INTERNATIONAL ISSUES

Chapter 9 Treaties and international obligations

New Zealand is party to a number of treaties that give rise to a diverse range of ongoing international obligations. These cover issues such as human rights, child abduction, human trafficking, the rights of the disabled, refugees, endangered species, trade, transport, communications, and other economic issues. The term "treaty" is used in this chapter to refer to all legally binding international agreements, including bilateral and multilateral treaties, and United Nations conventions to which New Zealand has acceded.

New Zealand must give full effect to a treaty, or it will risk breaching its international obligations. In such instances, considerable resources will be required to remedy any non-compliance with the relevant treaty. Non-compliance places New Zealand's international reputation at risk and exposes it to any applicable sanctions under the treaty.

Given the breadth of New Zealand's international obligations, proposed legislation will often affect, or have the potential to affect, one or more of New Zealand's international obligations. Care must be taken to ensure that any proposed legislation does not inadvertently cause New Zealand to breach any of its existing treaty obligations.

All multilateral treaties and bilateral treaties of particular significance (as the Minister of Foreign Affairs determines) are required to undergo parliamentary treaty examination. This process includes a National Interest Analysis.[28]

Once parliamentary treaty examination is complete, the practice in New Zealand is to pass any domestic legislation necessary for compliance with a treaty before that treaty comes into force for New Zealand.

The Ministry of Foreign Affairs and Trade (MFAT) is the Government's principal adviser on matters relating to treaties and international relations. MFAT maintains the official database of New Zealand's binding treaty obligations at international law and should be consulted if a department is considering signing any international instrument that may impose obligations on New Zealand.[29]

The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, international obligations.[30]

[28] Standing Orders of the House of Representatives 2017, SO 397(2) and 398.
[29] New Zealand Treaties Online www.treaties.mfat.govt.nz/
[30] Cabinet Office *Cabinet Manual 2017* at 7.65(d).

Guidelines

9.1 Are any pre-existing treaties or international obligations relevant to the proposed legislation?

New legislation must not be inconsistent with existing international obligations.

MFAT, the Crown Law Office, and the particular department that has responsibility for the relevant existing treaty should be consulted to identify any relevant international obligations and whether the proposed legislation will result in any inconsistency.

If possible, any relevant non-binding international instruments should be identified. Although not binding on New Zealand in international law, they may have wider significance. Non-binding instruments include declarations, resolutions, and instruments under negotiation or non-binding international standards. Advice should be sought from MFAT, the relevant department, or the Crown Law Office as to the legal significance of any relevant non-binding international instruments.

New Zealand is currently party to, and is in the process of negotiating, a number of trade agreements (sometimes called Free Trade Agreements, Closer Economic Partnerships, or Strategic Economic Partnerships). These agreements may have specific provisions in areas such as intellectual property rights (including the use of trademarks and patent rights), and dispute resolution processes that domestic law must not inadvertently restrict. Further information about existing trade agreements and those currently under negotiation can be found on MFAT's website.

If legislation relates to the sale of goods or occupational registration, the Trans-Tasman Mutual Recognition Arrangement may be relevant and should be considered. That non-treaty arrangement, implemented in New Zealand in the Trans-Tasman Mutual Recognition Act 1997, overrides other legislation unless specifically excluded. More information can be found on the Ministry of Business, Innovation & Employment website.

9.2 Is a treaty being implemented?

The appropriate method of incorporating treaty obligations into New Zealand law should be used to ensure that all relevant international obligations are given full effect.

To have effect in New Zealand, international obligations must be incorporated into New Zealand law. In many cases, this will require an amendment to domestic law to give effect to a treaty obligation. In other cases, it will be necessary to pass entirely new legislation.

The language in treaties is often ambiguous. This is so that a diverse group of governments can reach agreement. Any terms or language that may be ambiguous should be identified and parliamentary counsel should be consulted to determine whether the language needs to (or can) be adjusted in the proposed legislation, and what method of incorporation is most appropriate.

