A TRANS-TASMAN JUDICIAL AREA: CIVIL JURISDICTION AND JUDGMENTS IN THE SINGLE ECONOMIC MARKET

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I. INTRODUCTION[1]

Australia and New Zealand have established a coherent civil jurisdiction and judgments scheme. It sees, to a large extent, New Zealand incorporated into arrangements that already allocate civil jurisdiction between the various federal and State courts in the Australian federation and that provide for the interstate enforcement of civil judgments in Australia. The basic principle of this scheme is that any civil judgment made in any court in the Trans-Tasman Single Economic Market (covering Australia, its external Territories and New Zealand) will, with almost no qualification, be enforceable in any other part of the market area, and the same principle will hold for many tribunal orders. The exercise of jurisdiction by any court in Australia or New Zealand is to be sorted according to discretionary "appropriate court" (or *forum conveniens*) principles or by choice of court agreements.

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In this article –

Aust	Trans-Tasman Proceedings Act 2010 (Cth)
Christchurch Agreement	Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (done at Christchurch 24 July 2008)
CVA	Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT); Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW); Jurisdiction of Courts (Cross-vesting) Act (NT); Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld); Jurisdiction of Courts (Cross-vesting) Act 1987 (SA); Jurisdiction of Courts (Cross-vesting) Act 1987 (Tas); Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic); Jurisdiction of Courts (Cross-vesting) Act 1987 (WA)
HCCCA	Convention on Choice of Court Agreements 2005 (done at The Hague 30 June 2005)
NZ	Trans-Tasman Proceedings Act 2010 (NZ)
SEPA	Service and Execution of Process Act 1992 (Cth)

References to the Australian "States" are taken to include the federal Territories, including Norfolk Island and the other external Territories. Although there is a fundamental distinction between the States and Territories in both constitutional status and the degree of insulation from federal power, for questions of jurisdiction and judgments in Australia they are, for the most part, treated on the same terms.

This is the first opportunity to consider the trans-Tasman civil jurisdiction and judgments scheme closely. In this article, I therefore give, in Part II, an account of earlier attempts to improve the enforcement of judgments between Australia and New Zealand and the reasons for the new scheme in the Single Economic Market. Then, in Part III, an extended examination of the scheme is undertaken. The principles of adjudicative jurisdiction (the right to hear litigation) and enforcement jurisdiction (the power to coerce, to enforce judgments) that are to apply in the market area are discussed, and critiqued. In particular, I raise problems with aspects of the scheme that fail to address the potential for related and concurrent proceedings (*lis pendens*) and that may undermine the efficiency of the scheme's enforcement jurisdiction. However, any shortcomings in the scheme should not be exaggerated. It establishes a Judicial Area that is unusually well-adapted to the circumstances of the Single Economic Market. In Part IV, I therefore reflect on the proportionality of the principles of adjudicative jurisdiction and suggest even deeper legal integration for Australia and New Zealand.

II. BACKGROUND

A. The CER Scheme of 1992

A uniform scheme of jurisdiction and judgments for British colonies in the South Pacific was attempted by the Federal Council of Australasia in 1886,[2] and this gave shape to the earliest interstate scheme that was adopted after the federation of the Australian colonies in 1901.[3] The intra-Australian scheme would, over a long period, develop a peerless efficiency in the cross-border enforcement jurisdiction of State courts that, necessarily, did not extend to New Zealand. For most of the twentieth century, New Zealand judgments were only enforceable in the Australian States by an action in debt at common law or by legislation modelled on the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK). In effect, these amounted to "indirect jurisdiction" schemes for enforcing judgments; there was no shared understanding between Australia and New Zealand on what amounted to a legitimate adjudicative jurisdiction for each country's courts to exercise, and so, at the point of cross-Tasman enforcement, the right of New Zealand courts to render a given judgment could still be brought into question in Australia – and vice-versa.

The Closer Economic (CER) Relations Trade Agreement[4] accentuated the need for the more efficient cross-border enforcement of judgments between Australia and New Zealand. In particular, European insights into

Australasian Civil Process Act 1886 (FCA); Australasian Judgments Act 1886 (FCA). There had been special legislative provision for the enforcement of judgments between British colonies in Australasia from 1855: Further Remedies to Creditors Act 1855 (NSW); Further Remedies to Creditors Act 1856 (SA); Relief of Creditors Ordinance 1856 (WA); Remedies to Creditors Act 1857 (Tas); Australasian Creditors Act 1858 (NZ); Further Remedies to Creditors Act 1858 (Vic); Common Law Practice Act 1867 (Qld) ss 20-2.

Service and Execution of Process Act 1902 (Cth).

Australia and New Zealand Closer Economic Relations Trade Agreement (done at Canberra 28 March 1983; entered into force 1 January 1983).

the relationship between, on the one hand, the free movement of people, goods, services and capital within a multistate market area and, on the other, the freer enforcement of civil judgments showed how outmoded the trans-Tasman arrangements were. It nevertheless took too long to achieve improvements in cross-border enforcement jurisdiction under CER and, its metamorphosis in 2004, the Single Economic Market. A half-hearted effort at easing the enforcement of judgments across the Tasman was made in the late 1980s and early 1990s, in explicit recognition that "further recognition and reciprocal enforcement of court decisions ... including enforcement of injunctions, orders for specific enforcement and revenue judgments" would help to remove impediments to trade.[5] Legislation passed in both countries in 1992 was supposed to give effect to that.[6] However, it did more to secure governmental interests – easing the enforcement of revenue judgments,[7] and giving absolutely free circulation to competition judgments.[8] Oddly, it largely ignored anything that would help trade and commerce.[9] The 1992 CER scheme delegated a power to the national governments to allow, by subordinate legislation, the cross-Tasman enforcement of injunctions and other non-money judgments but, after almost two decades, no step to promulgate suitable regulations had been taken.[10]

In Australia, the intra-national scheme for civil jurisdiction and judgments had taken much of its present shape by 1993. This rests on a complex web of federal and State statutes,[11] but proceeds on simple principles for adjudicative jurisdiction and the interstate enforcement of judgments. In short, the scheme provides that any judgment or order made by any State court or tribunal can be enforced by registration in any other part of the Australian federation. There are no substantive grounds enabling a challenge to registration.[12] So far as sorting jurisdiction between different State courts is concerned, this is done by discretionary principles for identifying the *forum conveniens* – the most appropriate court in the

5 Memorandum of Understanding on Harmonisation of Business Laws 1988 (done at Darwin 1 July 1988) art 5(h).

6 Foreign Judgments Act 1992 (Cth); Federal Court of Australia Act 1976 (Cth) Pt IIIA, Div 5; Reciprocal Enforcement of Judgments Act 1934 (NZ) Pts 1, 1A.

7 R Mortensen, "Judgments Extension under CER" [1999] New Zealand Law Review 237 at 248-9, 269 ("Judgments Extension").

8 Ibid, at 249-51.

9 Ibid, at 247, 269. D Goddard, "Global Disputes – Jurisdiction, Interim Relief and Enforcement of Judgments" (1999) 516 Law Talk 29 at 29 ("Global Disputes"). The only net gain achieved in the 1992 amendments was that judgments of the New Zealand District Court became enforceable by registration in Australia: Foreign Judgments Regulations (Cth) r 5(2). Judgments made in Australian inferior courts were already registrable in New Zealand under the Judicature Act 1908 (NZ).

10 Judgments Extension, above n 7, at 247.

11 Service and Execution of Process Act 1992 (Cth) (SEPA); and Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT); Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW); Jurisdiction of Courts (Cross-vesting) Act (NT); Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld); Jurisdiction of Courts (Cross-vesting) Act 1987 (SA); Jurisdiction of Courts (Cross-vesting) Act 1987 (Tas); Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic); Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) (collectively referred to as CVA).

12 SEPA, ss 104-9.

federation for dealing with the litigation.[13] From the Australian perspective, the Single Economic Market and the Trans-Tasman Travel Arrangement secure for New Zealand the rights of cross-border trade, commerce and movement that constitutional guarantees give to the States.[14] However, in circumstances where trans-Tasman and interstate trade, commerce and investment were to be treated, in effect, on an equal footing, there was every reason to be dissatisfied with the disparities between the 1992 CER scheme and the intra-Australian scheme.

B. The CER Scheme Critiqued – The 1990s

The primary criticisms of the 1992 CER scheme for the enforcement of judgments concentrated on its reliance on indirect jurisdiction. It did not recognise the long-arm jurisdiction of Australian and New Zealand courts to enter judgment against defendants outside their borders. The defendant still had to be served with the process of the judging court when inside the country's or State's borders, or had to submit to the court's jurisdiction.[15] It would not be possible to enforce in Australia a New Zealand judgment made against an Australian debtor who refused to appear in the New Zealand proceedings.[16] It would not be possible to enforce in New Zealand a judgment made in New South Wales against even a Victorian defendant who had failed to appear.[17] In short, the CER scheme did not even accommodate the workings of the intra-Australian scheme and, from the New Zealand side, treated Australian State courts as if they were foreign to each other.[18] It was suggested, therefore, that the CER scheme shift towards a double convention.[19] A double convention ties uniform rules for more efficient, and less costly, cross-border enforcement of the judgments of courts in the market area to uniform principles for the exercise of jurisdiction by those courts. It therefore recognises the relationship between enforcement and adjudicative jurisdictions. The double convention models in place in Europe and Australia were compared,[20] and it was suggested that New Zealand be incorporated into the framework of the intra-Australian scheme,[21] with different mechanisms for settling jurisdiction in the *forum conveniens* so as to recognise and accommodate New Zealand's independent sovereign status.[22]

13 For superior courts, see CVA, s 5. For inferior courts, see SEPA, ss 20(3)-(4). For a more detailed account of the scheme, see R Mortensen, "Autochthonous Essential: State Courts and a Cooperative National Scheme of Civil Jurisdiction" (2004) 22 University of Tasmania Law Review 109 at 112-40 ("State Courts").

14 Australian Constitution, s 92.

15 D Goddard, "The Reciprocal Enforcement of Judgments Amendment Act 1992: A Half Step Towards CER" [1992] New Zealand Recent Law Review180 at 187 ("Half Step"); Judgments Extension, above n 7, at 267-9; Global Disputes, above n 9, at 29.

16 Half Step, above n 15, at 187-8.

17 Ibid, at 188. Although the NSW judgment would be enforceable in Victoria: SEPA, s 105.

18 Judgments Extension, above n 7, at 268-9.

19 Ibid, at 267-9.

20 Ibid, at 253-67.

21 See Half Step, above n 15, at 188, where Goddard recommends the intra-Australian scheme's rules of enforcement jurisdiction for a Trans-Tasman scheme.

22 Judgments Extension, above n 7, at 269-73; cf Global Disputes, above n 9, at 30, where Goddard recommends against the use of *forum conveniens* in trans-Tasman cases. He recommended adoption of aspects of the Lugano Convention.

The Australian scheme's principles of adjudicative jurisdiction were thought to be more suitable than the rule-based European schemes. Australian and New Zealand judges shared "a common legal heritage and language, and [were] closely acquainted with legal developments and trends in each other's countries",[23] and in international litigation New Zealand courts already used the principles of *forum conveniens* that Australian courts largely used in interstate matters.[24]

C. The CER Scheme Critiqued – The 2000s

Although it did so without reference to the criticisms made in the 1990s, a Trans-Tasman Working Group commissioned in 2003 made similar recommendations about recasting the CER scheme.[25] In 2005, the Working Group also reviewed the European and intra-Australian models of civil jurisdiction and judgments.[26] When issuing its final report in 2006, the Working Group similarly recommended that Australian and New Zealand courts be subject to uniform principles of jurisdiction centring on the *forum conveniens*.[27] The report included other recommendations on the service of subpoenas in civil and criminal proceedings,[28] evidence and use of video technology in proceedings,[29] and the enforcement of fines and civil penalties between Australia and New Zealand.[30] However, by the time this report was issued, international developments in questions of jurisdiction and the cross-border enforcement of judgments had also been completed. The Hague Conference on Private International Law had finalised the Convention on Choice of Court Agreements,[31] which had agreed on rules for only one, but a commercially significant, ground of jurisdiction – a contractual agreement to submit litigation to the courts of a nominated country – and provided principles for the easier transnational enforcement of judgments made when exercising jurisdiction on that ground. The Working Group therefore also recommended that the principles of the Choice of Court Convention be incorporated into the agreed adjudicative jurisdictions of any trans-Tasman scheme.[32] The result was the bilateral Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed in Christchurch in 2008.[33]

23 Judgments Extension, above n 7, at 271.

24 Ibid, at 272-3.

25 See Australia (Attorney-General's Department) and New Zealand (Ministry of Justice), *Trans-Tasman Court Proceedings and Regulatory Enforcement – A Public Discussion Paper by the Trans-Tasman Working Group* (Commonwealth of Australia, 2006) ("Discussion Paper"); Australia (Attorney-General's Department) and New Zealand (Ministry of Justice), *Trans-Tasman Court Proceedings and Regulatory Enforcement – A Report by the Trans-Tasman Working Group* (Commonwealth of Australia, 2006) ("Working Group Report").

26 Discussion Paper, above n 25, at 11-12, 21, 23, 28.

27 Working Group Report, above n 25, at 15-16.

28 Ibid, at 17-18, 23.

29 Ibid, at 17-20.

30 Ibid, at 21-3.

31 Convention on Choice of Court Agreements 2005 (done at The Hague, 30 June 2005) (HCCCA).

32 Working Group Report, above n 26, at 16.

33 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (done at Christchurch 24 July 2008) ("Christchurch Agreement").

