AUSTRALIASIAN FORUM SHOPPING

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INTRODUCTION

1. Following the emergence of the global financial crisis, various major disputes arose from the transactional collapses following the implosion of several major international financial institutions. In this context, forum shopping and jurisdictional competence have emerged as central issues in some of the more complex cases. As Fleming states "[i]n a crisis that stretched across the globe, the phenomenon of claimants shopping for the best jurisdiction was inevitable".[1] As commerce is increasingly conducted across jurisdictional boundaries, the number of cross-border disputes is naturally increasing. As such, it is important that lawyers advising on international transactions and litigation are familiar with the issues that may arise in respect of forum shopping.

2. Mr Bell SC's paper raises practical issues to consider when drafting choice of law and jurisdiction clauses. This paper helps place that discussion in a broader context by focusing on issues where the forum in which a dispute will be determined is, in itself, in dispute. In particular, it discusses:

   (a) the concept of forum shopping generally, including the reasons why parties do it and why its practice is traditionally considered to be undesirable;

   (b) how parties can influence or challenge the forum in which a dispute will be heard; and

   (c) recent developments which may have an impact on forum shopping by Australasian clients.

THE CONCEPT OF FORUM SHOPPING

What is forum shopping?

3. Black's Law Dictionary defines forum shopping as "the practice of choosing the most favourable jurisdiction or court in which a claim might be heard".[2] Clients bringing or defending proceedings will often prefer to do so in their own jurisdiction for various reasons of expense, convenience and familiarly with the procedural and substantive rules. Multinational companies may be more concerned with staging proceedings in the jurisdiction that best suits them tactically.

[1] J Fleming "After the storm" (2009) 91 *European Lawyer* 10, 13.

[2] Black's Law Dictionary (9th ed, 2009, Westlaw International Online) (accessed 1 July 2011).

4. Commenting on the approach of United States courts, Lord Denning famously stated:[3]

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win.... If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.

5. The practice of forum shopping appears to have existed for a long time. The classical conception of it involves a plaintiff attempting to have a dispute heard in an advantageous forum. However, defendants may also forum shop through applications for a stay or anti-suit injunction or through pre-emptive declaratory relief.[4] Parties may take steps to influence the dispute forum long before any specific dispute arises; for example, when they elect where to incorporate.

6. While its practice is prevalent throughout the world, the phrase 'forum shopping' carries a pejorative connotation.[5] The most prominent objection to forum shopping is that it is contrary to 'decisional harmony'[6] – the notion that the venue in which a dispute is heard ought not affect its outcome. As consistency of outcomes is a fundamental tenet of any legal system,[7] it is considered unjust if the result of a case should hinge on technical differences between jurisdictions.[8] The traditional private international law jurisdiction selection rules were designed, in Savigny's words, to ensure that the applicable law is not determined by the 'unilateral discretion of one party'.[9] As such, it is customary to regard the attainment of uniform solutions as the chief purpose of private international law. If complete decisional harmony was achieved, the practice of forum shopping would wither. However, the goal of harmonization and unification of internal laws or choice of law rules, while realised in some regions and fields, remains a utopian ideal.[10]

7. There is also a concern about the extent to which forum shopping may negatively affect the public perception about the fairness of the legal system, as it is thought that it subjects parties to the additional cost and inconvenience of participating in litigation beyond their own legal system in

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[3] *Smith Kline & French Laboratories Ltd v Bloch* [1983] 2 All ER 72 at 74.

[4] A Bell "The Why and Wherefore of Transnational Forum Shopping" (Feb 1995) *The Australian Law Journal* (69) 124 at 125-126.

[5] F K Juenger "Forum shopping, domestic and international" (1989) 63 *Tulane Law Review* 553 at 553.

[6] See F K Juenger "What's Wrong with Forum Shopping" [1994] *Sydney Law Review* (16) 5 at 6.

[7] See Hart *The Concept of Law* (Oxford University Press, Oxford, 1961), 155.

[8] See "Forum shopping reconsidered" 103 (7) *Harvard Law Review* (1990) 1677; *Stevens v Head* (1993) 112 ALR 7 (HCA) at 31.

[9] F K Juenger "Forum shopping, domestic and international" (1989) 63 *Tulane Law Review* 553 at 558.

[10] A Bell *Forum shopping and venue in transnational litigation* (Oxford University Press, Oxford, 2003) at para 2.01.

circumstances where such participation may be intentionally oppressive.[11] Where particular courts are overburdened, there may also be a concern that a reputation as a favourable forum for certain types of case will increase the judicial workload and prevent the timely achievement of justice in other cases.[12]

8. It has been argued that forum shopping is detrimental to the rule of law in the sense that it detracts both from its predictability (the law should be sufficiently predictable to guide human behaviour so that citizens may formulate and execute their endeavours with confidence) and consistency (individuals should not be exposed to the requirements of contemporaneously valid but inconsistent laws).[13] This is because, if the legal consequences of a party's actions depend on the laws of multiple jurisdictions, it is much more difficult for the party have certainty as to their legal rights and obligations.

9. However, reasonable people disagree as to extent to which forum shopping is objectionable. Many commentators support the wider acceptance of forum shopping as a normal aspect of litigation strategy.[14] The attitude in the United States appears to be more liberal than in other common law jurisdictions. For example, in the Supreme Court decision in *Keeton v Hustler Magazine,*[15] the Court allowed a defamation action brought in New Hampshire by a plaintiff based in New York to continue even though the limitation period in the defendant's place of incorporation (Ohio) had run out. The New Hampshire limitation period was significantly and uniquely longer than other states. The Court held this even though few magazines were sold in New Hampshire and the injury to reputation there was minimal. Rehnquist CJ noted (at p779) that the plaintiff's:

> ... successful search for a state with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favourable substantive or procedural rules or sympathetic populations.

10. Similarly, in *Goad v Celotex Corp*[16] the Fourth Circuit Court noted that "[t]here is nothing inherently evil about forum-shopping" calling it a "spectre, or ... strawman, depending on whose ox is being gored". Lord Simon Glaisdale in *The Atlantic Star* stated:[17]

> "Forum shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.

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[11] F Ferrari "'Forum Shopping' Despite International Uniform Contract Law Conventions" (51) 3 *The International and Comparative Law Quarterly* (July 2002) 689 at 707.

[12] "Forum shopping reconsidered" 103 (7) *Harvard Law Review* (1990) 1677 at 1678.

[13] See B R Opeskin "The Price of Forum shopping" (1994) *Sydney Law Review* (16) 14.

[14] See F K Juenger "What's Wrong with Forum Shopping" [1994] *Sydney Law Review* (16) 5; "Forum shopping reconsidered" 103 (7) *Harvard Law Review* (1990) 1677 at 1691.

[15] *Keeton v Hustler Magazine* 465 US 770 (1984).

[16] *Goad v Celotex Corp* 831 F 2d 508 (1987) at 512.

[17] *The Atlantic Star* [1974] AC 436 at 471.

11. It has also been acknowledged by English commentators that there is intrinsic value in allowing foreign parties access to domestic courts. Cheshire, North & Fawcett have observed that:[18]

> ... there is a public interest in allowing trial in England of what are, in essence, foreign actions. When foreigners litigate in England this forms a valuable invisible export, and confirms judicial pride in the English legal system.

12. This accords with the view that forum shopping is less a problem and more an example of informed consumers making purchasing decisions in a manner that improves the efficiency and effectiveness of legal systems internationally. This view relies on the idea of 'regulatory competition'.[19] Taking a long term view, forum shopping may improve legal systems through constructive comparison with others.[20] This is essentially the "race to the top" theory. "Race to the bottom" theorists argue that such competition results in a systematic lowering of regulatory standards leading to high costs to the consumers and state as a whole, and thus calls for more centralised law and policy making.[21]

13. Irrespective of the differing views as to forum shopping, it is undeniably an issue that will form part of the strategy of cross-border litigation for many years to come. As such, lawyers advising on international transactions should see knowledge as to the potential benefits presented by the pluralism of legal cultures as simply an emerging part of their advisory role.

Why shop around?

14. In international disputes, where the dispute is determined may be an important strategic issue as it may affect the cost and ultimate result of the dispute, whether in terms of substantive decision or settlement. The main reason parties forum shop is the international diversity of internal substantive laws, choice of law rules and procedural rules.[22] When considering whether to select a particular forum, a wide range of legal and practical factors may be relevant.

15. These factors include:[23]

    (a) *Familiarity*: the shopper may have a significant amount of experience in a particular jurisdiction or may wish to exploit the other party's lack of familiarity.

