



## Enforcement of Foreign Judgments in Australia

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**With increased uncertainty in a coronavirus world, it has never been more important for international creditors to be aware of the most effective way to enforce their foreign judgments in Australia against Australian debtors.**

In this article, we set out the basics of Australia's judicial system,<sup>1</sup> and the applicable enabling legislation for recognising and enforcing foreign judgments in Australia. This article also outlines the general limitations of enforcing foreign judgments in Australia before considering the grounds to set aside or challenge the enforcement of foreign judgments.

### Enabling legislation to recognise foreign judgments in Australia

Unlike many other countries, Australia is not party to any multilateral treaties concerning the recognition of, or enforcement of, foreign judgments including the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971* or the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019*. Australia is however party to bilateral treaties with the following countries:

1. the United Kingdom – *Reciprocal*

*Recognition and Enforcement of Judgments in Civil and Commercial Matters [1994] ATS 27*; and

2. New Zealand – *Government of Australia and Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement [2013] ATS 32*.

This means that creditors in respect of judgments of other countries have to be enforced in Australia through certain and alternative avenues.

Creditors need to utilise one of the following methods before a foreign judgment can be recognised and enforced in Australia. These include applying



pursuant to any of the following:

1. *Foreign Judgments Act 1991 (Cth) (FJA)* and the *Foreign Judgments Regulations 1992 (Cth) (FJA Regulations)* – this Act provides for the enforcement of specific foreign judgments throughout Australia (including United Kingdom judgments and certain New Zealand judgments) by way of registration of the judgments rendered in specific Courts of foreign countries listed in the Schedule to the FJA Regulations;
2. *Trans-Tasman Proceedings Act 2010 (Cth) (TTPA)* – covers enforcement of specific New Zealand judgments including judgments in respect of tax debts, money and non-money judgments and criminal judgments of fines, compensation, damages and reparation; or
3. the Common Law where the judgment is not recognised in either of the abovementioned legislation.

#### **Foreign Judgments Act 1991 (Cth)**

The FJA applies to the registration and enforcement of "enforceable money judgments" which includes money judgments generally and judgments in respect of New Zealand tax or Papua New Guinea income tax. Reference has been made to "non-money judgments" within the FJA, however, it reverts to the FJA Regulations to define the kinds of non-money judgments. This has yet to be included within the FJA Regulations.

Therefore, judgments made in the 'superior Courts' of the Bahamas, British Virgin Islands, Canada (Alberta, British Columbia and Manitoba Provinces), Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, South Korea, Malawi, Montserrat, Papua New Guinea, Poland, St Helena, St Kitts and Nevis, St Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, the United Kingdom and Western Samoa are eligible for registration and recognition within Australia.

Likewise, judgments from 'inferior Courts' listed in the FJA Regulations made in the United Kingdom (Country Courts in England, Wales and Northern Ireland and the Sheriff Courts in Scotland), Switzerland (Bezirksgerichte, Erstinstanzliche Gerichte, Arbeitsgerichte and Mietgerichte), parts of Canada (provincial Courts of Alberta, British Columbia and Manitoba) and each District Court of the Republic of Poland are also eligible for registration in Australia.

Interestingly, although there are 35 foreign jurisdictions listed above, only 6 are within Australia's top ten trading partners, these being Germany, Japan, New Zealand, Singapore, South Korea and the United Kingdom. However, some of Australia's largest trading partners (China, the United States and India) are outside the ambit of the FJA.

#### **Trans-Tasman Proceedings Act 2010 (Cth)**

Reflecting the close relationship between Australia and New Zealand, the bilateral treaty with New Zealand was ratified and Australia enacted the TTPA. This Act enables the recognition and enforcement of judgments made in New Zealand in respect of tax debts, money and non-money judgments and criminal judgments for fines, compensation, damages and reparation.

#### **Enforcement of Foreign Judgments under the FJA**

A foreign judgment is able to be enforced as though it was a judgment issued in Australia by an application made to a Court (generally the Supreme Court of a State or Territory) to register the judgment pursuant to the FJA.

For a foreign judgment to be registered and enforced under the FJA, the judgment must be:

- a) from a Court that is specified under the FJA and the FJA Regulations;
- b) final or interlocutory money judgment or order other than for taxes (save for New Zealand and Papua New Guinea) fines



or penalty, given or made by a Court in civil proceedings or a judgment or order given or made in a criminal proceeding for the payment of a sum of money for compensation or damages;

- c) final and conclusive – the judgment must settle the dispute between the parties;
- d) not wholly satisfied; and
- e) enforceable in the country of the original Court.