Strangely, while the Agreement gave effect to most of the Working Group's recommendations, it did not include the recommendation to incorporate the principles of the Choice of Court Convention into any reformed trans-Tasman arrangements. The Christchurch Agreement only provide for choice of court agreements to be dealt with under *forum conveniens* principles,[34] enabling courts to maintain a broader discretion about the enforcement of choice of court agreements. Further criticism was therefore made of the Christchurch Agreement.[35] It was argued that there was a need to require Australian courts to enforce agreements that placed litigation in New Zealand courts, as they had used discretions to the point where it was extremely unlikely that they would enforce an agreement by which a court outside Australia had been chosen as the exclusive forum for the dispute.[36] At the same time, government lawyers on both sides of the Tasman were nevertheless preparing legislation that would still provide for Choice of Court Convention principles in trans-Tasman disputes.[37] This legislation was passed without amendment in the Australian federal Parliament in April 2010.[38] In New Zealand, the Bill received closer parliamentary scrutiny. The Justice and Electoral Committee suggested a number of amendments,[39] with which the Australian Federal Attorney-General's Department agreed. The amended New Zealand Bill was then passed in August 2010.[40] Amendments to align the Australian Act with the New Zealand Act are therefore likely to be made before commencement, which is intended for the second half of 2011.

III. THE CIVIL JURISDICTION AND JUDGMENTS SCHEME

A. Overview

The Trans-Tasman Proceedings Acts create a Trans-Tasman Judicial Area.[41] For matters internal to the Single Economic Market Area, there are shared rules for an efficient enforcement jurisdiction that rest on shared principles

34 Christchurch Agreement, art 8(2)(c).

35 R Mortensen, "The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention" (2009) 5(2) Journal of Private International Law 213 at 234-5 ("Hague and Ditch").

36 Ibid, at 232-5, 240-2.

37 Email Julie Nind to author, 26 September 2010.

38 Trans-Tasman Proceedings Act 2010 (Cth) ("Aust").

39 New Zealand, Trans-Tasman Proceedings Bill – As Reported from the Justice and Electoral Committee, 2010 ("JEC Report").

40 Trans-Tasman Proceedings Act 2010 (NZ) ("NZ").

41 I adapted this term from the use of the expression "European Judicial Area" in the European Union and the European Economic Area. The idea was first suggested by French President Valéry Giscard d'Estaing, who in 1977 contemplated "un espace judiciaire européen" that also involved special arrangements for easier extradition between European countries: V Giscard d'Estaing, "Proposition concernant l'espace judiciaire européen" Brussels, 5 December 1977. Since the meeting of the European Council in Tampere, Finland, in 1999, the term has been used to refer generally to the collection of different schemes of judicial cooperation in Europe. The arrangements for jurisdiction and judgments within the EU under the Brussels I Regulation and Convention, and within the EEA under the Lugano Convention, are regarded as aspects of the European Judicial Area: see Judgments Extension, above n 7, at 253; A Saggio, "European Judicial Area for Civil and Commercial Matters: The Brussels and Lugano Conventions" (1991) 31 Rivista di Diritto Europeo 617;

for adjudicative jurisdiction. Furthermore, it is recognised that one of the countries in the Single Economic Market – Australia – is itself a multistate market area, and in many civil and commercial matters its internal borders are as significant as the 'border' with New Zealand. Importantly, therefore, the shape of the trans-Tasman scheme of civil jurisdiction and judgments is largely modelled on the intra-Australian scheme and accommodates the extended jurisdiction of Australian State courts. However, there are aspects of the intra-Australian scheme that were not adopted, but that perhaps should have been; and other aspects that were adopted, but that perhaps should not have been.

It is possible to characterise the Trans-Tasman Judicial Area as the archetype of a common law double convention on civil jurisdiction and judgments.[42] In the usual, "xenophobic"[43] approach to cross-border enforcement jurisdiction, the judgment can usually be challenged at the point of enforcement on substantive grounds such as the judgment was obtained by fraud or by a denial of natural justice; it is incompatible with a local or another foreign judgment; it is giving effect to a foreign penal or taxation law; it is contrary to public policy; or the court that made the judgment was not exercising a recognised international jurisdiction.[44] Easily the ground most commonly raised to resist the cross-border enforcement of a judgment is the foreign court's lack of international jurisdiction, which, in actions *in personam*, normally means the liable defendant either had no presence in the foreign country at the time the writ was served or had not agreed to submit to the jurisdiction of the foreign court.[45] As a result, cross-border enforcement is significantly eased by denying the liable defendant the right to challenge the adjudicative jurisdiction of the judging court. However, in schemes in multistate market areas this inevitably means that the participating countries and States agree, in relation to each other,[46] to uniform and proportionate grounds for courts to exercise jurisdiction in matters internal to the market. So, in the arrangements under the Brussels I Regulation[47] and Convention[48] (for the European Union) and the Lugano Convention (for the European Economic Area),[49] the participating countries

P Beaumont and E Johnston, "Can Exequatar Be Abolished in Brussels I whilst Retaining a Public Policy Defence?" (2010) 6 Journal of Private International Law 249 at 249. For the use of the term "Trans-Tasman Judicial Area", see Hague and Ditch, above n 35, at 222; OL Knöfel, "Internationales Zivilverfahrensrecht 'Down Under' – Australisch-neuseeländisches Binnenmarktprozessrecht" (2009) 55(9) Recht der Internationalen Wirtschaft 603.

42 Hague and Ditch, above n 35, at 221-2.

43 J Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart Publishing, 2002) 3.

44 For example, see R Mortensen, *Private International Law in Australia* (LexisNexis, 2006) at 130-6, 138-43 ("Private International Law").

45 Ibid, at 130-6.

46 For the significance of this qualification, see below nn 244-252.

47 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation").

48 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (done at Brussels 27 September 1968): OJ 1978 L304/77.

49 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (done at Lugano 16 September 1988): OJ 1988 L319/9 ("Lugano Convention").

have agreed to rules of jurisdiction that centre on the *forum domicilii*[50] but that allow other countries' courts to exercise jurisdiction when the events that gave rise to the matter have some other defined connection with the country – in actions in delict or tort, for instance, the harmful event must have taken place there.[51] That enables any judgment to be enforced anywhere in the EU or EEA without exposing the jurisdiction of the rendering court to challenge. The European schemes, nevertheless, still allow the judgment to be challenged at the enforcement stage on any of the other traditional grounds for resisting enforcement.[52] In contrast, the intra-Australian scheme has common adjudicative jurisdictions that place litigation in the *forum conveniens* – the most appropriate court in Australia to deal with the case. Furthermore, at the point of enforcing the judgment in a different State, it not only denies the liable defendant the right to challenge the jurisdiction of the rendering court – it denies the liable person the right to resist the judgment on *any* ground.[53] This is probably the most efficient and complete scheme for the cross-border enforcement of judgments that is known; it could only be made more efficient by removing the requirement of registration in the second State to make the judgment enforceable there. And this is almost what has been extended to trans-Tasman arrangements.

Adjudicative jurisdiction in the trans-Tasman scheme rests on common law institutions. This was the Working Group's natural choice for the Single Economic Market as, first, Australia and New Zealand "share a common law heritage and very similar justice systems"[54] and, secondly, the intra-Australian scheme had already successfully reconfigured common law institutions for its uniform principles of civil jurisdiction.[55] The understandings of *jurisdictio* (or official authority) for courts in the European schemes rest on the defendant's domicile within the EU or EEA; so the *forum domicilii* is placed at the centre of Brussels-Lugano arrangements.[56] However, the authority of common law courts is grounded on the exercise of physical power. That power is traditionally expressed by service of the defendant with the Queen's writ,[57] which, at common law, does not run beyond the kingdom[58] – be that marked by the borders of the country or the State. As a result, the common law assumes that presence within the country or State at the time of service 'perfects' the obligation of obedience.[59] In truth, this is a fiction. The writ can be ignored with impunity. It is only when proceedings are heard, judgment is

50 Brussels I Regulation, art 2; Lugano Convention, art 2.

51 Brussels I Regulation, art 5(3); Lugano Convention, art 5(3).

52 Brussels I Regulation, art 27; Lugano Convention, art 27; Judgments Extension, above n 7, at 253-61.

53 Judgments Extension, above n 7, at 262-7; Private International Law, above n 44, at 39-51, 159-62.

54 Working Group Report, above n 26, at 6.

55 Ibid, at 7.

56 Brussels I Regulation, art 2; Lugano Convention, art 2; although courts may also exercise jurisdiction on other, rule-defined grounds: Brussels I Regulation, arts 5-7; Lugano Convention, arts 5-7.

57 *John Russell & Co Ltd v Cayzer, Irvine and Co Ltd* [1916] 2 AC 298 at 302; *Laurie v Carroll* (1958) 98 CLR 310at 323; see also *McDonald v Mabee* 243 US 90 at 91 (1916).

58 *Laurie v Carroll* (1958) 98 CLR 310 at 322.

59 Ibid, at 324.

entered *and* the judgment is enforced that the sovereign's power is in practice perfected. Adjudicative jurisdiction requires enforcement jurisdiction before coercion can be applied.[60] However, the intra-Australian scheme is still based on the common law principle that adjudicative jurisdiction depends on the run of a State court's writ, but it is extended by statute to the borders of the nation as a whole.[61] Similarly, the trans-Tasman scheme sets its jurisdiction on the run of any Australian or New Zealand writ to the borders of the Single Economic Market Area.[62] In Warren Pengilly's words, it gives "a uniform writ stretching from the Cocos (Keeling) Islands to the Chathams".[63]

The result is that every Australian and New Zealand court has jurisdiction as of right, and can exercise coercive power, over every individual and corporation that has a presence in the market area. The process of courts representing 11 different legal systems[64] circulates within the same area, and therefore potentially risks *lis pendens*. That risk gives rise to the question of *which* court in the market area, if any, should be the single preferred venue for the litigation. The exercise of jurisdiction is therefore funnelled by one of two means: principally by the doctrine of *forum conveniens*, and exceptionally by a choice of court agreement. Significantly, the *forum conveniens* funnel relies on judicial discretion to identify "the more appropriate court" in the market area, and to stay proceedings in the local court if "the more appropriate court" is in the other country.[65] The standard adopted is that of the House of Lords' decision in *Spiliada Maritime Corporation v Cansulex Ltd*,[66] where "the clearly more appropriate forum" test was used to stay proceedings or decline to exercise a long-arm jurisdiction that was, otherwise, within the powers of the court.[67] Although originating in Scots law,[68] the *Spiliada* standard has wide acceptance in English and Commonwealth common law as an internationally-sensitive means of placing litigation in the best court for it. It has been accepted in New Zealand,[69] and in Australia as the dominant principle for allocating jurisdiction in the intra-Australian civil jurisdiction

60 It was not always so. Into the 18th century, penalties were applied in England for a failure to respond to a writ in civil proceedings because causes would not be tried in the absence of the defendant. Scots law, and other systems under Roman legal influence, would enter judgment by default and apply coercive measures at that point – the modern approach of the common law. See Lord Kames, *Historical Law Tracts* (Legal Classics, 1988, first published 1761) at 295-304.

61 SEPA, ss 12, 15.

62 Aust, ss 9-10; NZ ss 14-15.

63 W Pengilly, "On Trans-Tasman Banter and 'Things' CER" [1990] New Zealand Law Journal 199 at 200.

64 New Zealand and, in Australia, the six States, two internal Territories, Norfolk Island and the federal polity.

65 Aust, s 19(1); NZ, s 24(1).

66 [1987] 1 AC 460.

67 Ibid, at 478.

68 *Sim v Robinow* 1892 19 R 665.

69 *Oilseed Products (NZ) Ltd v HE Burton Ltd* (1987) 1 PRNZ 313; *Club Mediteranee NZ v Wendell* [1989] NZLR 216; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 WLR 297; *Kidd v Van Heeren* [1998] 1 NZLR 324; *Jackson v Henning & Associates* [2006] NZHC 639 at [12]; *Kidd v Van Heeren* [2006] NZCA 42; *Dale v Jeffrey* [2008] NZHC 147 at [21].

scheme.[70] It has not been accepted in Australia for international litigation,[71] including litigation where the competing court is in New Zealand. This has lingering implications for the Trans-Tasman Judicial Area.

B. Jurisdiction

1. Establishing Jurisdiction

The principles of adjudicative jurisdiction in the Trans-Tasman Proceedings Acts apply to civil proceedings *in personam* and some family law matters.[72] Questions of divorce; child, spousal and de facto partner maintenance; and proceedings *in rem* are excluded,[73] which already makes it a substantially broader scheme than is found in the Brussels and Lugano arrangements.[74] The Acts enable initiating process from *any* Australian court – no matter how high or low – to be served (without leave) in New Zealand,[75] and initiating process from *any* New Zealand court to be served (without leave) in Australia.[76] The same rules apply for the service of process from tribunals, although only those tribunals allowed trans-Tasman service by the national governments.[77] So long as service takes place in accordance with the law of the place where the writ was issued, it is taken as having the same effect as it would in the place of issue.[78] Appearances must be entered within 30 days, or any longer period allowed in the place where the writ was issued.[79] These provisions are modelled directly on those for interstate service of process under the Australian scheme.[80] For the first time, many inferior courts in Australia have the power to establish an international jurisdiction.[81]

70 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; CVA, s 5; SEPA, s 20(3).

