, counsel appearing by telephone or video link might not be subject to effective professional supervision. This issue could be addressed by requiring counsel to have the right to appear before the court hearing the proceeding before they can seek leave to appear remotely.

7.10 Statutory provision would be needed to confirm that participants who appear remotely under this regime have the same privileges, protection and immunities as they have in court proceedings in their own country.

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[45] The Working Group proposal is confined to judicial proceedings and not alternative dispute resolution. These concerns do not arise for arbitration or other forms of alternative dispute resolution as the parties can agree on appropriate arrangements to deal with these matters.

Questions

Q28. Do you agree that parties and counsel should be able to appear as of right by telephone or video link, subject to court approval of the method, when applying for a stay of civil proceedings following service under the proposed trans-Tasman regime?

Q29. Do you agree that, in other situations in civil proceedings, parties and counsel who have the right to appear before the court should be able to appear by telephone or video link with leave of the court?

Q30. Do you think that a party or counsel should be able to appear as of right in other civil proceedings? Please indicate in what circumstances you consider this should happen and your reasons.

Q31. Do you agree counsel should be required to have the right to appear before the court hearing the civil proceedings (through registration under the trans-Tasman mutual recognition arrangement) before they can seek leave to appear remotely before that court?

Part IV: Civil penalties, fines and subpoenas in criminal proceedings

Introduction

This Part of the paper focuses on enforcing judgments given in civil pecuniary penalty proceedings and enforcing certain criminal fines. It also puts forward a proposal for taking evidence in criminal proceedings. The Working Group does not propose to deal with trans-Tasman service of criminal proceedings. This is significantly different from service of civil proceedings. For one thing, neither country asserts jurisdiction to serve criminal proceedings on defendants out of its jurisdiction. Instead, where a defendant is overseas, extradition is available to secure his or her return if the offence is a serious one.

Another important difference is the process that follows non-appearance by the defendant. In civil proceedings, non-appearance can result in judgment being entered by default. In criminal proceedings, a defendant is made to appear if he or she does not do so voluntarily. While there are rules under SEPA enabling this to occur, the Working Group believes that, in the trans-Tasman context, this is best considered in a future project looking at improved trans-Tasman co-operation in criminal matters.

The Working Group also does not propose to deal with the enforcement of certain regulatory orders (such as community service and probation orders) that can be made in Australia under particular statutes. The nature of these orders makes them inappropriate for enforcement on a cross-border basis.

Issue 8: Enforcing civil pecuniary penalty orders

Proposed solution
A civil pecuniary penalty order made in one country should be enforceable in the other as a civil judgment under the proposed trans-Tasman regime. Either country could exclude particular pecuniary penalty regimes in the other country from enforcement.

Existing position

8.1 Both Australia and New Zealand allow courts to impose civil pecuniary penalties for breach of certain regulatory requirements. Examples include breaches of the restrictive trade practices provisions of the *Commerce Act 1986* (NZ) and the *Trade Practices Act 1974* (Cth). Significant civil penalties can often be imposed. Civil penalty regimes are more common in Australia, but are being used increasingly in New Zealand.

8.2 Proceedings seeking civil penalties are civil proceedings and subject to the civil evidential burden ('the balance of probabilities'). In Australia, civil penalty proceedings are brought on behalf of the Commonwealth by a Commonwealth public official. In New Zealand, they are brought on behalf of the Crown by the Chief Executive of a Government Department, or by a designated agency such as the Commerce Commission.

8.3 A foreign judgment cannot be registered under the FJA or the REJA if it is for a fine or other penalty. Nor are these judgments enforceable at common law.

8.4 Although the courts do not appear to have considered the matter, it seems that a civil pecuniary penalty order would be refused registration under the FJA/REJA on the grounds that it is a penalty.

Practical problems

8.5 A number of important factors are relevant in the trans-Tasman regulatory environment. These include:

- the existence of integrated markets
- common market participants in both countries
- mutual recognition regimes for goods and occupations under the Trans-Tasman Mutual Recognition Arrangement (TTMRA), and
- substantial convergence of regulation in areas such as food standards and product safety standards.

8.6 As between Australia and New Zealand, the risk of regulatory arbitrage and exploitation of enforcement barriers gives both Australia and New Zealand an interest in the integrity of trans-Tasman markets. This mutual interest extends to the effective enforcement of each other's regulatory regimes such as those relating to competition law and security offerings, and preventing those regimes from being undermined by people in the other country. This interest is strengthened by the level of economic integration between the two countries and the signalled move to a single economic market.

