

# **ENFORCEMENT OF FOREIGN JUDGMENTS AND AWARDS IN AUSTRALIA**

***- SUMMARY GUIDE & CHECKLIST -***

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## Introduction and overview

### **This Guide**

1. This guide informs practitioners of the statutory, regulatory, procedural and evidentiary requirements arising in applications to register, recognise and/or enforce foreign and interstate judgments in NSW, and foreign arbitral awards in Australia, as well as dealing with the recognition and enforcement of NSW judgments interstate and (in part) overseas.
2. The guide operates principally by means of a ‘checklist’ of issues. It is intended as a time-saving guide for an issue with which practitioners are often unfamiliar.
3. Use of or reference to the common law will require consideration of a substantial body of case law, theory and doctrines of private international law. For that reason, only a limited discussion is included of the common law, except at the broad level and as to procedure. Further research or advice from an experienced practitioner in the area is recommended.

### **Parts I and II – Foreign Judgments under Statute and at Common Law**

#### **(a) Introduction to the Foreign Judgments Act 1991 (Cth) (the FJA)**

4. A foreign judgment may be useful for two purposes:
  - (a) its *enforcement* value, against local assets of the judgment debtor (even if the judgment debtor is not present in the jurisdiction); or
  - (b) its preclusive effect (*res judicata*, issue estoppel and *Anshun* estoppel), by mere *recognition* of the foreign judgment and the issues it determined.
5. Traditionally, foreign judgments were sued on at common law (to enforce as a type of debt, if a money judgment *Nouvion v Freeman* [\(1889\) 15 App Cas 1](#) at 8; *Grant v Easton* [\(1883\) 13 QBD 302](#) at 303) or pleaded in proceedings as part of a claim or defence (where local remedies are sought).
6. However, money judgments (and certain NZ non-money judgments) of the superior courts and some inferior courts of certain foreign countries can be ‘registered’ and enforced under Part 2 of the *Foreign Judgments Act 1991* (Cth) (FJA).
7. The FJA offers a simpler, more certain process that avoids the need to commence fresh proceedings for enforcement. It is an essentially administrative or bureaucratic function, typically conducted *ex parte*, modelled on a similar process in the civil law (France etc.) known as an *exequatur*. (It was the intention of the 1933 UK legislation on which the FJA is based to achieve that result). Thus, there are strict evidentiary and procedural requirements imposed on an applicant. It only becomes litigious if an application is brought to set aside registration.

## Enforcement

8. Enforcement of a foreign judgment can be achieved:
- (a) If Pt 2 of the FJA applies to it, *only* under that Act (s 10).
  - (b) If Pt 2 of the FJA does not apply to it, *only* at common law.

## Recognition

9. Recognition of a foreign judgment can be achieved as follows:
- (a) If Pt 2 of the FJA applies to the judgment, it must be recognised as conclusive between the parties by an Australian court (s. 12(1) FJA) and can also be recognised at common law (s. 12(3) FJA).
  - (b) However, that rule does not apply, and recognition at common law will also be denied, if two requirements are met (s. 12(2)-(3) FJA):
    - (i) either:
      - A. registration has been effected under the FJA but was set aside;  
or
      - B. registration would have been set aside had the judgment been registered; and
    - (ii) it is not capable of recognition at common law.
10. For example:
- (a) If it is a money judgment from the England & Wales High Court (FJA applies), and the basis of jurisdiction was ‘tag’ jurisdiction (service on the judgment debtor while he or she was fleetingly present in NZ), this is not a recognised basis of jurisdiction under the FJA (and so registration would be set aside) but it *is* sufficient at common law, so s. 12(3) entitles a court to recognise it.
  - (b) If it is a money judgment from the England & Wales High Court (and so the FJA would apply), and the basis of jurisdiction was that the proceedings are in respect of a transaction effected through or at an office or place of business that the judgment debtor once had in the country of that court, but no longer has and is not present at the time of commencement of proceedings (the English Plaintiff using long-arm NZHC jurisdiction rules to serve *ex juris*), but also the defendant was not properly served and so had no notice of the proceedings, then its registration would be set aside (s. 7(2)(a)). Since that basis of jurisdiction is not available at common law, there would be no recognition.
  - (c) If jurisdiction was based on service out of England, and the only connecting factor is that English law governs the contract (a typical head of extra-territorial jurisdiction in Australia and England), it is not capable of recognition either under the FJA or at common law (since that head of jurisdiction is not recognised under the FJA or at common law).

11. If it is not a money judgment, but Pt 2 of the FJA would have applied to it if it were, the above rules also apply: see s. 12(1).
12. If Pt 2 of the FJA does not apply to the foreign judgment, and Pt 2 would not have applied to it even if it were a money judgment, recognition can only be effected (if at all) at common law.

**(b) Applicability of the FJA - Overview**

13. The principal criteria for the application of Pt 2 FJA is that the judgment is a final and conclusive money judgment from countries specified in the Regulations. They must either emanate from **superior courts** of those countries that have been specified (and the regulations provide an *inclusive* list of what are considered to be superior courts in those countries) or from **inferior courts** that are actually listed in the Regulations – that is, both the country and the inferior court must be specified, whereas only the country need be specified for ‘superior courts’. See section ‘A’ below and the extracts from the Regulations in Annexure ‘B’ below.
14. Other criteria ‘in effect’ arise from the need to avoid the registration being set aside and the need to provide proof/evidence (see s. 6(3) and UCPR 53.3) at the outset that, *inter alia*, the judgment is not one whose registration must be set aside. The most important requirement is to show that the foreign court had the appropriate jurisdiction to determine the matter and deliver the judgment. For this, it must have had one or other of the specified grounds of jurisdiction recognised by the Act, whether the action be *in personam* or *in rem*. These are mostly derived from the common law, but are not identical. However, for enforceable money judgments that are not *in personam* or *in rem* State (common law and statute) grounds of jurisdiction are picked up automatically. This last point is significant given the express carve out from the definition of *actions in personam* for matrimonial matters, bankruptcy, estates etc. in s. 3(1) FJA. See section ‘E’ below.

**(c) Summary of Parts I and II of this Guide:**

- As to whether the FJA applies, see Section ‘A’.
- If the FJA does not apply, go to the common law and see Section ‘K’.
- As to the time and means of initiating registration, see Section ‘B’.
- An affidavit in support is required – Section ‘C’.
- A precedent is at Annexure C.
- For the notice of registration to be served on Judgment Debtors, see Section ‘D’.
- To set aside registration, a motion must be filed. As to method and grounds for setting aside, see section ‘E’.
- To seek a stay of enforcement pending an appeal in the foreign country of origin of the judgment etc., see section ‘F’.
- The power of particular court officers is set out at Section ‘G’.

- If the registration is not set aside, enforcement can occur. See section ‘H’.
  - Statutory demands and bankruptcy notices are alternative statutory methods of ‘enforcement’ in kind, which do not require prior registration. See section ‘J’.
  - The FJA only permits registration by a Supreme Court or the Federal Court. As only a few types of judgments, rarely enforced, are eligible for registration in the Federal Court of Australia, only the NSW Supreme Court Rules (SCR) and Uniform Civil Procedure Rules (UCPR) are referred to in this guide. The FJA-relevant rules in the Federal Court and other State & Territory Supreme Courts are listed in section ‘T’ below.
15. Common Law: An overview is provided of the common law rules, on which the FJA is founded. However, it requires more expertise and consideration of extensive case law. At common law and under the FJA (except for certain NZ judgments) only money judgments are enforceable. Other judgments can be recognised at common law. Further research is always warranted. See sections ‘K’ to ‘M’ below.
16. New Zealand Judgments: Certain New Zealand judgments can be enforced through the Federal Court in the *Federal Court of Australia Act 1976* (Cth), Part IIIA (trans-Tasman market proceedings). This is restricted to judgments given in the High Court of New Zealand in proceedings arising under sections 36A, 98H and 99A of the (NZ) *Commerce Act 1986* (NZ). These are not dealt with in this Guide. NZ judgments generally are now dealt with in Part 7 of the *Trans-Tasman Proceedings Act 2010* (Cth). See Part III below.
17. Other relief: Before commencing registration or proceedings, consider whether freezing (Mareva) orders are necessary. See article on freezing orders by the author available on the 7 Wentworth Selborne Chambers website.
18. Other legislation: Maintenance orders and agreements, child support orders etc., as well as orders as to custody and parenting are registrable and enforceable by the Family Court under the *Family Law Act 1975* (Cth), which gives effect to various international conventions. These are not dealt with in this Guide.

### **Part III – Recognition and enforcement under the *Trans-Tasman Proceedings Act 2010***

19. On 11 October 2013, the *Trans-Tasman Proceedings Act 2010* (Cth) (TTPA) entered into force together with the 2012 regulations,<sup>1</sup> and alongside its New Zealand counterparts.<sup>2</sup> The TTPA is but the latest step

<sup>1</sup> Trans-Tasman Proceedings Regulation 2012 (Cth).

<sup>2</sup> *Trans-Tasman Proceedings Act 2010* (NZ); Trans-Tasman Proceedings Regulations and Rules 2013 (NZ).

under the 2004 Single Economic Market initiative. However, it is a major step towards the creation of a 'Single Judicial Area' covering Australia and New Zealand.<sup>3</sup>

20. This is achieved through:

- (a) simplified procedures for commencing and maintaining actions involving parties across the Tasman for civil proceedings commenced in Australian courts and prescribed tribunals<sup>4</sup>, other than prescribed proceedings<sup>5</sup>;
- (b) rules for the allocation of jurisdiction;
- (c) common standards for the exercise of adjudicative authority, so that the adjudicatory competence of Australian and New Zealand courts is not later called into question; and
- (d) easing the procedure for the recognition and enforcement of ANZ judgments, beyond that contained in the *Foreign Judgments Act 1991*, and similar to that for interstate judgments under the *Service and Process Act 1992* (Cth).

#### **Part IV – Interstate Enforcement of Judgments in Australia**

- 21. Recognition of court judgments in NSW and of NSW judgments around Australia arises from the Full Faith and Credit provision of the Australian Constitution, at least as to inter-state judgments. State and Territory judgments are also given effect by the *Evidence Act 1995* (Cth).
- 22. Registration and/or enforcement each requires compliance with Pt 6 of *Service and Execution of Process Act 1992* (Cth) (**SEPA**).
- 23. NOTE: This includes foreign judgments registered interstate under the FJA which are to be enforced using the power of the local courts.