71 See text at nn 108-118 below.

72 Aust, s 8(1)(a); NZ, s 12(1).

73 Aust, s 8(2)(a)-(b); NZ, s 12(2)(a)-(b).

74 For instance, adjudicative jurisdiction includes matters of wills and succession, insolvency and recovery of public revenue, which are excluded from the European schemes: Brussels I Regulation, art 1; Lugano Convention, art 1.

75 Aust, s 9.

76 NZ, s 13.

77 Aust, s 8(1)(b) (by regulation); NZ, ss 12(b)(i)-(ii) (by Order in Council).

78 Aust, s 10; NZ, s 14. There is comparable provision for service of subpoenas, though requiring the leave of the issuing court and limited (for Australia) to federal courts and to State and Territory courts prescribed by regulation: Aust, ss 29-39; Evidence Act 2006 (NZ), ss 150-67. The legislation also validates service of subpoenas from the other country, and makes disobedience of the subpoena a contempt of court in the place of service. In the case of New Zealand subpoenas served in Australia, disobedience is contempt of the Federal Court of Australia: Aust, ss 40-45; Evidence Act 2006 (NZ), ss 163-67. For service of initiating process, there is no provision in the country of service validating service of process from the other country (as there is for subpoenas). However, this is not strictly necessary as, despite the common law theory that adjudicative jurisdiction is based on the exercise of physical power (see nn 57-58), the assumption that they can exercise coercive power at this point is a fiction. Under the Trans-Tasman Proceedings Acts, it is the grant of enforcement jurisdiction to every Australian and New Zealand court that practically compels engagement with any proceedings begun by cross-border service: Aust, s 74; NZ, s 63. See above n 60.

79 Aust,13; NZ, s 17.

80 SEPA, ss 12, 15, although within Australia appearances in interstate proceedings must be entered within 21 days: SEPA, s 17.

81 The New Zealand District Courts and the Family Court already have an international jurisdiction: see, for example, District Courts Rules 2009 (NZ), r 3.44. The Queensland District Court also has an international jurisdiction: District Court Rules 1968 (Qld), s 59.

An Australian or New Zealand superior court may also assume jurisdiction to grant interim relief (such as a Mareva injunction, an Anton Piller order or a suppression order)[82] in support of proceedings across the Tasman.[83] The principal proceedings may not yet have been commenced.[84] Indeed, to be effective, Mareva or Anton Piller proceedings usually have to catch the defendant by surprise – so the defendant may not yet have notice of the principal proceedings. All that is needed to establish jurisdiction in this case is an application from a party (or an intended party) to the proceedings in the other country, and the supporting court considering that it is "appropriate" to give interim relief in support.[85] Naturally, the judging court must accept that it has the power to give the kind of relief sought, and that it would itself have given the relief in similar, but purely domestic, proceedings.[86]

2. Funnelling Jurisdiction I: The Forum Conveniens

(i) The Discretion to Stay Proceedings

The Trans-Tasman Proceedings Acts expressly provide for a stay of proceedings on the ground of *forum non conveniens*. Once jurisdiction is established in a court in one country, the defendant may apply to have the proceedings stayed on the ground that a court in the other country is "the more appropriate court" to deal with the litigation.[87] The application can be considered without a hearing, or with a hearing if either the plaintiff or defendant (or another person served with the application) asks for one.[88] To lower the costs of a jurisdictional dispute, the defendant, and the defendant's lawyer, have a right in an application for a stay to appear from

82 These are the examples given by the Working Group: Working Group Report, above n 25, at 13.

83 Aust, s 26(1); NZ, s 31(1). The national governments may give other courts the power to provide supporting interim relief: Aust, s 25(d) (regulation); NZ, s 31(3) (Order in Council). The New Zealand Act will not allow supporting interim relief in the form of an interim payment, discovery, a warrant for the arrest of property, or orders for subpoenas under the Trans-Tasman scheme: NZ, s 31(2). The Australian Act will not expressly allow supporting interim relief in the form of a warrant for the arrest of property: Aust, ss 25, 26(1). These provisions probably have the same effect as the New Zealand provisions as orders for discovery in Australia are regarded as orders of final (and not interim) relief, and so are excluded by implication: Australia, Trans-Tasman Proceedings Bill 2009 – Explanatory Memorandum (Commonwealth of Australia, 2009) at [59] ("Explanatory Memorandum").

84 Aust, s 25; NZ, s 31(1).

85 Aust, ss 25, 26(1)(a); NZ, ss 31(1), 32(1)(a).

86 Aust, s 26(1)(b); NZ, s 32(1)(b). The Australian Act also states that interim relief may be refused because the court considers that "it has no jurisdiction ... and it is for that reason inexpedient to give the interim relief": Aust, s 26(2). In the initial drafting, this was borrowed from the Civil Jurisdiction and Judgments Act 1982 (UK), s 25(2), which appears to respond to the jurisdictional conditions of the Brussels I Regulation. The New Zealand Act (s 32) does not have this provision, as the New Zealand Parliament considered that "appropriateness" alone should govern the granting of interim relief, and the inclusion of a provision like s25(2) of the UK Act might unnecessarily discourage courts from giving supporting interim relief: New Zealand, Parliamentary Debates, 24 August 2010 (Charles Chauvel MP). It would be best to repeal s 26(2) of the Australian Act.

87 Aust, s 17(1); NZ, s 22(1).

88 Aust, ss 18(1)-(2); NZ, ss 23(1)-(2). Regulations may require, or allow, other persons to be served with the application for the stay: Aust, s 18(2)(c); NZ, s 23(2)(c).

a remote location – that is, from across the Tasman.[89] In deciding whether another court is "the more appropriate', the court hearing the application must consider: (a) the places where the parties reside or principally conduct business; (b) the places where any likely witnesses reside; (c) the place where the subject-matter of the litigation is located; (d) any non-exclusive choice of court agreement; (e) the governing law; (f) any concurrent proceedings in the other country; and (g) the financial circumstances of the parties.[90] This list is not exhaustive; anything else the court considers relevant can be taken into account.[91] If the court decides that there is a more appropriate court in the other country, it may grant a stay of proceedings.[92] There is no requirement that the proceedings then be taken in the other court, but the stay can be conditioned on having the proceedings determined without delay or undue expense.[93] This would normally mean that the proceedings be commenced in the other country's court. There is also power to set a deadline for proceedings to be reactivated in the other country.[94] If proceedings are to be recommenced in (say) New Zealand, the litigation, although beginning from scratch there, is regarded as having been commenced at the time it was begun in the Australia.[95] In other words, so far as the tolling of any statute of limitations is concerned, the plaintiff is not to be disadvantaged because of any delay caused *merely* by the granting of a stay, and the re-activation of the litigation in the other country.

The centrality of principles of *forum conveniens*, and the reliance on judicial discretion to identify the *forum conveniens*, is the unique quality of the intra-Australian scheme of civil jurisdiction. The Australian scheme uncouples the doctrine of *forum conveniens* from the rules-based framework of long-arm jurisdiction when process is served outside the country. In most cases where the doctrine is used, the court has to meet technical "nexus requirements" – such as the proceedings relate to a tort occurring in the country or a contract governed by its law – in addition to being the *forum conveniens*, before it can exercise jurisdiction over a defendant served outside its borders.[96] For State courts, the intra-Australian scheme has (since 2003) dropped all "nexus requirements", and left the exercise of jurisdiction to be decided only by a decision as to which court is the *forum conveniens*.[97] The Australian scheme of civil jurisdiction nevertheless, because of constitutional constraints,[98] retains rule-based jurisdictions for the federal courts. The jurisdictions of the Federal Court, Family Court of

89 Aust, s 18(4); NZ, s 23(4). This is only a right in applications for stays. In all other cases, the court must give leave before remote appearance, and the appearance of lawyers from the other country, is allowed: Aust, ss 46-63; NZ, ss 34-51.

90 Aust, ss 19(2)(a)-(g); NZ, ss 24(2)(a)-(g). These parallel the common law connecting factors: see *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 476-8.

91 Aust, s 19(2)(i); NZ, s 24(2)(h).

92 Aust, s 19(1); NZ, s 24(1).

93 Aust, s 19(3); NZ, s 26.

94 Aust, ss 19(3), 23(1)(b); NZ, ss 26, 29(1)(b).

95 Aust, s 23(2); NZ, s 29(2).

96 Australian Law Reform Commission, *Service and Execution of Process, Report No 40* (1987) 81.

97 Ibid, at 84-5.

98 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Australia and Federal Magistrates Court are limited by both the statutory grants of federal jurisdiction granted to them and the principles of *forum conveniens*.

The mechanism for putting trans-Tasman litigation into the *forum conveniens* differs from the intra-Australian scheme in a number of respects. First, Australian superior courts seem to retain a power to stay proceedings when another Australian court has a claim on them,[99] but in practice the stay has been supplanted by the power to *transfer* the proceedings to another superior court.[100] The advantage of the transfer mechanism is that, in the transferee court, there is no need to recommence proceedings or to repeat any steps already taken in the litigation.[101] An inferior State court has power only to stay proceedings if it concludes that there is another Australian court that is the *forum conveniens*.[102] Transfers are possible, but only by removal into the relevant Supreme Court and its ordering a transfer to another State.[103] Secondly, in the intra-Australian scheme the anti-suit injunction is also available to prevent a *forum non conveniens* within the federation from hearing the litigation. The grant of an anti-suit injunction on the ground of *forum non conveniens* is completely prohibited under the Trans-Tasman scheme:[104] a difference that seems hard to justify.[105] This is explored below.

(ii) The Discretion to Grant Stays: Potential Differences

Although the Acts set the same "more appropriate court' standards when exercising the discretion to grant a stay, there are potentially three issues that could lead to different treatment of the discretion on different sides of the Tasman. The first is that the statute forces Australian courts to shift from their traditionally parochial attitude in questions of where international litigation is to be heard. The Trans-Tasman Proceedings Acts' adoption of *Spiliada*-like measures of *forum conveniens* demands no change in the approach of New Zealand courts,[106] which have followed *Spiliada* since the House of Lords decided the case.[107] The High Court of Australia, however, has studiously avoided adoption of *Spiliada* for international cases.[108] Instead, in *Voth v*

99 *McEntee v Connor* (1994) 4 Tas R 18; *Schmidt v Won* [1998] 3 VR 435; *Douglas v Philip Parbury & Associates* [1999] WASC 15; cf *Pegasus Leasing Ltd v Balescope Pty Ltd* (1994) 63 SASR 51 at 56.

100 CVA, s 5.

101 CVA, s 11(3).

102 SEPA, s 20.

103 CVA, s 8.

104 Aust, s 22; NZ, s 28.

105 See text at below nn 126-155.

106 JEC Report, above n 39, at 2.

107 See RJ Paterson, "Forum Non Conveniens in New Zealand" (1989) 13 New Zealand Universities Law Review 337; *Oilseed Products (NZ) Ltd v HE Burton Ltd* (1987) 1 PRNZ 313; *Club Mediteranee NZ v Wendell* [1989] NZLR 216; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 WLR 297; *Kidd v Van Heeren* [1998] 1 NZLR 324; *Jackson v Henning & Associates* [2006] NZHC 639 at [12]; *Kidd v Van Heeren* [2006] NZCA 42; *Dale v Jeffrey* [2008] NZHC 147 at [21].

108 See A Gray, "*Forum Non Conveniens* in Australia: A Comparative Analysis" (2009) 38 Common Law World Review 207; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575; *Puttick v Tenon Limited* (2008) 238 CLR 265 at 276-7, 280.

Manildra Flour Mills Pty Ltd[109] in 1990 it decided that an Australian court should only order a stay or dismissal of proceedings if it appeared to the court that it was itself "a clearly inappropriate forum" for dealing with the dispute.[110] When coupled with exorbitant rules of long-arm jurisdiction, this standard has given Australian courts the most forum-centred settings for the exercise of international jurisdiction in the common law world.[111] *Voth* directs courts not to stay or dismiss proceedings simply because there is a clearly more appropriate court with jurisdiction in the proceedings in another country.[112] As a result, Australian courts met with the claims of New Zealand courts in trans-Tasman proceedings have on the whole kept the proceedings,[113] and there are cases where, clearly, a transfer interstate would have been ordered but where a stay in favour of a New Zealand court was refused.[114] There has been a slightly more generous attitude in *lis pendens* cases.[115] The low point, in terms of principle, was nevertheless reached in 2008 in *Puttick v Tenon Limited*.[116] There, the High Court of Australia insisted on holding on to jurisdiction in trans-Tasman tort proceedings being pursued in Victoria. The outcome is understandable, as the defendant had not proved, at the time the stay was sought, either that New Zealand was the place of the tort (the *locus delicti*) or that it provided the governing law – a weighty factor in *forum conveniens* applications. However, French CJ and Gummow, Hayne and Kiefel JJ also noted how the claim should be treated if New Zealand had provided the governing law. They cited aspects of the special recognition of New Zealand law and judgments in Australian law,[117] and said that these considerations[118]

> all point against treating the identification of New Zealand law as the lex causae as a sufficient basis on which to conclude that an Australian court is a clearly inappropriate forum to try a dispute.

109 (1990) 171 CLR 538.

110 Ibid, at 558.

111 See RA Brand and SR Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press, 2007) at 100.

112 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at, 558.

