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Australia

ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

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This country-specific Q&A provides an overview of enforcement of judgments in civil and commercial matters laws and regulations applicable in Australia.

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AUSTRALIA

ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS



1. What international conventions, treaties or other arrangements apply to the enforcement of foreign judgments in your jurisdiction and in what circumstances do they apply?

In Australia, foreign judgments are primarily recognised and enforced through the statutory regime enshrined in the Foreign Judgments Act 1991 (Cth) (FJ Act) and the Foreign Judgments Regulations 1992 (Cth) (FJ Regulations), or alternatively pursuant to common law principles.

The FJ Act stands as the operative legislation governing the recognition and enforcement of foreign judgments in Australia. The statutory regime applies where there is substantial reciprocity of treatment in relation to the enforcement of judgments between Australia and the superior courts (and specified inferior courts) of foreign countries as prescribed in the FJ Regulations. Where substantial reciprocity is established, a judgment creditor can register a foreign judgment, which gives it the same force and effect as if it were made by an Australian court.

Currently, the FJ Regulations specify that the FJ Act applies with respect to judgments given in the superior courts in Alberta, the Bahamas, British Columbia, the British Virgin Islands, the Cayman Islands, Dominica, the Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, Korea, Malawi, Manitoba, Montserrat, Papua New Guinea, Poland, St Helena, St Kitts and Nevis, St Vincent and the Grenadines, Seychelles, Singapore, the Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, the United Kingdom and Western Samoa.

In cases where a foreign judgment is not made in a court prescribed in the FJ Regulations, including notably courts in the USA, Russia, China and India, parties must rely on common law principles for recognition and enforcement.

In addition, a specific regime operates between Australia and New Zealand (NZ), under the Trans-Tasman Proceedings Act 2010 (Cth) (the TTP Act). As discussed in Question 4 below, a NZ judgment can be recognised and enforced in Australia if the NZ judgment is “registrable” pursuant to section 66 of the TPP Act.

2. What, if any, reservations has your jurisdiction made to such treaties?

There are no reservations.

3. Can foreign judgments be enforced in your jurisdiction where there is not a convention or treaty or other arrangement, e.g. under the general law?

Yes, enforcement may be sought under the common law principles as an action in debt. Question 4 below contains further details.

Alternatively, a judgment creditor can commence fresh proceedings and rely on the original cause of action in the foreign proceedings. The foreign judgment may then give rise to an estoppel, preventing the judgment debtor from asserting particular defences that were available to it in the foreign proceedings.

4. What basic criteria does a foreign judgment have to satisfy before it can be enforced in your jurisdiction? Is it limited to money judgments or does it extend to other forms of relief?

Statutory regime

Section 6 of the FJ Act provides that a foreign judgment must be registered by the Federal Court of Australia or

the Supreme Court of a state or territory if it meets the following three substantive requirements:

- it is a judgment to which the FJA applies;
- is not wholly satisfied; and
- is enforceable in the place it was made.

The FJ Act can apply to non-money judgments if prescribed by the FJ Regulations. However, to date, no provision has been made for any kinds of non-money judgments (i.e. injunctions or specific performance) to fall within the ambit of the FJ Act.

A foreign judgment will be treated as “final and conclusive” irrespective of any pending appeal or if it is subject to appeal in the courts of the foreign jurisdiction.

Special regime - New Zealand

Pursuant to section 66 of the TPP Act, a registrable NZ judgment must be final and conclusive and be:

- given in a civil proceeding by a NZ court;
- given in a civil proceeding by a NZ tribunal prescribed by the Trans-Tasman Proceedings Regulations 2012 (Cth) (the TTP Regulations);
- given in a criminal proceeding by a NZ court and consist wholly of a requirement to pay an injured party a sum of money by way of compensation, damages or reparation;
- given in a criminal proceeding by a NZ court and consist wholly of an imposition of a regulatory regime criminal fine; or
- an order under the Trans-Tasman Proceedings Act 2010 of NZ or the NZ Evidence Act by a NZ court or tribunal (see section 66(1)(e) TTP Act).

An NZ judgment is not registrable if it is wholly or partly:

- related to family matters as referred to as “excluded matters”;
- an order under proceeds of crime legislation;
- an order relating to the granting of probate or letters of administration of the estate of a deceased person;
- an order relating to the guardianship or care of a person; or
- an order relating to the care, control or welfare of a child.

Non-monetary judgments are therefore capable of registration and there is no requirement for registration that the NZ court had “international jurisdiction”.