#### **Part V – International Enforcement of NSW Judgments**

- 24. Enforcing NSW judgments abroad is mostly a matter of foreign law. Certificates can be obtained from NSW courts to assist this process.

#### **Part VI: Recognition and Enforcement of Foreign Arbitral Awards**

- 25. An arbitral award within Australia is enforceable in accordance with the terms of the Uniform Commercial Arbitration Acts, in each state. These are in largely similar form and to largely similar effect.
- 26. The recognition and enforcement of foreign arbitral awards (as defined) is dealt with either under the *International Arbitration Act 1974* (Cth) (the

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<sup>3</sup> See Prof. R Mortensen, A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments In The Single Economic Market, (2010) 16 *Canterbury Law Review* 61.

<sup>4</sup> To date, no tribunals have been prescribed in Australia or New Zealand.

<sup>5</sup> These include *in rem* proceedings, divorce & maintenance, and other (to be) prescribed matters.

“IAA”) together with the Uniform Commercial Arbitration Acts, or at common law.

27. **1958 New York Convention Awards:** Part II of the IAA applies to awards to which the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards applies. See section ‘N’.
28. **1985 UNCITRAL Model Law Awards:** Part III of the IAA applies to awards to which the 1985 UNCITRAL Model Law on International Commercial Arbitration applies, having force of law in Australia under s. 16 IAA. See section ‘O’.
29. **ICSID Awards:** Part IV of the IAA deals with ICSID investor-state arbitral awards. These are not covered by this paper.
30. **Awards at Common law:** For the common law position, see section ‘P’.
31. **International Arbitration Agreements:** There are related issues to do with enforcement of arbitration agreements by staying local (Australian) proceedings in favour of arbitrations in or outside of Australia to which the IAA applies. State legislation can be used where the IAA does not apply. At common law, foreign court proceedings in breach of an arbitration agreement can be enjoined (injunction) where the defendant is amenable to the court’s jurisdiction, by means of an anti-suit injunction. See section ‘Q’.

**Part I: Enforcement of Foreign Judgments in NSW under the  
Foreign Judgments Act 1991 (Cth)**

**A Does the *Foreign Judgments Act* apply?**

ISSUE	Y / N
<b>(a) Does Pt 2 of the Act apply? s 5(4), (10) FJA</b>	
<p><b>(i) Is it a judgment from New Zealand?</b></p> <p>The Part does not apply to a judgment given by a court of New Zealand: s. 5(10). For the enforcement in Australia of judgments given by courts of New Zealand, see Pt 7 <i>Trans-Tasman Proceedings Act 2010</i> and below Part II below.</p>	
<p><b>(ii) Does it come from a <u>country</u> and <u>court</u> to which the FJA applies?</b></p> <p><i>Note: You must get a ‘Yes’ answer to 1 and any of 2, 3 or 4 (but note 5).</i></p>	
<p>1. Is it from a <u>country</u> listed in Column 2 (Country) of the Schedule to the <i>Foreign Judgments Regulations 1992</i></p> <p><i>See extract in <a href="#">Annexure B, Item 1.</a></i></p>	
<p>2. Is it from a <u>superior court</u> listed in Column 3 (Courts) of the Schedule?</p> <p><i>Note: If in the Schedule, it is deemed to be a Superior Court – FJA s 5(2).</i></p> <p><i>See extract in <a href="#">Annexure B, Item 1.</a></i></p>	
<p>3. Is it otherwise a ‘superior court’?</p> <p><i>Note: If it is not listed in the Schedule as a superior court, you can still otherwise prove that the foreign court is a Superior Court – FJA s 5(2). See <i>Mariala Estates Ltd v Athanasi &amp; Ors</i> [2001] NSWSC 1013.</i></p>	
<p>4. Is it from an ‘inferior court’ listed in Regulation 5?</p> <p><i>See extract in <a href="#">Annexure B, Item 2.</a></i></p>	
<p>5. Is it a judgment of a superior court on appeal from an inferior court listed in Regulation 5?</p> <p><i>If the answer to 5 is ‘yes’, you must satisfy 4 unless it is now the appellate court’s judgment that is being enforced (per the procedural law of the foreign courts; e.g. because it has conducted a rehearing <i>de novo</i>) and not just an affirmed inferior court judgment. The appellate court must be a superior court per 1-3 or an inferior court per 4. You may need an expert in foreign procedural law to determine this.</i></p>	
<p><b>(iii) Is it a <u>judgment</u> to which the FJA applies?</b></p> <p><i>Note: You must get a ‘yes’ to 6 and 7, and a ‘yes’ to either of 8A or 8B.</i></p>	
<p>6. Is it a “judgment”? Includes any of the following (s 3 FJA):</p>	

<ul style="list-style-type: none"> <li>– Final or interlocutory judgment/order by court in civil proceedings</li> <li>– Judgment or order by a court in criminal proceedings for payment of a sum of money as compensation / damages to injured party <i>See Fletcher Steel v Moghe</i> <a href="#">[2006] NSWSC 425</a>.</li> <li>– Arbitration award (not s 34(a) of the <i>International Arbitration Act</i> 1974 or an award that may be enforced under s 35(2) of that Act) conducted in and under law of a country, and is enforceable in a court of that country as for a judgment / order by that court. <i>See Celtic Resources Holdings Plc v Arduina Holding BV</i> <a href="#">[2006] WASC 68</a>. <i>Note: s 34(a) International Arbitration Act 1974 applies to ICSID centre awards.</i></li> </ul>	
<p>7. Is it a “final and conclusive” judgment?</p> <p><i>Note: See common law. See also s 5(5) FJA (still final if appeal pending or has been appealed but not yet heard).</i></p> <p><i>Note: Includes default judgments: Re Teape (unreported, SC(QLD), Ryan J, No 1125/1992, 26 February 1993, <a href="#">BC9303388</a>).</i></p>	
<p>Either:</p> <p>8A. Is it an “enforceable money judgment”? Means (s 3 FJA):</p> <ul style="list-style-type: none"> <li>– Any sum of money other than taxes or other charges of a similar nature a fine or other penalty (see common law). <i>See Schnabel v Lui</i> <a href="#">[2002] NSWSC 15</a> (Bergin J).</li> <li>– Amount of money payable as “New Zealand tax” (defined in s 3)</li> <li>– Amount of money payable in respect of “recoverable Papua New Guinea income tax” (defined in s 3)</li> </ul>	
<p>8B. Is it an “enforceable non-money judgment”? (see ss. 3, 5(4)(a)).</p> <p><i>Note: Only s 6(2)(a) applies, being <u>Commerce Act 1986 (NZ) non-money judgments (other than proceedings in which a matter for determination arises under section 36A, 98H or 99A of that Act, which are excluded from Parts 2 FJA by s 5(10)).</u></i></p>	
<p><b>(iv) Has it already been registered in another State or Territory in Australia?</b></p> <p><i>If so, you are simply seeking registration in NSW under the Service &amp; Execution of Process Act 1992 (SEPA) to pursue assets here. See Part IV below.</i></p>	

## B. Registration Process: Time & Originating Process

ISSUE	Y / N
<b>(a) When – Time Bar – s 6(1) FJA</b>	
<ul style="list-style-type: none"> <li>▪ You must apply within six years after the date of foreign judgment or after the appeal is complete (if any), whichever is the later: s 6(1)</li> </ul> <p><i>Note: ‘Apply’ refers to the date of filing: <a href="#">Ellis v Dariush-Far [2007] QCA 398</a></i></p> <p><i>Note: The 12 year time bar in <a href="#">s 17 Limitation Act 1969 (NSW)</a> applies to enforcement proceedings brought on the registered foreign judgment, not to registration of it.</i></p>	
<b>(b) Where to Commence – The ‘appropriate’ court – s 6(2) FJA</b>	
<ul style="list-style-type: none"> <li>▪ If it is a money judgment under the <i>Commerce Act 1986</i> of New Zealand (other than under ss. 36A, 98H or 99A) – go to the Federal Court of Australia or the Supreme Court of a State or Territory.</li> </ul>	
<ul style="list-style-type: none"> <li>▪ If it is a non-money judgment under the <i>Commerce Act 1986</i> of New Zealand (other than under ss. 36A, 98H or 99A): go to the FCA</li> </ul>	
<ul style="list-style-type: none"> <li>▪ In all other cases: go to the Supreme Court of a State or Territory</li> </ul> <p><i>Note: Not necessary that state of registration also be state of enforcement. Can register in NSW then use Pt 6 of Service and Execution of Process Act 1992 (Cth) to register that NSW judgment elsewhere: <a href="#">Re S A Cryonic Medical [2002] VSC 338</a> – see <a href="#">Part III</a> below.</i></p>	
<b>(c) How to commence 1 – Federal Court of Australia</b>	
<ul style="list-style-type: none"> <li>▪ By <b>Application</b>, using <a href="#">Form 134</a>.</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Pay the filing fee: \$1,290.00 individuals; \$3,745.00 corporations.</li> </ul> <p><i>For current Federal Court fees and charges, see <a href="#">here</a>.</i></p>	
<p>See Div 41.6 for rules similar to the NSW rules set out below.</p> <p><i>For current Federal Court Rules, see <a href="#">here</a>.</i></p>	
<b>(c) How to commence 2 – NSW Supreme Court – UCPR 53.2(1)</b>	
<ul style="list-style-type: none"> <li>▪ By <b>summons</b> in Common Law Division (UCPR Form 4A / 4B) <ul style="list-style-type: none"> <li>– ‘Plaintiff’ renamed Judgment creditor - UCPR 53.2(2)</li> <li>– ‘Defendant’ renamed Judgement debtor - UCPR 53.2(2)</li> </ul> </li> </ul>	