113 Stay refused: for example, *James Hardie & Co Pty Ltd v Cameron* [1995] NSWDDT 5; *James Hardie & Co Pty Ltd v Bruce* [1996] NSWDDT 6; *Putt v James Hardie & Co Pty Ltd* [1998] NSWDDT 1; *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20; *Union Shipping New Zealand Ltd v Morgan* [2002] NSWCA 124; *James Hardie and Coy Pty Limited v Coyle* [1998] NSWSC 190; and see also *B and B (Re Jurisdiction)* [2003] FamCA 105. Stay granted: for example, *Howard v National Bank of New Zealand Ltd* [2003] FCA 41; *Drummond v Ansto* [1999] NSWSC 20.

114 For cases retained against New Zealand as the *forum delicti*, see *James Hardie & Co Pty Ltd v Cameron* [1995] NSWDDT 5; *James Hardie & Co Pty Ltd v Bruce* [1996] NSWDDT 6; *Putt v James Hardie & Co Pty Ltd* [1998] NSWDDT 1; *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20.

115 *[citation removed to comply with NZ suppression order]*; cf *In the Marriage of Gilmore* (1993) 100 FLR 311; *Century Yuasa Batteries Pty Ltd v Century Batteries Holdings Pty Ltd* [2004] QSC 271. It is recognised in Australia that *lis pendens* tends to trigger the conditions for a stay in accordance with the principles of *Voth: Henry v Henry* (1996) 171 CLR 571 at 591.

116 (2008) 238 CLR 265.

117 See, Evidence and Procedure (New Zealand) Act 1994 (Cth); Federal Court of Australia Act 1976 (Cth) Pt IIIA.

118 (2008) 238 CLR 265 at 278.

The *dictum* is utterly perverse. The degree of legal integration between Australia and New Zealand is not used to express a special degree of trust in New Zealand courts' ability to deal with the proceedings, but is used to give even less deference to New Zealand courts than would be given to other foreign courts in tort claims.

A Trans-Tasman Judicial Area deepens the legal integration of Australia and New Zealand substantially. There remains a risk, albeit a small one, that legal integration will be used as an excuse in Australia for perpetuating protectionist approaches to Australian adjudicative jurisdictions – maintaining the thinking of the *Puttick* court. The Australian Trans-Tasman Proceedings Act nevertheless dictates that the mindset of *Puttick* be abandoned, and it is hoped that Australian courts will recognise the radical shift in juridical culture that this brings.

The second issue is harder to control – the weight to be given to mandatory rules when using the discretion to identify the *forum conveniens*. A mandatory rule is one that gives the strongest expression to national or State interests. It applies in proceedings even if the parties have tried to contract out of the rule's application, or if the law of some other place is the governing law. In short, courts in the nation or State must apply the rule even if that means it overrides the parties' contractual choice or the governing law selected by the usual choice of law rule.[119]

The importance of a mandatory rule to decisions about where to litigate is this: the rule will only end up applying if the proceedings are retained by the court that is itself making the decision about adjudicative jurisdiction. If they are heard elsewhere, the proceedings may, by contract or choice of law rule, be subject to a *lex causae* other than the mandatory rule. But the court determining where to litigate may consider the mandatory rule so important that it is decisive in concluding that the proceedings should not be stayed.

This has often been the effect, in Australia, of s 18 of the Australian Consumer Law (which replaced s 52 of the Trade Practices Act 1974 (Cth)), which gives relief for misleading and deceptive conduct. Section 18 is regarded as a mandatory rule. Stays of proceedings on *forum non conveniens* grounds have been refused in Australia because it was doubtful whether a foreign court would give effect to s 18.[120] Richard Garnett believes that this approach encourages plaintiffs to plead s 18 – and it is an easy matter to include it in most general civil claims – simply to reinforce the case for an Australian court to hold proceedings despite a

119 See M Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) at 30-1 ("International Litigation").

120 See the cases discussed in R Garnett, "Stay of proceedings in Australia: A 'Clearly Inappropriate' Test?" (1999) 23 Melbourne University Law Review 30 at 46-48 ("Stay of Proceedings"). Further, Australian courts have refused to enforce choice of court agreements purely on the ground that a s 18 claim has been made and would only apply in the proceedings if they were heard in an Australian court: R Garnett, "The Enforcement of Jurisdiction Clauses in Australia" (1998) 21 University of New South Wales Law Journal 1 at 18-19; M Keyes, "Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice" (2009) 5 Journal of Private International Law 181 at 199-200 ("Jurisdiction under the Convention"). A similar approach has been taken when litigants have relied on the s 52 claim to avoid disputes being referred to arbitration: ibid, at 188-92.

more appropriate forum elsewhere.[121] The thinking, adapted to claims involving New Zealand, could possibly survive the Trans-Tasman Proceedings Acts, as the court 'must take into account ... any other matter that [it] considers relevant'.[122] The availability of relief under s 18, though, should be treated as irrelevant to jurisdictional questions in trans-Tasman proceedings, as the very same relief is available in New Zealand under the Fair Trading Act 1986.[123] Unfortunately, the myopia evident in Australian courts' approach to s 18 has been compounded by a failure even to consider whether there is similar relief available in the competing court.[124] It should be reinforced that, despite being a mandatory rule in Australia, s 18 represents a standard of commercial and consumer protection that is applicable throughout the entire Single Economic Market, and it does not represent a juridical advantage to plaintiffs that is peculiar to Australian law. This is one mandatory rule that should not be given any special weight in Trans-Tasman *forum conveniens* applications.

Even if the Trans-Tasman Proceedings Acts mean that s 18 is not given special weight in jurisdictional questions, they do not prevent other mandatory rules made by parliaments (national or State) either side of the Tasman being used to hold litigation that would otherwise be relocated. The possibility of a rule, unique to one place in the market area, being regarded as mandatory is likely to see different courts legitimately making different assessments of the *forum conveniens*.[125]

The third issue gives rise to a distinctive set of considerations: the availability of the anti-suit injunction.

(iii) Anti-suit Injunctions

As is required by the Christchurch Agreement,[126] the Trans-Tasman Proceedings Act prohibits *any* Australian court – inferior or superior – from issuing an anti-suit injunction against a New Zealand court "on the ground that the New Zealand court is not the appropriate forum".[127] New Zealand courts are similarly prohibited from restraining any Australian proceedings on *forum non conveniens* grounds.[128] At least in competition for litigation within the Single Economic Market, this means that courts are limited to a measure of self-restraint – the stay of proceedings – when putting litigation into the

121 Stay of Proceedings, above n 120, at 47.

122 Aust, s 19(2)(i); NZ, s 24(2)(h).

123 Fair Trading Act 1986 (NZ), ss 9-12.

124 *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Barden* SC of New South Wales, Rolfe J, 19 October 1994; see Stay of Proceedings, above n 120, at 47.

125 An issue that may possibly give rise to this kind of assessment is the application in New Zealand courts of the Accident Rehabilitation and Compensation Act 1992 (NZ) to New Zealand residents injured in Australia. There would be no reason to apply the Act if the proceedings were heard in Australian courts. A question (still to be answered) is how much weight the Act is to receive in New Zealand in applications to have proceedings heard in the *forum delicti*, which is the preferred forum conveniens in claims involving foreign wrongs: see R Tobin and E Schoeman, "The New Zealand Accident Compensation Scheme: The Statutory Bar and the Conflict of Laws" (2005) 53 American Journal of Comparative Law 493 at 502-6.

126 Christchurch Agreement, art 8(5).

127 Aust, s 22.

128 NZ, s 28.

forum conveniens. The common law's other means of placing litigation in the appropriate court – an injunction against a litigant who persists in having the proceedings determined in a *forum non conveniens* – is denied. This ban is not modelled directly on the intra-Australian scheme. It is adapted from the Australian scheme, but is a more comprehensive prohibition than Australian courts are subjected to in jurisdictional questions within the federation.[129]

(a) Anti-suit injunctions in Australia

The intra-Australian scheme has a limited ban on the granting of anti-suit injunctions in s 21 of the federal Service and Execution of Process Act. An injunction may not be issued by one State court against proceedings in a second State court if: (1) the proceedings were commenced in the second court by interstate service of process; and (2) the reason for the injunction is that the second State court is 'not the appropriate forum' for the proceedings (a *forum non conveniens*).[130] However, it should be noted that, s 21 to one side, most inferior courts in Australia do not have any power whatsoever to issue anti-suit injunctions. Injunctive powers, being within an equitable jurisdiction or to prevent abuse of the court's process, are simply not granted to a number of inferior courts[131] or, if granted to them, are limited to matters that do not extend to restraints on legal proceedings.[132] There are only two inferior State courts in Australia that technically have the power to grant anti-suit injunctions.[133] These, like the superior State courts, are nevertheless constrained by s 21's ban when the court that is being cast as a *forum non conveniens* is exercising an interstate jurisdiction.

Anti-suit injunctions can therefore be issued in Australia in a range of situations. First, they can be issued where the proceedings have begun in a court that is a *forum non conveniens* and, also, where: (1) the court is a federal court; (2) the court is a State court exercising jurisdiction because process was served inside the State; (3) the court is a State court exercising jurisdiction because of contractual submission to its jurisdiction; or (4) the court is a State court exercising long-arm jurisdiction over individuals or corporations served overseas. Secondly, as discussed below,[134] anti-suit injunctions can be issued by a State court when the court in the second State is taking proceedings in breach of an exclusive choice of court agreement.[135] Thirdly,

129 Explanatory Memorandum, above n 83,at [49].

130 SEPA, s 21.

131 For example, Local Court of New South Wales: cf Local Court Act 2007 (NSW), s 30. Local Court of Northern Territory: cf Local Court Act (NT), s 14. Magistrates Court of Queensland: Magistrates Courts Act 1921 (Qld), s 4. Magistrates Court of South Australia: Magistrates Courts Act 1991 (SA), s 8. Magistrates Court of Tasmania: Magistrates Court Act 1987 (Tas), s 3B. Magistrates Court of Victoria: cf Magistrates Court Act 1997 (Vic), s 100(1)(b). District Court of Western Australia: cf District Court of Western Australia Act 1969 (WA), s 50. Magistrates Court of Western Australia: cf Magistrates Court (Civil Proceedings) Act 2004 (WA), s 6.

132 For example, District Court of New South Wales: District Court Act 1973 (NSW), s 140. District Court of Queensland: District Court of Queensland Act 1967 (Qld), s 68(1)(b)(xii).

133 For example, Magistrates Court of the Australian Capital Territory: Magistrates Court Act 1930 (ACT), s 258(1)(a). County Court of Victoria: County Court Act 1958 (Vic), s 37(1)(a).

134 See text at below nn 192-197.

135 *Great Southern Loans v Locator Group* [2005] NSWSC 438.

anti-suit injunctions can be issued by a State court against proceedings in another State to protect the abuse of the first court's process and to preserve its integrity.[136]

And fourthly, the federal courts do not fall under s 21 at all. All federal courts have general injunctive powers.[137] All are also exposed to any State court issuing an anti-suit injunction, as the federal courts' process runs throughout the whole of Australia without the need to rely on the rights of interstate service under the Service and Execution of Process Act. The State Supreme Courts have the general equitable jurisdiction to grant any kind of injunction; the Family Court of Western Australia appears also to have these powers.[138]

Section 21's ban on anti-suit injunctions seems just to protect the exercise of jurisdiction based on interstate service of process, and to that end it may just be hedged in the way that it is so as to remain within the limits of federal legislative power.[139] It has not done much – there is no reported case where s 21 has ever been applied. Reasons for the provision remain elusive. The Australian Law Reform Commission, when recommending s 21's ban on anti-suit injunctions, merely asserted that "[t]he proper court to consider the question of the appropriate venue is the court in which a proceeding has been instituted."[140] It therefore missed, or misunderstood, the single essential issue of these cases; proceedings have been instituted in more than one court. Australian jurisprudence on anti-suit injunctions has emphasised that the power to restrain proceedings within the federation "should be exercised with care"[141] or "with great caution",[142] but this is unexceptional. The same standards apply in international litigation. An earlier view that the anti-suit injunction "negates the concepts which underlie the Federation of the Australian States"[143] has been superseded by the recognition that "anti-suit injunctions are more readily granted within the confines of the federal system" and "within the federal system, it is sufficient to support an injunction that the test of inappropriateness be satisfied".[144] Especially since the constitutional ban on federal courts exercising State jurisdictions was clarified,[145] the anti-suit injunction has become even more important for sorting collisions between federal and State jurisdictions.[146]

136 Ibid, at [76].

137 Family Law Act 1975 (Cth), s 34; Federal Court of Australia Act 1976 (Cth), s 23; Federal Magistrates Act 1999 (Cth), s 15.

138 Family Court Act 1997 (WA), s 35.

139 The Australian Constitution, s 51(xxiv) gives power to the federal Parliament for "the service ... throughout the Commonwealth of the civil ... process of the courts of the States". This does not seem to reach prohibitions on State courts exercising injunctive powers that are not protecting the interstate service of process.

140 Australian Law Reform Commission, above n 97, at 89.

141 *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1 at 6.

142 *Greinert v Jarrett* [2004] NSWSC 209 at [41].

143 *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1 at 6.

144 *Valceski v Valceski* [2007] NSWSC 440 at [76]; *Dibeek Holdings Pty Ltd v Notaras* (1997) 141 FLR 36 at 373-4.

