



Trans-Tasman Proceedings Act 2010

Fact sheet - Trans-Tasman Proceedings Act 2010

Determining where to hear a case

If a court case has been filed against you in New Zealand, you can apply to the New Zealand court to have the case 'stayed' (suspended) if you believe it would be more appropriate to have the case heard in Australia.

For Example: Bob has been contracted to print books in Sydney and send them to a client in Auckland. The contract was negotiated and concluded in Australia, the law governing the contract is Australian law and all witnesses to the printing of the books are located in Australia. A dispute arises under the contract and Bob is sued by his client in a court in Auckland. Bob can apply (appearing remotely) to the New Zealand court to have that proceeding 'stayed' and argue that it would be more appropriate for the proceedings to be held in Australia.

What is *forum non conveniens*?

The test that the court applies in deciding whether to stay a proceeding so it can be heard in a more appropriate forum (court) is generally known as the *forum non conveniens* test. Article 8 of the agreement provides a uniform statutory test that both Australian and New Zealand courts must apply in considering a *forum non conveniens* application. This test is reproduced in Sections 17-23 of the [Trans-Tasman Proceedings Act 2010](#) (Aus) and Sections 22-29 of the [Trans-Tasman Proceedings Act 2010](#) (NZ).

How do I apply to stay a New Zealand court case?

If you are looking to have a New Zealand court proceeding stayed, you must make an application under the New Zealand legislation. An application can be made using Form 2 in the [Trans-Tasman Proceedings Regulations and Rules 2013](#) (NZ).

The court cannot consider a *forum non conveniens* question unless a defendant has made a formal application under s22 of the [Trans-Tasman Proceedings Act 2010](#) (NZ)). Generally, an application from a defendant has to be within 30 working days from when they have been served with an initiating process (officially notified they are being sued).

How does the test work?

A New Zealand court can only order a stay of a proceeding where it is satisfied that an Australian court has the jurisdiction to determine the matter in dispute and is the more appropriate court to determine those matters. If you are applying for a *forum non conveniens* stay of proceedings, you will need to get legal

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advice to ensure the court you are looking to have the dispute moved to has the jurisdiction to hear the matter in dispute.

In determining whether another court is the more appropriate court, a number of factors set out in section 23 of the Trans-Tasman Proceedings Act 2010 (NZ) must be taken into account. These factors are:

- **The places of residence of the parties and witnesses.** It might be more appropriate for the case to be heard in the country where the majority of the parties and witnesses live.
- **The place where the subject matter of the proceedings is situated.** It might be more appropriate for the case to be heard in the country where the subject of the dispute is located.

For example: If a dispute is in relation to the sale of an aeroplane and the aeroplane is located in Australia, then it may be more appropriate for the case to be heard in an Australian court.

- **Prior agreements between the parties about where a dispute will be heard.** Sometimes contracts include a provision on which courts should decide a dispute about the contract. The court will consider whether to enforce any such agreement between the parties. Different rules apply if the agreement is 'exclusive' (see 'exclusive choice of court agreements' below).
- **The law governing the dispute.** If the court decides that the law of Australia is the more appropriate law to apply in the proceeding, then it may be more appropriate for an Australian court to determine the dispute.
- **Whether a related or similar proceeding has already commenced.** If a court case related to this dispute is already underway, it may be more appropriate for the court considering the existing court case to also consider this dispute.

For example: an Australian and New Zealand company have a contractual dispute being argued in an Australian court. It may be more appropriate for the Australian court to also consider further disputes that arise in relation to under the contract.

- **The financial circumstances of the parties.** If there is a significant financial imbalance between the two parties, it may be more appropriate for the case to be heard in a court where it will be easier for the disadvantaged party to take part.



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For example: a large machinery company in New Zealand and a small farmer in Western Australia have a dispute. The farmer does not have the resources to fly over to a New Zealand court, whereas the machinery company does have substantial resources for travel and regularly travels to Western Australia for other business. As it would be easier and more affordable for the farmer to appear before a Western Australian court, the Western Australian court may be the more appropriate court to hear the dispute.

- Any other matter prescribed in the Regulations.

What is an exclusive choice of court agreement?

Sometimes contracts include a provision on where a dispute about the contract will be heard. If this provision is an 'exclusive' choice of court agreement, then the court chosen in the contract must hear all disputes relating to the contract.

A choice of court agreement will be exclusive if it:

- is in written form
- designates a specific court (or courts), to the exclusion of all other courts, as the only court (or courts) to determine disputes between those parties
- is not an agreement that is primarily in relation to personal, family or household purposes
- is not a contract of employment.

The court won't enforce an exclusive choice of court agreements if:

- it isn't legally made
- either party lacked capacity to make the agreement,
- enforcing it would lead to a manifest injustice or
- the court in the agreement has already decided not to determine the proceedings.