<ul style="list-style-type: none"> <li>▪ Seeking the following orders:</li> </ul>	
<p>1. Order for registration under s 6(2). Must stipulate extent to which the judgment may be enforced: UCPR 53.5(2).</p> <p><i>Given s. 6(7) and (12), this means setting out the amount of the judgment. Allardyce Lumbar Company Limited v Quarter Enterprises Pty Limited [2010] NSWSC 807 (Davies J)</i></p> <p><i>See Form 69A at Annexure A for form of order in Summons &amp; Minute of Order. See Annexure A, item 1 below for the form.</i></p>	
<p>2. Order that registration occur in the absence of the public and without attendance by the Plaintiff: UCPR 53.2(4)</p> <p><i>Notes: Should request that in the Summons, e.g.:</i></p> <p style="padding-left: 40px;"><i>“2. An order under UCPR 53.2(4) that order 1 [i.e. the registration order] be made in the absence of the public and without any attendance by or on behalf of the judgment creditor.”</i></p> <p><i>Note: Avoids necessity to get a return date and to serve. A Registrar has the delegation to make the order in Chambers if this order is included. See section ‘G’ below.</i></p>	
<ul style="list-style-type: none"> <li>▪ Pay the filing fee: \$1,054.00 individuals; \$2,886.00 corporations.</li> </ul> <p><i>For current Supreme Court fees and charges, see <a href="#">here</a>.</i></p>	
<b>(d) Currency – subs. 6(11), (11A), (12) FJA</b>	
<ul style="list-style-type: none"> <li>▪ The foreign judgment can be registered still in its foreign currency.</li> <li>▪ For reasons set out in Note 2 in section ‘I’ of this Guide below, if it is in a foreign currency, it must stay that way.</li> </ul> <p><i>Note: It is sufficient simply to specify the currency in the order for registration. It is not necessary to make any further statement in an affidavit that it is ‘wished’ or ‘desired’ that the judgment be so registered. Allardyce Lumbar Company Limited v Quarter Enterprises Pty Limited [2010] NSWSC 807 (Davies J).</i></p>	
<p><b>WARNING</b> – See note 2 in section ‘I’ of this Guide. The below will only apply if the legislative error is corrected in subsequent legislation.</p>	
<ul style="list-style-type: none"> <li>▪ Otherwise, use equivalent amount in Australian currency: <ul style="list-style-type: none"> <li>– <b>Date of Rate:</b> Use the exchange rate prevailing on the <b>second business day</b> (the <i>conversion day</i>) before the day on which the application for registration is made.</li> </ul> <p><i>NOTE: Business day means a day on which the authorised FOREX dealers selected publish rates at which Australian dollars may be bought in the currency in which the judgment is expressed: s 6(11B).</i></p> <p><i>Note: Must be <u>exactly</u> second business day before, not day of application, otherwise it will be registered in contravention of the FJA: Lewis (formerly Brehm) v Beck (unreported, Vic SC, Beach J, 12/5/1998, <a href="#">BC9802042</a>)</i></p> <li>– <b>Time of Rate:</b> Rate is the average of the rates at which Australian dollars may be bought in the currency in which the judgment is</li> </li></ul>	

<p>expressed at 11 AM on the conversion day.</p> <p><i>Note: If several rates are applicable on the same day, the lowest should be chosen: Malaysia-Singapore Airlines Ltd v Parker (1972) 3 SASR 300</i></p> <p>– <b>Source of Rate:</b> Take an average of three (3) “authorised foreign exchange dealers” as defined in s 6(16) FJA selected by the JC.</p>	
<b>(e) Minute of Order</b>	
<ul style="list-style-type: none"> <li>▪ Should accompany the Summons so that orders can be made by the Registrar in Chambers. See <a href="#">Form 69A</a> (see Annexure A, item 1).</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Should stipulate the time within which application may be made to set aside (s 6(4) FJA) – must be at least 14 days except in exceptional circumstances: r 5(1). See <a href="#">Form 69A</a> (see Annexure A, item 1).</li> <li>▪ <i>Note: To abridge time, you can go before the Registrar for order under UCPR 1.12 or SCR 59A (see Delegation <a href="#">here</a>), or any judicial officer.</i></li> </ul>	
<b>(f) Service – UCPR 53.2(2)</b>	
<ul style="list-style-type: none"> <li>▪ Judgment creditor can proceed without service of the summons: r 2(2). <i>Note: This is why the affidavit evidence that accompanies the Summons is so extensive.</i></li> <li>▪ Must however serve Notice of Registration – see below section D.</li> </ul>	
<b>(h) Service outside of NSW, within Australia – SEPA</b>	
<ul style="list-style-type: none"> <li>▪ If serving the Summons and Notice interstate, ensure that you comply with Pt 2 of <i>Service and Execution of Process Act 1992 (Cth) (SEPA)</i>. This includes using the prescribed form of cover notice (as required by s. 16 SEPA), being Form 1 in Schedule 1 of the Service and Execution of Process Regulations 1993 <a href="#">here</a>.</li> </ul>	
<b>(h) Service outside of Australia – UCPR 11.2, Sch 6 item (u)</b>	
<ul style="list-style-type: none"> <li>▪ As for (f), but you can serve on foreign defendant (so as to enforce against local assets). See UCPR 11.2 plus Schedule 6, item (u) which permits service out of the jurisdiction where “proceedings are commenced to enforce in New South Wales a judgment wherever given”.</li> </ul>	

## C. Evidence (Affidavit)

*Note: You must file an affidavit in support of the application for registration. The Court must order the judgment registered upon proof of the matters prescribed in applicable rules of Court: s 6(3) FJA. The relevant rules are in UCPR 53.3. See the precedent Affidavit set out in Annexure C.*

ISSUE	Y / N
<b>Supreme Court of NSW</b>	
<b>Affidavit in Support of Summons – UCPR 53.3; s 6(3),(11) FJA</b>	
<ul style="list-style-type: none"> <li>▪ Affidavit requires the following: UCPR 53.3(1)  <i>Note: Forms: NSW Sup Ct - UCPR <a href="#">Form 40</a>. Federal Court: <a href="#">Form 20</a>  See Order 74 for equivalent rules in the Federal Court.  As an example of a review of evidence in support, see <i>Allardyce Lumbar Company Limited v Quarter Enterprises Pty Limited</i> [2010] NSWSC 807 (Davies J)</i></li> </ul>	
– <u>The Foreign Judgment</u> or a verified or certified or otherwise duly authenticated copy of the judgment should be annexed / exhibited.	
– <u>Translation of the foreign judgment</u> : certified by a notary public or authenticated by (expert) evidence.	
– <u>Personal Details of Parties</u> : <i>So far as known to the deponent:</i>	
– Name and trade (e.g. John Doe, Company Director) or business (ABC, Inc, widget exporter) of Judgment creditor ( <b>JC</b> )	
– Usual or last known place of abode or of business of JC	
– Name and trade (e.g. John Doe, Company Director) or business (XYZ, Inc, widget importer) of Judgment Debtor ( <b>JD</b> )	
– Usual or last known place of abode or of business of JD	
– <u>Parts of Judgment</u> : Which provisions/orders/parts of the judgment subject of the application.	
– <u>Amount</u> : Amount originally owing (for a money judgment)	
– <u>Appropriate Court</u> : Evidence that the NSW SC is the appropriate court under s 6(1) of the Act (see ‘Where to Commence, above)	

<p>– Evidence to the best of the information or belief of the deponent or witness showing:</p>	
<p>(a) <b>Entitlement:</b> That the judgment creditor is entitled to enforce the judgment (e.g. assignee of judgment creditor, change name etc., no other bar).</p>	
<p>(b) <b>Enforceable:</b> That, at the date of the application, the judgment can be enforced by execution in the country of the original court (nothing there to prevent it).</p>	
<p>(c) <b>Non-applicability of s 7:</b> That, at the date of the application, the registration would not be, or be liable to be, set aside under section 7 of FJA. See section ‘E’ below.</p> <p><i>Note: It will be apparent from the below that the affidavit must be made by an Australian legal practitioner.</i></p> <p><i>Note: In other words, you have to express a legal opinion as to the non-applicability of the grounds under s 7, including the non-existence of facts that may otherwise form the basis of its application. See section ‘E’ below.</i></p> <p><i>Note: in Queensland it is not necessary to prove this – UCPR 1999 (Qld) s. 947E;</i></p>	
<p>– <b>Interest:</b> Where interest is payable by the law of the country of the original court on any money which is payable under the judgment, set out all of the following:</p>	
<p>(a) The <u>rate</u> of interest.</p>	
<p>(b) The <u>amount</u> of interest which has become due under the judgment up to the time of application for registration.</p>	
<p>(c) The <u>daily amount</u> of interest which, subject to any future payment on account of the judgment, will accrue after the date of the application.</p>	
<p>– <b>Unsatisfied:</b> The extent to which the judgment is unsatisfied.</p>	
<b>Federal Court of Australia</b>	
<b>Affidavit in Support of Application – FCR 2011, r 41.62(2)(b)</b>	
<p>(a) a copy of the judgment certified by the original court, and if the judgment is not in the English language a translation of the judgment authenticated by an affidavit; and</p> <p>(b) State the following:</p> <p>(i) the full name, occupation and the usual or last-known place of residence, or of business, of the parties;</p>	

<ul style="list-style-type: none"> <li>(ii) if section 6 (1) (b) of the <i>Foreign Judgments Act 1991</i> is relied on — the date of the last judgment in proceedings by way of appeal;</li> <li>(iii) that the judgment was given in a proceeding in which a matter for determination arose under the Commerce Act 1986 (New Zealand), other than a proceeding or a part of a proceeding in which a matter for determination arose under section 36A, 98H or 99A of that Act;</li> <li>(iv) that Part 2 of the <i>Foreign Judgments Act 1991</i> applies to the judgment;</li> <li>(v) that if the judgment were registered the registration would not be, or be liable to be, set aside under section 7 of the <i>Foreign Judgments Act 1991</i>;</li> <li>(vi) the amount of costs of, and incidental to, the registration sought to be included in the registered judgment;</li> <li>(vii) if the judgment is a money judgment — that judgment was given in a superior court of a country in relation to which Part 2 of the <i>Foreign Judgments Act 1991</i> extends, or an inferior court of such a country, being an inferior court in relation to which Part 2 of the <i>Foreign Judgments Act 1991</i> extends;</li> <li>(viii) if section 13 of the <i>Foreign Judgments Act 1991</i> does not apply to the country of the original court — that that section does not so apply;</li> <li>(ix) if the judgment is a non-money judgment — that the judgment is a non-money judgment of a kind prescribed under section 5 (6) of the <i>Foreign Judgments Act 1991</i>.</li> </ul>	
<b>Affidavit filed on day of hearing – r 41.63</b>	
<p>State the following:</p> <ul style="list-style-type: none"> <li>(c) the causes of action to which the judgment relates;</li> <li>(d) that the judgment can be enforced in the country of the original court;</li> <li>(e) the rate of interest (if any) payable under the law of that country on any amount payable under the judgment;</li> <li>(f) if the judgment is a money judgment: <ul style="list-style-type: none"> <li>(i) that the judgment has not been wholly satisfied; and</li> <li>(ii) if the judgment has been partly satisfied — the balance remaining payable on that day; and</li> <li>(iii) the interest (if any) that by the law of the country of the original court has become due under the judgment up to the time of registration; and</li> <li>(iv) if the amount payable under the judgment is expressed in a currency other than Australian currency and the application does not state that the judgment is to be registered in the currency in which it is expressed — that the judgment is to be registered for the equivalent amount in Australian currency, based on the rate of</li> </ul> </li> </ul>	