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[18] Cheshire, North & Fawcett *Private International Law* (11th ed, Oxford University Press, Oxford, 1987) at 233.

[19] A M Sachdeva "Regulatory competition in European company law" 30(2) *European Journal of Law & Economics* (2010) 137 at 138.

[20] "Forum shopping reconsidered" 103 (7) *Harvard Law Review* (1990) 1677 at 1689.

[21] A M Sachdeva "Regulatory competition in European company law" 30(2) *European Journal of Law & Economics* (2010) 137 at 138-139.

[22] A Bell *Forum shopping and venue in transnational litigation* (Oxford University Press, Oxford, 2003) at para 2.07.

[23] See Rhys Clift "Forum Shopping, Anti-Suit injunctions and EU Law: A Brief Overview" (ICLG Guide to International Arbitration 2007, Global Legal Group) at p 30.

(b) *Procedural laws*: as procedure is governed by the law of the forum (the *lex fori*),[24] the decision as to forum will dictate the procedure which applies. Common areas of procedural difference are in relation to discovery,[25] limitation,[26] interest rates,[27] security for costs, appealability, evidence,[28] class actions,[29] and joinder. The classification of 'substantive' and 'procedural' law can often be difficult.[30] The broader the interpretation of what is 'procedural', the greater the incentive for forum shopping.[31]

(c) *Substantive laws*: where parties have a choice of (substantive) law clause, the mandatory substantive laws of a forum (which apply regardless of choice of law) may influence the attractiveness of a forum. Mandatory substantive laws are typically designed to protect public interests.[32] Examples of laws that are (arguably) mandatory are consumer protection laws,[33] exemption clause controls,[34] personal injury legislation,[35] investor protection legislation,[36] and

[24] Matters of substance by the law chosen by the forum court to apply based on the parties' choice or otherwise (the *lex causae*).

[25] For example, while common law legal systems generally require comprehensive exchange of documents, civil law systems tend to require production of a much narrower category of documents.

[26] Krauskopf & Tkacikova "Competition law violations and private enforcement: forum shopping strategies" 4(1) *Global Competition Law Review* 26, 37. The limitation period may start to run from the accrual of the cause of action, the date the wrongful conduct ceased, the date the infringement was reasonably discoverable or (in the competition law context) the date the investigation commenced. One of the major reasons for forum shopping among the Australian states/territories was the New South Wales six year limitation period (as compared to the three year period for personal injury in other states): Peter Nygh "Choice of Law Rules and forum Shopping in Australia" (1995) *Public Law Review* (6) 237 at 237-8.

[27] One of the major reasons for forum shopping among the Australian states/territories was the difference in pre-judgment and post-judgment interest rates across them: Peter Nygh "Choice of Law Rules and forum Shopping in Australia" (1995) *Public Law Review* (6) 237 at 237-8.

[28] For example, Court as opposed to party appointed expert witnesses: Krauskopf & Tkacikova "Competition law violations and private enforcement: forum shopping strategies" 4(1) *Global Competition Law Review* 26 at 37.

[29] Some jurisdictions have advanced rules to allow for class actions (United States) and others do not (NZ)).

[30] This can be the case when determining issues relating to limitation, proper parties, set-off, counterclaim and remedies: Goddard & McQueen *Private International Law in New Zealand* (NZLS Seminar, 2001) at pp 121-125.

[31] A Bell "The Why and Wherefore of Transnational Forum Shopping" (Feb 1995) *The Australian Law Journal* (69) 124 at 126.

[32] G A Bermann "Introduction: Mandatory rules of law in international arbitration" 18 *American Review of International Arbitration* 1, 1-2. Mandatory law will usually involve three elements: (i) an intention to protect an interest despite ordinary choice of law rules; (ii) a close connection with state interests; and (iii) a need for protection: P Nygh *Autonmy in International Contracts* (Clarendon Press, Oxford, 1999) 205.

[33] For example, Credit Contracts and Consumer Finance Act 2003 (NZ) s 137(b), Consumer Credit Contract Act 1974 (UK) and Trade Practices Act 1974 (Aus), Fair Trading Act 1986 (NZ): see A Bell *Forum shopping and venue in transnational litigation* (Oxford university Press, Oxford, 2003) at para 5.38.

[34] For example, s27(2) of the Unfair Contract Terms Act 1977 (UK).

[35] For example, Law Reform (Personal Injuries) Act 1948 (UK) and Fatal Accidents Act (UK), Accident Compensation Act 2001 (NZ) s299: A Bell *Forum shopping and venue in transnational litigation* (Oxford university Press, Oxford, 2003) at para 5.38.

[36] For example, Companies Act 2006 (UK), Companies Act 1993 (NZ) and Corporations Act 2001 (Aus): A Bell *Forum shopping and venue in transnational litigation* (Oxford university Press, Oxford, 2003) at para 5.45.

employment laws.[37]Parties may also have preferences as to the non-mandatory substantive laws of a particular jurisdiction in circumstances where there is no applicable choice of substantive law and potential liability in more than one jurisdiction.

(d) *Available remedies:* A good example of the remedy differences is the attitude towards damages awards in New Zealand, Australia and England as compared to the United States jury awards.[38] Rules as to the mitigation of damages[39] and freezing and search orders[40] also differ.

(e) *Choice of law rules:* common law jurisdictions tend to focus on domicile whereas civil law jurisdictions focus on nationality. Some jurisdictions have no doctrine of forum non conveniens or there may be very different conceptions of 'appropriateness' as to forum.[41]

(f) *Recognition/enforcement:* Enforcing a judgment in a foreign jurisdiction can be complicated, slow, expensive and, in many cases, very difficult to achieve at all. Arbitral awards present less risk regarding enforcement as arbitral awards, at least for commercial matters, can be readily enforced in a wide range of countries under the New York Convention of 1958.

(g) *Judicial characteristics*: courts may have particular expertise in resolving technical disputes. The perceived ability of the judiciary, generally or in a particular area, may influence the decision. Further, some courts may develop a reputation for being more liberal or strict in a particular area perceivably to the advantage of the shopper.[42]

[37] Mandatory laws are to be distinguished from the exclusionary rule applied to foreign revenue (e.g. Income Tax Act), penal (e.g. Crimes Act) and other public laws which will not be enforced by domestic courts. Nor are they to be mistaken for the rule that foreign laws may not be enforced on the grounds that they are contrary to local fundamental public policy (*ordre public*): Cheshire, North & Fawcett *Private International Law* (14th ed, Oxford University Press, Oxford, 2008) at 121-151.

[38] See F K Juenger "Forum shopping, domestic and international" (1989) 63 *Tulane Law Review* 553, 556.

[39] Krauskopf & Tkacikova "Competition law violations and private enforcement: forum shopping strategies" 4(1) *Global Competition Law Review* 26, 34.

[40] A Bell *Forum shopping and venue in transnational litigation* (Oxford university Press, Oxford, 2003) at para 2.04.

[41] See Andrew Bell "The Why and Wherefore of Transnational Forum Shopping" (Feb 1995) *The Australian Law Journal* (69) 124 at 135.

[42] An example of this phenomenon in the United States is the District Court for the Eastern District of Texas in Marshall, Texas which became a popular forum for patent lawsuits because it found in favour of the plaintiff 78% of the time, compared to a national average of 59%. Yan Leychkis "Of fire ants and claim construction: an empirical study of the meteoric rise of the Eastern District of Texas as a pre-eminent forum for patent litigation" (2008) *Intellectual Property Law Review* (40) 139-233.

(h) *Deference to party autonomy*: while a choice of law clause will usually be given full effect in Australasia, in some States of the United States, such clauses will be subjected to a reasonableness test and will be disregarded completely in some civil law jurisdictions.[43]

(i) *Practitioner quality*: a shopper may perceive an advantage from the general competence level of practitioners in a particular forum.

(j) *Costs award expectations:* Recoverable legal costs in the English system are typically in the region of 60-70% of total costs incurred. In New Zealand, it can be much lower, with the use of a fixed schedule of recoverable amounts for steps in a proceeding.

(k) *System costs*: for example, it will generally cost less to bring a claim in Wellington than it will in London or New York. Systems have different rules regarding contingency fees. Such fees are generally acceptable in the United States but prohibited or restricted in most other common law jurisdictions.[44]

(l) *Speed:* the shopper may wish for the dispute to resolved as quickly or as slowly as possible for tactical reasons and certain forums will have reputations for fast or slow resolution.[45]

(m) *Administrative (in)convenience*: locating the trial in a particular jurisdiction may be particularly convenient for the shopper or particularly inconvenient for the other party.