The text following is intended only as a brief summary of the main methods of incorporation

(further advice should be sought from legal advisers, MFAT and the Parliamentary Counsel Office as to which method is the most appropriate):

- **Wording method—**This is the most common method. The wording of the treaty is reflected in the body of the legislation, although the legislation may or may not specify the treaty that it is incorporating. The wording may be reflected verbatim or, if necessary, translated to more accurately reflect local conditions. This method is useful if it is necessary to translate the wording of a treaty to reflect local conditions or if the treaty requires additional steps to be taken in New Zealand law (for example, one purpose of the New Zealand Bill of Rights Act 1990 was to implement the International Covenant on Civil and Political Rights).

- **Formula method "force of law"—**The full or partial text of the treaty is set out in the legislation, usually in a schedule. The legislation will use a form of words to proclaim that the treaty has the "force of law" and will apply domestically. This method is rarely used, but it is useful if the treaty amounts to a self-contained body of law that does not require any operational structures to support it (*see* sections 202 – 206 of the Contract and Commercial Law Act 2017).

- **Subordination method—**The legislation contains a provision that authorises the making of regulations or rules that give effect to the treaty or particular parts of it. This method is useful if the treaty provides for, or will require, ongoing technical changes that are appropriate to delegate to the Executive, or in rare cases that require implementation under strict and compressed timetables (*see* section 36(1) of the Maritime Transport Act 1994).

- **Hybrid method—**In some cases, more than one method may be used. For example, legislation may use the wording method to set out the relevant treaty rights and protections, but use the subordination method to trigger the application of those provisions. Another example is where the formula method is used to give the treaty force of law in New Zealand, but the wording method is used to create the specific mechanisms necessary for the administration of the law. The Adoption (Intercountry) Act 1997 is an example of this.

If the purpose of legislation is to implement a treaty, it is best practice for the purpose clause of the legislation to explicitly state that to help interpretation.

9.3 Does the legislation provide ready access to the treaty that it implements?

Legislation that implements a treaty should provide easy access to the treaty that it implements.

People must have ready access to the primary source of the legislation (for example, in a schedule of an Act). However, treaties can be amended from time to time; so there must be clarity about the effect of any subsequent change to the referenced document, and how to best identify and provide access to the authoritative version of the treaty following any amendment.

It will be necessary to balance the need to provide easy access to the text of the treaty being implemented against any practical difficulties of doing so. For example, it might not be appropriate to annex particularly lengthy or technically complex treaties to legislation.

Chapter 10 Dealing with conduct, people, and things outside New Zealand

In our globally connected world, it is very common for issues arising under legislation to involve a cross-border element. Perhaps most commonly, a person who breaches the law within New Zealand may be overseas when it is enforced. Alternatively, there may occasionally be sound policy reasons for New Zealand to regulate the behaviour of New Zealanders when they are overseas.

New Zealand law does not automatically apply to activities, people, or property that is not within New Zealand's territory. This poses a number of difficulties for those attempting to regulate matters that take place wholly or partly outside New Zealand and for those attempting to apply New Zealand law to people or property outside New Zealand.

Not identifying and addressing cross-border issues when developing legislation can lead to uncertainty, litigation, and potentially a failure to fully achieve the policy objective of the legislation. This chapter will help officials to identify and, if appropriate, address cross-border issues in the policy development and legislative design process.

If cross-border issues arise, three practical questions confront people seeking to understand and apply the law:

- Which rules apply? Will it be New Zealand law, or the law of another country?
- Who will make decisions in particular cases? Will it be a New Zealand court or decision maker or an overseas court or decision maker?
- What effect will a decision have? Will a New Zealand decision be effective overseas? Will an overseas decision be treated as effective in New Zealand?

It is important to identify the nature and significance of any current or future cross-border issues at an early stage of the policy development process. The next step is to determine how New Zealand law might apply to those situations to help ensure that the policy objective of the legislation is achieved. The approach taken to the application of New Zealand law needs to be consistent with accepted international law principles concerning jurisdiction (the question of who decides) and take account of practical issues with enforcement. Seeking specialist advice is vital if cross-border issues arise. The Ministry of Foreign Affairs and Trade (MFAT) and the Ministry of Justice (MOJ) should also be consulted on proposed solutions.