<p>exchange prevailing on that day.</p> <p>(g) briefly but specifically, the grounds relied on for each statement made in the affidavit.</p>	
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## D. Notice of Registration

*Note: Once the summons and affidavit in support are filed, the Registrar will grant the application within about 2-3 days and notify you. You must then serve the notice of registration. The appropriate form is Form 69B. Typically, you will serve the summons and affidavit as well, but that is not required except as a matter of courtesy and in the interests of the proper administration of justice.*

ISSUE	Y / N
<b>(a) Requirement of Service – UCPR 53.6(1)-(2)</b>	
1. Notice of registration must be served on the Judgment Debtor. <i>Note: Defendant need not reside in the jurisdiction. Hunt v BP Exploration Co (Libya) Ltd (1980) 144 CLR 565.</i>	
2. Personal service except where: <ul style="list-style-type: none"> <li>– Judgment debtor has entered an appearance</li> <li>– Judgment debtor is in default of appearance</li> <li>– Otherwise ordered [substituted service – see UCPR Pt 10 r 14]</li> </ul>	
<b>(b) Form and Content of Notice – UCPR 53.6(3)</b>	
1. Use General <a href="#">Form 1</a> and add the content from Supreme Court prescribed <a href="#">Form 69B</a> (see Annexure A, Item 2 below)	
2. Notice must state the following:	
– Particulars of the judgment registered and of the order for registration.	
– Right of the judgment debtor to apply for an order to: <ul style="list-style-type: none"> <li>(a) Set aside the registration; and</li> <li>(b) Stay any enforcement of the judgment.</li> </ul>	
– Time within which the judgment debtor may file notice of a motion for an order setting aside the registration. <i>Note: 14 days unless special circumstances apply – UCPR 53.5(1).</i>	
– If summons not served on the judgment debtor, the address for service of the judgment creditor. <i>Note: Even if service of the summons is unnecessary, you may as well serve the summons and affidavit in support.</i>	

## E. Application to set aside

*Note: Assuming that you are now acting for the Judgment Debtor, you will need to act quickly and in any event within the time specified by the Notice (usually 14 days) to set aside registration.*

ISSUE	Y / N
<b>Note on Onus and Discretion</b>	
<ul style="list-style-type: none"> <li>▪ A party moving to set aside registration of a judgment under FJA s 7 bears the onus of proof on that application, to be satisfied on the balance of probabilities: <i>Allardyce Lumber Company Ltd v Quarter Enterprises Pty Ltd (No 2)</i> [2012] NSWSC 438, Johnson J at [67]; <i>Esso China Inc v Mou</i> [1999] VSC 294 Balmford J at [16]-[17].</li> <li>▪ Once this onus is satisfied, the court does not have a discretion to decline to set aside the judgment: <i>Bank Polska Kasa Opieki Spolka Akcyjna v Zbigniew Opara</i> [2010] QSC 93 McMurdo J at [48], [50].</li> </ul>	
<b>(a) First Step – Getting a copy of the judgment – UCPR 36.12-13</b>	
1A. <i>Informal</i> : Request copy of affidavit and exhibits from JC / Applicant.	
1B. <i>Formal</i> : Get access to Court file as party - UCPR 36.12. .	
<p>NB: Can also request Registrar to provide certified copy of ‘external judgments’ to any person appearing to have a sufficient interest in it – UCPR 36.13. Registrar must endorse statement as to:</p> <ul style="list-style-type: none"> <li>(a) the provision under which registration or filing was effected,</li> <li>(b) the date of registration or filing,</li> <li>(c) that registration / filing was effected by a faxed copy (if so),</li> <li>(d) that registration / filing cancelled (if so), including date thereof.</li> </ul>	
<b>(b) Where are applications made to set aside ? s 7(1) FJA</b>	
1A. In the Court in which judgment registered; OR	
1B. In the Court in which judgment registered under Pt 6, <u><a href="#">Service and Execution of Process Act 1992</a></u> (Cth) (SEPA)  <i>Note: Rules of private international law do not apply to judgments so registered. Must use FJA and local rules to set aside: <u><a href="#">s 109 SEPA</a></u>.</i>	
<b>(c) When must applications be made by? UCPR 53.7</b>	

1A. Within the time specified in the notice (s 6(4) FJA) (usually 14 days).	
1B. Within such further time as the court directs (s 6(5) FJA).  <i>Note: If you need more time, go up before an Associate Justice or Duty Judge and get an extension of time. Seek consent from other side if possible/practicable.</i>  <i>Note: If you are late, you can only attempt to get an order ‘nunc pro tunc’ extending time. Put an affidavit together to explain the delay.</i>  <i>Note: You can always make application even before service. If the Defendant files a motion in the proceedings without the notice yet being served, the court must still set a period within which the Defendant must make application, but the court can just set a nominal period once it has dismissed that motion: Morf-Zinggeler v Morf [1999] WASC 10 (27 April 1999)</i>	
<b>(d) How is the application made?</b>	
▪ By notice of motion in the proceedings.  <i>Note: Use UCPR <a href="#">Form 20</a>.</i>	
<b>(e) What grounds can you rely on?</b>	
<b>(i) <u>Must</u> set aside – s 7(2)(a) – Any of the following:</b>	
1. Not a judgment to which the FJA applies (now or at the time of registration)	
2. Registered for an amount greater than that payable  <i>Note: Court must then, on application of the JC, order that the judgment be registered in respect of the amount payable under at the date of the application: s 9(1) FJA</i>	
3. Registered in contravention of the Act  <i>Note: If set aside because no longer enforceable in original country, does not prejudice a fresh application to register when it is: s 9(2) FJA</i>	
4. Judgment Debtor did not receive notice of the foreign proceedings in sufficient time to enable it to defend them and did not appear (denied natural justice)  <i>Note: See for example Barclays Bank Ltd v Piacun [1984] 2 Qd R 476; Norsemeter Holding AS v Pieter Boele [No.1] [2002] NSWSC 370; rev'd on appeal [2002] NSWCA 363.</i>  <i>Giving someone “notice of the proceedings” requires more than simply informing them that proceedings either exist or will exist. They should see the nature of the proceedings and the claims for relief: Maschmann v Wenzel [2007] NSWSC 850.</i>	
5. Fraud by the Judgment Creditor or the foreign court (see common law)  <i>See for example Yoon v Young Dung Song (2000) 158 FLR 295; [2000] NSWSC 1147; Close v Arnot (unrep, Graham AJ, SCNSW no. <a href="#">10107/96</a>, 21 November 1997).</i>	
6. Foreign judgment was set aside on appeal or in original court	
7. Rights in judgment not vested in applicant	

8. The judgment has been discharged	
9. The judgment has been wholly satisfied <i>Note: This is determined on the day the court hears and determines the application, not the date of filing of the application. Ellis v Dariush-Far [2007] QCA 398.</i>	
10. Enforcement would be contrary to public policy (see common law) <i>Note: The scope of this rule is unclear. Bank Polska v Opara [2007] QSC 1, Chesterman J at [16]. Hence, it may be useful to consider the common law. See Jenton Overseas Investment Pte Ltd v v Townsing [2008] VSC 470 (11 November 2008), Whelan J at [6]; Bouton v Labiche (1994) 33 NSWLR 225.</i>	
<p><b>(ii) Must set aside – s 7(2)(a)(iv) + 7(3)-(4) – Foreign court had no jurisdiction – If fails all of the following:</b></p> <p><i>Note: If there is no head of jurisdiction under any of 11, 12 or 13, or if there is jurisdiction under these but 14 applies, the foreign court had no jurisdiction and registration must be set aside.</i></p> <p><i>Note: The list of heads of jurisdiction in 11, 12 and 13 is exhaustive. As such, e.g., mere presence at time of service of claim will not suffice under the FJA, unlike common law. See Société Co-opérative Sidmetal v Titan International Ltd [1966] 1 QB 828.</i></p>	
11. <i>Actions in personam</i> : Set aside unless one of these applies: <i>Note: The below criteria were developed based on the rules of common law as to recognition of the jurisdiction of foreign courts, also known as ‘jurisdiction in the international sense’. See Crick v Hennessy [1973] WAR 74; Re Word Publishing Co Ltd [1992] 2 Qd R 336.</i>	
<ul style="list-style-type: none"> <li>– Judgment Debtor (<b>JD</b>) voluntarily submitted</li> </ul> <p><i>This is determined by the rules of the enforcing court, not the foreign court. See De Santis v Russo [2001] QSC 65; (2001) 27 Fam LR 414; rev’d on appeal [2001] QCA 457; [2002] 2 Qd R 230; BC200106580.</i></p> <p><i>Note: You do not voluntarily submit if you appeared/participated solely to protect/release property seized, contest jurisdiction, argue discretionary decline of jurisdiction. See s 7(5) FJA.</i></p>	
<ul style="list-style-type: none"> <li>– JD was the plaintiff or cross-claimant in the foreign proceedings</li> </ul>	
<ul style="list-style-type: none"> <li>– JD agreed in advance to submit to the foreign jurisdiction</li> </ul> <p><i>For example, by an exclusive or non-exclusive jurisdiction clause in the contract.</i></p>	
<ul style="list-style-type: none"> <li>– JD, being the defendant in the proceedings, was resident (natural person) or had its principal place of business (corporations only) in the foreign jurisdiction at time of commencement</li> </ul>	
<ul style="list-style-type: none"> <li>– JD was the defendant in the proceedings and the proceedings were in respect of a transaction effected through or at an office or place of business that the JD had in the county of that court</li> </ul> <p><i>Note: You must consider whose place of business it is - the individual’s or the company’s (if any) where he or she works. While there is no reliable case on this</i></p>	