Common law

The common law test stipulates four requirements that must be met before a foreign judgment can be recognised. The onus is on the party seeking recognition and enforcement.

First, the foreign court must have exercised an “international jurisdiction”. International jurisdiction does not mean the foreign court has jurisdiction under its own rules; rather, jurisdiction in the international sense means competence recognised under Australian private international law rules, which will be satisfied where:

1. the defendant was present in the foreign jurisdiction when served with the originating process from the foreign proceeding;
2. the judgment made in the foreign court delivered title to, or possession of, tangible property located in the foreign place; or
3. the defendant submitted to the jurisdiction of the foreign court by:
 - a. agreeing to accept the jurisdiction of the foreign court; or
 - b. appearing in the proceeding, other than to contest jurisdiction or the exercise of jurisdiction on discretionary grounds.

A judgment debtor will usually be taken to have submitted to jurisdiction if it takes a step which is not consistent with, or relevant to, the challenge of jurisdiction.

In addition, international jurisdiction might also be established at common law when the defendant was domiciled or ordinarily resident in the foreign jurisdiction.

Second, the judgment must be final and conclusive – it must be *res judicata*, i.e., not capable of being re-litigated by the same parties in the same court. This will not be the case if, for example, the decision is capable of being varied or discharged at the discretion of the foreign court or by a court of the same level. The existence of an appeal does not render a decision inconclusive. However, Australian courts may stay enforcement when an appeal is pending in the foreign jurisdiction.

Third, the parties must be the same as those in the foreign judgment.

Fourth, as stated above, the judgment must be for a fixed sum. However, Australian courts will not enforce foreign judgments that are based on a foreign revenue debt or a penalty imposed by a foreign law. Judgments

for exemplary or punitive damages however may be enforced where they involve a sum payable for disregard of a claimant's rights, rather than a failure to comply with court orders (*Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544).

In seeking recognition and enforcement, the judgment creditor need only allege that the judgment debtor owes it a fixed sum. The judgment debtor can then put any of the above requirements in issue, such that the onus of proving the requirement is borne by the judgment creditor (*R v McLeod* (1890) 11 LR (NSW) 218, 221).

5. What is the procedure for enforcement of foreign judgments pursuant to such conventions, treaties or arrangements in your jurisdiction?

Statutory regime

A judgment creditor must apply within six years after the date of the foreign judgment to register a foreign judgment under the FJ Act (section 6(1) FJ Act). The application to a Supreme Court can be made *ex parte* without giving any notice to the judgment debtor.

After a court registers the foreign judgment, the judgment creditor must serve a notice of registration on the judgment debtor and inform them of their right to apply to set aside the registration. After the deadline passes for setting aside the registration, the judgment creditor can enforce the foreign judgment in the same way as an Australian judgment (section 6(7) FJ Act).

Special regime - New Zealand

A judgment creditor that intends to enforce a NZ judgment in Australia must apply for registration using the form provided in Schedule 1 of the Trans-Tasman Proceedings Regulations 2012 (Cth). The application must be made within six years after the date of the NZ judgment and can be filed by email (section 67(5) TTP Act). In addition, a sealed, certified or otherwise authenticated copy of the NZ judgment must be physically filed at the court in hard copy (rule 17(2)(b) TTP Regulations).

A judgment creditor can make the application for registration in a superior Australian court (Federal Court of Australia, Family Court of Australia or the Supreme Court of any state or territory) or an inferior Australian court provided it has power to grant the relief contained within the NZ judgment (see section 67 TTP Act). In the case of a civil pecuniary penalty, the inferior court must be one that has the power to impose such a penalty of the same value (section 67(2)(b) TTP Act).

Where an Australian court registers the NZ judgment, the creditor must serve a notice of registration on the debtor within 15 working days after registration (section 73 TTP Act). Once the notice has been served, the NZ judgment can be enforced. The application to set aside registration must be made within 30 working days after the notice of registration was given to the debtor or any longer period that an Australian court considers appropriate (section 72(2) TTP Act). If the notice is not served, the creditor must wait 45 working days before seeking enforcement (section 74 TTP Act).

6. If applicable, what is the procedure for enforcement of foreign judgments under the general law in your jurisdiction?

Common law

Each court prescribes rules relating to initiating proceedings and any required evidence. However generally speaking, an application for the recognition of a foreign judgment under common law principles must be by originating motion, and must be accompanied by a supporting affidavit. The affidavit must also exhibit an authenticated copy of the judgment and an English translation of the judgment, if the judgment is not in English.