(n) *Press and political factors:* particularly in areas of ongoing regulator involvement, such as competition law, forum shoppers will take into account the extent to which the claimant's business/industry can receive considerable media coverage as there are numerous cases where media coverage has pushed courts and the government towards outcomes.[46]

FORUM CHALLENGES

16. The question of where a dispute will be determined depends on two legal issues:

[43] Goddard & McQueen *Private International Law in New Zealand* (NZLS Seminar, 2001) at pp 133 and 164.

[44] Krauskopf & Tkacikova "Competition law violations and private enforcement: forum shopping strategies" 4(1) *Global Competition Law Review* 26 at 31.

[45] There is an interesting phenomenon in the European Union in the intellectual property context whereby defendants will intentionally file proceedings seeking declaratory relief in a jurisdiction where courts are notoriously slow in order to reduce the pressure to reach a settlement. This action is referred to as a 'torpedo': Stothers (et al) "Forum shopping and 'Italian torpedoes' in competition litigation in the English courts" 4(2) *Global Competition Litigation Review* (2011) 67 at 67.

[46] The extent of lobbying or special interest groups' operation in respect of the claimant's industry may also have an impact: Krauskopf & Tkacikova "Competition law violations and private enforcement: forum shopping strategies" 4(1) *Global Competition Law Review* 26 at 32.

(a) *jurisdiction*: when a case is filed, the court decides whether it has jurisdiction; and

(b) *forum conveniens* ('appropriate forum'): where courts in more than one country have jurisdiction, in which Court should the dispute most appropriately be tried in the interests of the parties and for the ends of justice.[47]

17. When a foreign defendant is served with proceedings, they may challenge the proceeding on the basis that the forum court is not the appropriate forum for determination of the dispute. In New Zealand, this may be via an appearance protesting jurisdiction and subsequent application to dismiss the proceedings (where the *plaintiff* bears the onus of showing the forum court is the appropriate court)[48] or, where no protest was filed or the defendant is held to have submitted to the Court's jurisdiction, via an application for a stay (where the *defendant* bears the onus of showing the forum court is not the appropriate court).[49] In the first case, the application asserts that there is no jurisdiction and in the second case, that jurisdiction ought not be exercised. As such, to avoid the onus, defendants must file a protest to jurisdiction.

Forum non conveniens

18. Forum non conveniens is one of the central methods of combating forum shopping. Generally, if proceedings are served on a defendant in circumstances where they feel that plaintiff has failed to bring the action before the 'natural forum', the defendant may seek a stay/dismissal of the proceeding in the forum Court on the ground that it is forum non conveniens - that there is another Court with jurisdiction to hear and determine the matter in which the proceeding could be more appropriately tried in the interests of the parties and for the ends of justice. If the forum Court does not consider that it is the *forum conveniens*, it will allow the objection and grant a stay or dismissal of proceedings unless justice requires otherwise.[50]

19. The doctrine of forum non conveniens is based on the principle of comity (mutual respect). The forum court must respect the right of a foreign court to assume jurisdiction. If the foreign court has reasonably concluded that there was no more convenient forum, comity requires the forum court to respect the decision of the foreign court. A court must balance the interests of the parties

[47] *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (CA) at 280.

[48] HCR rr 5.49 and 6.29.

[49] HCR r 15.1; see *McGechan on Procedure* (Brookers online) at HR6.29.05 and Brooker's Civil Procedure (Brookers online) at HC5.4910A.

[50] *Laws of New Zealand: Conflict of Laws: Jurisdiction and foreign Judgments* (LexisNexis online) at para 27-28; Goddard & McQueen *Private International Law in New Zealand* (NZLS Seminar, 2001) at p 43.

acknowledging there is injustice, not only when a plaintiff is allowed to pursue the action in a forum inconvenient to the defendant, but also when a plaintiff is not allowed a timely trial.

20. Generally, the court will not grant relief if it would unjustly deprive the plaintiff of advantages in the first instance forum. Nevertheless, there should be a real and substantial connection between the venue and the cause(s) of action. Where there is more than one Court with jurisdiction to hear and determine a claim, the forum conveniens is the forum with which the action has the most real and substantial connection.

21. Factors which are relevant to the determination of forum conveniens include: the relative cost and convenience of proceeding in each jurisdiction; the location and availability of documents and witnesses; the existence and state of litigation in another jurisdiction; whether all relevant parties are subject to the forum jurisdiction, so that all issues can be resolved in one hearing; whether the law governing the dispute is the law of the forum; the existence of an agreement to submit to a particular jurisdiction or a clause relating to the appropriateness of a particular forum; the strength of the plaintiff's case; the likely location of enforcement; the genuineness of the defendant's objection to forum; procedural advantages in one jurisdiction; and a decision in another jurisdiction that it is forum conveniens.[51]

22. Where more proceedings in respect of the same subject matter have been commenced in more than one forum at the same time, the situation is referred to as *lis alibi pendens* – 'dispute elsewhere pending'. While English law had traditionally regarded *lis alibi pendens* as an independent ground for the granting of a stay, it has been absorbed into the development of the doctrine of forum non conveniens.[52]

23. The doctrine of forum non conveniens was developed by the Scottish courts in the 19th century, adopted in the United States (with some modifications) and later in England. It has since been adopted throughout the common law, most notably in Canada, Hong Kong, New Zealand, Singapore and India.[53] Anomalously, Australia has taken a different approach to determining which court should hear a dispute. New Zealand, England and most other common law countries apply the broad principles set down by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd,*[54] which requires the court to decline to exercise jurisdiction where there is a more appropriate forum for the trial of the

[51] *Laws of New Zealand: Conflict of Laws: Jurisdiction and Foreign Judgments* (LexisNexis online) at para 30; Goddard & McQueen *Private International Law in New Zealand* (NZLS Seminar, 2001) at p44.

[52] R Mortensen "Duty Free Forum Shopping: Disputing Venue in the Pacific" (2001) 32 VUWLR 673 at 678.

[53] Dicey, Morris & Collins *The Conflict of Laws* (14th ed, 2006, London, Sweet & Maxwell) vol 1, para 21-011.

[54] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

action. Australian courts have generally applied the test adopted by the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd*,[55] which requires the court to decline to exercise jurisdiction only where it is clearly an inappropriate court to decide the dispute.[56] The *Voth* approach is narrower than the *Spiliada* approach 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.[57]

Jurisdictional challenges

24. Where a foreign defendant has been served outside New Zealand with New Zealand proceedings, they may file an appearance objecting to the Court's jurisdiction.[58] The defendant may then apply to dismiss the proceeding for want of jurisdiction. The plaintiff can apply to set aside the appearance.[59] Other than forum grounds, the basis of challenge may, for example, be on grounds that the plaintiff does not have an arguable case on the merits or that the court does not have subject matter jurisdiction.[60]

25. Where such jurisdictional protest is made, the Court must dismiss the proceeding unless the party effecting service (usually the plaintiff) establishes:[61]

    (a) in the case of service without the court's leave (see para 36 below): (i) there is a good arguable case that the claim falls wholly within one of the categories for which leave to serve is not required and that the Court should assume jurisdiction because there is a serious issue to be tried on the merits, New Zealand is the appropriate forum for the trial and any other relevant circumstances support an assumption of jurisdiction; or (ii) leave would have been granted if sought and the failure to apply should be excused; or

    (b) in the case of service with leave: leave was correctly granted in the light of the evidence now before the court.

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

[56] The Australian forum will be regarded as 'clearly inappropriate' only if "...continuation of the proceedings in... [the Australian]... Court would be oppressive in the sense of 'seriously and unfairly burdensome, prejudicial or damaging' or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment'": *Henry v Henry* (1996) 185 CLR 571 at 587.

[57] Dicey, Morris & Collins *The Conflict of Laws* (14th ed, 2006, London, Sweet & Maxwell) vol 1, para 21-011. *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group* (August 2005) at p 27; see R Mortensen "Duty Free Forum Shopping: Disputing Venue in the Pacific" (2001) 32 VUWLR 673 at 676-678.

[58] HCR r 5.49.

[59] HCR r 5.49(3).

[60] For example, disputes regarding foreign immovable property are determined by the forum where it is located

[61] HCR r 6.29.

