

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

EVIDENCE AND PROCEDURE (NEW ZEALAND) BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Honourable Duncan Kerr MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED



EVIDENCE AND PROCEDURE (NEW ZEALAND) BILL 1994

OUTLINE

This Bill implements arrangements agreed with New Zealand to facilitate the obtaining of evidence in litigation involving trans-Tasman elements.

2. The Bill provides -

for service and enforcement in Australia and New Zealand of New Zealand and Australian subpoenas, in all civil proceedings (except family proceedings);

for Australian and New Zealand courts to take evidence from New Zealand and Australia by video link or telephone, in all proceedings; and

special rules for judicial notice of New Zealand laws and for proof of New Zealand public and official documents in all proceedings.

3. The Bill replaces Part IIIA of the *Federal Court of Australia Act 1976* and most of Part VA of the *Evidence Act 1905*, which contain broadly similar provisions applicable in the Federal Court in a very narrow range of competition law proceedings.

FINANCIAL IMPACT

4. The Bill is expected to have little impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

5. This clause provides for the Act be cited as the *Evidence and Procedure (New Zealand) Act 1994*.

Clause 2: Commencement

6. Sections 1 and 2 of the Act commence on Royal Assent. The remaining provisions commence on a day to be fixed by Proclamation. This will enable the Act to be brought into force simultaneously with corresponding New Zealand legislation.

Clause 3: Definitions

7. This clause defines words and expressions used in the Act. The principal definitions are:

- ‘document’ which is defined to mean any record of information;
- ‘expenses’ which, in relation to subpoenas, is defined to include the reasonable costs of travel and accommodation to comply with a subpoena or of finding, collating and producing a document or thing;
- ‘family proceeding’ which is defined to mean proceedings relating to the guardianship, custody, access or maintenance of a child, marriage or divorce, maintenance of a spouse or former spouse, property arising out of a marital or (present or former) de facto relationship, paternity, adoption, protection of persons from domestic violence and the status or property of persons unable to manage their own affairs;
- ‘superior court’ which means the High Court of Australia, Federal Court of Australia, Family Court of Australia and State and Territory Supreme Courts. All other courts are inferior courts.

Clause 4: Extended definitions of “court” etc.

8. This clause provides that a tribunal will be taken to be a court for the purposes of one or more Parts of the Bill (except Parts 1 and 6) if regulations so provide.

‘Tribunal’ is defined to mean a person or a body authorised by Commonwealth, State, Territory or New Zealand law to take evidence on oath or affirmation, but does not include a court or a person exercising a power conferred on the person as a judge, magistrate, coroner or officer of a court.

9. The clause also provides that where a tribunal is taken to be a court for the purposes of a Part of the Bill, a reference in such a Part to a judge will refer also to a member of the tribunal.

Clause 5: External Territories

10. This clause extends the Act to each external Territory.

Clause 6: Act to bind Crown

11. This clause provides for the Crown in all its capacities to be bound by the Act.

PART 2 - AUSTRALIAN SUBPOENAS

Clause 7: Application of this Part

12. This clause applies Part 2 to subpoenas issued by a federal court or a prescribed State and Territory court, in any proceeding other than a criminal proceeding or a family proceeding.

Clause 8: Service of subpoenas in New Zealand

13. This clause authorises, subject to the regulations and any applicable rules of court, service of a subpoena in New Zealand, provided that leave has been given under clause 9. The subpoena may require the person named in it to attend to give evidence or to produce documents at a place either in Australia or New Zealand.

Clause 9: Subpoenas not to be served without leave

14. This clause provides that a subpoena may not be served in New Zealand unless leave for such service has been given by a judge of a superior court. If the proceeding

is in an inferior court, leave may be given by a judge of the Federal Court, or by a judge of the relevant State or Territory Supreme Court.

15. The factors to be taken into account by the judge in determining whether to grant leave include:

- the significance of the evidence to be given or the document or thing to be produced by the person named in the subpoena; and
- whether it could be obtained by other means without significantly greater expense and with less inconvenience to the person named.