<p><i>subparagraph, bankruptcy analogues suggest that being an employee or director of the company does not make the company's place of business that person's as well.</i></p>	
<p>– Amount is payable in respect of New Zealand tax.</p>	
<p>12. <i>Immovable property or in rem claims</i>: Set aside registration if the property was not situated in the jurisdiction at time of proceedings. <i>Note: Conflict of laws speaks of movables and immovables, not realty and personalty.</i></p>	
<p>13. <i>Excluded Actions in Personam and Other claims.</i>  Note that s 3(1) FJA excludes from the definition of 'actions in personam' judgments in matrimonial matters, administration suits, bankruptcy, winding up, mental health or guardianship of infants.  Sufficient if jurisdiction is recognised by the law of a State or Territory (whether common law, statute).  <i>E.g.: Adoption Act 2000 (NSW), Child Protection (International Measures) Act 2006 (NSW).</i></p>	
<p>14. <i>All claims</i>: Set aside even if any of 11-13 are satisfied where foreign jurisdiction is asserted:</p>	
<p>– Over immovable property outside that court (i.e. the rule in <i>British South Africa Co v Cia de Moçambique</i> [1893] AC 602)</p>	
<p>– Contrary to exclusive jurisdiction / arbitration clause unless JD voluntarily submitted, counter-claimed or otherwise pre-agreed</p>	
<p><b>(iii) <u>May</u> set aside – s 7(2)(b) FJA – If:</b></p>	
<p>▪ Judgment in foreign proceedings was already <i>res judicata</i> before another court's final and conclusive judgment made with jurisdiction</p>	
<p><b>(iv) <u>Must</u> set aside – <i>Foreign Proceedings (Excess Of Jurisdiction) Act 1984 (Cth) – s 9</i></b></p>	
<p>▪ Foreign anti-trust proceedings (e.g. <i>Sherman Act</i> in the US) judgments (especially if relating to conduct outside the foreign court's jurisdiction or awarding multiples of damages) can be prevented from registration by the Cth Attorney-General under s 9. Requires AG instrument.</p>	
<p><b>(f) Procedure if set aside – s 7(6) FJA</b></p>	
<p>▪ If it is a foreign judgment registered under Pt 6 SEPA, Applicant (JC) must notify court in which judgment was first registered in Australia.</p>	
<p>– Forthwith, to Registrar of that first court</p>	
<p>– Within 7 days, sending certified copy of order setting aside.</p>	

## F. Application to stay

*Note: If the foreign judgment is currently the subject of an appeal, or will be, and registration cannot (or probably will not) be set aside, you should seek further or in the alternative an order for a stay of enforcement. If local proceedings may give rise to a set-off, this may also be grounds for a non-FJA discretionary stay.*

ISSUE	Y / N
<b>(a) Stay – s 8 FJA</b>	
1A. If appealing in foreign court, or can and will appeal, JD can seek a stay either (s 8(1)): <ul style="list-style-type: none"> <li>– Pending appeal (i.e. hearing and judgment on appeal)</li> <li>– Until a particular day</li> <li>– For a particular period</li> </ul>	
1B. If Judgment Debtor ( <b>JD</b> ) has not yet appealed, Court must require JD as applicant for stay to appeal within a certain time: s 8(2)	
2. Condition of stay that JD pursues appeal in expeditious manner: s 8(3)	
3. Court can make other orders, including security for costs: s 8(4)	
<b>(b) Discretionary Stay of Foreign Judgments</b>	
<ul style="list-style-type: none"> <li>▪ Consider seeking discretionary stay of enforcement.</li> </ul> <p><i>Note: It may be that local proceedings still underway may amount to a sum available to pay or be set off against the judgment debt. See <i>Lewis v Lamb</i> [2004] NSWSC 322; <i>LFDB v SM (No 2)</i> [2016] FCA 295.</i></p>	
<b>(c) Other steps for Judgment Debtor</b>	
<ul style="list-style-type: none"> <li>▪ Consider application to pay by instalments – See UCPR Pt 37</li> </ul>	

## G. Hearing – Powers of Court Officers

ISSUE	Y / N
<b>(a) Power to decide</b>	
<ul style="list-style-type: none"> <li>▪ <u>Uncontested in Chambers</u>: Registrar has delegation to order that a foreign judgment be registered under s 6 FJA but only where a request has been added under UCPR 53.2(4). <i>See Part 3, item 1 of “Delegation to Registrars under section 13 of the Civil Procedure Act 2005” last updated 14 October 2007 – <a href="#">here</a>.</i></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <u>Uncontested, Contested</u>: Associate Justice: UCPR 1.10A <i>plus</i> SCR <a href="#">Pt 60 r 1A</a> + SCR <a href="#">Schedule D</a>, Part 1, Column 1 (as to ss. 6, 7, 8, 9 FJA). <i>Note: If the request under UCPR 53.2(4) is not made, you must go to an Associate Justice.</i></li> </ul>	
<b>(b) Form of Order</b>	
<ul style="list-style-type: none"> <li>▪ As per Minute of Order – see section ‘B’.</li> </ul>	

## H. Enforcement Mechanism

*Note: Failure to register a foreign judgment to which the FJA applies is a bar to enforcement. s. 10 FJA*

ISSUE	Y / N
<b>(a) In NSW, Judgment Registered in NSW – UCPR 53.8</b>	
<i>Note: A registered foreign judgment is treated the same as a NSW judgment: UCPR 52.8(1)</i>	
1. Judgment Creditor must first file an affidavit of service of the Notice of Registration or must otherwise satisfy the court that service has been fulfilled: UCPR 53.8(2)	
<ul style="list-style-type: none"> <li>▪ Can't take any step to enforce (without leave of the court) while Notice period still running or after notice of motion to set aside is filed and until it is determined: UCPR 53.8(3)</li> </ul> <p><i>Note: To same effect, s 6(10) FJA</i></p>	
2. Proceed to enforce judgment per UCPR Pt 39.	
<b>Example – Bankruptcy / Insolvency</b>	
<ul style="list-style-type: none"> <li>▪ Can use judgment to apply for Bankruptcy Notice. <i>See: Re a Judgment Debtor (No 2176 of 1938) [1939] Ch 601; Re Linley [1951] VLR 319; Re McGilvray; Ex parte Foreign Commerce Bank Inc (1986) 66 ALR 181; New Zealand Breweries Ltd v Singh [2010] FMCA 260</i></li> <li>▪ Can use judgment to apply for administration of estate by trustee in Bankruptcy. <i>See: The Society of Lloyd's v Marich (2004) 139 FCR 560; [2004] FCA 1502.</i></li> <li>▪ Can use judgment as basis for statutory demand, even if not yet complied with Pt 59A r 9 procedural steps (debt not enforceable but is due and payable). <i>See: MEC Import Sales Pty Ltd v Iozzelli SRL (1998) 29 ACSR 229; (1998) 16 ACLC 1617; [1998] VSC 76; BC9805378. Statutory demands can be in foreign currency: Daewoo Australia Pty Ltd v Suncorp Metway Ltd (2000) 48 NSWLR 692 at 704; [2000] NSWSC 35.</i></li> </ul>	
<b>(b) Enforcement interstate – s 107 SEPA</b>	
<ul style="list-style-type: none"> <li>▪ See below (Part III below)</li> <li>▪ See the relevant local Rules (see Section 'P' of this Guide for a list of relevant inter-State rules)</li> </ul>	

## I. Other FJA Issues

### 1. Non-registration of registrable foreign judgment

- Cannot be enforced: s 10(1) FJA
- Is recognised, until registration set aside or can establish that it would be set aside: s 12 FJA.

*Note: Issue estoppel preserved by s 12(3) FJA.*

**2. Register of Foreign Judgments:** The SC Common Law Division no longer keeps a special register of judgments registered under the FJA (old SCR 59A r 6). Now, in the computerised system, you must enter the proceedings number. Access to the file is per the Rules. Form is [here](#).

**3. Currency Conversion:** [s 6\(16\) FJA](#) defines “authorised foreign exchange dealer” as a person authorised by a general authority issued by the Reserve Bank of Australia under regulation 38A of the *Banking (Foreign Exchange) Regulations* to buy and sell foreign currency.

However, the RBA no longer authorises foreign exchange dealers. In terms of the *Financial Services Reform Act 2001* (FSR Act), which commenced on 11 March 2002, the licensing of all financial service providers (including foreign exchange dealers), when required by the *Corporations Act 2001*, is the responsibility of the Australian Securities & Investments Commission (ASIC). The *Financial Services Reform (Consequential Provisions) Act 2001* (Cth) provides a transitional period of up to two years for dealers to obtain a new Australian financial services (AFS) licence from ASIC.

This means that a foreign exchange dealer authorised by the RBA prior to commencement of the FSR Act could continue dealing in foreign exchange under such authority until the dealer obtains an AFS licence from ASIC or 11 March 2004, whichever occurred first. The FJA is now out of date, and requires amendment. There are no longer any such entities as described in s 6(16) since the end of the transition period. The RBA general authorities no longer authorise someone ‘to buy and sell foreign currency’. Only solution is either to get three licensed FOREX dealers’ averages, and see if the point is raised. If the point is taken, get the judgment registered in the foreign currency. A check can be made of AFS licensees through the Financial Services homepage on ASIC’s website, but there is no consolidated list of FOREX licensees. However, all of the major banks have FOREX licenses. Licensees, with on-line FOREX calculators, include the Commonwealth Bank, Westpac, NAB, ANZ etc.

It seems that Courts are unaware of this lacuna, and are continuing to register foreign currency judgments in Australian dollars. See *Ramanathan v Naidu* [\[2007\] NSWSC 693](#). Contrast *Ellis v Dariush-Far* [\[2007\] QSC 142](#). It would be better practice to provide the evidence of the conversion rate and have that noted by the Court.

#### 4. Foreign State Immunity and the FJA

- A proceeding for the registration of a foreign judgment under the FJA is a proceeding within the meaning of s.9 of the [Foreign States Immunities Act 1985](#) (Cth) and as such the proceedings cannot be brought unless one of the exceptions in the FSIA apply: *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43, French CJ and Kiefel J at [49], Gageler J at [135], Nettle & Gordon JJ at [185].