145 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

146 Cf State Courts, above n 13, at 138.

(b) Anti-suit injunctions in the Trans-Tasman Judicial Area

There are two related concerns about the ban on anti-suit injunctions issued on *forum non conveniens* grounds in trans-Tasman proceedings. First, there is the nature of the imbalance between the trans-Tasman and intra-Australian schemes. If, for instance, each of the Federal Court and the South Australian Supreme Court regarded itself as the *forum conveniens* for related litigation, it would be open to either to end the impasse by an anti-suit injunction (and the court that drew first would probably be the survivor).[147] If the same situation arose between the New Zealand High Court and the Federal Court, neither could do anything to end the impasse.[148] Lopsidedness between the two schemes is expected; what is unexpected is that a court in the transnational scheme has fewer means of protecting its adjudicative jurisdiction than a court in the federal scheme.

Lis pendens does occur in Australia.[149] It has occurred before in trans-Tasman litigation.[150] The second reason to be concerned about this ban on anti-suit injunctions is that there are even more structural reasons why *lis pendens* could arise under the Trans-Tasman Proceedings Acts.[151]

Despite this, the Working Group recommended against the availability of the anti-suit injunction in trans-Tasman litigation. It proposed that the injunction not be "used to circumvent the proposed trans-Tasman regime, including the provisions on staying the proceedings on the ground that another court is the more appropriate forum."[152] Again, this explanation is not developed. It is hard to understand how the anti-suit injunction is "used to circumvent" core principles of *forum conveniens*. Quite the reverse. The procedure for granting an anti-suit injunction demands more extensive analysis of "appropriate forum" criteria than the procedure for a stay (or a transfer) does. The application requires the court considering the injunction first to consider whether it itself is the *forum conveniens*.[153] It also, usually,[154] requires that the plaintiff (almost certainly the defendant in the other court)

147 In *Pegasus Leasing Limited v Cadoroll* (1996) 59 FCR 152, it was the Federal Court that first issued the injunction.

148 This overlooks any potential constitutional difficulty about restricting the powers of federal courts for protecting the exercise of federal jurisdiction. If there is a constitutional minimum of orders needed to protect federal jurisdiction, the Australian Trans-Tasman Proceedings Act may not be able to prevent any federal court from issuing anti-suit injunctions: see Hague and Ditch, above n 35,at 224.

149 *Pegasus Leasing Limited v Balescope Ltd* (1994) 63 SASR 51; *Pegasus Leasing Limited v Cadoroll* (1996) 59 FCR 152.

150 *Marriage of Gilmore* (1993) 100 FLR 311; *Gilmore v Gilmore* [1993] NZFLR 561; Working Group Report, above n 25, at 15.

151 See text at above nn 106-125.

152 Working Group Report, above n 25, at 18. See also Explanatory Memorandum, above n 83, at [49].

153 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871; *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 at 931; *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 at 396-7; *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

154 The High Court of Australia held in *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 at 396-7 that the application for a stay in the foreign court may not be required where the injunction is enforcing an exclusive choice of court agreement or protecting the integrity of the local court's processes.

have applied for a stay of proceedings in the other court – and that will as often also be an application on the ground of *forum non conveniens*.[155] Far from circumventing the question of the more appropriate forum, the jurisprudence of the anti-suit injunction requires courts to engage deeply with the whole question of the *forum conveniens* before the order can be made. As a matter of the scheme's juridical coherence, restoring the right to order anti-suit injunctions to the superior courts (at the very least) in both countries would therefore reinforce the centrality of the principle of *forum conveniens* in questions of jurisdiction. More practically, it would give us something the scheme presently does not have at all for proceedings that do not involve a choice of court agreement – a means of dealing effectively with *lis pendens*.

3. Funnelling Jurisdiction II: Exclusive Choice of Court Agreements

The Working Group recommended that where a choice of court agreement (that is, a jurisdiction or forum clause in a contract) would figure in trans-Tasman litigation, "a court would be required to decline jurisdiction in favour of the chosen court".[156] It then noted how the "approach is consistent with the 2005 Hague Convention on Choice of Courts Agreements".[157] The Choice of Court Convention had been drafted by the Hague Conference on Private International Law with Australia's and New Zealand's involvement. It has not yet been ratified or implemented by either country, although it is under consideration in Australia.[158] The Convention has two principal rules of adjudicative jurisdiction that apply when litigants are parties to a choice of court agreement that, in the terms of the Convention, provides for the litigation to be dealt with exclusively in the courts of a given convention country. First, the courts of the chosen country must, unless the agreement is void under the law of that country, hear the litigation.[159] Secondly, if litigation is brought in a convention country that the parties had not chosen, the courts of that country *must* (with extremely limited exceptions) suspend or dismiss the proceedings.[160] The theme is evidently one of respect for contractual commitments, and with a stronger expectation than the common law has that agreements about where litigation will be conducted will be honoured.

In Australia, the approach to choice of court agreements has been governed by the High Court's decision in *Akai Pty Ltd v The People's Insurance Co Ltd*.[161] There, the majority (Toohey, Gaudron and Gummow JJ) held that, unless there were strong reasons not to enforce it, proceedings brought in breach of a choice of court agreement should normally be stayed or dismissed.[162] After *Akai*, however, Australian courts have had a relaxed

155 *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 at 931.

156 Working Group Report, above n 25, at 16.

157 Ibid.

158 The EU and the United States signed the Choice of Court Convention in 2009. Mexico remains the only country to have ratified, which it did in 2007.

159 HCCCA, art 5(1).

160 HCCCA, art 6.

161 (1996) 188 CLR 418.

162 Ibid, at 445, 447.

understanding of "strong reasons" and have viewed the power to stay with the same parochialism that marks the approach to *forum conveniens* in *Voth*. Mary Keyes has undertaken a number of studies on Australian practice in relation to choice of court agreements, and has identified how Australian courts progressively became more prepared to retain proceedings brought in breach of an exclusive choice of court agreement – and so to give their imprimatur to a breach of contract.[163] By 2008, there was only an 11 per cent chance that an Australian court would enforce an agreement that exclusively designated a foreign court for the litigation.[164] Although the sample on which these figures were based was small, it does show that it had become the norm in Australia to hold proceedings and dishonour the contract. There are recent signs that this practice may have been checked. In *Global Partners Fund Limited v Babcock & Brown Limited*,[165] the NSW Court of Appeal recognised the need to give an exclusive choice of court agreement a generous reading and effect – specifically to curb the exercise of exorbitant jurisdictions.[166] And, although the Christchurch Agreement was silent about any special treatment of choice of court agreements,[167] separate provision was made in the Trans-Tasman Proceedings Acts for them to be dealt with outside *forum conveniens* principles. The disjunction between the Agreement and the legislation is nevertheless of lingering significance because, for Australia, any federal power here to legislate for State courts rests on the existence of a treaty obligation.[168] Whether the treatment of choice of court agreements in the legislation is a proportionate implementation of the Agreement, and so constitutionally valid in Australia, remains an open question.

(i) The Mandatory Stay

The trans-Tasman scheme does not embrace the whole philosophy of the Choice of Court Convention. It only adopts the mechanism that is used when an exclusive choice of court agreement is identified. If in proceedings in a New Zealand court there is "an exclusive choice of court agreement" – as defined in the Act – that chooses a court in Australia, or in a nominated State, the New Zealand court must stay the proceedings.[169] The same applies in an Australian court when an agreement exclusively designates a New Zealand court for the litigation.[170] A New Zealand court, hearing a matter under which the parties have designated the New Zealand court for the litigation, may not stay the proceedings.[171] And if there are proceedings before any Australian court that finds there is an exclusive choice of court agreement that chooses "an" Australian court for litigation, the proceedings must not be stayed.[172] This language is a little ambiguous so far as the availability of

163 International Litigation, above n 119, at 162-75; Jurisdiction under the Convention, above n 120, at 23.
164 Jurisdiction under the Convention, above n 120, at 23.
165 [2010] NSWCA 196.
166 Ibid at [68].
167 See text at above nn 34-37.
168 Australian Constitution, s 51(xxix).
169 NZ, s 25(1)(a).
170 Aust, s 20(1)(a).
171 NZ, s 25(1)(b).
172 Aust, s 20(1)(b).

any stay deflecting trans-Tasman proceedings to another Australian court is concerned. It does not affect the powers of superior courts to *transfer* litigation to another Australian court. If, for instance, the Queensland Supreme Court were to be confronted in trans-Tasman litigation by an agreement that designated that the litigation only be pursued in the Western Australian Supreme Court, it must deny the stay but can still transfer the proceedings to Western Australia without doing violence to the language of the Australian Trans-Tasman Proceedings Act.[173] However, if this scenario were before the District Court of Queensland, which can only relocate litigation within Australia by ordering a stay on condition that the matter be heard in another State, then some incompatibility between its powers under the intra-Australian scheme and those arising under the trans-Tasman scheme could arise.[174]

(ii) An Exclusive Choice of Court Agreement

The Trans-Tasman Proceedings Acts do not, however, adopt the Choice of Court Convention's definition of an exclusive choice of court agreement. Instead, they again model a common law approach in defining an agreement as 'exclusive' only if the language of the clause demonstrates a clear intention that the litigation be conducted only in the named country or State. The Acts define an exclusive choice of court agreement "in relation to matters in issue between parties to a proceeding" as[175]

> a written agreement ... that designates the courts, or a specified court or courts, of a specified country, *to the exclusion of any other courts*, as the court or courts to determine disputes between those parties that are or include those matters.

The Acts do not apply to any contracts relating to personal, family, household or employment matters.[176]

The Choice of Court Convention provides that an exclusive choice of court agreement is[177]

> an agreement concluded by two or more parties that ... designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.

At first, this seems close to the definition that the trans-Tasman scheme has adopted. However, the Convention deems the agreement to be exclusive "unless the parties have expressly provided otherwise".[178] The Trans-Tasman Proceedings Acts and the Convention therefore have different default positions. A choice of court agreement is presumed *not* to be exclusive under the Acts, but is presumed to be exclusive under the Convention. The

173 Cf *Firefighters Games Brisbane v World Firefighters Games Western Australia Inc* (2001) 161 FLR 355.

174 It is only likely to be a rare case, but a clarification in the Australian Trans-Tasman Proceedings Act that s 20(1)(b) does not affect the powers of inferior courts under s 20 of the Service and Execution of Process Act might avoid it ever arising.

175 Aust, s 20(3)(a); NZ, s 25(4)(a) (emphasis added).

176 Aust, s 20(3)(b)-(c); NZ, s 25(4)(b)-(c).

177 HCCCA, art 3(a).

178 HCCCA, art 3(b).

difference would be marked for agreements that stated that the parties "agree to submit to the jurisdiction of the courts of Victoria"[179] or that the parties "submit to the jurisdiction of any competent court in the Commonwealth of Australia".[180] Under the Acts, each of these agreements would almost certainly be construed as non-exclusive as they do not limit adjudicative jurisdiction to Victorian or Australian courts "to the exclusion of any other courts". A submission to the jurisdiction of any "court in the Commonwealth of Australia" has the additional feature of being a submission to the jurisdiction of courts in, at the very least, nine different States and Territories.[181] As a result, the trans-Tasman scheme's requirement that proceedings be stayed would not be applicable, and the clause would merely be weighed as a consideration in determining the *forum conveniens*.[182] In contrast, under the Convention each of these clauses is likely to be treated as exclusive as the parties have not expressly provided otherwise. The submission to "any court in Australia" would be deemed to make the proceedings exclusive to Australia, and allow Australian rules to sort out which Australian court should hear the matter.[183] In either case, in a convention country outside Australia proceedings would have to be suspended or dismissed.[184] It would take a clause like "questions with respect to ... this Agreement ... shall be subject to the non-exclusive jurisdiction of the High Court of New Zealand" before the Convention permitted, say, an Australian court to hold on to any litigation captured by the contract.[185]

The difference between the Trans-Tasman scheme and the Choice of Court Convention leads to a question about the treatment of choice of court agreements within the Single Economic Market if Australia and New Zealand were to ratify and implement the Convention. In the first place, the Convention itself provides for a bilateral treaty like the Christchurch Agreement to sit side-by-side with the Convention, and to be given priority when the treaty and Convention conflict.[186] This may not, nevertheless, be an effective means of cocooning distinctive trans-Tasman arrangements from the demands of the Convention. The Convention will "give-way' to bilateral treaty arrangements as long as, first, both parties are resident in a convention country and, secondly, the treaty applies to them. For the trans-Tasman scheme, the complication is that jurisdiction is grounded on service of process within the market area and not, as under the Convention, on residence. Service of a non-resident in the market area may therefore lead to both the terms of the Christchurch Agreement (with its implementing Trans-Tasman Proceedings Acts) and the provisions of the Choice of Court

179 *Atwood Oceanics Australia Pty Ltd v BHP Petroleum Pty Ltd* SC of Western Australia, Master Seaman, 6 August 1987.

180 *Woolworths v DS McMillan* SC of New South Wales, Rogers J, 29 February 1988.

181 Hague and Ditch, above n 35, at 231; see above n 64.

182 Aust, ss 19(2)(d); NZ, ss 24(2)(d).

183 HCCCA, art 25(1)(c); RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Courts Agreements – Commentary and Documents* (Cambridge University Press, 2008) at 43.