8.7 Civil pecuniary penalties play an important role in encouraging compliance with a regulatory regime. If a civil penalty cannot be enforced because the defendant and the defendant's assets are in the other country, the effectiveness of that regulatory regime is reduced.

8.8 For example, suppose the chief executives of two New Zealand companies enter into a price-fixing arrangement in NZ in relation to their Australian customers. This arrangement breaches the *Trade Practices Act 1974* (Cth). The Australian Competition and Consumer Commission (ACCC) serves civil pecuniary penalty proceedings on each chief executive in New Zealand. The chief executives are represented in the proceedings. However the civil

pecuniary penalty orders that result are not enforceable against the chief executives in New Zealand where they reside and have their assets.

Options

8.9 The trans-Tasman regime outlined in Part II could apply to civil pecuniary penalty orders so that a civil pecuniary penalty order would be enforceable in the same way, and subject to the same requirements, as any other civil judgment.

8.10 There are 2 ways this option could be put in place.

Broad coverage

8.11 It could apply to *any* civil pecuniary penalty order from Australia or New Zealand. This would be consistent with the treatment of tax judgments - a tax judgment of any kind from one country is enforceable in the other. Broad coverage would also avoid anomalies created by including some regimes but not others. It would remove the incentive to skip to the other country to get beyond the reach of a regulatory regime. There would also be no need to keep a list of the regimes covered.

8.12 On the other hand, a mutual interest will not exist for every regulatory regime that imposes a civil penalty, so the underlying rationale for enforcement would not apply.

Narrow coverage

8.13 The option could be limited to civil penalties in certain statutes, or certain provisions in those statutes. The list could be added to from time to time.

8.14 This approach is consistent with the proposal below for criminal fines (civil pecuniary penalties are often seen as closely related to criminal penalties). It would allow an incremental approach and for the scheme to focus on those regulatory regimes where there was sufficient mutual interest to justify inclusion.

8.15 On the other hand, this approach is inconsistent with the treatment of tax judgments and gives rise to the possibility of anomalies. Maintaining an up-to-date list of statutes or provisions covered could also be difficult.

Other issues

8.16 The Working Group recognises that allowing civil pecuniary penalties imposed in one country to be enforced in the other is likely to raise concerns. Some may see it as infringing sovereignty to allow laws with a punitive element from one country to be enforced in another. However, the mutual interest in enforcing these regimes seems to outweigh that of maintaining barriers to enforcement on sovereignty grounds. The Working Group is persuaded that broad coverage of civil penalties orders is warranted.

8.17 If the broad approach is taken, the Working Group considers that each country should be able to exclude a particular pecuniary penalty scheme from being enforceable by specifying it in regulations. A 'negative' list of this sort would allow schemes to be excluded on public policy grounds, or because of the particular domestic focus of the regulatory regime. The public policy exception to enforcement (see Issue 1) would also be an additional important safeguard.

Preferred option

8.18 The Working Group supports making civil pecuniary penalty orders from one country enforceable in the other under the proposed trans-Tasman regime. To address concerns about public policy issues, particular pecuniary penalty regimes could be excluded from the scheme by regulation.

Questions

Q32. Do you agree that any civil pecuniary penalty order imposed in one country should be enforceable in the other? Do you agree that there should be the option of excluding particular pecuniary penalty regimes from the regime by regulation?

Q33. If you think enforcement should be limited to certain civil pecuniary penalty orders only, please explain your reasons and indicate which penalty orders you think should be included.

Q34. Are there any safeguards or limits on enforcement, other than public policy grounds, that you think are needed?

Issue 9 – Enforcing fines for certain regulatory offences

Proposed solution
Fines imposed in one country for criminal offences under certain regulatory statutes should be enforceable in the other, in the same way as civil judgment debts. The regulatory statutes would include:

Australia

Trade Practices Act 1974 (Cth)
Corporations Act 2001 (Cth)
Consumer protection and product safety legislation at State and Territory level
Occupational regulation legislation at State and Territory level

New Zealand

Commerce Act 1986
Companies Act 1993
Fair Trading Act 1986
Securities Act 1978
Securities Markets Act 1988
Takeovers Act 1993
Financial Reporting Act 1993
Credit Contracts and Consumer Finance Act 2003
Occupational regulation legislation

Existing position

9.1 The FJA and REJA both define judgment as one 'given or made by a court in any civil proceedings, or ……in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party'. Orders to pay a criminal fine fall outside this definition. This is reinforced by the fact the FJA and REJA only apply to judgments for a sum of money that is *not* a fine or other penalty. This is also a ground for not enforcing a judgment at common law.