Applications to the Court in Australia can be made without notice to the Judgment Debtor (unlike applications made to the Court pursuant to Common Law as described below) and requires affidavit evidence in support of the application. This evidence requires, among other things, a certified copy of the original Court's judgment, particulars of the judgment debtor, that the judgment has not been wholly satisfied and that the judgment is enforceable in the country of the original Court.

Once a judgment is registered, notice of the registration must be served on the Judgment Debtor. Each State or Territory's Court Rules provides specific time frames for which the notice must be served. For example, service of the notice must be completed within 28 days (Queensland) or as soon as practicable (South Australia). A Judgment Debtor, depending upon the Court Rules of each State or Territory, then has the opportunity to apply to set aside the registration of the judgment within 14 days of notice of the registration (e.g. in New South Wales) or within any other time specified in the Court Order.

#### **Enforcement of New Zealand Judgments under the TTPA**

For a New Zealand judgment to be registered and enforced under the TTPA, the judgment must be:

- a) final and conclusive judgment:
  - i) given in a civil proceeding by a New Zealand Court; or
  - ii) given in a civil proceeding by

a New Zealand Tribunal that is prescribed under the *Trans-Tasman Proceedings Regulations 2012* (Cth) (TTPR); or

- iii) a judgment or order given or made in a criminal proceeding for the payment of a sum of money for compensation, damages, reparation, or a "regulatory regime criminal fine"; or
- iv) an order made under the *Trans-Tasman Proceedings Act 2010* (NZ) or *Evidence Act 2006* (NZ) for expenses incurred in particular circumstances (this includes expenses by a witness to comply with a subpoena when served in Australia and expenses in connection with appearing remotely from Australia in a New Zealand proceeding); and

- b) does not relate to any "excluded matter".

Similar to applications made pursuant to the FJA, the TTPA does not require initial notice to be given to the judgment debtor (unless the Court orders otherwise). The application is however more streamlined compared to the FJA only requiring a sealed order as evidence in support of the application.

Notice of the registered judgment must be then served on the judgment debtor within 15 working days of registration who then has 30 working days to apply to set aside the registration.

#### **Enforcement of Foreign Judgments under Common Law**

Where a foreign judgment is made in a country or Court which is not recognised under the FJA or TTPA, the judgment may be "enforced" under common law in the same way as a money claim, that is, by way of an originating process in the relevant Court pursuant to the foreign judgment as the basis for the debt. The relevant Court will be dependent upon the location of the debtor and monetary jurisdiction limits of each Court.

Once the claim has been filed, the creditor



must serve the claim on the debtor as prescribed by the relevant Court rules of each State or Territory. The debtor then has the opportunity to file a defence to the claim (usually within 28 days of being served with the claim).

A debtor can only defend the money claim made under common law on limited grounds, namely:

- a) one of the following conditions below have not been met:
  - i) the foreign Court must have exercised a jurisdiction which the Australian Courts recognise;
  - ii) the judgment must be final and conclusive;
  - iii) the applicant must be identical to the parties of the foreign judgment; and
  - iv) the judgment must be for a fixed or readily calculable debt;
- b) the foreign judgment was obtained by fraud;
- c) the judgment is contrary to public policy;
- d) the foreign Court acted contrary to natural justice (for example, the proceedings in the foreign Court were not served upon the debtor); or
- e) the foreign judgment is penal or a judgment for a revenue debt.

#### **Grounds to set aside registration**

Similar to common law, there are required grounds to make an application to set aside the registration of foreign judgments under the FJA or TTPA.

Typical grounds to set aside registration under the FJA include:

- a) the FJA no longer applies to the judgment – the Judgment is not or has ceased to be a judgment to which this Part (reciprocal enforcement of judgments) of the FJA applies;
- b) judgment was registered for an incorrect

amount or in contravention of the FJA;

- c) the Court had no jurisdiction to register the judgment;
- d) no notice of the original proceedings – the judgment debtor being the defendant in the original proceedings was not given notice of those proceedings;
- e) judgment was obtained by fraud;
- f) judgment was reversed on appeal or otherwise set aside in the country of the original Court;
- g) incorrect applicant – the rights under the judgment were not vested in the person by whom the application for registration was made;
- h) judgment was discharged or wholly satisfied; or
- i) contrary to public policy – not including in respect of a judgment for New Zealand tax.

Grounds to set aside registration under TTPA include:

- a) contrary to public policy;
- b) judgment was registered in contravention of TTPA; or
- c) the judgment was in respect of movable property and at the time of the proceedings in the original Court, was not situated in New Zealand.

#### **Time limitations to apply for registration or commence common law proceedings of a foreign judgment**

Depending upon whether the application is commenced pursuant to the FJA, TTPA or under common law, there are time limits within which to bring the application for registration or to commence common law proceedings.