Guidelines

10.1 Do any cross-border issues need to be addressed?

Significant cross-border issues relevant to the policy area should be identified.

Officials should identify whether the legislation needs to take into account conduct outside New Zealand, people or assets outside New Zealand, or cross-border transactions. This includes assessing the potential for these situations to arise or increase in the future. The following are the sort of cross-border matters that may need to be addressed if they will have

a significant impact:

- cross-border transactions (such as the sale and purchase of goods or services, including online transactions);
- people outside New Zealand whose conduct affects people in New Zealand;
- people in New Zealand whose conduct affects people outside New Zealand;
- civil proceedings in New Zealand that involve overseas parties (for example, overseas suppliers who have all their assets overseas);
- civil proceedings in New Zealand concerning transactions governed by foreign law;
- civil proceedings overseas that raise issues of New Zealand law;
- information or evidence overseas required for detecting, investigating, and enforcing breaches of New Zealand law;
- whether the determinations of New Zealand courts or decision makers will be recognised or enforced overseas and vice versa;
- whether co-operation with other Governments is needed to give effect to the policy;
- whether there are applicable treaties or other international obligations; and
- criminal conduct outside New Zealand by people or businesses connected to New Zealand.

10.2 What is the intended scope of the legislation?

Legislation should expressly state when it applies to cross-border situations if these situations are significant and likely to arise often.

If significant cross-border issues do arise, legislation must provide clear answers to questions about when the rules in the legislation apply and when decision-making powers can be exercised. It should do so by reference to relevant cross-border or connecting factors.

The following are connecting factors that are commonly used to determine when New Zealand law applies:

- whether certain conduct or events occurred in New Zealand;
- whether certain property is situated in New Zealand;
- whether a particular transaction is governed by New Zealand law or has a New Zealand element;
- whether a person is a New Zealand citizen or permanent resident of New Zealand;

- whether a person is present, resident, habitually or ordinarily resident, or domiciled in New Zealand at the time of certain events, at the time that civil or criminal proceedings are commenced, or at the time that the relevant court process is served on the person; and

- whether certain consequences could occur in New Zealand, and the knowledge of the person involved as to whether those consequences would occur in New Zealand.

International law principles affect the extent to which it is appropriate for New Zealand law to attempt to apply to conduct that takes place, or to people who are, outside New Zealand. Those principles affect the choice of connecting factors. Practical limits on New Zealand's ability to apply and enforce New Zealand law on people outside New Zealand also affect the choice of connecting factors. This is a complex area and specialist advice should be sought, including from MFAT, legal advisers, and MOJ.

10.3 Are special procedural rules required for civil claims with a cross-border element?

Generally, the existing rules of court procedure for commencing proceedings against someone overseas should apply.

The High Court Rules and the District Court Rules contain standard rules about when civil proceedings can be commenced against someone overseas. There must be good reason for departing from these rules, particularly if the proceedings will be commenced in the High Court or the District Court. If a new judicial body, such as a tribunal, is created and may need to hear claims against someone overseas, the legislation should expressly provide for analogous procedural rules.

The Trans-Tasman Proceedings Act 2010 sets out a framework to facilitate the commencement and resolution of civil disputes if there is a trans-Tasman element, such as an Australian party. Further guidance on trans-Tasman proceedings can be found on the Ministry of Justice website.

If legislation creates substantive rights to redress, such as the right to recover damages, the likelihood of the legislation being applied in proceedings before overseas courts should be considered. If that is likely, provisions conferring jurisdiction to award redress should not be linked to a specifically New Zealand-based court or tribunal (for example, by defining reference to court as being to the New Zealand High Court). This ensures that the power to award redress can be exercised by a foreign court. Provisions should also avoid broad remedial discretions if possible, as foreign courts are generally unwilling to exercise discretions of this kind when applying another country's laws.

10.4 Are special rules required for criminal proceedings with a cross-border element?

New criminal offences should be subject to the rules on territorial application in sections 6 and 7 of the Crimes Act 1961, unless there are special circumstances.

Sections 6 and 7 of the Crimes Act 1961 limit the application of the Crimes Act and any

other criminal offences (unless otherwise stated) to conduct that occurs within New Zealand. The criminal law will still apply if only part of the conduct amounting to an offence occurs in New Zealand.