7. What, if any, formal requirements do the courts of your jurisdiction impose upon foreign judgments before they can be enforced? For example, must the judgment be apostilled?

Statutory regime

The FJ Act and FJ Regulations establish a national framework for foreign judgments to be registered and enforced in Australia. However, the formal requirements and procedures are provided for in and differ between state and territory legislation. For example, rule 11.04 of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2018 (Vic) requires different evidence to that prescribed in rule 53.3 of the Uniform Civil Procedure Rules 2005 (NSW). Division 41.6 of the Federal Court Rules 2011 (Cth) also contains its own unique requirements to register a foreign judgment. It is therefore important to be aware of the differences and comply with the relevant jurisdiction's procedural rules.

Special regime - New Zealand

An authenticated copy of the NZ judgment must be filed at the relevant Australia court along with the application

for registration. See further answer to question 5 above.

Common law

See answer to question 6 above.

8. How long does it usually take to enforce or register a foreign judgment in your jurisdiction? Is there a summary procedure available?

Statutory regime

If the judgment can be registered under the statutory regime, and no challenge is made to the registration, the registration will likely be fast (e.g., within weeks). The speed with which enforcement will take place will depend on the method of enforcement sought.

However, if the registration or enforcement is challenged, the process can be delayed significantly. While registration and enforcement can normally be achieved within 12 months, this is highly dependent on the facts of the specific case.

There is no summary procedure available.

9. Is it possible to obtain interim relief (e.g. an injunction to restrain disposal of assets) while the enforcement or registration procedure takes place?

Yes, there is no bar to obtaining interim orders such as freezing orders.

10. What is the limitation period for enforcing a foreign judgment in your jurisdiction?

Statutory regime

Under section 6(1) of the FJ Act, a judgment creditor must apply to the appropriate court in their jurisdiction within six years after the date of the judgment to have the judgment registered.

Where there have been proceedings by way of appeal against the judgment, a judgment creditor must apply to the appropriate court within six years of the date of the last judgment in those proceedings.

If the judgment creditor fails to apply within time, they will be time-barred, unless the court extends the period within which such an application may be made (section

6(5) FJ Act).

Special regime - NZ

Under section 67(5) of the TTP Act, a judgment creditor must apply for registration within six years after the day on which the judgment is given.

If there have been proceedings by way of appeal against the judgment, an application must be made no later than six years after the day of the last judgment in those proceedings.

However, the Australian court has the power to grant any longer period it court considers appropriate.

Common law

Where recognition and enforcement is sought at common law, the relevant limitation period for recognising and enforcing a foreign judgment is provided for in each state or territory's legislation, as follows:

Jurisdiction	Legislation	Limitation period from the date when the foreign judgment becomes enforceable
Victoria	Limitation of Actions Act 1958 (Vic) s 5(4)	15 years
New South Wales	Limitation Act 1969 (NSW) s 17(1)	12 years
Queensland	Limitation of Actions Act 1974 (Qld) s 10(4)	12 years
South Australia	Limitation of Actions Act 1936 (SA) s 34	15 years
Tasmania	Limitation Act 1974 (Tas) s 4(4)	12 years
Northern Territory	Limitation Act 1981 (NT) s 15(1)	12 years
Australian Capital Territory	Limitation Act 1985 (ACT) s 14(1)	12 years

There is no specific limitation period prescribed in Western Australia to enforce a foreign judgment. However, there is a general limitation period of six years from the time the cause of action accrued (Limitation Period 2005 (WA) section 13).

11. On what grounds can the enforcement of foreign judgments be challenged in your jurisdiction?

Statutory regime

A judgment debtor can apply to set aside the registration

of a foreign judgment by applying to the court in which the judgment was registered. Pursuant to section 7(2)(a) of the FJ Act, the court has no discretion and must set aside the registration of the judgment if satisfied that:

- the judgment is not, or has ceased to be, a judgment to which the FJ Act applies;
- the judgment was registered for an amount greater than the amount payable under it at the date of registration;
- the judgment was registered in contravention of the FJ Act;
- the original court had no jurisdiction in the circumstances of the case (see also subsections 7(3)–(4) FJ Act, which sets out when the foreign court is deemed to have jurisdiction) (see also response to question 13 below);
- the judgment debtor did not receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear;
- the judgment was obtained by fraud;
- the judgment has been reversed on appeal or otherwise set aside by the original court;
- the rights under the judgment are not vested in the person by whom the application for registration was made;
- the judgment has been discharged or wholly satisfied; or
- the enforcement of the judgment would be contrary to public policy.