16. The judge must impose a condition that the subpoena not be served after a specified day, and may impose other conditions. Leave can not be given if the person named is less than 18 years old.

Clause 10: How subpoenas are to be served in New Zealand

17. This clause provides that, subject to compliance with any directions given by the judge when granting leave for service, a subpoena must be served in New Zealand in the same way as it would be in the State or Territory where it was issued. Service of the subpoena is not effective unless it is accompanied by a copy of the order granting leave and a notice in the prescribed form setting out the rights and obligations of the person named in the subpoena in relation to the subpoena and information about how to apply to have the subpoena set aside.

18. The form of the notice may be prescribed either by regulations or by rules of the court of which a judge gave leave to serve the subpoena. If there is no prescribed form the corresponding form under the Federal Court Rules is to be used, with the necessary modifications.

Clause 11: Expenses

19. This clause provides that service of a subpoena is not effective unless allowances and travelling expenses or vouchers sufficient to meet the person's reasonable expenses of complying with the subpoena are paid or tendered to the person, either at the time of service or at some other reasonable time before the person is required to comply.

Clause 12: Subpoenas not requiring attendance

20. This clause requires that a subpoena only to produce documents or things must permit the person named in it to comply with the subpoena by delivering the documents or things to a Registry of the New Zealand High Court not less than 10 days before the date on which the documents or things are required in the court that issued the subpoena. New Zealand law will provide for the documents or things to be sent to that court.

Clause 13: Applications to set subpoenas aside

21. This clause provides that the person named in the subpoena may apply to have it set aside. The application must be made to the court of which a judge gave leave to serve the subpoena, and must contain the applicant's address for service, which may be in either Australia or New Zealand. Documents in the proceedings may be served on the applicant by leaving them at, or faxing or sending them by post to, that address.

22. The application must be lodged with the Registrar of the court. It may be lodged by facsimile. The Registrar must cause a copy of the application, and any affidavit setting out facts on which the applicant wishes to rely in support of the application, to be served on the solicitor on the record of the person who applied for the subpoena to be issued or, if there is no solicitor on the record, on that person.

Clause 14: Setting aside subpoenas

23. This clause provides that the court may set aside a subpoena, in whole or in part.

24. The court must set the subpoena aside if it requires the person named in it to attend at a place in Australia, and that person:

does not have necessary travel documents and can not reasonably obtain them within the time for compliance with the subpoena; or

would be liable to be detained to serve a sentence if he or she complies with the subpoena; or

is liable to prosecution or is being prosecuted for an offence in Australia; or

- is liable to the imposition of a penalty in civil proceedings in Australia, other than under the *Trade Practices Act 1974*.

25. The court must also set aside a subpoena if the person named is subject to a restriction on his or her movements imposed by law or by order of a court (for example, bail, parole, an alternative sentencing order) that is inconsistent with his or her complying with the subpoena.

26. The grounds on which a court may set aside a subpoena include:

- the evidence to be given could be obtained satisfactorily by other means without significantly greater expense;
- compliance would cause the person hardship or serious inconvenience; or
- in the case of a subpoena for production, the document or thing should not be taken out of New Zealand and satisfactory evidence of the document or thing can be given by other means.

27. An expedited procedure is provided for hearing an application to set aside a subpoena. If neither the applicant nor the person (if any), at whose request the subpoena was issued, objects the court can determine the application without a hearing. If there is a hearing it can be conducted by video link or telephone. If the applicant requests a hearing either by video link or telephone the hearing must be conducted by video link or telephone, the choice of medium being made by the court.

Clause 15: Entitlement to expenses

28. This clause provides that a person who complies with a subpoena is entitled to be paid his or her reasonable expenses of so complying. Payment must be made by the person (if any) at whose request the subpoena was issued. If there is no such person, where the subpoena was issued by a federal court, the amount must be paid by the Commonwealth and in any other case, by the State or Territory in which it was issued. The court which issued the subpoena may make orders to ensure payment is received.

Clause 16: Non-compliance with subpoenas

29. This clause provides that if a person does not comply with a subpoena, the court that issued the subpoena may issue a certificate under seal stating that leave was given for service of the subpoena in New Zealand by a superior court judge and that the person failed to comply with it.