184 HCCCA, art 6(1).

185 For example, *Hamilton v Infiniti Capital Andante Limited* [2008] NZHC 644 at [4].

186 HCCCA, art 26(2).

Convention being applicable, but without the Convention's "give-way rule" being triggered.[187] This may be less common; it would be expected that service because of presence in the market area and residence will coincide more often than not. However, the possibility of presence in the market area and residence outside it does give the first reason why, if both countries implement the Choice of Court Convention, they should then consider amending the Trans-Tasman Proceedings Acts to adopt the Convention's definition of an exclusive choice of court agreement.

The second reason why an adoption of the Convention's definition of an exclusive choice of court agreement should be adopted is that the Choice of Court Convention rests on a greater degree of trust in the integrity of foreign courts than principles of *forum conveniens* do. So, an Australian court confronted with a contract that stated "legal actions arising out of ... the present bill of lading will be judged by the [Commercial Court of Marseille]"[188] would, if the European Union had implemented the Choice of Court Convention, have to treat the agreement as an exclusive designation of French jurisdiction and dismiss the proceedings. But if the contract provided that "legal actions arising out of ... the present bill of lading will be judged by the [High Court of New Zealand]" it would probably be treated as non-exclusive under the Trans-Tasman Proceedings Act,[189] and a stay of proceedings could be refused. In other words, the Convention would require greater deference to the jurisdiction of the French court than the trans-Tasman scheme would demand for the New Zealand court – a completely anomalous result when the trans-Tasman scheme is supposed to rest on "the confidence that both countries have in each other's judicial and regulatory institutions".[190] That confidence would be better expressed by bringing the stronger theme of international judicial trust that underlies the Choice of Court Convention into the Trans-Tasman Judicial Area.

Australia and New Zealand may well adopt the Convention's approach to exclusivity in choice of court agreements at a later time; probably if, and when, both countries were to implement the whole Choice of Court Convention. It was decided not to do so for the Trans-Tasman Proceedings Acts because it would be better, if there is to be a move from the common law position, that this be done for all disputes and not just for trans-Tasman proceedings.[191]

187 Hague and Ditch, above n 35, at 238-9. The Choice of Court Convention makes provision for Regional Economic Integration Organisations to become party to the Convention. The REIO may provide for its own rules on choice of court agreements, and not the Convention's, to apply for disputes internal to the REIO: HCCCA, art 26(6). However, Australia and New Zealand's Single Economic Market does not constitute an REIO in these terms, as the REIO must have "competence over some or all of the matters governed by [the] Convention": art 29(1). The Single Economic Market does not create any institution that has the necessary kind of legislative competence that allows it to qualify as an REIO. The Convention's provisions for REIOs are naturally meant to accommodate the European Union.

188 *Compagnie Des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 588.

189 Aust, s 20(3)(a).

190 Working Group Report, above n 25, at 6.

191 Email Julie Nind to author, 26 September 2010.

(iii) The Anti-suit Injunction

It would appear that the anti-suit injunction is available to restrain any proceedings brought in a court across the Tasman, but in breach of a choice of court agreement. Judicial reading of s 21 of the Service and Execution of Process Act excludes the enforcement of choice of court agreements from the ban. In *Great Southern Loans v Locator Group*,[192] the NSW Supreme Court issued an anti-suit injunction against proceedings that had been brought in the Victorian County Court despite the terms of an agreement providing that exclusive jurisdiction rested with courts in Sydney. The Victorian proceedings had been commenced by service of a writ in NSW under the Service and Execution of Process Act, provoking the argument that the Supreme Court was prohibited by s 21 from any attempt to restrain the County Court proceedings.[193] McDougall J admitted that, in intraAustralian proceedings for transfers and stays, an exclusive choice of court agreement might be taken into account when deciding the question of *forum conveniens*. However, he added that it did not follow that an injunction to enforce an exclusive choice of court agreement (and prohibiting proceedings in any but the chosen court) was made on "appropriate forum" grounds.[194] Australian jurisprudence strongly bifurcates *forum conveniens* questions (dealt with under *Voth*)[195] and choice of court agreements (dealt with under *Akai*)[196] when considering courts' adjudicative jurisdiction, although both approaches are informed by a strong forum bias. The inapplicability of s 21's ban to the enforcement of choice of court agreements by injunction is perfectly consistent with that bifurcation, as the inapplicability of the trans-Tasman scheme's ban on injunctions to exclusive choice of court agreements would be. In recent New Zealand jurisprudence, the tendency has been to treat exclusive choice of court agreements as an aspect of the decision to stay proceedings on *forum non conveniens* grounds.[197] That risks New Zealand courts understanding the scheme's ban on anti-suit injunctions against Australian proceedings "on the grounds that the Australian court is not the appropriate forum" as including injunctions to enforce choice of court agreements. Again, different readings of the ban on different sides of the Tasman are highly undesirable. In this case, also, the need to avoid *lis pendens* and to have a means of breaking it suggests that the ban should be read as narrowly as possible. It would be best to follow *Great Southern Loans* in the trans-Tasman scheme.

C. Judgments

The easier enforcement of cross-Tasman judgments is the reason for the scheme. Adjudicative jurisdiction will certainly receive much more attention in litigation, but that is precisely the intention. The aim is to have questions

192 [2005] NSWSC 438.
193 See text at above n 130.
194 [2005] NSWSC 438 at [74].
195 See text at above nn 108-116.
196 See text at above nn 161-168.
197 *Kidd v Van Heeren* [1998] 1 NZLR 324; *Kidd v Van Heeren* [2006] NZCA 42; *Dale v Jeffrey* [2008] NZHC 147.

about where to litigate, and what to litigate about, dealt with in one set of proceedings, and to deter subsequent litigation which, under "xenophobic" schemes of recognising and enforcing foreign judgments, also occurs in the place of enforcement. Therefore, the number of defences available to the liable defendant at the point of cross-border enforcement is pared – both to make litigation at the enforcement stage pointless, and to increase the incentives for the defendant to engage actively in the original proceedings. The Brussels and Lugano schemes only remove the right to question the jurisdiction of the rendering court, although, for the Brussels I Regulation, the Court of Justice has consciously narrowed the remaining defences to enforcement further to ease the circulation of judgments within the EU.[198] That alone has stifled litigation on enforcement jurisdiction, which in Europe is insignificant when compared with litigation over adjudicative jurisdiction.[199] The intra-Australian scheme has, over 17 years, had no reported litigation on enforcement. That is understandable: there are simply no grounds in Australia to challenge the importing of an interstate judgment.[200] However, there is a large body of case law on adjudicative jurisdiction in the Australian scheme, and especially the *forum conveniens* questions that arise in litigation over transfers between superior courts.[201]

1. Enforceable Judgments

The trans-Tasman scheme is the most comprehensive transnational scheme for the enforcement of judgments. To be enforceable across the Tasman, a judgment need only be final and conclusive.[202] It may be a judgment made in principal or interlocutory proceedings. It may be a judgment for a sum of money to be paid, or it may be a "non-money judgment" – an order that requires a person to do, or to refrain from doing, something.[203] This realises the promise made in the CER understanding of the late 1980s;[204] injunctions and orders for specific performance are enforceable under the Trans-Tasman Proceedings Acts. As there are no requirements that the liable defendant have appeared in the original proceedings, judgments by default are enforceable. Judgments are regarded as final and conclusive even if they are subject to appeal.[205]

The scheme then enlarges the range of enforceable judgments beyond what is possible in the European judgments scheme. Paralleling the European scheme, the judgment may have been made in *any* Australian or New Zealand court – superior or inferior.[206] The trans-Tasman scheme also allows orders of Australian and New Zealand tribunals to be enforced in the other country but, mirroring the rules for service of process, only when the tribunal has been approved by the national government of the

198 For the Court of Justice's approach to the public policy defence, see Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1395; and below at n 282.
199 Judgments Extension, above n 7, at 267-8.
200 SEPA, s 109.
201 Judgments Extension, above n 7, at 268.
202 Aust, s 66(1); NZ, s 54(1).
203 Aust, s 4; NZ, s 4(1).
204 See above n 5.
205 Aust, s 66(3); NZ, s 54(4).
206 Aust, s 66(1); NZ, s 54(1)(a).

country of enforcement.[207] It also enables enforcement of a range of court or tribunal orders that are not civil judgments, and elsewhere are often excluded from transnational enforcement.[208] First, judgments awarding criminal compensation, damages or reparation in criminal proceedings are enforceable.[209] These are not enforceable at common law, although they are under the 1992 CER scheme.[210] Secondly, when meeting conditions set by the national government, "regulatory regime fines" imposed in criminal proceedings may be enforceable.[211] Thirdly, so long as they are not of a kind that the national government has excluded from the trans-Tasman scheme, judgments imposing civil pecuniary penalties are enforceable.[212] Fourthly, orders made in competition proceedings, which were made enforceable by the 1992 CER scheme, continue to be enforceable.[213] A significant impetus for the Christchurch Agreement and the Trans-Tasman Proceedings Acts, particularly for the Australian Government, was the hope of improving the effectiveness of trans-Tasman competition policy; and the effectiveness of the regulation of corporations, the securities industry, banking and financial services, occupational health and safety, and consumer protection.[214] The white-list approach for enforcing regulatory fines, and the black-list approach for *not* enforcing civil penalties, are specifically directed at regulatory enforcement in the commercial, consumer and workplace sectors. Fifthly, orders for the payment of expenses incurred in trans-Tasman proceedings either to comply with a subpoena or to appear remotely from the other country are enforceable.[215] Sixthly, it is evident from the provisions for registration that taxation judgments from each country remain enforceable in the other.[216] And finally, "judgment laundering" is allowed. A foreign judgment (originally from somewhere outside the Single Economic Market) that is registered in one country becomes enforceable in the other.[217]

The Trans-Tasman Proceedings Acts exclude from the enforcement regime orders made in a range of civil proceedings, including some proceedings that are covered by the adjudicative jurisdiction side of the scheme. However, in many cases these orders are already enforceable across the Tasman under existing multilateral recognition and enforcement regimes: orders in family proceedings

207 Aust, s 66(1)(b) (regulation); NZ, ss 54(1)(b), 55(1)(a) (Order in Council). A tribunal can only be approved if it is exercises an adjudicative function and does not need a court to make its orders enforceable: Aust, s 66(4); NZ, s 55(2). In short, the tribunal must act like and have the powers of a court.

208 Cf Brussels I Regulation art 1; Lugano Convention, art 1.

209 Aust, s 66(1)(c); NZ, s 54(1)(c).

210 Foreign Judgments Act 1992 (Cth), s 3; Reciprocal Enforcement of Judgments Act 1934 ((NZ), s 2.

211 Aust, s 66(1)(d) (regulation); NZ, s 77 (Order in Council).

212 These are civil judgments made by courts, and are therefore *prima facie* enforceable. Nominated kinds of civil pecuniary penalties may be excluded from the enforcement regime: Aust, s 66(2)(h) (regulation); NZ, s 74 (Order in Council).

213 Aust, s 66(1)(f); NZ, ss 69-72.

214 Working Group Report, above n 25, at 21-2.

215 Aust, s 66(1)(e); NZ, s 54(1)(d).

216 Aust, s 79(2)(b); NZ, s 68(2)(b).

217 Aust, s 66(1)(g); NZ, s 54(1)(e). It would also seem to be the case that a foreign judgment enforced in either country at common law would be enforceable in the other, as it would be a final judgment debt made in a civil proceeding: Aust, s 66(1)(a); NZ, s 54(1)(a).

(including those relating to children), guardianship and probate jurisdiction.[218] The trans-Tasman scheme also excludes any order under proceeds of crime legislation, and any that, if violated, make the defendant liable to conviction in the place where the order was made.[219] There is also a general power, given to the national governments, to black-list specific kinds of non-money judgments – nominated by the governments – from enforcement.[220]

2. Means of Enforcement

Judgments and orders that are identified as enforceable under the Trans-Tasman Proceedings Acts can only be enforced in the other country by registration in a court.[221] It leaves open the possibility that a judgment not captured by the Acts could still be enforceable by an action in debt at common law, but that possibility is slim. The range of judgments and orders included in the enforcement regime is broader than any other transnational judgments scheme, and seems to cover all judgments that would be enforceable at common law.

In general, a judgment can be registered by a person in whose favour it is made, or one who has rights under the judgment that have become vested.[222] Registration takes place, at that person's option, in a superior court in the place of enforcement or in an inferior court that has the power to give the relief (of the kind or amount) ordered in the judgment.[223] If a judgment is for a regulatory regime fine, registration may only take place in a superior court.[224] If it is a New Zealand competition judgment, it can only be enforced in Australia by registration in the Federal Court.[225] An Australian competition judgment is to be registered in the New Zealand High Court.[226] Notice of registration must be given to the liable defendant within 15 days of registration.[227] So long as notice has been given, when it is registered the judgment takes effect as if it had been given by the registering court, and execution can be levied with that court's machinery.[228] If notice has not been given, the judgment only takes effect as a local judgment 45 days after registration.[229] It should be noted that the effect of the Australian Act is that, if registration of a New Zealand judgment takes place in an Australian State court, then the judgment only has effect in that State. Registration in a federal court gives capacity to execute judgment throughout Australia. The larger enforcement machinery of the State courts might nevertheless make them more attractive for registering a New Zealand judgment than the federal courts. If so, the judgment could then be enforced by registration in other States under the Service and Execution of Process Act.[230]

218 Aust, ss 66(2)(a), 66(2)(d)-(g); NZ, ss 54(2)(a), 54(2)(g)-(i).
219 Aust, ss 66(2)(c), 66(2)(i); NZ, ss 54(2)(e), 54(2)(j).
220 Aust, ss 66(2)(b), 66(2)(j); NZ, s 54(2)(b).
221 Aust, s 65; NZ, s 53.
222 Aust, ss 4, 67; NZ, ss 4(1), 56.
223 Aust, ss 67(1)-(2); NZ, ss 56(1), 75(2).
224 Aust, s 67(3); NZ, s 78(1).
225 Aust, s 67(4).
226 NZ, s 72(1).
227 Aust, s 73; NZ, s 62.
228 Aust, s 74(1); NZ, s 63(1).
229 Aust, s 74(2); NZ, s 63(2).
230 See SEPA, s 3(1) (definition of "judgment" – (e)); cf Foreign Judgments Act 1992 (Cth), s 6(8).