26. Defendants must be careful not to take any steps from which it may be inferred that they have submitted to jurisdiction (or waived their right to object) as, if a defendant takes a step that is necessary or useful only if jurisdiction is conceded (responding to a summary judgment application for example), then by that step a defendant submits to New Zealand jurisdiction.[62]

Injunction and declaratory relief

27. Defendants may seek an 'anti-suit' injunction restraining a plaintiff from commencing or pursuing foreign proceedings where such proceedings would be oppressive or vexatious. This may be, for example, where the plaintiff cannot possibly succeed, if they sue in more than one jurisdiction without substantial reasons, if the conduct of the foreign proceedings would interfere with the due process of the domestic court or if the foreign court has assumed jurisdiction either without considering whether there was an alternative forum or reached an obviously unreasonable conclusion on the merits (i.e. forum non conveniens).[63]

28. In *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*[64] Lord Goff stated four principles applicable to the granting of anti-suit injunctions: (a) the injunction is granted when the 'ends of justice' require it; (b) it is granted against the plaintiff in the foreign proceedings in personam and not against the foreign court itself; (c) it is only granted against a person 'who is amenable to the jurisdiction of the [local] court, against whom an injunction will be an effective remedy'; and (c) the jurisdiction is one that should be exercised with caution (because such injunctions are an indirect attack on the jurisdiction of the foreign court contrary to the principle of comity).

29. Defendants can also strike pre-emptively by commencing proceedings for declaration of non-liability. In New Zealand, this would be by way of relief under the Declaratory Judgments Act 1908.

[62] McGechan on Procedure (Brookers online) at para HC5.49.07.

[63] *Laws of New Zealand: Conflict of Laws: Jurisdiction and foreign Judgments* (LexisNexis online) at para 37; Goddard & McQueen *Private International Law in New Zealand* (NZLS Seminar, 2001) at p 51; Rhys Clift "Forum Shopping, Anti-Suit injunctions and EU Law: A Brief Overview" (ICLG Guide to International Arbitration 2007, Global Legal Group) at p 31.

[64] *Société Nationale industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC).

AUSTRALASIAN FORUM SHOPPING – RECENT DEVELOPMENTS

Trans-Tasman Proceedings Act 2010

30. The strength of the trans-Tasman social and economic ties is well-recognised and has lead to various integration and cooperation initiatives.[65] Such close ties also lead to a greater number of legal disputes with a trans-Tasman element. The Trans-Tasman Proceedings Act 2010 (the **TTPA**) forms part of the longstanding agenda for the trans-Tasman harmonisation of regulatory frameworks to create a "Single Economic Market" - a seamless business environment.[66]

31. In 2003, the Trans-Tasman Working Group on Court Proceedings and Regulatory Enforcement, comprising senior officials from Australia and New Zealand, was established to review trans-Tasman cooperation in court proceedings and regulatory enforcement. Following an extensive consultation process, the key recommendation was that a 'trans-Tasman regime' be introduced modelled on the Australian Service and Execution of Process Act 1992 (Cth) (**SEPA**), which governs the service of proceedings between Australian states/territories. The report stated:[67]

> With the exception of some reforms to the Australian and New Zealand civil justice systems in the early 1990s, including the development of a trans-Tasman evidence regime, the two countries generally treat cross border civil disputes involving the other in the same way as they would treat a dispute involving any other foreign country. This does not reflect the special relationship between Australia and New Zealand, which share a common law heritage and very similar justice systems. For these reasons, and because of the confidence that both countries have in each other's judicial and regulatory institutions, many of the safeguards required for interaction with more distant, dissimilar countries are unnecessary.

32. The New Zealand and Australian governments agreed to adopt the reforms (the agreement between the two governments is appended as schedule 1 of the TTPA).[68] The New Zealand and Australian Trans-Tasman Proceedings Bills received royal assent on 31 August and 13 April 2010. They will come into force by order in council/proclamation on a date yet to be determined. The New Zealand Ministry of Justice informally advises that they hope the Acts will come into force in the second half of this year but they are unsure whether this will be achieved.

33. The stated purposes of the TTPA are to (s3): (a) streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; (b) minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and (c) implement

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[65] Such as the 1973 Trans Tasman Travel Arrangement and the 1983 Australia New Zealand Closer Economic Relations Trade Agreement (CER).

[66] Colin James "The elusive single economic market" Legal Research Foundation Conference (9 March 2007).

[67] Trans-Tasman Working Group "Trans-Tasman Court Proceedings and Regulatory Enforcement" (December 2006), 8.

[68] Schedule 1 Trans-Tasman Proceedings Act 2010. On signing the Agreement, the Hon Lianne Dalziel (Minister of Commerce at the time) called it "an unprecedented level of cooperation between Australia and New Zealand in civil court proceedings": Hansard (24 August 2010), Raymond Huo MP.

the Trans-Tasman Agreement in New Zealand law. (Australia's equivalent legislation is the Trans-Tasman Proceedings Act 2010 (Cth) (the **Australian Act**)).

34. The Australian Act and TTPA will be referred to collectively as the '**new rules**'. Australian and New Zealand drafters worked closely to ensure that the two Acts are aligned as far as possible. Any differences between the two reflect differences in drafting style between New Zealand's Parliamentary Counsel Office and the Australian Office of Parliamentary Counsel. In some cases, they also reflect differences in the domestic legal and political context.[69] While this paper focuses on the TTPA, the observations made will also generally be applicable to the Australian Act.

35. The new rules contain a number of significant changes for commercial legal advisers. First, they allow for New Zealand proceedings to be served in Australia (and vice versa) without needing to seek leave or establish a connection with the jurisdiction. Secondly, they adopt a common statutory test for *forum non conveniens* to replace potentially inconsistent rules in New Zealand and Australia (see para 23 above). Thirdly, they provide for mutual recognition and enforcement of specified Australian judgments or tribunal decisions, including those given in trans-Tasman market proceedings. Fourthly, they empower New Zealand courts to give interim relief in support of Australian civil proceedings (and vice versa). Fifthly, they allow people in Australia to appear remotely in New Zealand civil proceedings (and vice versa).

Service and enforcement

36. Australia and New Zealand currently treat each other as they treat other foreign countries when it comes to cross-border service and the recognition and enforcement of judgments.[70] Courts in both countries have jurisdiction to allow service of civil proceedings on a defendant overseas. Under current New Zealand law, originating documents may be served on a defendant outside on New Zealand without leave in specified situations.[71] In any other case, originating documents may only be served out of New Zealand with the leave of the Court (r 6.28).[72] Under current law, to serve an Australian defendant in a New Zealand proceeding, the *plaintiff* must establish that the New Zealand

[69] Trans-Tasman Proceedings Bill Departmental Report Part 1 (May 2010) at para 13; Supplementary report (July 2010).

[70] There are some limited exceptions to this, including special arrangements for enforcing each other's tax judgments and lower court money judgments: See Foreign Judgments Act 1991 (Cth) and Reciprocal Enforcement of Judgments Act 1934 (NZ).

[71] These include where damage was sustained in New Zealand, where the disputed contract was made, performed or breached in New Zealand or governed by New Zealand law, where the subject property of the proceeding is in New Zealand, where the defendant is domiciled or ordinarily resident in New Zealand, where the defendant has submitted to the Court's jurisdiction or where it is sought to enforce any judgment or arbitral award: HCR r 6.27.

[72] For leave to be granted, the *plaintiff* must satisfy the Court that (a) the claim has a real and substantial connection with New Zealand; (b) there is a serious issue to be tried on the merits; (c) New Zealand is the appropriate forum for the trial (forum conveniens); and (d) any other relevant circumstances support an assumption of jurisdiction.

Court is the forum conveniens unless the proceeding fits within one of the categories specified in r 6.27.

37. However, different rules apply when a court is asked to recognise or enforce a judgment of a foreign court under the Foreign Judgments Act 1991 (Cth) (**FJA**) and Reciprocal Enforcement of Judgments Act 1934 (NZ) (**REJA**) or the common law.[73] The basic problem is that, although Australasian courts have jurisdiction to allow service of proceedings on a defendant overseas, if that defendant does not submit to the court's jurisdiction, the resulting judgment may not be enforceable in the other country. This gives the defendant an incentive to ignore the proceedings, knowing they are safe from enforcement action.

38. Under TTPA s13, a plaintiff in a New Zealand proceeding may serve a defendant in Australia with any originating document without obtaining leave to do so and without any need to show a connection with New Zealand or forum conveniens. Documents served in Australia must be served in the same way that is required or permitted under New Zealand procedural law.