For applications for registration of a foreign judgment under FJA and TTPA, the application must be made to an Australian Court within six years of the date of the original foreign judgment.<sup>2</sup>



The judgment creditor must serve the notice of registration before the Court ordered date to apply to set aside the registration of the foreign judgment depending upon which application for registration is made (for example, within 28 days after registration of the foreign judgment in Queensland or no less than 14 days before the due date to set the registration aside in New South Wales)<sup>3</sup> or within 15 working days under the TTPA.<sup>4</sup>

The judgment creditor must not take any enforcement step once the foreign judgement is registered against the debtor until an affidavit of service of the notice of registration of the foreign judgment is filed or until the Court is satisfied service of the notice has been effected.

For fresh proceedings commenced to sue upon a foreign judgment under common law, the claim must be commenced within the specific timeframe in each State or Territory's legislation, depending upon the cause of action. For example, in New South Wales and Queensland, the general limitation period to commence an action for debt or contract is 6 years, however in the case of a foreign judgement an action must be brought in 12 years from the date upon which the foreign judgment became enforceable in the country in which the judgment was made.<sup>5</sup>

### Typical enforcement rights following judgment made in Australia

Once a foreign judgment has been registered or a common law judgment is obtained (and has not been set aside) in Australia, the judgment creditor has specific enforcement rights depending upon which Australian Court registered the judgment or obtained a common law judgment. These include the following:

a) enforcement rights for a registered judgment under the FJA has the same force and effect, and the Court in which it was registered has the same control over the enforcement, as if the judgment had been originally given by the Australian Court in which it was registered.

b) enforcement rights for a registered judgment under the TTPA has the same force and effect and may give rise to the same proceedings for enforcement as if the judgment had been originally given by the Australian Court in which it was registered; and

c) other enforcement rights can include:

i) examination of debtor (compelling the judgment debtor to attend Court to determine his/her assets);

ii) attachment or garnishee orders in respect of debts or income owed to the debtor (issued to garnishee to direct funds from the judgment debtor's salary or bank accounts to pay money which the judgment debtor owes);

iii) Stop Orders on money or securities in Court to the credit of a debtor;

iv) Charging Orders or Warrants creating a security interest over real or personal property (interest in land/goods/securities) to prevent the judgment debtor from dealing with the asset;

v) Court appointment of receivers (to gather assets of judgment debtor to facilitate payment of debt);

vi) Mareva Orders to prevent the judgment debtor from dealing with his/her assets prior to a hearing of the action for debt recovery; and

vii) Anton Piller Orders to enable search and seizure to prevent destruction or dispossession of goods or documents prior to a hearing of the action for debt recovery.

### Time limitations to enforce judgment made in Australia

There are also limitation periods to enforce a judgment *once made* under the Rules of each State or Territory. New South Wales, Queensland, Western Australia, Northern Territory, Australian Capital Territory and Tasmania have a 12-year limitation period from the date the judgment was given in



Australia for it to be enforced. Victoria and South Australia have a period of 15 years from the date the judgment was given in Australia for it to be enforced.

However, if more than 6 years has passed but less than 12 or 15 years respectively, all States and Territories require leave of the Court to enforce an Australian Common Law judgment. This can be found in each State and Territory's respective Court Rules.

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<sup>1</sup> Australia is a federation of six states which, together with two self-governed territories, each having its own constitution, government and laws. The national or central government referred to as the federal government or the Commonwealth Government of Australia makes laws under its Constitution which are binding on all states and territories across Australia. Further, each respective state or territory creates its own legislation (Acts and Subordinate Legislation).

Legislation which is enacted by the Commonwealth Government is binding on all states and territories of Australia. Where there is any inconsistency between Commonwealth legislation and State or Territory legislation, the Commonwealth legislation prevails to the extent of the inconsistency.

As such, to determine cases in respect the Commonwealth and state or territory legislation, Australia's judicial system thereby consists of Federal Courts (High Court of Australia and Federal Courts) and State Courts which include superior courts (Supreme Court) and inferior courts (usually District Court and Magistrates Court). Matters concerning legislation enacted by the Commonwealth Government are usually only heard in Federal Courts and the superior courts of each State and/or Territory.

<sup>2</sup> *Foreign Judgments Act 1991* (Cth), s 6; *Trans-Tasman Proceedings Regulations 2012* (Cth), s 67.

<sup>3</sup> *Uniform Civil Procedure Rules 1999* (Qld), r 947; *Uniform Civil Procedure Rules 2005* (NSW), r 53.5.

<sup>4</sup> *Foreign Judgments Act 1991* (Cth), s 6(4); *Trans-Tasman Proceedings Regulations 2012* (Cth), s 73.

<sup>5</sup> *Limitation Act 1969* (NSW), ss 14 and 17(2); *Limitation of Actions Act 1974* (Qld), s 10.