Those rules should only be departed from in exceptional circumstances. There must be a clear case for New Zealand law to apply, and it must be reasonable to expect the people to whom the legislation will apply to comply with New Zealand law (because of their links with New Zealand) or any international standards reflected in New Zealand law. In such cases, justification should be recorded in the policy documentation.

In addition, the following things will have an effect on attempts to address cross-border criminal activity:

- Generally, New Zealand law does not provide for a criminal trial or hearing to be held in respect of a defendant who is outside New Zealand (section 25(e) of the New Zealand Bill of Rights Act 1990). Natural persons who commit serious offences in New Zealand may be extradited to New Zealand to stand trial (*see* the Extradition Act 1999).

- New Zealand courts do not hear criminal proceedings in respect of breaches of the criminal laws of another country. New Zealand law must provide that the conduct that constitutes the overseas offence is a criminal offence in New Zealand, even though the conduct occurred outside New Zealand, before there can be a trial before a New Zealand court.

The Ministry of Justice and the MFAT Legal Division should always be consulted before making provision for New Zealand courts to have criminal jurisdiction in respect of conduct occurring outside New Zealand.

There can be practical enforcement problems in criminal cases with a cross-border element. Critical evidence required for a criminal proceeding in New Zealand may be located in another country, and vice versa. The proceeds of a crime committed in New Zealand may be located overseas, and vice versa. General mechanisms like the Mutual Assistance in Criminal Matters Act 1992 (MACMA) and the Criminal Proceeds (Recovery) Act 2009 can help if serious criminal offending is involved. Subpart 1 of Part 4 of the Evidence Act 2006, which provides for taking evidence remotely between Australia and New Zealand, applies to criminal proceedings.

However, there will be situations, such as when New Zealand and another country or countries have closely co-ordinated regulatory regimes, where more extensive co-operation may be required. How to deal with this is discussed in the next section.

10.5 Will any cross-border issues impair the ability of a regulatory agency to perform its functions?

Legislation should expressly authorise a regulatory agency to work with overseas counterparts if that is necessary for the agencies to carry out their functions.

In general, the investigative and other regulatory powers of New Zealand agencies can be

exercised within New Zealand only in respect of suspected breaches of New Zealand law. In some cases, this principle may impair the ability of New Zealand agencies to effectively regulate conduct if cross-border issues are involved.

MACMA provides a basic framework to enable countries to provide assistance to, and request assistance from, New Zealand with criminal investigations and prosecutions.

For civil regulatory action, or if the framework in MACMA is insufficient for criminal matters, the legislation should specify powers to request that an overseas counterpart obtain information for the New Zealand regulator and vice versa (or otherwise specify that they should provide assistance to each other), if that is necessary for the regulators to perform their functions.

10.6 Should the legislation provide for recognition or enforcement of overseas decisions in New Zealand?

Legislation should provide for decisions made by overseas courts or regulators to be recognised or enforced in New Zealand if that would support the policy objective.

In some cases, it may be necessary to recognise or enforce a decision of an overseas agency or court in New Zealand to ensure that the legislation achieves its purpose or that broader policy goals are met. Broader policy goals may include reducing compliance costs, reducing legal uncertainty, removing incentives for forum shopping and enhancing the integrity of a statutory regime by ensuring that it is effective across borders.

The common law already recognises some overseas decisions affecting a person's status (such as marriage) and some decisions of overseas courts in civil cases. There are also generic statutory regimes for recognition and enforcement. The Trans-Tasman Proceedings Act 2010 provides for the recognition and enforcement in New Zealand of a broad range of Australian court decisions and some tribunal decisions. Other examples include the Reciprocal Enforcement of Judgments Act 1934 (for some decisions of foreign courts) and the MACMA (for a limited class of orders made in criminal proceedings).

New Zealand legislation cannot provide for the recognition or enforcement of New Zealand decisions overseas, but that could be provided for in a recognition regime based on a bilateral arrangement with another country (such as the Trans-Tasman Mutual Recognition Arrangement).