

Trans-Tasman litigation

On 18 March 2010, the Commonwealth Parliament passed the *Trans-Tasman Proceedings Act 2010* (Cth), and the *Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010* (Cth), both of which received royal assent on 13 April 2010. The legislation aims to make trans-Tasman litigation simpler, cheaper and more efficient. In particular, the legislation implements the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed on 24 July 2008. The text of the agreement can be found in the Australian Treaty Series at [2008] ATNIF 12. The new legislation also incorporates other existing legislation regulating trans-Tasman legal proceedings, so as to provide a single point of reference for the law governing the conduct of such proceedings. Reciprocal legislation is currently before the New Zealand Parliament.

The new legislation will affect various aspects of trans-Tasman legal practice. In particular, it will:

- allow initiating process issued in civil proceedings in Australian courts to be served in New Zealand without leave (Part 2 of the Act);
- replace the 'clearly inappropriate forum' test for *forum non conveniens* with a 'more appropriate forum' test, as a common statutory test to be applied between Australia and New Zealand in determining when proceedings should be stayed on the ground that a court in the other country should hear the dispute. A number of factors must be taken into account by the court in the exercise of its discretion to grant a stay, and those are set out in the legislation (s 19). However, those matters are not exclusive or exhaustive (although the legislation does specify that the court must not take into account the fact that the proceeding was commenced in Australia). Specific additional provisions govern the situation if there is an exclusive agreement between the parties as to the choice of forum (s 20) (Part 3 of the Act);
- prohibit anti-suit injunctions as between Australian and New Zealand proceedings on the ground that the relevant court is not the appropriate forum (s 22, Part 3 of the Act);
- allow prescribed Australian courts to grant interim relief in support of New Zealand proceedings (Part 4 of the Act);
- build on the existing co-operative evidence regime to allow subpoenas to be issued in criminal proceedings, and for subpoenas to be issued with leave (Part 5 of the Act);
- facilitate the greater use of technology to enable parties and lawyers to appear remotely in civil proceedings in the other country (Part 6 of the Act);
- broaden the range of judgments of New Zealand courts that can be enforced in Australia, to include non-money judgments, civil pecuniary penalties and certain fines (Part 7 of the Act); and
- provide special rules for the conduct of trans-Tasman market proceedings, formerly in Part IIIA of the *Federal Court of Australia Act 1976* (Cth) (see Part 8 of the Act). Those are proceedings brought under provisions of the *Trade Practices Act 1974* (Cth), which prohibit a corporation with a substantial degree of market power from taking advantage of that power to eliminate or damage competition in any market.

Although the Australian Acts have been passed, the co-operative scheme will not commence until both Australia and New Zealand have completed all domestic arrangements necessary to fully implement the reforms. The Commonwealth Attorney-General's Department is currently monitoring the progress of the New Zealand Bill through Parliament, and will move into the next phase of the project after the passage of that legislation.

By Kylie Day

Verbatim

McGrath and Honey as the joint liquidators of HIH Insurance Ltd (in liq) (ACN 008 636 575) v Perpetual Trustee Co Ltd (2008) 66 ACSR 210

Per Graham J

[1] This case is concerned with 'redemption' and 'conversion'. However, neither word is to be understood in its biblical or

religious sense. Rather, the case requires a meaning to be given to these words as used in an 'HIH NZ converting notes 1998 trust deed' made 26 October 1998 (the trust deed), which provided for the creation and issue of 'notes' by the directors of the second defendant/first cross-defendant, HIH Holdings (NZ) Ltd (in liq) ARBN 084 759 866 (NZ).