Practical problems

9.2 The matters discussed under Issue 8 (eg integrated markets, mutual recognition of activities and interest in the integrity of markets and regulatory regimes) are equally relevant to criminal fines imposed under those regulatory regimes. Criminal sanctions are intended as a deterrent and to ensure compliance with the law. Where offences arise in regulatory statutes, such as the fundraising provisions in the *Corporations Act 2001* (Cth) or the *Securities Act 1978* (NZ), there is potential for unscrupulous persons to take advantage of the fact that fines cannot be enforced, for example, by skipping to the other country.

9.3 By way of illustration, S Ltd, an Australian-based company, offers an investment scheme to New Zealanders. There is a misleading statement in its offer documents. S Ltd is registered as an overseas company in New Zealand and, as required, has appointed an agent to accept service in New Zealand. A criminal prosecution is taken under the *Securities Act 1978* and a fine is imposed. It is not possible to recover the fine in New Zealand because S Ltd has moved any remaining assets out of New Zealand, back to Australia.

Options

9.4 The Working Group does not propose that all criminal fines should be enforceable in the other country. The reason for enforcement is the mutual interest in the integrity and effectiveness of certain of each other's regulatory regimes. The guiding principle for enforcement on a trans-Tasman basis is that the fine arises from a regulatory regime impacting on the effectiveness, integrity and efficiency of trans-Tasman markets, or confidence in those markets. Using this yard-stick, areas such as securities offerings to the public, competition law, consumer protection and product safety provisions, occupational regulation, insider trading and prudential regulation are clear candidates. There may also be others. As a start, the Working Group has identified the following list of statutes:

Australia

Trade Practices Act 1974 (Cth)
Corporations Act 2001 (Cth)
Consumer protection and product safety legislation at State and Territory level
Occupational regulation legislation at State and Territory level

New Zealand

Commerce Act 1986
Companies Act 1993
Fair Trading Act 1986
Securities Act 1978
Securities Markets Act 1988
Takeovers Act 1993
Financial Reporting Act 1993
Credit Contracts and Consumer Finance Act 2003
Occupational regulation legislation

9.5 The list could be added to over time. Offences covered would include those where a fine and/or imprisonment could be imposed. However, the regime would only be available where a fine had been imposed.[46]

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[46] Note that for offences where the penalty is imprisonment of a certain level, steps can be taken to extradite the alleged offender under the Extradition Act 1988 (Cth) and the Extradition Act 1999 (NZ). It is not proposed to consider sentences of imprisonment, in the context of this project.

9.6 The Working Group has noted, however, that some of the Acts listed above also regulate industry issues that only arise in the relevant country. For example, the Commerce Act 1986 (NZ) includes a Part which provides for regulation of electricity line companies, and the Trade Practices Act 1974 (Cth) contains provisions dealing with the introduction of GST and the regulation of the Australian telecommunications industry.

9.7 Given their domestic focus, these industry specific parts would not appear to have sufficient trans-Tasman implications to warrant inclusion. It seems highly unlikely that sanctions imposed on a New Zealand electricity lines company by a New Zealand court, or on an Australian telecommunications company by an Australian court, would need to be enforced in the other country. As a consequence, the Working Group is interested in whether the proposal should exclude the domestic industry specific parts of the legislation set out above.

9.8 The Working Group acknowledges there may be merit in considering whether criminal fines generally should be enforceable across the Tasman. However, this is best considered in the context of future work on increased co-operation in the criminal justice area.

9.9 The Working Group has considered two options to deal with the problem of enforcing fines imposed by regulatory statutes:

Enforcement as a criminal fine

9.10 A criminal fine from one country could be recovered by the other as if the fine had been imposed in that country. This means the coercive powers available to enforce criminal fines in each country would be available to enforce fines from the other.

9.11 This raises two issues. The first is the appropriateness of using the coercive enforcement powers of one country to enforce the criminal sanctions of the other. This may be seen as infringing the sovereignty of the country undertaking enforcement. The second issue is that it would be problematic to treat these fines as local fines without additional requirements. Additional safeguards would be needed to protect defendants, and each country would need the power to refuse enforcement in appropriate cases. From a practical point of view, new operational systems might also be needed to track trans-Tasman fines through the enforcement system.