A registering court may, if the liable defendant applies within 30 days of getting notice of registration, order a temporary stay of enforcement proceedings.[231] It can also order a stay of execution on any of the grounds available to the court in its existing jurisdiction.[232] If the court grants a stay, it must require the liable defendant to challenge the judgment in the country where it was made.[233] This is the pattern in the intra-Australian scheme, where all challenges to the validity and enforceability of a judgment are to be made in the court that made it.[234] Again, while it does not preclude the re-opening of a judgment, it does require that questions of that kind be taken in the court that originally rendered it. The internal borders of the Single Economic Market are not to be used to hide from litigation in any court in the market area.

The efficiency of the scheme lies in the provisions for setting aside registration. First, the common law defences cannot be used to resist enforcement.[235] That takes out most opportunities to bar the importing of a judgment. Secondly, registration can naturally be set aside when it is not made in accordance with the Trans-Tasman Proceedings Acts.[236] Thirdly, registration can be set aside if the judgment was made in relation to immovable property that was outside the place where the court originally making judgment was located.[237] If courts are exercising powers properly, this restriction could only be applicable to judgments made in NSW or, possibly, the Australian Capital Territory, where courts have a discretionary power to exercise jurisdiction in matters relating to foreign immovables.[238] In New Zealand and the other Australian States, the common law ban on hearing claims involving foreign immovables – the *Moçambique* rule – is still in place.[239] This defence is therefore the back-end of the *Moçambique* rule, and largely only confines the enforcement jurisdiction of NSW and ACT courts in New Zealand. Fourthly, a judgment made in proceedings *in rem* can be set aside when the *res*, even if it was movable, was outside the place where the original judgment was made.[240] This reinforces the scope of the Acts; proceedings *in rem* do not come within the scheme's principles of adjudicative jurisdiction and, as a result, judgments *in rem* are excluded.[241] Fifthly, registration can be set aside when enforcement would be contrary to public policy in the country where registration is being sought.[242] The public

231 Aust, ss 77(1), 77 (3); NZ, ss 65(1), 65(3).
232 Aust, s 77(4); NZ, s 65(5).
233 Aust, s 76; NZ, s 65(2).
234 SEPA, s 106.
235 The provisions state that "[e]nforcement ... is not affected by the operation of any rule of private international law": Aust, s 79(1); NZ, s 68(1).
236 Aust, s 72(1)(b); NZ, s 61(2)(a).
237 Aust, s 72(1)(c); NZ, s 61(2)(c).
238 Law Reform (Miscellaneous Provisions) Act 1955 (ACT), ss 34-5; Jurisdiction of Courts (Foreign Land) Act 1989 (NSW). For the scope of this jurisdiction, see Private International Law, above n 44, at 78-83.
239 *British South Africa Company v Companhia de Moçambique* [1893] AC 602; Working Group Report, above n 25, at11.
240 Aust, s 72(1)(c); NZ, s 61(2)(c).
241 Aust, s 8(2)(b); NZ, s 12(2)(b); see above at n 73.
242 Aust, s 72(2)(b); NZ, s 61(2)(b).

policy defence is, in truth, the only genuine qualification to the enforcement jurisdiction of courts in the trans-Tasman scheme, and will be considered in more depth below.[243]

3. The Outer World

The enforceability of a civil judgment under the trans-Tasman scheme does not depend on the court having established adjudicative jurisdiction in accordance with the scheme. Any judgment or order made in any civil proceeding in the Single Economic Market qualifies for enforcement. If served with process inside the market area, the defendant is protected by the requirement that the judging court only deal with cases that come within the Trans-Tasman Proceedings Acts' proportionate jurisdictions. If the defendant is served outside the market area, he or she loses the protection of the trans-Tasman scheme's proportionate jurisdictions. Further, by virtue of the enforcement jurisdiction created in the Acts, the defendant has lost the older common law and statutory protections that denied enforcement to cross-Tasman judgments made against an absent defendant.[244]

The result is that, if an Australian or New Zealand court renders judgment when exercising an exorbitant jurisdiction over a defendant served outside the market area, that judgment is enforceable, without any possibility of questioning adjudicative jurisdiction, anywhere in Australia and New Zealand.

The problem has been met before – in Europe. The Brussels and Lugano schemes set common, rule-based jurisdictions for defendants domiciled in the EU and EEA, but allow national courts to exercise any other jurisdiction they wish, no matter how exorbitant, in relation to defendants domiciled outside the EU and EEA.[245] So, a French court claims jurisdiction on the basis of the *plaignant's* French nationality, and on that basis could enter judgment against a Singaporean for actions taking place in Singapore.[246] If it did so, that judgment is enforceable against the Singaporean's assets anywhere in Europe, and the exorbitance of the French jurisdiction cannot be raised to resist it.

Automatic recognition of judgments within Europe, but without any jurisdictional safeguards for those "outwith Europe", has received extensive criticism from American and Australian commentators.[247] Even English critics have said "[t]he result is nothing short of scandalous" because the

243 See below at nn 265-287.

244 Private International Law, above n 44, at 130-6, 152-6.

245 Brussels I Regulation, art 4; Lugano Convention, art 4.

246 *Code Civil* (France), art 14.

247 For example, AT Von Mehren, *Recueil des Cours* (Hague Conference on Private International Law, 1980-II) at 1, 96-101 ("'Hague Recueil"); AT Von Mehren, "Recognition and Enforcement of Sister-State Judgments: reflections on General Theory and Current Practice in the European Economic Community and the United States" (1981) 81 Columbia Law Review 1044; K Nadelmann, "The Outer World and the Common Market Experts' Draft Convention on Recognition of Judgments" (1968) 5 Common Market Law Review 409; K Nadelmann, "Jurisdictionally Improper Form in Treaties on Recognition of Judgments: The Common Market Draft" (1967) 67 Columbia Law Review 995; K Nadelmann, "Clouds Over International Efforts to Unify Rules of Conflict of Laws" (1977) 41 Law and Contemporary Problems 54 at 58-62; M Pryles and FA Trindade, "The Common Market

"harsh and discriminatory treatment" of defendants domiciled outside Europe offends principles of due process.[248] However, the European scheme is no longer, as Arthur Von Mehren thought, "unique" in its treatment of judgments relating to the "outer world".[249] The trans-Tasman scheme now introduces a similar dynamic. Australian and New Zealand courts certainly have exorbitant jurisdictions although, typically, Australian jurisdictions are the more extreme. These jurisdictions cannot now be exercised in trans-Tasman cases,[250] but they can when the defendant is served outside the market area. For instance, most State Supreme Courts (the ACT and Western Australia courts are excepted) claim jurisdiction in tort claims where, in effect, a plaintiff claiming injuries lives in the State.[251] Furthermore, the potential to dismiss proceedings in cases like this is only constrained by the thin discretion of *Voth*, which means that the jurisdiction will almost inevitably be exercised if the plaintiff invokes it.[252] New Zealand's more exorbitant jurisdictions in proceedings commenced by service outside the market area, in contrast, are capable of being restrained by principles of *forum non conveniens* that rely on the *Spiliada* standard. They are therefore much more likely to approximate the jurisdiction that is allowed under the trans-Tasman scheme. The net effect is that Australian courts' more extreme claims of jurisdictional reach in cases involving individuals and corporations outside the market area will be enough to exercise enforcement jurisdiction against any assets the defendants may hold in New Zealand.

However, it is unlikely that the trans-Tasman scheme's discriminatory treatment of defendants in the "outer world"' will attract the same attention or sustained criticism that the Brussels and Lugano arrangements have. The Single Economic Market is simply not as important to the American critics as the European markets are. It is nevertheless just as objectionable in terms of principle. Having said that, it is much more easily corrected than are the European arrangements. It only requires the Australian parliaments, or the High Court of Australia, to replace *Voth* with *Spiliada* standards in all international cases[253] – a move that would bring all international jurisdictions close to the adjudicative jurisdictions of the trans-Tasman scheme.

(EEC) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters – Possible Impact Upon Australian Citizens" (1974) 48 Australian Law Journal 185 at 193-4.

248 A Briggs and P Rees, *Civil Jurisdiction and Judgments* (LLP, 2nd ed, 1997) at 311.

249 Hague Recueil, above n 247, at 96.

250 The Trans-Tasman Proceedings Acts actually do not codify the rules for cross-Tasman service of process, although the intention is to amend court rules to exclude any other ground for cross-Tasman service: see JEC Report, above n 39, at 3.

251 This is based on the rules that allow international service of process in a tort claim where injury is sustained, in part, in the State, regardless of where the tort occurred. As the courts have recognised loss of earning capacity as a relevant injury for these rules, and this inheres in the plaintiff, injury is sustained wherever the plaintiff happens to live: Private International Law, above n 44,at 67-70; and see *Flaherty v Girgis* (1987) 162 CLR 574; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491. The New Zealand rule demands that the tort, or all of the damage, have taken place in New Zealand before international service can ground jurisdiction in a tort claim: High Court Rules (NZ), r 6.27(2)(a)(ii).

252 For example, *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.

253 See Gray, above n 108, at 207.

4. Incompatible Judgments

A curious omission from the trans-Tasman scheme is any express statement in the Acts as to how courts should deal with incompatible judgments. The common law and the earlier statutory schemes give priority to a local judgment made before an otherwise enforceable foreign judgment,[254] and will give priority to the earlier of two competing foreign judgments.[255] There is no authority indicating how a court should deal with a foreign judgment that was made before an incompatible local judgment was rendered.[256]

The rules denying recognition to one judgment or the other where there is incompatibility between them differ from the other defences to enforcement. They amount to a set of priority rules more than a bar to the efficient circulation of judgments. However, the silence in the Trans-Tasman Proceedings Acts seems to be for no reason other than slavish adoption of the position in the intra-Australian scheme. The Service and Execution of Process Act also says nothing about how to deal with incompatible judgments and, as in the trans-Tasman scheme, a common law priority rule cannot be used to break the silence.[257] In commenting on this issue (when recommending the present Australian judgments scheme), the Australian Law Reform Commission considered that incompatible judgments were unlikely to arise but, if they did, courts would probably give priority to the judgment made first.[258] It then explicitly *refused* to recommend a statutory rule to that effect. The Trans-Tasman Working Group did the same. It thought that incompatible judgments were unlikely to arise within the market area, and so there was no need for a priority rule for incompatible judgments in the legislation.[259]

This kind of drafting policy is a little baffling. The Working Group implicitly recognised that incompatible judgments *might* arise, and if that is the case it would seem worthwhile to cover the possibility with an explicit priority rule. Incompatible judgments are the likely result whenever *lis pendens* occurs. Enough has been said already to establish that *lis pendens* is a possibility in the Trans-Tasman Judicial Area.[260] And, with the banning of anti-suit injunctions made on *forum non conveniens* grounds, it is even more likely to arise in trans-Tasman proceedings than it is within Australia – where the anti-suit injunction is actually used to avoid courts making incompatible judgments. Further, the Law Reform Commission and the Working Group both concentrated on judgments that were, on their face, conflicting – in effect, action estoppels. However, as I pointed out in the 1999 criticisms of the CER scheme, the greater risk lies with issue estoppels.[261] This has

254 *Vervaeke v Smith* [1983] 1 AC 145.

255 *Showlag v Mansour* [1995] 1 AC 431; Foreign Judgments Act 1991 (Cth), s 7(2)(b); Reciprocal Enforcement of Judgments Act 1934 (NZ), s 6(2).

256 On the basis of *Showlag v Mansour* [1995] 1 AC 431, Davies, Bell and Brereton state that "[i] t would seem also to follow that an earlier foreign determination should prevail over one in the forum": *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) at 841.