Clause 17: Courts' other powers unaffected

30. This clause provides that nothing in Part 2 limits any other power of a court.

PART 3 - NEW ZEALAND SUBPOENAS

Clause 18: Application of this Part

31. This clause applies Part 3 (except clause 23) to a subpoena issued in a proceeding, other than a criminal or a family proceeding, in a New Zealand court, if a judge of the New Zealand High Court has given leave to serve the subpoena in Australia.

Clause 19: Service of subpoenas in Australia

32. This clause provides that such a subpoena may be served on a person in Australia by serving it on him or her, together with a copy of the order made by a New Zealand High Court judge granting leave for service in Australia, and a notice that sets out the rights and obligations of the person and information about how to apply to the High Court of New Zealand to have the subpoena set aside.

Clause 20: Obligation to comply with subpoenas

33. This clause provides that, subject to any rights to apply to have the subpoena set aside under New Zealand law, a person served with the subpoena in Australia must comply with it if:

it was served in accordance with clause 19 and New Zealand law;

- the person is at least 18 years old; and

at the time of service, or at some other reasonable time before the person is required to comply with the subpoena, allowances and travelling expenses sufficient to meet the person's reasonable expenses of complying are paid or tendered to the person.

Clause 21: Non-compliance with subpoenas

34. This clause provides that a person who fails to comply with a New Zealand subpoena is taken to be in contempt of the Federal Court of Australia unless he or she can establish that the failure to comply should be excused.

35. In deciding whether the failure should be excused the Federal Court may have regard to matters not made known to the New Zealand High Court which are likely, if they had been known, to have led the High Court to set aside the subpoena, provided that the failure to make facts known to the High Court was not the person's fault or

should be excused. The Federal Court may also have regard to other matters to which it would have had regard if it had issued the subpoena.

36. A certificate under seal of the New Zealand court that issued the subpoena stating that leave to serve the subpoena in Australia was given by a High Court judge and that the person failed to comply with the subpoena is evidence of contravention of clause 20. Findings of fact made by the New Zealand High Court on an application to set aside the subpoena cannot be challenged unless the New Zealand High Court was deliberately misled in making those findings.

Clause 22: Documents etc. for transmission to a New Zealand court

37. This clause provides that the Federal Court and prescribed State or Territory courts may receive documents or things required by a New Zealand subpoena for production. The Registrar of a court at which such a document or thing is lodged must arrange for the Registrar of the court that issued the subpoena to be informed of the lodgment by fax or similar means and for the document or thing to be sent to that court, as soon as practicable.

Clause 23: Other powers to serve subpoenas unaffected

38. This clause provides that any power under New Zealand law to serve a subpoena on a New Zealand citizen in Australia is not affected by Part 3.

PART 4 - USE OF VIDEO LINKS OR TELEPHONES IN AUSTRALIAN PROCEEDINGS

Clause 24: Application of this Part

39. This clause applies Part 4 to proceedings in federal courts and prescribed State and Territory courts.

Clause 25: Australian courts may take evidence etc. from New Zealand

40. This clause authorises a federal court or a prescribed State and Territory court to take evidence and receive submissions by video link and telephone from New Zealand in any civil or criminal proceeding.

41. The court can not direct that evidence be taken or a submission received in these ways unless it is satisfied that the necessary facilities are available or can be provided, and that the evidence can more conveniently be given, or the submission more conveniently made, from New Zealand.

42. In connection with taking evidence or receiving submissions in such ways the court may exercise in New Zealand all its powers that New Zealand law permits it to exercise in New Zealand. New Zealand law will enable the court to exercise in New Zealand powers similar to those which this Bill enables a New Zealand court to exercise in Australia.

Clause 26: Taking evidence by video link

43. This clause provides that evidence is not to be given or a submission made by video link unless the place where the court is sitting and the place where the evidence is to be given or submission made are each equipped with video facilities that enable the persons in each place to see and hear each other.