Enforcement as if a civil judgment debt

9.12 A fine from one country could be enforced in the other in the same way as a civil judgment debt. There is precedent for this approach in Part 5 of the *Securities Act 1978* (NZ), which enables a judgment from a designated country requiring the payment of a pecuniary penalty (whether criminal or civil) to be registered. It is then enforced in the same way as a civil judgment debt.

9.13 This option is somewhat unconventional. However, there are clear advantages. First, the country where the fine is to be enforced does not have to use its coercive criminal fine collection powers to collect the other's fines. Secondly, the country whose fine is to be enforced can decide whether this is justified in terms of cost and deterrence, since it will begin enforcement proceedings and bear their cost (recoverable on enforcement).

9.14 Rather than creating a separate regime for criminal fines, it makes sense to include the relevant fines as judgments enforceable under the proposed trans-Tasman regime. The public policy exception to enforcement would apply and the defendant could seek a stay of enforcement to challenge the fine in the original court. Because of the sensitivity of enforcing criminal fines, the Working Group proposes that they could only be registered for enforcement with a higher court.

9.15 The Working Group is conscious that this proposal is likely to raise concerns, even if the mechanisms for enforcing a civil judgment debt are used. In particular, there will be concern about infringing sovereignty. However, selecting criminal offences in regimes where there is a strong mutual interest in effectiveness and integrity in our view justifies removing this traditional barrier to enforcement.

9.16 There may also be some nervousness that this proposal may result in activity in one country being regulated by the other. The way to address this is to ensure a real connection between the country imposing the criminal fine and the conduct amounting to the offence. This could be done by specifying the statutes to which enforcement applies. The circumstances in which fines would be enforced in the other country could also be specified.

Preferred option

9.17 The Working Group's preferred option is to allow fines imposed under certain statutes (or certain offences in those statutes) to be enforced under the proposed trans-Tasman regime in the same way as civil judgment debts, with additional safeguards. Although this extends traditional concepts, it seems the simplest and least problematic solution.

Questions

Q35. Do you agree that criminal fines imposed for certain regulatory offences should be enforceable in the other country as if they were a civil judgment debt? If not, please explain your reasons.

Q36. What safeguards or limits to enforcement do you think are needed?

Q37. Do you agree with the suggested list of statutes? Are there any you think should be left out? Are there any additional statutes that should be included?

Q38. Should the domestic industry-specific parts of listed statutes be excluded?

Issue 10: Extending trans-Tasman subpoenas to criminal proceedings

Proposed solution

Subpoenas in criminal proceedings should be served across the Tasman with the leave of a judge under the *Evidence and Procedure (New Zealand) Act 1994* (Cth) and the *Evidence Amendment Act 1994* (NZ).

Existing position

10.1 Currently subpoenas cannot be issued under the trans-Tasman evidence regime[47] in criminal proceedings. Although evidence can be taken by video link or telephone in criminal proceedings, in practice, this only works if the witness co-operates. However, if a subpoena could be served in the other country, it could require the witness to attend at a court or elsewhere in the other country to give evidence by video link or telephone.

Practical problems

10.2 Not being able to subpoena a witness in criminal proceedings means that, if the witness is unwilling, evidence can only be obtained under less convenient procedures such as the Mutual Assistance in Criminal Matters scheme in each country. A mutual assistance evidence request is actioned at the discretion of the Attorney-General. A local judge takes the evidence and provides a written record to the court making the request.

Preferred option

10.3 If trans-Tasman subpoenas could be issued in criminal proceedings, witnesses could be made to give evidence by telephone or video link, or in person before the court. This would be a relatively simple procedure. It would let the court actually hear and see the testimony, and help it to assess credibility. The Attorney-General need not be involved.

10.4 The protections applying to the service of trans-Tasman subpoenas would provide a level of assurance if criminal proceedings were covered.[48] These include the need for leave from a judge, who must take into account matters such as the significance of the evidence and whether it could be obtained another way without significantly more cost and with less inconvenience to the witness. Witnesses can also apply to set aside subpoenas served on them if complying would cause hardship and inconvenience.