39. Upon being served with New Zealand proceedings, the defendant can seek security for costs (s20) and can seek to have the proceeding stayed on the grounds that an Australian court has jurisdiction and is the more appropriate court to determine the dispute (ss21-22) taking into account specified factors (set out below). The new rules effectively shift the burden of showing forum non conveniens onto the *defendant*.

40. The new rules also: (a) prevent courts from granting anti-suit injunctions against proceedings in the foreign court on the ground that the foreign court is not the appropriate forum for the proceeding (to prevent circumvention of the new rules which provide for forum questions to be determined in the context of a stay application);[74] (b) apply only to actions in personam (i.e. binding only the parties to the proceeding and not attaching to the property);[75] and (c) do not touch the *Moçambique*[76] rule under

[73] Trans-Tasman Working Group "Trans-Tasman Court Proceedings and Regulatory Enforcement" (December 2006) at p11. One of the grounds for setting aside registration under the FJA and REJA (reflecting the common law) is that the foreign court did not have jurisdiction over the defendant: Section 7(2)(a)(iv) FJA and s6 REJA. Jurisdiction is established by either: (a) the defendant's presence or residence in the forum country at the time proceedings were issued; or (b) the defendant's submission to the forum court's jurisdiction by voluntarily appearing in the proceedings (other than to protest jurisdiction) or by agreement between the parties before the proceedings began: AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) at p 10.

[74] TTPA s 28.

[75] TTPA s 12(2)(b).

[76] After the leading authority *British South Africa Company v Companhia de Moçambique* [1893] AC 602.

which a court generally has no power to determine matters of title to, or possession of, immovable property (primarily land) located outside its jurisdiction.[77]

Forum non conveniens

41. The TTPA shifts the burden of showing forum non conveniens onto the *defendant* as proceedings that would previously have required the plaintiff to obtain leave to serve originating documents (requiring the plaintiff to establish forum conveniens) can be served without leave under the new rules. The defendant may then seek a stay on grounds of forum non conveniens.

42. As noted above at paragraph 23, New Zealand and Australia have different rules regarding forum non conveniens in that an Australian court will decline to exercise jurisdiction only where it is *clearly inappropriate* for it to decide the dispute (considering only its own appropriateness) whereas New Zealand courts will decline jurisdiction where there is a *more appropriate* forum for the trial of the action (considering the appropriateness of the foreign court).

43. Under current law, there is a risk that, where there are concurrent proceedings in New Zealand and Australia, the Australian court will refuse a stay because it does not consider Australia a clearly inappropriate forum and the New Zealand court will similarly refuse a stay because it considers New Zealand to be the more appropriate forum.[78] Adopting the SEPA approach, the new rules create a common rule whereby the court, upon application for a stay will assess whether the foreign court: (a) has jurisdiction and (b) is the *more appropriate* forum (the approach taken currently by New Zealand courts).

44. In determining whether the foreign court is the more appropriate Court to determine a dispute under the TTPA, the forum Court must not take into account where the proceeding was commenced but it must consider (s24(2)): (a) the parties' places of residence or, if a party is not an individual, its principal place of business; (b) the likely witnesses' places of residence; (c) where the subject matter is situated; (d) any non-exclusive jurisdiction agreement; (e) the most appropriately applicable law; (f) whether a related or similar proceeding has been commenced in Australia; (g) the financial circumstances of the parties; and (h) any other relevant matters.

[77] Despite the fact that this rule has been abolished in NSW and ACT, it is still otherwise in force throughout Australasia, it was thought that while domestic reforms may progressively abolish the rule, it was premature to effect abolition under the TTP: Trans-Tasman Working Group "Trans-Tasman Court Proceedings and Regulatory Enforcement" (December 2006) at p13.

[78] This is exactly what occurred in a 1993 matrimonial property proceeding. Proceedings were underway in both New Zealand and Australia. Neither court stayed the proceedings before it. Fortunately, the parties settled their dispute so that a 'race to judgment' did not occur. Otherwise, the party who first obtained judgment would have the advantage of being able to enforce that judgment in the other country: *In the Marriage of Gilmore* (1993) 100 FLR 311 and *Gilmore v Gilmore* [1993] NZFLR 561.

45. The Brussels Convention of 1968 and the EU Council Regulation (EC) 44/2001 govern choice of jurisdiction and recognition and enforcement of judgments among EU members.[79] Both the Convention and Regulation provide that proceedings must generally be commenced in the country of the defendant's *domicile*.[80] The Working Group considered adopting this approach. It ultimately recommended against it on the bases that it was better suited to civil law jurisdictions, that it did not address other issues the SEPA model did and that there were other concerns regarding the EU model.[81] A domicile-based rule still allows for some forum shopping.[82]

46. However, there could be more scope for jurisdictional argument under the TTPA's open assessment of the 'most appropriate forum'. Concern regarding the potential for inconsistent application in New Zealand and Australia was voiced during the consultation process but the Working Group dismissed the concern on the basis that likelihood of inconsistency was "sufficiently unlikely as to not require a legislative solution".[83] While the new rules ameliorate the risks of inconsistency through a common non-exhaustive list of factors for Australasian courts to consider when determining the appropriate forum, there remains a risk of inconsistent application.

Enforcement scope

47. Under the FJA and REJA, only final and conclusive money judgments of certain courts of the other country can be registered and enforced,[84] except for some provision for enforcement of non-final and non-monetary judgments made in certain competition proceedings relating to trans-Tasman markets.[85]

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[79] Rhys Clift "Forum Shopping, Anti-Suit injunctions and EU Law: A Brief Overview" (ICLG Guide to International Arbitration 2007, Global Legal Group) at p 32. Note that Denmark is still subject to the Brussels Convention and that Switzerland, Iceland and Norway are subject to the Lugano Convention of 1988 containing similar rules.

[80] However, there are alternatives in specific contexts. For example, in contractual disputes, a defendant can be sued where the contract was (or was to be) performed and in tort claims, the defendant may be sued where the harmful event occurred or may occur. Where more than one court has jurisdiction and proceedings have been filed in both, priority is decided on a 'first to file' rule: Rhys Clift "Forum Shopping, Anti-Suit injunctions and EU Law: A Brief Overview" (ICLG Guide to International Arbitration 2007, Global Legal Group) at p 32; Trans-Tasman Working Group "Trans-Tasman Court Proceedings and Regulatory Enforcement" (December 2006) at p 11; King & Colbran "Forum shopping" 149(18) *Solicitors Journal* (May 2005) 531, 532; Krauskopf & Tkacikova "Competition law violations and private enforcement: forum shopping strategies" 4(1) *Global Competition Law Review* 26 at 36.

[81] Some of the concerns were the complexity of the rules regarding domicile and the view that the 'first to file' rule is arbitrary and undesirable: AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) at p 13.

[82] For example, a claim for declaration of non-liability where the 'natural' defendant attacks the natural plaintiff can found jurisdiction in the natural plaintiff's jurisdiction (because the natural defendant becomes the plaintiff).

[83] Page 18 of the report.

[84] Reciprocal Enforcement of Judgments (Australian Inferior Courts) Order 1992; Part 1A of the Reciprocal Enforcement of Judgments Act 1934. Similarly, at common law in New Zealand and Australia (applicable where no reciprocal arrangement exists), judgment is enforced only if it is final, conclusive and for a definite sum of money.

[85] Section 32B of the Federal Court of Australia act 1976 (Cth); see Mortensen, Read *Private International Law in Australia* (LexisNexis Butterworths Australia, Sydney, 2006) at 158-159; Part 1A of the Reciprocal Enforcement of Judgments Act 1934.

The current rules extend enforcement to specified categories of non-money judgments by order in council but no specifications have ever occurred. As such, orders for specific performance or injunctions are currently unenforceable.

48. The new rules extend the types of judgments that will be enforceable trans-Tasman to include: (a) final non-money judgments, such as final injunctions and orders for specific performance; (b) decisions of mutually agreed tribunals or decision classes of such bodies; (c) civil pecuniary penalty orders (unless specifically excluded by order in council) – a 'negative list' approach; and (d) criminal fines for regulatory offences if specifically declared to be included order in council – a 'positive list' approach. The new rules also provide that certain judgments of tribunals as designated by order in council will be enforceable (s55).

49. Enforceability will not extend to proceedings governed by existing co-operative schemes and which require a high level of court supervision, such as probate, estate administration, child care and welfare, relationship maintenance and proceeds of crime (s54(2)). Registered judgments may be set aside where enforcement is contrary to local public policy (s 61(2)(b)).