Clause 27: Taking evidence by telephone

44. This clause provides that evidence is not to be given or a submission made by telephone unless the place where the court is sitting and the place where the evidence is to be given or submission made are each equipped with telephone conference facilities that enable the persons in each place to hear each other.

Clause 28: Expenses

45. This clause authorises the court to make orders for the payment of expenses incurred in connection with taking evidence or making submissions by telephone or video link.

46. It further provides that where a Commonwealth tribunal is prescribed in regulations under subclause 4(1) for the purposes of Part 4 of the Bill, those regulations may also provide that the tribunal may not make an order under clause 28 against a person other than the Commonwealth. This provision will enable regulations to ensure that clause 28 applies consistently with the general approach in Commonwealth tribunals in which orders for payment of expenses may only be made against the Commonwealth.

Clause 29: New Zealand counsel entitled to practise in Australia during video links etc.

47. This clause confers on a person entitled to practise as a barrister, solicitor or both before the High Court of New Zealand a right to practise as a barrister, solicitor or both in an Australian proceeding in relation to the taking of evidence or the making of submissions by video link or telephone from New Zealand.

PART 5 - USE OF VIDEO LINKS OR TELEPHONES IN NEW ZEALAND PROCEEDINGS

Clause 30: New Zealand courts may take evidence etc. from Australia

48. This clause authorises a New Zealand court to take evidence or receive submissions from a person in Australia by video link or telephone.

Clause 31: Powers of New Zealand courts

49. This clause authorises a New Zealand court to exercise any of its powers, except its powers to punish a person for contempt or to enforce its judgments or process, in relation to receiving evidence or submissions by video link or telephone from Australia.

50. Under the clause the laws of New Zealand that apply to the proceeding in New Zealand also apply to the practice and procedure of the court in taking evidence and receiving submissions by video link or telephone from Australia.

Clause 32: Orders made by New Zealand courts

51. This clause provides that, without limiting the operation of clause 31, a New Zealand court may (when taking evidence or receiving submissions by video link or telephone):

- direct that the proceeding or part of it be conducted or continued in private;
- require a person to leave the place in Australia where evidence is being or will be given or submissions are being or will be made; and
- prohibit or restrict the publication of evidence or the name of any party or witness.

Clause 33: Enforcement of orders

52. This clause imposes an obligation to comply with an order made under clause 32. Subject to the Federal Court Rules, such an order may be enforced by a Federal Court judge, as if it had been made by the Federal Court. A person who contravenes an order is taken to be in contempt of the Federal Court, unless he or she establishes the failure should be excused.

Clause 34: Privileges, protection and immunity of participants in New Zealand proceedings

53. This clause confers the same protections on participants in New Zealand proceedings, in relation to the taking of evidence or receiving of submissions by video link or telephone from a person in Australia, as participants have in proceedings before the Federal Court.

Clause 35: New Zealand Courts may administer oath in Australia

54. This clause authorises a New Zealand court to administer an oath or affirmation to a witness in Australia for the purpose of obtaining evidence by video link or telephone. Section 35 of the *Crimes Act 1914*, which relates to false evidence, is applied by the clause to evidence given under such an oath or affirmation.

Clause 36: Assistance to New Zealand courts

55. This clause authorises an officer of the Federal Court, the Family Court of Australia or a prescribed State or Territory court to be present, at the request of a New Zealand court, at the place where a witness is giving evidence by video link and telephone and to facilitate the proceeding as directed by the court.

Clause 37: Contempt of New Zealand courts

56. This clause creates offences, each punishable by 3 months imprisonment, relating to conduct while evidence is being given or a submission is being made in Australia, by video link or telephone. The offences concern assault, threats, intimidation or wilful insult of persons involved in the proceedings, wilful interruption or obstruction of the proceedings, and wilful and unlawful disobedience of a court order.

PART 6 - EVIDENCE OF CERTAIN NEW ZEALAND MATTERS

Clause 38: Application of this Part

57. This clause applies Part 6 to all proceedings in an Australian court. For the purposes of this Part 'court' means a federal, State or Territory court or a person or body authorised by Australian law or by the consent of the parties to hear, receive or examine evidence.