257 SEPA, s 109.

258 Australian Law Reform Commission, above n 96, at 257; see also Judgments Extension, above n 7, at 267.

259 Working Group Report, above n 25, at 18.

260 See text at above nn 106-125.

261 Judgments Extension, above n 7, at 267.

been the experience in Europe. Where judgments by default are capable of registration, a litigant may be ignorant of issues she is found to be estopped from raising.[262] If an issue or an action estoppel like this does arise, there will be no choice. The resolution of the incompatibility will have to be litigated. The enforcing court will not be able to use the common law for guidance and, if it happens that registration is sought in a place where an inconsistent local judgment was the second in time, the common law would in any case have been of no help.[263] A simple rule, giving priority to the judgment made first in the market area, would avoid this without any cost to the efficiency of the Trans-Tasman judgments scheme.[264]

5. Public Policy

The point where differences arise in the enforcement jurisdictions of the trans-Tasman and intra-Australian schemes is in the availability of the public policy defence to resist the enforcement of judgments. This is not available in Australia; indeed, there is a constitutional prohibition on the Australian States from refusing on public policy grounds to recognise the judgment of a sister-State court.[265] However, the public policy defence is available to resist judgments from across the Tasman. There could be three possible reasons for this. The first might be that it is symbolic. The availability of the public policy defence is the one difference between the intra-Australian and the trans-Tasman judgments schemes, and so it serves to remind that, from the Australian perspective, New Zealand is not to be treated as just one of the sister-States of the federation. The second is that the public policy defence might help to fill the scheme's silence about the treatment of incompatible judgments. "Public policy" could be used to squirrel common law principles for the treatment of incompatible judgments into the trans-Tasman scheme. Still, it does not guarantee uniform approaches to the treatment of cross-Tasman judgments – especially in relation to the still unresolved question of a foreign judgment that precedes an incompatible local judgment. The third is that it might help to defend against judgment laundering. For instance, Papua New Guinea income tax judgments are enforceable by registration in Australia,[266] but not directly in New Zealand. As they can be registered in Australia, however, they are *prima facie* registrable in New Zealand.[267] The Trans-Tasman Proceedings Acts do not expressly allow revenue judgments to be set aside, and the free circulation of revenue judgments from Australia and New Zealand is expressly allowed throughout the market area.[268] Otherwise,

262 Ibid.

263 Cf Davies, Bell and Brereton, above n 256.

264 I revise my earlier suggestion to adopt Article 9(f)-(g) of the Choice of Court Convention: Hague and Ditch, above n 35, at 236-7. Article 9 always gives priority to a local judgment over a foreign judgment – regardless of which was first in time. This does not sufficiently discourage *lis pendens* in the market area, and I therefore think it better to give priority to the judgment that first made the issues *res judicata*.

265 Australian Constitution, s 118; see *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 at 577, 588.

266 Foreign Judgments Act 1991 (Cth), s 3(1).

267 See above n 217.

268 Aust, s 79(2)(b); NZ, s 68(2)(b).

there is a strong public policy of denying enforcement of foreign revenue judgments.[269] The public policy defence could therefore be used to set aside, in New Zealand, an Australian-registered PNG income tax judgment.

A role for the public policy defence has to be guessed because the Working Group's reasons for it are unconvincing. First, in its 2006 Discussion Paper, the Working Group suggested the defence might be used in New Zealand to deny recognition of an Australian judgment giving damages for personal injuries against a New Zealander for an accident that occurred in New Zealand.[270] The suggestion was that this would be contrary to New Zealand's public policy as it would be incompatible with New Zealand's accident compensation scheme in the Accident Rehabilitation and Compensation Insurance Act 1992. There are three problems with this explanation. Since 2002, Australian courts have been bound by choice of law rules that strictly demand application of the *lex loci delicti* in international tort cases, and would undoubtedly apply the terms of the Accident Compensation Act in cases of injury in New Zealand.[271] Further, proceedings relating to a wrong in New Zealand are, under *Spiliada* principles of *forum conveniens*, likely to be stayed in Australia if the defendant asks for them to be heard in New Zealand – the *forum delicti*.[272] The Acts – hopefully – will shift Australian courts from their previous *Puttick* parochialism in personal injuries cases.[273] And in any case, a mere difference in laws (or amounts of compensation) has never been sufficient at common law to see the public policy defence applied.[274] It has been applied (outside the market area) in cases where enforcement would be seriously detrimental to national interests, would cause serious injustice in the circumstances of the case, or where the content of the foreign law (on which the judgment is based) is morally unacceptable.[275] However, it is hard to see a judgment for common law damages qualifying for exclusion under these standards. In any case, Australian courts will not be awarding damages for injuries suffered in New Zealand.

A second role for public policy suggested by the Working Party was that it could be used to refuse the enforcement of a regulatory regime fine, and a related third reason was to refuse the enforcement of civil penalty orders.[276] The Trans-Tasman Proceedings Acts expressly provide that a court may not refuse enforcement of a judgment on the ground that it imposes a civil penalty or a regulatory regime fine,[277] so the argument must be that public policy can be used to resist enforcement of a penalty or fine *of a particular kind*. This

269 *Government of India v Taylor* [1955] AC 491.
270 Discussion Paper, above n 25, at 16.
271 *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491.
272 *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey; The Albaforth* [1984] 2 Lloyd's Rep 91; *Schapira v Ahronson* [1999] EMLR 735; *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1013-14, 1017; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.
273 See text at above nn 108-118.
274 *Addison v Brown* [1954] 1 WLR 779; *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 49.
275 PB Carter, "The Role of Public Policy in Private International Law" (1993) 42 International and Comparative Law Quarterly 1.
276 Working Group Report, above n 25, at 21, 22.
277 Aust, s 79(2)(c); NZ, s 68(2)(c).

seems unlikely, but would also be undesirable. As explained above,[278] civil pecuniary penalties are generally enforceable but the national governments have power to make a black-list of penalties that would be excluded from the regulatory enforcement regime of the trans-Tasman scheme.[279] Fines are only enforceable under the scheme if placed on a white-list by the national governments.[280] Either way, to qualify as an enforceable judgment in the first place, the *kind* of penalty or fine must have been scrutinised closely by the national government and have passed muster. Already, as a matter of national policy, it has been regarded as a judgment worthy of enforcement. For a court then to refuse enforcement on public policy grounds is to have the executive and judicial branches of government speaking with different voices. This is not only unlikely, it is to be avoided at all costs.

That being the case, we are left with, ironically, no clear policy rationale for the public policy defence. That is unfortunate, as it has vague and uncertain boundaries; the very idea of public policy is "a very unruly horse and when once astride it you never know where it will carry you".[281] As the aim of the scheme is to improve the circulation of judgments in the Single Economic Market, it would be hoped that Australian and New Zealand courts will interpret this defence in the narrowest possible way. This is the approach that the Court of Justice has taken to the European version of the defence,[282] and it is most likely that a similar approach will be taken in the trans-Tasman scheme. New Zealand courts have already stated a competing public policy of preferring the recognition of foreign judgments.[283] Consistently with the positive policy of enforcement, Australian and New Zealand courts have never (outside matrimonial cases)[284] refused to recognise a judgment made in *any* foreign country on public policy grounds.[285] It is almost impossible to conceive where they might refuse recognition of a judgment originally from across the Tasman. That, however, is not the point. It is the only means available to liable defendants in one country for resisting judgments from the other, and therefore will necessarily be the focus of all efforts to protect against enforcement. It does not help that courts "never know ... where [the public policy defence] will carry you". Its vagueness and uncertainty make the defence unusually suited to creative arguments for resisting enforcement. So, while it is unlikely that it will be applied, that will not necessarily stifle any delaying litigation over enforcement. As I have argued before, the public policy defence is one of those "safeguards required for interaction with more distant, dissimilar countries" that the Working Group itself doubted was

278 See text at above nn 206-217.

279 Aust, s 66(1)(f); NZ, ss 69-72.

280 Aust, s 66(1)(d); NZ, s 77.

281 *Richardson v Mellish* (1824) 2 Bing 229 at 252; 130 ER 294 at 303.

282 To offend the public policy of a European country, the judgment must be "a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or a right recognised as being fundamental within the legal order": Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1395 at [37]. In *Krombach*, the judgment was one that violated the human right to a fair trial: see Beaumont and Johnston, above n 41, at 253-9.

283 *Bolton v Marine Services Ltd* [1996] 2 NZLR 15 at 18-19.

284 *Marriage of El Ouiek* (1977) 29 FLR 171.

285 See *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470 at [20].

necessary in any trans-Tasman scheme.[286] It would be better to deal with incompatible judgments, and with revenue judgments ultimately originating from outside the Single Economic Market,[287] by express rules. And it would then be better to remove the public policy defence altogether.

IV. CONCLUSION: TRANS-TASMAN CIVILISATION

Throughout this article, I have referred to the adjudicative jurisdictions of the Trans-Tasman Proceedings Acts as "proportionate". It is the strong *Spiliada* standard of *forum conveniens* which gives this proportion. When the Working Group was taking submissions on adjudicative jurisdiction for the proposed trans-Tasman scheme, surprisingly few concerns were expressed about the possibility that litigation would migrate to one jurisdictional centre in the market area. The possibility that large companies would centralise debt collection processes in one place, and force defendants to argue *forum conveniens* (or presumably give up and accept judgment) was certainly raised.[288] This may well happen, although the cost of the application from remote locations is considerably reduced and costs orders may well deter the practice.[289] Similar representations were made in Australia when the Law Reform Commission was considering the present Australian scheme of civil jurisdiction and judgments. The Queensland Government expressed concern about the "accretion of actions to the courts in New South Wales and Victoria even in respect of causes of action which may have arisen in Queensland, Western Australia or Tasmania".[290] It has not happened. There are concentrations of some kinds of claims in the Sydney courts – company applications in particular[291] – but that has nothing to do with the principles of civil jurisdiction. If anything, reliance on *forum conveniens* criteria has ensured that exorbitant jurisdictions pioneered by NSW courts[292] were replaced by the stronger geographical "centre of gravity" considerations. They have probably slowed the migration of litigation to courts in Sydney.

By all accounts, the principles of *forum conveniens* and choice of court agreements adopted in the Acts are best placed to restrain the *Puttick*-parochialism[293] that has emerged in Australian approaches to trans-Tasman jurisdiction. This is a singular achievement. In making principles of *forum conveniens* the centrepiece of adjudicative jurisdiction in the Single Economic Market, the Trans-Tasman Proceedings Acts give effect to the most "civilised" of legal principles:[294] one that demands the conscious exercise of

286 Hague and Ditch, above n 35, at 228-9; see Working Group Report, above n 25, at 10, 13.

287 See text at above nn 266-269.

288 Working Group Report, above n 25, at 10. The option of preventing *forum conveniens* applications by setting a standard form contract with an exclusive choice of court agreement that favoured the one jurisdictional centre was not discussed, although this is a possibility.

289 Ibid.

290 Australian Law Reform Commission, above n 96, at 82; although the hypothetical case offered by the Queensland Government did not exemplify the particular problem it feared: ibid.

291 State Courts, above n 13, at 144-5.

292 For example, see above nn 238 and 251.

293 See text at above nn 116-118.

294 *Baltimore and Ohio Railway Co v Kepner*, 314 US 44 at 55 (1941) (Frankfurter J); *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 141 (Lord Goff of Chieveley).

self-restraint and, in the Trans-Tasman Judicial Area, restraint despite a right that all courts have in civil proceedings to exercise a complete adjudicative jurisdiction and an almost complete enforcement jurisdiction to the borders of the market area.

The civilised quality of the Trans-Tasman Judicial Area is even more remarkable in that it is to rely entirely on cooperation. The success of the civil jurisdiction and judgments scheme depends on the common principles of adjudicative and enforcement jurisdiction being interpreted and applied in a consistent way by courts on both sides of the Tasman. In the intra-Australian and EU schemes, a common approach to civil jurisdiction and judgments is ultimately secured by a common court of appeal: in Australia, the High Court;[295] in the EU, the Court of Justice. There is no common court of appeal in the Trans-Tasman Judicial Area. So, with separate hierarchies of courts beneath the High Court of Australia and the Supreme Court of New Zealand, a uniform interpretation of the Trans-Tasman Proceedings Acts will only be achieved by cooperation. There is every reason to expect that Australian and New Zealand courts will give special persuasive authority to decisions made in the other country on the meaning of the Acts. The Acts state that they implement the Christchurch Agreement,[296] and the Agreement acknowledges each country's "confidence in the judicial ... institutions of the other".[297] However, this confidence (and the possibility of a common trans-Tasman interpretation) would be even better expressed if the Acts provided that, when interpreting them, courts were to "pay due account" to interpretations of the Acts made by courts in the other country.[298] Australian State courts are already required to follow the decisions of appeal courts from other States – outside their own hierarchies – when interpreting federal or uniform legislation, or in common law adjudication.[299] A similar status for the precedents of New Zealand courts in Australia, and Australian courts in New Zealand, would seem to be the natural consequence of the creation of a Trans-Tasman Judicial Area.

295 In Australia, *Spiliada* principles of *forum conveniens* for transfers between superior courts were initially only established by adjudication in the NSW Court of Appeal: *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711. Then, the *Bankinvest* approach was only adopted in different State courts and the federal courts by persuasion. There was thought to be no opportunity to appeal even to an intermediate court of appeal as the legislation purported to ban appeals in decisions involving transfers: CVA, s 13(a). However, in a number of cases an intermediate court of appeal avoided the ban on appeals by removing decisions about transfers to itself, and establishing precedent for courts below it: *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711; *Re Chapman and Jansen* (1990) 13 Fam LR 854; *Dawson v Baker* (1994) 120 ACTR 1. In *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, the High Court of Australia treated the ban on appeals to itself as inconsistent with Australian Constitution, s 73(ii), and ineffective. It then adopted *Spiliada* principles for all decisions about transfers; a decision binding all Australian superior courts. See Private International Law, above n 44, at 106-7.

296 Aust, s 3(c); NZ, s 3(1)(c).

297 Christchurch Agreement, Preamble.

298 Judgments Extension, above n 7, at 272. The EEA does not have a common court of appeal, but cf Lugano Convention, Protocol 2, art 1: courts in the EEA are to "pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of the Convention".

299 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-2.