50. The new rules mean that parties will have more enforcement options and a higher likelihood of enforcement success. Accordingly, there is a greater risk of default judgments being granted by foreign courts against New Zealand defendants and then enforced in New Zealand. New Zealand defendants may no longer be able to simply ignore proceedings in reliance of the foreign court's lack of jurisdiction over them.

Interim relief

51. At New Zealand and Australian common law, a court can grant interim relief only where necessary to protect an applicant's rights until final judgment is given in proceedings before that court. The two jurisdictional requirements for such relief are that: (a) there must be an underlying substantive cause of action that can be decided in the proceedings; and (b) the court must have jurisdiction to grant final relief against the defendant.[86] As such, under current law, orders for interim relief cannot be obtained in one country in support of proceedings in another – they can only be awarded by the court determining the substantive dispute.

52. The new rules enable orders for interim relief to be made by a court other than that seized of the substantive dispute. The scope of available relief is wide (e.g. search and freezing orders). A

[86] AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) at p 21.

'negative list' approach is taken, excluding orders as to interim payments, discovery, property arrest warrants and relief under part 4 (subparts 1 and 2) of the Evidence Act 2006 (dealing with evidence from overseas or to be used overseas). Interim relief will only be granted if such relief would have been granted had the proceeding been local.[87]

Forum shopping concerns

53. The new rules raise a number of potential concerns. The Working Group was aware of the forum shopping risk that a lack of legal consistency facilitates. The discussion document states:

> This 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. 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 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.

54. This passage shows that the Working Group had a narrow view of the reasons why parties shop around. As set out above, aside from choice of law rules and substantive law, parties may forum shop for a variety of reasons. It is unclear whether specifying the applicable law as a factor to be considered in determining the appropriate forum will have a significant impact on whether a party will seek to forum shop. To illustrate, if a contract specified that New Zealand law applied but courts in New Zealand and Australia both had jurisdiction, the choice of New Zealand law would not determine which forum was 'more appropriate' – it would simply be one of several factors.

55. The notion that common criteria for determining the appropriate forum will reduce forum shopping assumes parties will refrain from shopping in the belief that different courts will come to the same decision as to forum conveniens. However, as noted above, there remains a risk of courts differing as to the appropriate forum or parties may perceive there is sufficient risk of that to shop.

56. In this light, it is unclear whether the TTPA will reduce forum shopping. In fact, the increased ease of initial service and the lack of restrictions on where proceedings may be filed may encourage some plaintiffs to forum shop between Australian state jurisdictions and New Zealand. Under the new rules, once proceedings have commenced, defendants will bear the burden of demonstrating that the proceedings should be brought in another jurisdiction. Plaintiffs may be encouraged by this shift in the burden of establishing forum (non) conveniens to defendants. There is a risk these changes will

[87] See TTPA ss 31-32.

cause cost and inconvenience to foreign defendants and may increase the amount of time and money spent in jurisdictional disputes.

57. In response to concerns raised during the consultation process as to shifting the forum conveniens 'burden' to the defendant, the Working Group indicated that, as leave is not required in many instances under current law (in such case the defendant already bears the burden), the shift will be limited in practice.[88] This is true in the sense the range of cases for which leave is not currently required is broad (see para 36 above).

58. An example of this is that large companies may seek to consolidate their debt recovery processes in one jurisdiction, on the basis that small debtors will not consider it worthwhile to challenge the claims due to the costs and practical difficulties associated with remote litigation. While there is some evidence that such practices have occurred under the SEPA rules (on which the TTPA service rules are based),[89] the Working Group reported that there is "little concrete evidence" that this has been a real problem under SEPA. It recommended that such issue be dealt with in future should they emerge.[90] This risk has been reduced by the requirement that documents set out the defendant's rights.[91]

59. The SEPA rules were developed to deal with service issues in Australia and it could be argued that they are not be suitable in an international context. There is a difference between an Australian court exercising automatic jurisdiction over a person who is resident in another state within Australia and doing so over a person who is resident in New Zealand. Whether an Australian resident is sued in their home state or another state, they are still being sued in their own country and may still have recourse to the overarching jurisdiction of the Australian federal laws and courts. In contrast, while Australia and New Zealand have very close ties, they are separate countries with separate judicial, legislative and administrative structures. There is no trans-Tasman court to resolve any conflicts that may arise between competing judgments of the Australian and New Zealand courts.[92] The goal of

[88] Trans-Tasman Working Group "Trans-Tasman Court Proceedings and Regulatory Enforcement" (December 2006), 11.

[89] For example, the Victoria Legal Aid report on "Debt Recovery Law and Procedure in Victoria" suggests that national debt collection firms in Australia have engaged in forum shopping to the detriment of small debtors: AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) p 16.

[90] Trans-Tasman Working Group "Trans-Tasman Court Proceedings and Regulatory Enforcement" (December 2006) at pp 12-13.

[91] TTPA s15.

[92] While this situation may be rare, it will create a serious issue under the new rules as both Australian and New Zealand judgments will be entitled to automatic enforcement in both countries.

harmonisation may also be hindered by the courts taking different approaches to the application of the new rules.

60. The additional cost/inconvenience potentially caused to foreign defendants by the new rules is, however, ameliorated by the allowance for remote appearances without leave.[93]

Substantive and procedural differences?

61. As explained above, there is potential for the new rules to encourage forum shopping. However, such shopping may be discouraged by the fact that the procedural and substantive laws of New Zealand and Australia are highly harmonised, so the advantages of shopping are reduced.

62. Recent years have seen significant steps towards trans-Tasman harmonisation of laws and standards. There has been development of laws relating to competition, securities, takeovers, consumer protection, electronic transactions, disclosure regimes, cross-border insolvency, tax, company administration, accounting standards, financial services and reporting, intellectual property, food standards and therapeutic goods.[94] There are various trans-Tasman harmonisation and cooperation initiatives currently underway in respect of these areas.[95] Examples in the banking context include rules for regulator cooperation in fulfilling statutory banking supervision objectives and to avoid actions that could have a detrimental effect on financial system stability in the other country[96] and a mutual securities offer recognition scheme.[97]

63. However, despite such initiatives, there remain notable differences as between New Zealand and Australian law and as between the states/territories of Australia.[98] For example:

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[93] For example, via telephone/video-link by counsel and defendants in stay application hearings (ss 19, 23(4) and 39).

[94] See Ministry of Foreign Affairs & Trade "The Australia – New Zealand Closer Economic Relationship*"* (2005) at p 29; Australian Government Productivity Commission "Australian and New Zealand Competition and Consumer Protection Regimes" (16 December 2004); Australian Standing Committee on Legal and Constitutional Affairs "Harmonisation of legal systems" (November 2006), chapter 3.

[95] See Press Release by Bill English "Ministers English and Swan progress trans-Tasman relationship" (14 July 2011).

[96] The Reserve Bank of New Zealand Amendment Act 2006 (NZ) and the Financial Sector Legislation Amendment (Trans-Tasman Banking Supervision) Act 2006 (Cth). See also Australian Standing Committee on Legal and Constitutional Affairs "Harmonisation of legal systems" (November 2006) at pp 43-46.

[97] The Securities (Mutual Recognition of Securities Offerings—Australia) Regulations 2008. See Australian Standing Committee on Legal and Constitutional Affairs "Harmonisation of legal systems" (November 2006) at pp 48-49

[98] Colin James "The elusive single economic market" Legal Research Foundation Conference (9 March 2007); Australian Standing Committee on Legal and Constitutional Affairs "Harmonisation of legal systems" (November 2006), chapters 3 and 4; B R Opeskin "The Price of Forum shopping" (1994) *Sydney Law Review* (16) 14 at 19-20.

(a) Securities law: Australia has criminal offence provisions for serious contraventions of general duties - company directors can be prosecuted if they are reckless and fail to exercise their powers for a proper purpose. New Zealand has no such provisions.[99]

(b) Contract interpretation: Following the Supreme Court's decision in *Vector*,[100] New Zealand courts may be more able to look at pre-contractual negotiations when interpreting contracts. In Australia, the clear rule is that pre-contractual negotiations are irrelevant.[101] A party seeking to minimise the expense of litigation arising out of a trans-Tasman contract may prefer to have a dispute determined under Australian contract law to avoid the potential expense of having to deal with pre-contractual material.