Clause 39: Faxes

58. This clause provides that subject to any Rules of Court, Part 6 applies to a fax of a document in the same way as it applies to the original of the document, whether or not the original is itself a copy or extract.

Clause 40: Matters of law

59. This clause makes it unnecessary to tender evidence about the provisions and commencement of New Zealand laws, Proclamations and orders made by the Governor-General of New Zealand under a New Zealand Act and legislative instruments under New Zealand Acts which must be published or notified in the New Zealand Gazette.

Clause 41: Evidence of New Zealand official instruments

60. This clause provides that evidence of an official instrument made by the Governor-General in Council of New Zealand may be given by producing a copy or extract purporting to have been certified to be a true copy or extract by the Clerk of the Executive Council of New Zealand. Evidence of official instruments issued by the New Zealand Governor-General or under the authority of a New Zealand Minister may be given by producing a copy or extract purporting to have been certified as a true copy or extract by a New Zealand Minister.

Clause 42: Evidence of New Zealand acts of state

61. This clause enables evidence of a treaty or other act of state of New Zealand to be given by producing:

- a copy that purports to be sealed with the seal of New Zealand or that is proved to be an examined copy;

a book or pamphlet that contains the treaty or act of state and purports to have been printed by the New Zealand Government or is admissible in New Zealand courts as evidence of such treaties or acts of state ;

a book or other publication that contains the treaty or act of state and appears to be a reliable source of information; or

a document that purports to be a copy of the treaty or act of state, and bears a certificate by the person who has custody of the original, stating it is a true copy.

Clause 43: Evidence of public documents admissible in New Zealand under New Zealand Acts

62. This clause provides that where a public document is admissible in evidence in New Zealand under a New Zealand Act, the document is admissible to the same extent and for the same purpose if it purports to be sealed, stamped, signed, signed and sealed or signed and stamped in accordance with the New Zealand Act. A certified copy of, or extract from, such a document is also admissible.

Clause 44: Evidence of other New Zealand public documents

63. This clause provides that where a public document is admissible in evidence in New Zealand without proof of the seal, stamp or signature that authenticates it, or of the judicial or official character of the person who appears to have signed it, the document is admissible to the same extent and for the same purpose without such proof.

Clause 45: Evidence of New Zealand documents of a public nature

64. This clause enables a New Zealand document, which is of such a public nature as to be admissible in evidence in New Zealand on its mere production from proper custody, to be proved by an examined copy or extract, or a copy or extract purporting to be certified as a true copy or extract by a New Zealand officer who certifies that he or she has custody of it.

Clause 46: Part not to derogate from existing Australian laws

65. This clause provides that Part 6 does not affect any other means of giving evidence of the matters referred in the Part under any other Australian law.

PART 7 - MISCELLANEOUS

Clause 47: Application of the *Foreign Judgments Act 1991*

66. This clause applies to an order made by a New Zealand court, under the New Zealand legislation reciprocal to this Bill, for the payment of expenses incurred by a witness in complying with a subpoena served on the witness in Australia in accordance with Part 3 of this Bill or in connection with taking evidence or receiving submissions by video link or telephone from Australia under Part 5 of this Bill.

67. The clause provides that the *Foreign Judgments Act 1991* will apply, with modifications, to such an order to ensure that it will be enforceable by registration under that Act.

Clause 48: Rules of court

68. This clause empowers rule making authorities to make rules of court. The rules must not be inconsistent with the Act or regulations made under it.

69. Where no rules or regulations have been made to regulate practice or procedure in a court in relation to a matter under this Act, the Federal Court Rules are to apply, with necessary modifications and subject to any direction of the court.

Clause 49: Regulations

70. This clause enables the Governor-General to make regulations. However, the Governor of a State, the Chief Minister of the Australian Capital Territory or the Administrator of a Territory must make a written request before the Governor-General may make regulations specifying a court of the State or Territory for the purposes of receiving documents pursuant to a New Zealand subpoena or of providing assistance to New Zealand courts taking evidence by video link or telephone from Australia.