The court also has discretion to set aside the registration of the judgment if the matter in dispute in the original proceedings had, before the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter (section 7(2)(b) FJ Act).

A judgment creditor can apply to have the judgment to re-registered if it has been set aside solely on the basis that it was not enforceable in the original court, once it becomes enforceable in that foreign court (section 9(2) FJ Act).

Special regime - New Zealand

There are only three grounds on which an Australian court can set aside a registered NZ judgment. As per section 72(1) of the TTP Act, they include when:

- the enforcement of the judgment would be contrary to Australian public policy;
- the judgment was registered in contravention of the TTP Act; or
- the judgment relates to immovable property

or was an in rem judgment in respect of movable property, and neither such property was situated in NZ.

A judgment debtor can also apply for a stay of enforcement of a registered NZ judgment so that it can be appealed in a NZ court or tribunal provided that the debtor prosecutes the appeal expeditiously and otherwise complies with section 76 of the TTP Act.

Common law

There is a prima facie right to enforcement of a final and conclusive judgment given by a court of competent jurisdiction (in the international sense). While there is no right to raise a defence that could or should have been raised in the foreign proceeding, it is possible to raise a defence that was not available under the law of the foreign court or any material evidence that was unavailable for those proceedings.

Specific defences that may be available at the enforcement stage:

- That the judgment was obtained by fraud. The bar is high, for example, proof of perjury or forgery by a witness is insufficient unless the plaintiff procured the perjury or forgery. The fraud defence also only applies to evidence of dishonesty that was discovered after the foreign judgment was rendered.
- That enforcement of the foreign judgment would be contrary to Australian public policy. This would operate in a situation where the judgment is founded on a law that is contrary to the public policy of Australia.
- That the judgment (or part of it) is punitive in nature. An Australian court will not enforce a judgment that imposes a criminal penalty or punishment. An award for punitive or exemplary damages however will be enforced where it is for the vindication of private rights (see response to question 4 above).
- That the foreign judgment is for a revenue debt. There is a general rule that Australian courts will not enforce foreign laws that relate to revenue laws of a foreign state.
- The party seeking enforcement may be estopped on account of an earlier judgment within the forum. Where there is a conflicting prior decision, between the same parties, concerning the same issues in the forum, a foreign decision not be enforced which runs contrary to this earlier decision.
- That the foreign court acted contrary to natural justice.

12. Will the courts in your jurisdiction reconsider the merits of the judgment to be enforced?

The Court will not examine the merits of the foreign decision based on arguments concerning mistake of law or fact. However, the court may consider the substance of the decision when enforcement is challenged on the grounds of public policy or fraud.

13. Will the courts in your jurisdiction examine whether the foreign court had jurisdiction over the defendant? If so, what criteria will they apply to this?

Statutory regime

Under the FJ Act, pursuant to section 7(2)(a)(iv), the court has no discretion and must set aside the registration of the judgment if satisfied that the original court had no jurisdiction in the circumstances of the case.

The foreign court is deemed to have had jurisdiction where (s 7(3) FJ Act):

- the judgment debtor voluntarily submitted to the jurisdiction of that court;
- the judgment debtor was a plaintiff in, or counter claimed, in the proceedings in the court;
- the judgment debtor was a defendant in those proceedings, and:
 - agreed prior to commencement, to submit to the jurisdiction of the court of origin; or
 - at commencement, resided in (or had principal place of business, if a body corporate), in the State of origin; or
 - the proceedings were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
- there is an amount of money payable in respect of NZ tax under the judgment; or
- the judgment is in relation to immovable property, or an action in rem regarding movable property which was at the relevant time, in the State of origin; or
- in any other situation, the jurisdiction of the original court is recognised by the law in force in the State or Territory where the judgment is registered.

Common law

See response to question 4 above.

14. Do the courts in your jurisdiction impose any requirements on the way in which the defendant was served with the proceedings? Can foreign judgments in default be enforced?

Service in the original proceedings

In Australia, there are no specific requirement concerning the way in which the defendant is served. However, as stated in response to question 11 above, under the statutory regime the Court must set aside the registration of the judgment if the judgment debtor did not receive notice of the proceedings in the original court in sufficient time to enable the judgment debtor to defend the proceedings and did not appear (s 7(2)(a)(v) FJ Act).