Enforcement of foreign penalties

64. Under current law civil pecuniary penalty orders[102] and criminal fines for regulatory offences are unlikely to be enforceable trans-Tasman.[103] This follows the well-established common law rule that courts of one country will not enforce the penal or public laws of foreign countries.[104]

65. The TTPA extends the scope of enforceable trans-Tasman judgments to include: (a) civil pecuniary penalty orders unless excluded by order in council ('negative list' approach); and (b) criminal fines for regulatory offences if specifically declared to be included order in council ('positive list' approach). These will be enforceable as if they were civil judgments. New Zealand businesses/individuals operating in trans-Tasman markets will be exposed to the risk of fines and penalties imposed by the Australian courts following Australian regulator prosecutions. While the same applies to Australian businesses/individuals, the issue is likely to be more significant for New Zealanders who will now be subject to significantly greater exposure.[105]

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[99] Earlier this year, the New Zealand cabinet agreed a new liability framework under which reckless or intentional breaches of duty could result in criminal liability: Ministry of Economic Development "Review of Securities Law: Discussion Paper" (June 2010) p185; Minister of Commerce "Securities Law Review: Additional policy decisions and costings" (May 2011) at p 2.

[100] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5.

[101] See Kavanagh and West "Traps for lawyers advising on trans-Tasman contracts" *NZ Lawyer* (3 June 2011) at p10.

[102] Under the restrictive trade practices provisions of the Commerce Act 1986 (NZ) and the Trade Practices Act 1974 (Cth), for example.

[103] AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) at pp 40 and 43.

[104] Dicey, Morris & Collins *The Conflict of Laws* (14th ed, 2006, London, Sweet & Maxwell) vol 1, paras 5-020 and 5-028.

[105] New Zealand businesses and individuals will be directly exposed to the Australian regulatory enforcement, including higher fines and penalties from across the Tasman. For example, the maximum fines under the Trade Practices Act (Cth) for misleading and deceptive conduct are A1.1 million for companies or A$220,000 for individuals, compared with NZ$200,000 for companies and NZ$60,000 for individuals under Fair Trading Act (NZ).

66. This step is considered to be justified by the strong mutual interest in the integrity of trans-Tasman markets and the effective enforcement of regulation. The new rules aim to prevent people evading regulatory responsibilities by moving themselves or their assets between countries. The Working Group discussion paper notes the integrated nature of the Australasian markets, with common market participants, mutual recognition regimes for goods and occupations[106] and the convergence of regulation in areas such as food standards and product safety standards.

67. David Goddard QC, a member of the Working Group, stated that new rules "represent the furthest reaching proposals of this kind as between any two sovereign States with separate legal systems".[107] While concern has been expressed that this is a significant incursion on national sovereignty,[108] the Working Group considered that any sovereignty concerns were outweighed by the mutual benefit of mutual enforcement.[109]

68. It is unclear why civil penalties and regulatory fines are treated differently (negative list v positive list).[110] The more liberal position taken regarding civil penalties may be a product of the historical aversion to cross-border enforcement of penal laws. However, both are in essence punitive and the civil/criminal distinction may be little more than nomenclature.[111]

69. Direct and mutual enforcement of regulatory penalties may be seen by some as undesirable as, while regulatory proceedings will be mutually enforceable, there can be no assurance that the New Zealand and Australian regulatory regimes will move in the same direction. As such, there is a risk of contradictory regulation in areas like competition, securities and consumer protection.[112]

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[106] Under the Trans-Tasman Mutual Recognition Arrangement.

[107] David Goddard QC "Case study: Trans-Tasman court proceedings and regulatory enforcement", presented Legal Research Foundation Conference (9 March 2007); referred to in Hansard (24 August 2010) by Charles Chauvel MP and others.

[108] Hansard (24 August 2010), Keith Locke MP.

[109] It suggested that sovereignty concerns in respect of the positively-listed criminal offences could be addressed by ensuring a real connection between the country imposing the criminal fine and the conduct amounting to the offence by specifying the statutes to which enforcement applies or the circumstances in which fines would be enforced in the other country: AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) pp 41 and 46.

[110] The Working Group discussion paper simply states that "[t]he 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 yardstick, 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."

[111] For example, a fine under s40 of the Fair Trading Act 1986 (e.g. misleading and deceptive conduct) is a criminal penalty whereas a fine under s80 of the Commerce Act 1986 (restrictive trade practices) is a civil penalty.

[112] Some may suggest that this is immaterial as the regime relates only to enforcement and not to primary regulation. However, the line between the two may be blurred e.g. where one country's domestic court imposes a penalty that takes

70. The emphasis during the legislative process has been on using the principle of mutual recognition to support the concept of an integrated trans-Tasman market. However, potential issues which have been identified include:[113]

(a) The 2008 Agreement indicates that only fines for criminal regulatory offences that "affect the effectiveness, integrity and efficiency of trans-Tasman markets and in which both Parties have a strong mutual interest" will be nominated. However, much of the New Zealand legislation listed for likely inclusion are of largely domestic relevance.[114]

(b) Anecdotal evidence suggests New Zealand and Australia have different regulatory mindsets and the two countries are far from coordinated.[115] While mutual enforceability may foster a coordinated approach, there may be a period of dysfunctional regulatory overlap.[116]

(c) Where there is a true trans-Tasman nexus (i.e. contravening conduct which affects both jurisdictions) the proposed regime may increase the risk of double penalisation. In this light, it may fall to the regulators' discretion to ensure a harmonised approach.

Conclusion

71. The TTPA is a significant step towards the integration of New Zealand and Australia's legal and regulatory environments. Improving the ease of trans-Tasman service and enforcement appears to be a positive step. However, the new rules also bring new risks. Under the new rules, plaintiffs will not have to show any justification for issuing proceedings in one country against a defendant in the other. Defendants must now persuade the Court that it should not exercise jurisdiction, diminishing defendants' protection from ill-founded claims. The new rules expose New Zealand businesses and individuals to the significantly higher fines imposed by Australian regulation.

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account of trans-Tasman conduct or the seizure of a company's New Zealand assets to satisfy an Australian regulatory penalty: D Kalderimis "Trans-Tasman integration: court proceedings and enforcement" (www.chapmantripp.com, 18 December 2009).

[113] D Kalderimis "Trans-Tasman integration: court proceedings and enforcement" (www.chapmantripp.com, 18 December 2009).

[114] For example, the document proposes to allow cross-border enforcement of criminal penalties under the Commerce Act, Companies Act, Fair Trading Act, Securities Acts, Takeovers Act, Financial Reporting Act, Credit Contracts and Consumer Finance Act, as well as "occupational regulation legislation". The Working Group did, however, acknowledge that industry-specific parts of the legislation listed may perhaps be excluded: AG Dept (Aus) and Ministry of Justice (NZ) "Trans-Tasman Court Proceedings and Regulatory Enforcement: A Public Discussion Paper by the Trans-Tasman Working Group" (August 2005) at pp 7 and 45.

[115] The New Zealand Commerce Commission is unlikely to accept arguments that a New Zealand penalty should be reduced to take account of penalties imposed in Australia in respect of the same or related conduct. Likewise for the Australian Securities and Investments Commission.

[116] See the Hansard discussion on 25 August 2010 by Hon Lianne Dalziel.

72. The advantages of the TTPA have come with some mutual cession of legal sovereignty. To the extent the regulatory mindsets of both countries differ, the integration created by the Act may generate some friction in the short to medium term. There is possibly a greater likelihood of companies being drawn into litigation across the Tasman or of falling within the reach of both Australian and New Zealand regulators. There is therefore a risk that the new rules could potentially increase litigation and compliance costs for trans-Tasman businesses.

Company incorporation

73. Forum shopping is generally considered to occur when a party selects a forum in which to progress their claim, i.e. upon commencement of proceedings.[117] However, a party forum shops in the broader sense any time it makes a decision that will affect the forum for the dispute.[118] An expanded notion of forum shopping captures actions which occur prior to commencement of proceeding whereby a party makes an election which will influence where a dispute will likely be held.[119] As a learned yet unnamed Harvard author stated[120] "businesses enjoy one of the most significant forum-shopping powers available – the decision where to incorporate".

74. A business may incorporate in a particular jurisdiction in order to place itself within that jurisdiction or to generate a veneer of association with the country even if the activities of the business are not in actuality conducted in that jurisdiction – an 'incorporation of convenience'. However, incorporation in a jurisdiction may work to a business' advantage or disadvantage. There may be advantages to incorporation in a particular locality or to operating through an incorporated subsidiary in a particular state (tax, corporate rules etc). It may also render the business more susceptible to its activities being caught as locally domiciled and thus subject to local law and courts or it might serve to usefully separate the local and international operations of the business.