10.5 The Working Group believes that extending the trans-Tasman evidence regime to criminal proceedings would be beneficial as the process is simple and relatively convenient. The protections in the scheme offer sufficient

[47] This regime is explained in Part III.
[48] See Part III for an explanation of these protections.

safeguards against misuse. The Working Group therefore proposes extending the trans-Tasman subpoenas regime to criminal proceedings.

Questions

Q39. Do you agree that the exclusion of criminal proceedings from the trans-Tasman evidence regime should be removed? If not, please explain your views.

Issue 11: Regulator co-operation

Comment invited

11.1 The Working Group's Terms of Reference raise the question of co-operation between regulators. There is already a high level of co-operation between Australian and New Zealand securities regulators. The Australian Productivity Commission released a Research Report in December 2004 (*Australian and New Zealand Competition and Consumer Protection Regimes*) looking at the possibility of greater co-operation, coordination and integration of competition and consumer protection regimes in the two countries.[49] Work is currently being undertaken on increasing co-operation between competition regulators. In these circumstances, there is no significant benefit in considering the matter further in this paper. However, the Working Group would welcome your comment on whether there are other regulatory areas where further trans-Tasman co-operation would be desirable and what form it might take.

[49] The scope of existing cooperation in the financial services sector is discussed in Section D.4 of the Research Report.

APPENDIX 1

The SEPA model

The *Service and Execution of Process Act 1992* (Cth) (SEPA) overrides State law with respect to service between Australian States/Territories or execution of process and judgments covered by the Act. The key features of SEPA for civil proceedings are:

- Service of initiating process, from any State or Territory court, is allowed on a defendant across all Australian jurisdictions without leave (since inter-state service has the same effect as service in the place of issue).
- The plaintiff does not have to establish any particular connection between the proceedings and the forum before service can go ahead in another State (although the rules of court of each jurisdiction set out the requirements for issuing initiating process).
- The defendant can challenge the jurisdiction of the court of issue by applying for a stay of proceedings. This may be granted if the court of another State with jurisdiction is the appropriate court to decide the matter. A list of factors is taken into account, including where the parties and witnesses live, where the subject matter of the dispute is located and the law to be applied. However, the stay provisions of SEPA do not apply to proceedings in which the Supreme Court of a State is the court of issue, because the action may be transferred to a Supreme Court of another State under cross-vesting laws. These apply a substantially similar test to the question of whether proceedings should be transferred.
- A judgment from one State can be registered in another. Once registered, a judgment can be enforced in the State where it is registered. A registered judgment has the same force and effect and gives rise to same enforcement proceedings as a judgment of the court where it is registered.
- A judgment can only be varied, set aside or appealed in the court of origin. The court where a judgment is registered can order that enforcement not be commenced or be stayed for a period to let an application for relief be made to the court of origin.

Service

- For service to be effective:
    - a prescribed notice must be attached to the initiating process
    - a person must be served according to the law of the State of issue

- a company, registered body, or other body corporate must be served according to particular rules.

- If the person served ('the defendant') is required to enter an appearance under the law of the place of issue, they must do so within 21 days, or the period under the law of the place of issue, whichever is longer. Any appearance must provide an address for service within Australia.

- The defendant can apply to the court for a stay of proceedings on the basis that a competent court of another State is the appropriate court to decide the matter. In deciding whether another court is appropriate, the factors taken into account include:

  - the places of residence of the parties and witnesses

  - where the subject matter of the proceedings is located

  - the financial circumstances of the parties

  - any agreement between the parties about the court or place where proceedings should be commenced

  - the most appropriate law to apply in the proceedings, and

  - whether a related or similar proceeding has been commenced against the defendant or another person.

  The fact that proceedings were commenced in the place of issue is not a relevant factor. The court is still able to stay proceedings on other grounds (for example, because they are vexatious or oppressive).

- The application may be dealt with without a hearing, unless a party objects. The hearing can be conducted by video link or phone.

- Courts outside the State of issue are not able to restrain a party on the basis that the place of issue is not the appropriate forum.

Enforcing judgments

- There is a simple process for enforcing civil judgments between States/Territories.[50]

- A sealed copy of the judgment is lodged with the '*appropriate court*' in the State in which it is to be enforced (it can be faxed). On lodgement, the judgment must be registered.

- The '*appropriate court*' is decided as follows:

[50] The term '*judgment*' refers to a judgment or order in a civil proceeding for payment of a sum of money or requiring someone to do or not do an act or thing (not being an order under proceeds of crime legislation, other than a pecuniary penalty order) and includes awards in the course of a criminal proceedings for compensation of victims of crime.