#### J. Alternatives to FJA Enforcement

ISSUE	Y / N
<b>(a) Statutory Demands – Corporations Act 2001, Pt 5.4, Divs. 1-3</b>	
<ul style="list-style-type: none"> <li>▪ Section 10 FJA does not preclude reliance upon a foreign judgment as a basis for the service of a statutory demand (only deals with ‘recovery’ not recognition).</li> </ul> <p><i>See: Standard Commodities Pty Ltd v Société Socinter département Centragel</i> [2005] NSWSC 294 (Barrett J) at [10]. JD then gets presumption of insolvency and right to participate in the winding up.</p> <p><i>NOTE: Common law defences to recognition will still be available.</i></p>	
<b>(b) Bankruptcy Notice – Bankruptcy Act 1966 (Cth), Pt IV, Div 1; Bankruptcy Regulations 1966 (Cth), Pt IV, Div 1</b>	
<ul style="list-style-type: none"> <li>▪ Issue of Bankruptcy Notice is not a form of execution. <i>Re A Bankruptcy Notice</i> [1898] 1 QB 383 at 387 [so, s 10(1) FJA not triggered].</li> <li>▪ Where a judgment or order is expressed in an amount of foreign currency (whether or not it is also expressed in Australian dollars), the bankruptcy notice must contain a statement in accordance with reg 4.04(2)(a) and set out the matters in reg 4.04(2)(b).</li> </ul> <p><i>NOTE: Common law defences to recognition will still be available.</i></p>	

**Part II: Recognition and Enforcement of Foreign Judgments in  
NSW at Common Law**

**K. Is the Foreign Judgment capable of recognition (and enforcement)?**

*WARNING: There is considerable case law affecting each of the issues below. The below is thus only a guide to potential issues. You should seek advice or conduct further research before coming to a view in respect of each issue.*

ISSUE	Y / N
<b>(a) Did the foreign court have personal jurisdiction?</b>	
<i>Note: Any of these may be sufficient.</i>	
1. Was the Judgment Debtor ( <b>JD</b> ) present at the time of service:	
(a) <u>Natural persons</u> : Present in foreign jurisdiction at time of service? <i>Note: Not if forced or tricked into entering the jurisdiction.</i> <i>Note: Some authority that ordinary residence or domicile at time of service might suffice.</i>	
(b) <u>Corporations</u> : Did the corporation have a fixed place of business ('branch' or 'agency') from which the business of the company is done for more than a minimal period of time? <i>See: <u>Adams v Cape Industries Plc</u> [1990] Ch 433 at 530 (CA)</i>	
2. Was the JD domiciled or ordinarily resident in the jurisdiction?	
3. Did the JD submit to the jurisdiction of the foreign court?	
(a) By prior agreement (e.g. jurisdiction clause in a contract)	
(b) By voluntary appearance to the contest merits, but <u>not</u> merely: <ul style="list-style-type: none"> <li>(i) To contest jurisdiction;</li> <li>(ii) To argue discretionary exercise of jurisdiction (i.e. to decline);</li> <li>(iii) To defend property seized/restrained or threatened with same.</li> </ul> <i>See s. 11 FJA.</i>	
4. OR, is it a judgment <i>in rem</i> where the property was in the jurisdiction of the foreign court?	

<b>(b) Is the judgment ‘final and conclusive’?</b>	
<p>1. Is it final?</p> <p><i>Note: Final even if subject of actual or potential appeal.</i></p> <p><i>Not final if it can be varied by the same court which issued it (e.g. child support). Some contested interlocutory issues too. Is final if default judgment, even if can be set aside by application of defendant. See <u>Ainslie v Ainslie</u> (1927) 39 CLR 381.</i></p> <p><i>Seek advice on foreign procedure and common law rules before proceeding.</i></p>	
<p>2. It is conclusive? – Must be a decision on the merits.</p> <p><i>Note: Must be determined on the merits of the action: The Sennar [1985] 2 All ER 104.</i></p>	
<b>(c) Is the judgment for a fixed sum of money [enforcement only]?</b>	
As for FJA. Can be a formula.	
<b>(d) Are the parties the same and in the same interest?</b>	
Can be assignee of judgment creditor for enforcement, but not for estoppel claims.	
<b>(e) Is the judgment unsatisfied?</b>	
<p>The judgment can only be enforced to the extent unsatisfied.</p> <p><i>See <u>McKain v RW Miller &amp; Co (SA) Pty Ltd</u> (1991) 174 CLR 1 (HCA)</i></p>	

## L. Commencement and originating process (Enforcement Only)

ISSUE	Y / N
<b>(a) Time Bar – s 17 Limitation Act 1969 (NSW)</b>	
<ul style="list-style-type: none"> <li>▪ To enforce, must act within 12 years after date of foreign judgment.</li> </ul>	
<b>(b) Where to Commence</b>	
<ul style="list-style-type: none"> <li>▪ Per monetary or other limits of relevant NSW Courts: <ul style="list-style-type: none"> <li>– Local Court: \$100,000 (ss. 29-30 <a href="#">Local Court Act 2007</a> (NSW))</li> <li>– District Court: \$750,000 (ss. 3 “jurisdictional limit”, 9, 44 <a href="#">District Court Act 1973</a> (NSW)) <p><i>Note: If suing on the cause of action and not in debt, see other jurisdictional limits in District Court, e.g. as to equitable claims.</i></p> </li> <li>– Supreme Court: Unlimited amount.</li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li>▪ Note on Costs if Wrong Court: If you commence or continue in the Supreme Court for a claim under \$500,000, the Court will not ordinarily order costs in your favour if you succeed. See UCPR <a href="#">42.34</a>. Similarly, if you commence and continue in the District Court if the claim is under \$40,000: UCPR <a href="#">42.35</a>.</li> </ul>	
<b>(c) How to Commence</b>	
<ul style="list-style-type: none"> <li>▪ Either: <ul style="list-style-type: none"> <li>(a) Summons, if suing on it as a debt or common money count (<i>indebitatus assumpsit</i>) <p><i>See: RDCW Diamonds Pty Ltd v Da Gloria</i> <a href="#">[2006] NSWSC 450</a>; <i>Norsemeter Holding AS v Pieter Boele [No.1]</i> <a href="#">[2002] NSWSC 370</a> (Summons, and Motion for Summary Judgment) (rev’d on appeal – <i>Boele v Norsemeter Holding AS</i> <a href="#">[2002] NSWCA 363</a>).</p> </li> <li>(b) Summons or Statement of Claim if suing on cause of action <p><i>Note: If want better damages than in foreign court, could sue again in NSW.</i></p> <p><i>Note: See UCPR 6.2-4 as to whether to use Summons or Statement of Claim.</i></p> </li> </ul> </li> </ul>	

## M. Defences to Recognition and Enforcement at Common Law

*Note: There is extensive case law in relation to each of these issues. Conduct further research or seek advice.*

ISSUE	Y / N
<ul style="list-style-type: none"> <li>▪ Did the foreign court lack jurisdiction? (<i>see Section 'K' above</i>)</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Was the judgment procured by fraud by Judgment Creditor or of the foreign court?  <i>Note: Can be argued even if could have but did not, or even if did, argue fraud in the merits hearing in the foreign proceedings. Cannot be argued if an attempt was made to set aside the foreign judgment on grounds of fraud in the foreign jurisdiction.</i></li> </ul>	
<ul style="list-style-type: none"> <li>▪ Is the judgment contrary to Australian public policy?</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Did the foreign court act contrary to natural justice?</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Was the foreign judgment penal or for a revenue debt?  <i>Note: This is a complex area.</i></li> </ul>	
<ul style="list-style-type: none"> <li>▪ Is the judgment estopped by an earlier inconsistent judgment in NSW (including foreign judgment registered earlier)?</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Has the Cth A-G issued a certificate under the <i>Foreign Proceedings (Excess Of Jurisdiction) Act 1984</i> (Cth) – <a href="#">s 9</a> [see section 'E' above]</li> </ul>	

**Part III: Enforcement of Foreign Judgments in NSW under the  
Trans-Tasman Proceedings Act 2010 (Cth)**

1. The basic principle of the TTPA scheme is that any civil judgment (and some other judgments) made in any court in Australia or New Zealand will, with almost no qualification, be enforceable in the Courts of the other country.
2. Most significantly, the TTPA does not contain the restrictive jurisdictional grounds for recognition and enforcement, and does away with the common law (see s.79 TTPA).
3. A judgment is registered using prescribed Form 5 (see 2012 Regulations). A notice must be served on the judgment debtor (Form 6), as with the FJA. The judgment debtor then has 30 days to apply to set aside the judgment.
4. The TTPA permits “judgment laundering”, i.e. a non-ANZ judgment registered in either country can be re-registered in the other country.<sup>6</sup> It also applies to judgments against non-A/NZ defendants, which can then be enforced under the TTPA or the SEPA throughout Australia and New Zealand.
5. Where appropriate, a stay of enforcement can be ordered (s.76). This reflects existing practice, e.g. where the judgment debtor has a cross-claim against the judgment creditor in an Australian court.

ISSUE	Y / N
<b>(a) Is it a registrable New Zealand judgment? s. 66(1) TTPA</b>	
<i>If so, it must be registered under s.68 or cannot be enforced: s. 65(1).</i>	
(x) Is it a final and conclusive <a href="#">judgment</a> that is <a href="#">given</a> in a <a href="#">civil proceeding</a> by a New Zealand court?  <i>Note: It is final and conclusive even if appealable or an appeal has not been finalised: s.66(3)</i>  <i>Note: Civil proceedings are any proceedings that are not criminal proceedings: s.4 ‘civil proceeding’.</i>	
(xi) Is it a final and conclusive <a href="#">judgment</a> that is <a href="#">given</a> in a <a href="#">civil proceeding</a> by a New Zealand tribunal and prescribed in the regulations?  <i>Note: Nothing prescribed in regulations to date.</i>	
(xii) Is it a final and conclusive judgment given in a criminal proceeding that consists wholly of a requirement to pay an injured <a href="#">party</a> a sum of money by way of compensation, damages or reparation.	
(iii) Is it a final and conclusive judgment given in criminal proceedings which consists wholly of a “regulatory regime fine” imposed in NZ (see long list in regulation 15), e.g. under <i>Companies Act 1993</i> (NZ), <i>Securities</i>	

<sup>6</sup> s 66(1)(g) (TTPA Cth); s 54(1)(e) (TTPA NZ).