Under common law, a judgment may be refused recognition and enforcement if the foreign court acted contrary to natural justice, which could include circumstances where the judgment debtor did not receive notice of the proceedings in the original court in sufficient time to enable the judgment debtor to defend the proceedings and did not appear.

Judgments in default

Yes, Australian courts have generally taken the approach that a judgment entered in default of appearance is considered final and conclusive (see e.g., *Barclay's Bank v Piacun* [1984] 2 Qd R 476).

However, where the judgment debtor has a right in the State of origin to have a default judgment set aside without having to show cause, then the judgment may not be considered to be final and conclusive until that right has expired and, until such time, not capable of recognition and enforcement.

15. Do the courts in your jurisdiction have a discretion over whether or not to recognise foreign judgments?

Statutory regime

Under the FJ Act, the Australian courts have no discretion over whether to register a foreign judgment that meets the criteria under the Act.

However, as stated in the response to Question 11, the

court has discretion to set aside the registration of the judgment if the matter in dispute in the original proceedings had, before the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter (section 7(2)(b) FJ Act).

Special regime - New Zealand

Under the TPP Act, the Australian courts have no discretion over whether to register a foreign judgment that meets the criteria in 72 of the TTP Act.

Common law

At common law, where all other requirements are satisfied but the judgment is not for a fixed sum of money, the court, in certain circumstances, may order recognition and enforcement in equity. For example, foreign orders for the appointment of receivers, by way of equitable execution, or personal representatives to attach assets in Australia, have been recognised by Australian courts. Australian law, however, does not yet recognise and enforce non-money judgments such as injunctions.

16. Are there any types of foreign judgment which cannot be enforced in your jurisdiction? For example can foreign judgments for punitive or multiple damages be enforced?

Yes, Australian courts will enforce judgments for punitive damages in certain circumstances (see response to question 4 above).

17. Can enforcement procedures be started in your jurisdiction if there is a pending appeal in the foreign jurisdiction?

Yes, at common law and under s 5(5) of the FJ Act, a judgment is taken to be final and conclusive notwithstanding the fact that it is subject to a pending appeal. However, the court may order a stay on the enforcement of the foreign judgment pending the resolution of the appeal (s 8 of the FJ Act).

18. Can you appeal a decision recognising or enforcing a foreign judgment in your jurisdiction?

Yes, decisions can be appealed whether they were made under statute or the common law. The appellant must

show that the first instance judge in Australia made an error of law that merits overturning the lower court's decision.

19. Can interest be claimed on the judgment sum in your jurisdiction? If so on what basis and at what rate?

Yes, under the FJ Act, interest is payable according to the law of the foreign court up to the date of registration (s 6(15)(b)). Once the judgment is registered, it carries interest as if it were a judgment of the court where it is registered (s 6(7)(c)).

In respect of recognition and enforcement at common law, once recognition is obtained, the usual rules of court in the local court will apply.

20. Do the courts of your jurisdiction require a foreign judgment to be converted into local currency for the purposes of enforcement?

The judgment debtor can choose to register the judgment either in the original currency or to apply the conversion rate prevailing on the second business day before the day on which the application for registration was made (s 6(11) of the FJ Act).

21. Can the costs of enforcement (e.g. court costs, as well as the parties' costs of instructing lawyers and other professionals) be recovered from the judgment debtor in your jurisdiction?

The amount that a foreign judgment can be registered for includes the reasonable costs of and incidental to registration (s 6(15)(a)).

At common law, the usual costs rules will apply.

22. Are third parties allowed to fund enforcement action in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

There are no specific restrictions on using litigation funding for recognition or enforcement of foreign judgments in Australia. The liability of third-party funders for costs will generally depend upon the terms of the funding agreement, but non-parties (including third

party funders) can be made directly liable for costs by the court if doing so is in the interests of justice.

23. What do you think will be the most significant developments in the enforcement process in your jurisdiction in the next 5 years?

Ratifying the Hague Choice of Court Convention and the Hague Judgments Convention is likely to be the most significant development in the enforcement process in Australia in the next five years. However, see response to question 24 below.

24. Has your country ratified the Hague

Choice of Courts Convention 2005? If not, do you expect it to in the foreseeable future?

Australia has not ratified the Hague Choice of Court Convention. We understand that the Australian Government is looking at ratifying both the Hague Choice of Court Convention and the Hague Judgments Convention in the near future but there is no firm commitment at present.

25. Has your country ratified the Hague Judgments Convention 2019? If not, do you expect it to in the foreseeable future?

No, see responses to questions 23 and 24 above.

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