  - If the court that issued the judgment is a Supreme Court, then the appropriate court is the Supreme Court of another State.

  - In other cases, the appropriate court is the court of the State in which the judgment is to be registered that is competent to grant the relief awarded in the judgment.

  - If there is more than one such court, the appropriate court is the court of more limited jurisdiction.

  - If there is no court, the Supreme Court is the appropriate court.

- A registered judgment has the same force and effect, and can give rise to the same enforcement proceedings, as a judgment of the court in which it is registered. The only requirement for enforcement is that the judgment must, at the time that enforcement proceedings are taken, be able to be enforced by a court in the State of origin.

- The court in which a judgment is registered does not have a wider role beyond enforcement. Applications to set aside, vary or discharge the judgment must be made to the original court, not the court where it is registered.

- SEPA overrides the rules of private international law applied by the court in which a judgment is registered, which might otherwise provide a basis for refusing to enforce judgments from outside the jurisdiction.

  The full text of SEPA can be viewed on-line at:
  http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/249F8097C09A8575CA256F710050A5B4?OpenDocument

APPENDIX 2

The Brussels model

The Brussels model applies to *in personam* claims[51] in civil and commercial matters.[52] It regulates the jurisdiction of courts of first instance by setting out the circumstances in which a court can assume jurisdiction over a proceeding, based on the defendant's domicile. There are also special jurisdictional rules for certain types of proceedings. These apply even if the defendant is domiciled in another jurisdiction. Some of these rules give non-exclusive jurisdiction to a court and others confer exclusive jurisdiction. Whether a court can assume jurisdiction under a special rule involves deciding whether the proceeding is of a particular kind. Then any connecting factors specified in the rule must be applied. If, as is quite possible, courts in more than one State have jurisdiction, the model regulates priority between them on the basis that the court where proceedings first began has jurisdiction.

The model has very simple procedures for recognising judgments within its scope. Since the original assumption of jurisdiction is regulated, the resulting judgment can be enforced throughout the EU without further requirements. There are limited exceptions, for example a judgment does not have to be recognised where it is contrary to public policy in the State of recognition.

The following rules determine when a court can exercise jurisdiction:

- The primary basis of jurisdiction is the domicile of the defendant. 'Domicile' is not defined but left to national law to determine. In the UK implementing legislation,[53] 'domicile' means residence in, and a substantial connection with, the UK. A substantial connection is presumed after three months' residence but this can be rebutted.

- There are special jurisdictional rules for certain types of proceedings. For example, courts in the place where contractual obligations are performed have jurisdiction over contractual disputes.

- There are areas of exclusive jurisdiction that displace the domicile rule. For example, the court of the place where immovable property (principally land) is situated has exclusive jurisdiction over proceedings concerning rights *in rem* in, or tenancies of, that property.

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[51] An *in personam* claim is one brought against a person to do a particular thing (such as pay a debt) or not do something.

[52] This does not extend to revenue, customs or administrative matters. It also does not apply to the status or legal capacity of natural persons, wills or succession, bankruptcy, winding up of insolvent companies or legal persons, social security or arbitration.

[53] *Civil Jurisdiction and Judgments Act 1982*.

- The assumption of jurisdiction is mandatory and a court which has jurisdiction under the rules must accept jurisdiction. As a consequence, leave to serve outside the jurisdiction is not appropriate. There is also no scope to apply *forum non conveniens* rules[54] between Contracting States.

- A defendant who disputes jurisdiction can apply for an order that the court has no jurisdiction.

- In those cases where there is more than one court with exclusive jurisdiction or proceedings are commenced in courts in different States, the court where proceedings were first begun deals with the matter first. The other court(s) must stay proceedings until the jurisdiction of the first court is established. Once that jurisdiction is established, the second court must decline jurisdiction.

  A judgment given by a court of a Contracting State has the same force and effect, when it is registered in the appropriate court where it is to be enforced, as a judgment of the enforcing court. The same enforcement proceedings can be taken as for a judgment of the enforcing court.

  For more information about the Brussels Regulation see:
  http://www.europa.eu.int/scadplus/leg/en/lvb/l33054.htm (summary)
  http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf (text)

[54] *Forum non conveniens* rules are the give-way rules that courts apply where another court could also hear a proceeding.