<p><i>Markets Act 1988 (NZ)</i></p> <p>(iv) Is it a final and conclusive order by a NZ court or tribunal for the payment of expenses incurred in trans-Tasman proceedings being costs for subpoenas or remote appearances under the NZ Act or the NZ Evidence Act?</p> <p>(v) Is it an order in competition proceedings (as per 1992 scheme), (note: must be registered in the Federal Court)</p>	
<p><b>(b) Is it excluded? s. 66(2) TTPA. If wholly or partly any of the following:</b></p>	
<p>(a) It relates to an <a href="#">excluded matter</a>, being (s.4 ‘excluded matter’)</p> <p style="padding-left: 40px;">(a) the dissolution of a marriage; or  (b) spouse/de facto maintenance or civil union partner (per NZ law);  (c) <a href="#">enforcement</a> of a child support obligation.</p> <p>(b) is a non-money <a href="#">judgment</a> of a kind prescribed by the regulations; or  (c) is an order under <a href="#">proceeds of crime legislation</a>; or  (d) is an order relating to the granting of probate or letters of administration or the administration of the estate of a deceased person; or  (e) is an order relating to the guardianship or care of a person who is incapable of managing his or her personal affairs; or  (f) is an order relating to the management of the property of a person who is incapable of managing that property; or  (g) is an order relating to the care, control, or welfare of a child; or  (h) imposes a civil pecuniary penalty of a kind prescribed by the regulations; or</p> <p><i>Note: none prescribed</i></p> <p>(i) is an order that, if contravened by a person to whom it is directed, will make the person liable to conviction for an offence in the place where it was made; or  or  (j) relates to a matter of a kind prescribed by the regulations.</p> <p><i>Note: Regulation 16 prescribes for s.66(2)(j) a judgment that relates wholly or in part to an order made by a NZ court:</i></p> <p>(a) <i>under the Insolvency (Cross-border) Act 2006 (NZ):</i></p> <p style="padding-left: 40px;">(i) <i>recognising an Australian or foreign (other than NZ) proceeding; or</i>  (ii) <i>providing a discretionary remedy in relation to an Australian or foreign proceeding, if the order is made:</i></p> <p style="padding-left: 80px;">(A) <i>on or after the filing of an application for recognition of the proceeding and before the application is decided; or</i>  (B) <i>on or after recognition of the proceeding; or</i></p> <p>(b) <i>under NZ domestic insolvency laws--commencing a proceeding and appointing a representative, if the order is subject to recognition in Australia under the <a href="#">Cross-Border Insolvency Act 2008</a>.</i></p>	

**Part IV: Interstate Recognition and Enforcement of Judgments  
in Australia**

*Note: This section covers NSW judgments being recognised and enforced interstate, and interstate judgments being recognised and enforced in NSW.*

ISSUE	Y / N
<b>(a) Recognition</b>	
<p><i>Notes</i></p> <ul style="list-style-type: none"> <li>▪ <i>State judgments may be entitled to full faith &amp; credit: s 118 Constitution.</i></li> <li>▪ <i>State and Territory judgments get recognition through s 185 Evidence Act 1995 (Cth).</i></li> </ul>	
<b>(b) Enforcement: Is it a judgment to which Part 6, Service and Execution of Process Act 1992 (Cth) (<a href="#">SEPA</a>) relates?</b>	
1. Is it a 'judgment' – see s 3 SEPA:	
– Both money judgments & orders [ <i>Note: No need to be 'final'</i> ]	
– In civil proceedings, including compensation orders in criminal proceedings but not forfeiture orders (bail, proceeds of crime)	
– In criminal proceedings where debt due to the State [not fines, but see below] forfeiture of bail	
– Of adjudicative tribunal decisions enforceable without court order (e.g. tenancy, consumer, trade, land rights tribunals etc.)	
– Foreign judgments registered under the FJA	
2. Is it an excluded judgment – see s 3 SEPA?	
– Foreign judgment registered other than under the FJA	
– Fines	
– Grant of probate, letters of administration etc.	
– Guardianship of mentally ill persons or management of property	
– Care, control and welfare of child orders	
– Orders the contravention of which is punishable as an offence	

<b>(c) Registration Procedure – ss 104-105 SEPA</b>	
1. Obtain a sealed copy of the judgment	
2A. Lodge a sealed copy with prothonotary, registrar or other proper officer of relevant court; OR	
2B. Fax a sealed copy (and lodge sealed copy within 7 days) to same. <i>Note: If you don't lodge (and only fax), you can't enforce until you do lodge.</i>	
▪ Loses all enforceability once original Australian court loses power to enforce the judgment (e.g. appeal, variation of orders etc.).	
3. Enforcement as per relevant State / Territory Court rules.	
<b>(d) Setting aside registration – s 109 SEPA</b>	
▪ If Australian judgment, only if incapable of registration under Part 6.	
▪ If a foreign judgment, per the FJA. See section 'E' above	
▪ Otherwise, can't use common law rules etc. to set aside: s 109. Go back to original court / tribunal issuing.	
<b>(e) Staying enforcement – s 106 SEPA</b>	
<i>Note: Similar principles and rules to s 8 FJA.</i>	
1. If to appeal or set aside or vary original judgment in the interstate court or tribunal, can seek a stay of enforcement: <ul style="list-style-type: none"> <li>– Until a specified time</li> <li>– For a particular period</li> </ul>	
2. Order must be made on condition that JD make and prosecute application within specified time and in an expeditious manner: 106(2)	
3. Court can make other orders, including security for costs: s 106(3)	
<b>(e) Further enforcement in NSW – s 107 SEPA, SCR Pt 71A r 6-7</b>	
3. <u>Enforceability Affidavit</u> : Must file affidavit in interstate enforcement proceedings, not more than 14 days before the application, setting out:	
– That the judgment is capable of being enforced; and	
– Extent to which judgment is capable of being enforced, in or by the court of rendition (the foreign court) or a court in the place of	

rendition.	
<p>4. <u>Cost Recovery Affidavit</u>: By Affidavit, setting out</p> <ul style="list-style-type: none"> <li>– Particulars of costs and expenses claimed</li> <li>– Basis upon which the costs and expenses are claimed.</li> </ul> <p><i>Note: Can recover (s 107 SEPA)</i></p> <ul style="list-style-type: none"> <li>– <i>reasonable costs and expenses of, and incidental to, obtaining and lodging the copy of the judgment;</i></li> <li>– <i>costs and expenses reasonably incurred in attempting to execute the judgment in the court of rendition or in another State.</i></li> </ul>	
3A. <u>Service – NSW</u> : No requirement to serve affidavits above, and Court can assess costs in absence of public and without JD: SCR Pt 71A r 7	
3B. <u>Service - Other States</u> : See rules in relevant State – section ‘T’.	

**Part V: International Recognition and Enforcement of NSW  
Judgments**

*Note: See section ‘Q’ below for resources on international registration and enforcement.*

ISSUE	Y / N
<b>Outside Australia – See foreign law – Certificate</b>	
<ul style="list-style-type: none"> <li>▪ May need a certificate. See certificate available under s 15 FJA. <i>Note: Registrar has a delegation to issue such a certificate. See Part 3, item 1 of “Delegation to Registrars under section 13 of the Civil Procedure Act 2005” last updated 14 October 2007.</i></li> </ul>	
<ul style="list-style-type: none"> <li>▪ Must be a “judgment” within the meaning of the FJA (see s 3).</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Registrar must issue:               <ul style="list-style-type: none"> <li>(a) Certified copy of judgment</li> <li>(b) Certificate as to causes of action to which it relates and rate of interest payable.</li> </ul> </li> </ul>	

**Part VI: Recognition and Enforcement of  
Foreign Arbitral Awards and Arbitration Agreements in  
International Commercial Arbitration**

*Note: Where an arbitral award enforceable under Parts I or II of the International Arbitration Act 1974 (Cth) is (or becomes) enforceable as a judgment or order of a court in a country to which the Foreign Judgments Act applies, it is a foreign judgment to which that Act may apply and can (also) be enforced as a foreign judgment. See section A(ii)(7) above. In many respects, however, recognition and enforcement as an award will be easier and less open to challenge.*

**N. Arbitral awards to which the 1958 New York Convention (Part II of the *International Arbitration Act 1974*) applies**

ISSUE	Y / N
<b>(a) Does the 1958 New York Convention apply to the award?</b>	
<p><i>If “Yes” to 1, and passing all the other tests, the Convention applies.</i></p> <p><i>If: (a) “No” to 1; or</i></p> <p style="padding-left: 40px;"><i>(b) “Yes” to 1, but failing the other tests in 2 to 4,</i></p> <p style="padding-left: 40px;"><i>the award may be governed by the UNCITRAL Model Law (Part III of the IAA) or the common law. See below.</i></p> <p><i>Note: The New York Convention and the Model Law cannot <u>both</u> apply. If both would apply, the IAA provides that the Model Law will not apply. See <a href="#">s. 20 IAA</a>.</i></p>	
<p>1. Was the award made under an arbitration agreement? Art II; <a href="#">s.3 IAA</a></p> <p><i>Note: For the text of the 1958 Convention, see Schedule 1 to the <u>International Arbitration Act 1974</u> (Cth) (“IAA”) <a href="#">here</a>.</i></p>	
<p>– Where “the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”</p>	
<p>– It must be in writing. Include the following:</p> <p>(a) Arbitration agreement signed by both parties</p> <p>(b) Arbitration clause in contract signed by both parties</p> <p>(c) Arbitration clause or agreement in letter of offer, accepted by letter of acceptance</p> <p>(d) Arbitration clause or agreement in letter of offer, accepted by conduct (i.e. reduced to writing, even if ‘agreement’ not written)</p> <p><i>See <u>Comandate Marine Corp v Pan Australia Shipping Pty Ltd</u> [2006] FCAFC 192 (20 December 2006), Allsop J at [148]-[156].</i></p>	