75. A good illustration of forum shopping by incorporation is the tendency of companies to incorporate or reincorporate in Delaware.[121] The internal affairs of US corporations are governed by the law in the state of incorporation. Accordingly, corporations can choose the corporate law applicable to their

[117] See F K Juenger "Forum shopping, domestic and international" (1989) 63 *Tulane Law Review* 553 at 554.

[118] See "Forum shopping reconsidered" 103 (7) *Harvard Law Review* 1990 1677 at 1677-1678.

[119] This may be through the inclusion of a choice of forum/jurisdiction clause in a contract or the incorporation of an entity through which to do business in a particular jurisdiction or otherwise. While such elections may occur prior to contemplation of any dispute, they will have a direct impact on where any dispute is heard such that they are a form of forum shopping. The characteristics of the forum may be one of several factors influencing the decision as to where a business should incorporate a new company. In some cases, forum characteristic may be a major factor.

[120] "Forum shopping reconsidered" 103 (7) *Harvard Law Review* (1990) 1677 at 1692.

[121] Bradley & Schipani "The Relevance of the Duty of Care Standard in Corporate Governance 75 Iowa Law Review 1, 65 (1990).

internal affairs by incorporating in the state of their choice. In a recent national survey conducted of United Stated closely-held corporations, 33% of those with 1000 or more employees and 50% of those with 5000 or more employees were incorporated in Delaware.[122] Delaware also dominates the market for incorporation of publicly listed corporations.[123] The study suggested that this phenomenon resulted from: (a) the perception that the Delaware judiciary is of very high quality; and (b) the protection of the 'exculpation statute', which allows corporations to limit the personal liability of directors for certain types of duty violations in the corporate charter.[124]

New Zealand company incorporation rules

76. New Zealand's rules for company incorporation, contained in the Companies Act 1993, are more liberal than those of other economically similar jurisdictions like Singapore, Australia or Canada, all of which require at least one director to be resident in the state of incorporation. Incorporation requires a name, one or more shares, one or more shareholders and one or more directors. New Zealand also makes more use of the internet for the registration process, does not impose an annual licensing fee (anomalously) and the application fee is low by international standards.

77. While the administrative ease of these rules is attractive to foreign interests, it leaves the registration regime vulnerable to misuse by illegitimate offshore operators. New Zealand corporate lawyers will intermittently receive requests from foreign persons to either incorporate a new company in New Zealand or register an existing foreign company as an overseas company in circumstances where there is no nexus (other than the registration/incorporation) between the entity's operations and New Zealand. This may be done simply to associate the company with an advanced western economy considered to be politically neutral or to create scope for an argument that operations will be governed by New Zealand law where advantageous.

78. There is evidence that individuals and groups (mostly offshore) are misusing the New Zealand company incorporation process. A recent, and highly-publicised, example was the incident involving

[122] Of those incorporating outside the state where their primary place of business is located (i.e. their 'home state') within these brackets, 77% and 83% were incorporated in Delaware. Damman & Schundeln "The incorporation choices of privately held corporations" (27) 1 *Journal of Law, Economics & Organization* (2011) 79 at 83-84.

[123] Delaware has been a popular destination for IPO firms, having approximately 70% of IPO firm incorporations between 1978 and 2000 and 95% of those outside their home state: Damman & Schundeln "The incorporation choices of privately held corporations" (27) 1 *Journal of Law, Economics & Organization* (2011) 79 at 83-84.

[124] The Delaware statute enables a corporation to state in its certificate of incorporation (or later with shareholder approval) that a director shall not be personally liable to the corporation or its shareholders for damages for breach of any duty owed to the corporation or its shareholders (subject to some limited exceptions): Damman & Schundeln "The incorporation choices of privately held corporations" (27) 1 *Journal of Law, Economics & Organization* (2011) 79 at 89 and 92; Bradley & Schipani "The Relevance of the Duty of Care Standard in Corporate Governance 75 Iowa Law Review (1990) 1 at 43; W Felton "Director and Officer Exculpation Statutes in an Post-Enron World" (www.greenbaumlaw.com).

SP Trading Limited in late 2009/early 2010. Whilst registered in New Zealand, it was controlled overseas.[125] SP Trading was involved in chartering a plane that departed from North Korea and was intercepted in Bangkok carrying 35 tonnes of weapons in contravention of UN prohibitions on trading in arms with North Korea. SP Trading had no business presence in New Zealand. The person behind it had moved to Vanuatu by the time issues arose, putting them beyond the reach of sanction.[126]

79. The New Zealand Reserve Bank has similar concerns with respect to "overseas financial institutions" of which approximately 100 have been incorporated in New Zealand over the past three or so years. Such shell companies are used to carry on banking activities without the necessary controls, and many appear to be engaged in fraudulent activities.[127]

Legislative initiative

80. In essence, whilst registration in New Zealand should subject companies and those involved in them to New Zealand law, in practice, gaps in the regime may mean that does not in fact occur. As a result, in the short term, there is an initiative underway by the Ministry of Economic Development to implement several limited amendments to the Companies Act 1993 and Limited Partnerships Act 2008 to strengthen the regime.[128] There are four broad reform proposals:

(a) requiring companies to appoint at least one director or an agent who is ordinarily resident in New Zealand to enable the Registrar to confirm the bona fides of those behind the company, test the accuracy of the personal particulars supplied during registration and (where appropriate) hold someone to account for any breaches of law;

(b) requiring directors to supply date and place of birth information for official purposes only;

(c) requiring all companies to apply for an IRD number as part of their registration application process to provide some disincentive for incorporations of convenience; and

(d) enhancing the Registrar's ability to investigate, respond to or remedy issues regarding the bona fides of directors and shareholders and any integrity or registration compliance issues. This

[125] Its sole director was a New Zealand-based nominee who had signed a power of attorney handing over authority to two foreign individuals and the sole shareholder, another New Zealand company, held the shares on trust for the same two people.

[126] Minister of Commerce Report to Cabinet Economic Growth and Infrastructure Committee "New Zealand Company Registration Process" (File no: M/007/AL/004/014) (late 2010).

[127] Minister of Commerce Report to Cabinet Economic Growth and Infrastructure Committee "New Zealand Company Registration Process" (File no: M/007/AL/004/014) (late 2010).

[128] Minister of Commerce Report to Cabinet Economic Growth and Infrastructure Committee "New Zealand Company Registration Process" (File no: M/007/AL/004/014) (late 2010).

may include powers to: (i) require someone to confirm/correct the register; (ii) 'flag' a record on the Companies Office website as being under enquiry as to the information integrity; (iii) remove disqualified/prohibited people from the register who are acting in contravention of disqualification/prohibition; (iv) ban a person from directorship or management where they have provided inaccurate information to the Registrar or have persistently failed to comply with Companies Act or Financial Reporting Act requirements.

81. The Minister of Commerce's office advises informally that the bill to effect these changes is being drafted with the aim of introducing it to the house in October. The Ministry considers that the reform will generate little compliance burden for New Zealand companies and that any burden is justified by the preservation of New Zealand's international reputation. It acknowledged that further reforms in the medium term will be required to address the issues comprehensively.[129]

82. The Ministry of Justice are also considering substantive anti-money laundering reform in connection with New Zealand's assessment by the Financial Action Task Force (**FATF**), to which the New Zealand Government is obliged to respond to by October 2011. One of the proposed reforms is to bring company formation agents within the scope of the anti-money laundering legislation, requiring them to be supervised and to undertake due diligence on their customers.

CONCLUSION

83. As the global economy becomes more integrated with the increase of cross-border trade and the commercial relationships which naturally ensue, forum shopping is likely to become a more significant issue in future for larger companies. While various multilateral and bilateral cooperation and harmonisation initiatives may reduce the incentive for shopping, it is unlikely that absolute harmonisation will be realised as along as there are independent sovereign states. As such, there will always be some shopping incentive. Forum shopping may occur when a dispute arises or when parties are negotiating their contractual arrangements. It pays for both commercial and litigation lawyers to be aware of the benefits and pitfalls of jurisdictional diversity and the strategies they may employ to ensure that clients make the most of such diversity.

[129] For example, (a) regulation/prohibition of nominee directors; (b) recording the beneficial ownership of shares in a company; (c) measures concerning open-ended powers of attorney; (d) identification or verification of the identity of directors and shareholders by way of, for example, a unique identifier such as a passport or driver licence; (e) dealing with issues of shell financial institutions; and (F) regulations of company formation agents by including them as reporting entities under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.