<p>2. If “Yes” to 1, was the arbitral award made in the territory of a country other than Australia? Art I; s.3 IAA.</p> <ul style="list-style-type: none"> <li>– “Made” does not necessarily mean where the tribunal sat, but depends on where the “seat” of the arbitration is located.</li> <li>– Additional application in Art I of Convention to awards otherwise not regarded as domestic awards does not apply in Australia.</li> </ul>	
<p>3. If “Yes” to 2, was that other country a Convention country?</p> <p><i>Note: This is the reciprocity reservation provided for in Art I(3).</i></p> <p><i>Note: See list of Convention countries and their reservations at website of UNCITRAL at <a href="http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html">http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html</a>.</i></p>	
<p>4. If “No” to 3, is the person seeking enforcement at that time domiciled or ordinarily resident in Australia or a Convention country?</p> <p><i>Note: This is an Australian extension to Article I.</i></p>	
<p><b>(b) Are there any grounds for refusal? Art V, <a href="#">s. 8(3A), (5)-(7)</a> IAA</b></p>	
<ul style="list-style-type: none"> <li>— These must be raised and proved by the defendant to the application for enforcement. However, you should consider them at the outset. All of the grounds are discretionary. Where pleadings are involved, the material facts should be pleaded supporting the grounds.</li> <li>— There is no residual discretion. See <a href="#">s. 8(3A) IAA</a>. This overturns the contrary suggestion in <i>Resort Condominiums Inc v Lowell and Another</i> [1995] 1 Qd R 406 at [41]</li> </ul>	
<p>1. <b>Incapacity:</b> Was a party the subject of an incapacity at the time the agreement was entered into under the law applicable to it?</p> <ul style="list-style-type: none"> <li>– <i>NOTE: Typically this is a question for the lex domicilii of a person - the place where they are domiciled/registered, or the place of contracting, with a preference for recognising the agreement as valid. See choice of law discussions in standard texts.</i></li> </ul>	
<p>2. <b>Invalidity:</b> Was the agreement invalid under its express choice of law or the law of the country where the award was made?</p>	
<p>3. <b>Procedural Fairness:</b> Was the other party given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings?</p>	
<p>4. <b>Excess of Jurisdiction:</b> Did the award deal with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or does it contain a decision on a matter beyond the scope of the submission to arbitration? <i>Note: Can sever these parts: s.8(6)</i></p>	
<p>5. <b>Improper composition of panel or procedure:</b> The number qualifications etc. of the panel and its rules of procedure must be in accordance with the agreement or (in substitute) the law of the place where the arbitration took place (i.e. the law of the seat).</p>	

<p>6. <b>Award not yet or no longer binding:</b> If it is not yet binding, or has been suspended or set aside, by a competent authority in the country of the law of the place where the arbitration was made.</p>	
<p>7. <b>Subject matter incapable of determination by arbitration:</b> This depends on national law, but can include marriage/divorce, correction of public registers, bankruptcy and insolvency administration, some anti-trust cases, bribery and corruption charges, and some fraud cases.</p> <p><i>Note: s. 11 Carriage of Goods by Sea Act 1991 (Cth) has done away with the rule that ouster by arbitration of the jurisdiction of Australian courts to enforce the Hague-Visby rules is no longer a problem but only if the arbitration takes place in Australia.</i></p>	
<p>8. <b>Contrary to public policy:</b> Enforcement may be contrary to public policy.</p> <p><i>Note: <a href="#">s. 8(7A)</a> provides that, without limitation, the enforcement of a foreign award would be contrary to public policy if (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.</i></p>	
<p><b>(c) Are there any grounds for a stay? <a href="#">s.8(8)</a></b></p>	
<p>If an application has been made to set aside or suspend the award in a court/tribunal in the country where the award was made or the country of the law under which it was made, the Australian court can adjourn the proceedings (or so much as relates to the award) and may order security on the application of the party seeking enforcement.</p>	
<p><b>(d) Recognition of the Arbitral Award</b></p>	
<ul style="list-style-type: none"> <li>▪ An award to which Part II applies is binding on all parties to the arbitration agreement, by virtue of the IAA: s. 8(1).</li> <li>▪ As such, it can be pleaded as an element of a claim or defence.</li> <li>▪ Pleadings should plead the agreement, the award, that the award is binding on the parties (particularising by reference to s. 8(1) IAA), and the effect of the award on the pleaded case. The defences to enforcement (set out above) apply as defences to recognition as well, and should be pleaded in response to reliance on the foreign award.</li> </ul>	
<p><b>(f) Enforcement: When to commence</b></p>	
<ul style="list-style-type: none"> <li>▪ <b>Statutes of Limitation:</b> The authority of an award is at heart contractual. Accordingly, normal contractual limitations apply to breaches of contract arising from a failure to perform the terms of an award, whether under seal (i.e. a deed or ‘specialty’), typically 12 years, or not, typically 6 years. The States including NSW have special provisions reflecting this.</li> </ul>	

<ul style="list-style-type: none"> <li>▪ <b>NSW:</b> By <a href="#">s.20(2) Limitation Act 1969</a> (NSW), the time period is: <ul style="list-style-type: none"> <li>(a) where the award is made under an arbitration agreement and the arbitration agreement is made by deed-twelve years, and</li> <li>(b) in any other case-six years.</li> </ul> </li> <li>▪ <b>Other states:</b> To same effect see following (links to Austlii): <ul style="list-style-type: none"> <li>— ACT: s. 17 <a href="#">Limitation Act 1985</a></li> <li>— Vic: s. 5(1), (3) <a href="#">Limitation of Actions Act 1974</a> (15 yrs for deed)</li> <li>— NT: s. 18 <a href="#">Limitation Act</a> [from NT Gov't website, 11 Mar 08]</li> <li>— Qld: s. 10(1), (3) <a href="#">Limitation of Actions Act 1974</a></li> <li>— SA: ss. 34-35 <a href="#">Limitation of Actions Act</a> (15 years for deed)</li> <li>— Tas: s. 10(1), (3) <a href="#">Limitation of Actions Act 1974</a></li> <li>— WA: ss.13, 18 <a href="#">Limitation of Actions Act 2005</a> Cf ss.54, 58, 63-4</li> </ul> </li> <li>▪ <b>Federal Court:</b> Apply law in State or Territory where suing by s. 79 <a href="#">Judiciary Act 1903</a> (Cth).</li> </ul> <p><i>Note: Time runs from the first default for which enforcement is sought: s.20(3). See Hallen v Angledal [1999] NSWSC 552.</i></p>	
<b>(f) Enforcement: Where to commence</b>	
<ul style="list-style-type: none"> <li>▪ <b>Federal Court:</b> By <a href="#">s.13 IAA</a>, matters under Part II including interpretation of the Convention are deemed NOT to be matters arising under a treaty for the purposes of s. 38 <a href="#">Judiciary Act 1903</a> (Cth). As such, there is no exclusive jurisdiction vested in the High Court. However, it is a matter arising under a law made by the Commonwealth Parliament, so it is within the original jurisdiction of the Federal Court under s. 39B(1A)(c) of that Act. As such, you can enforce in the Federal Court as well.</li> <li>▪ <b>Supreme Court:</b> Under <a href="#">s. 8(2) IAA</a>, it may be commenced in any State court as if made in that State. See <a href="#">s. 3 IAA</a> “court”.</li> </ul> <p><i>Note: Enforcement under NSW law (s. 35 <a href="#">Commercial Arbitration Act 2010</a> (NSW)) requires leave of the Supreme Court (see s. 4 CAA, “the Court”) unless the arbitration agreement specifically gives jurisdiction to the District Court or Local Court (which an agreement for foreign arbitration almost certainly would not). However, the IAA now ‘covers the field’ for international commercial arbitration in Australia if the Model Law applies: <a href="#">s. 21 IAA</a>.</i></p>	
<b>(g) How to commence in NSW</b>	
<p><b>By summons in the Commercial List / Technology and Construction List of the Equity Division (UCPR Form 4A or 4B):</b></p> <p><i>Note: Enforcement of awards was once a matter for the Commercial Division, whose work was transferred to the Equity Division, Commercial List, in 1998. If the arbitration relates to construction or technology matters, it would be most appropriate to file the summons in the Technology and Construction List. This also requires a List Statement.</i></p> <p><i>Note: Filing fees are high in this list. See <a href="#">here</a>.</i></p>	

<p><b>(i) Orders on the face of the Summons</b></p> <p>Note: On Form, the “Type of claim” is “Applications under specific Commonwealth Acts”</p>	
<p>1. An order under s. 8(2) of the <i>International Arbitration Act 1974</i> (Cth) that the award dated [date of award] published and notified to the parties by [name of arbitrator] be enforceable as an order of the Court.</p> <p>** Note: Delete the text in brackets when using this form of order because you are referred here from section O(d) below (i.e. when using the text for an application to recognise and/or and enforce a foreign award to which the Model Law applies. This is because where the Model Law applies, it covers the field to the exclusion of State law. See <a href="#">s. 21 IAA</a>.</p>	
<p>2. An order that judgment be entered against the defendant(s) in terms that: [set out the terms of the award by the arbitrator].</p>	
<p><b>(ii) List Statement accompanying</b></p> <p>Use <a href="#">Form 1</a>. For the contents of List Statement, see Annexure 1 to Practice Note No. SC Eq 3 <a href="#">here</a>.</p>	
<p>(1) ‘Nature of Dispute’ section of form</p> <p>The enforcement of an award dated [date of award] published and notified to the parties by [name of arbitrator].</p>	
<p>(2) ‘Issues Likely to Arise’ section of form</p> <p>Whether the plaintiff ought to be granted leave to enforce the award as a judgment or order of the court and to enter judgment against the defendant in terms of the award.</p>	
<p>(3) ‘Plaintiff’s contentions’ section of form</p> <ol style="list-style-type: none"> <li>1. On [date(s) of arbitration], [name of arbitrator] heard disputes between the parties as arbitrator appointed pursuant to and under the terms of the [set out relevant governing law].</li> <li>2. On [date of publication and notification of award] the arbitrator published and notified the parties of the award in the arbitration dated [date of award].</li> <li>3. The defendant has [set out failure to comply with award].</li> <li>4. By reason of the defendant’s failure to satisfy and comply with the terms of the award, the plaintiff should be granted leave to enforce the award as a judgment of the court and for judgment to be entered in terms of the award.</li> </ol>	
<p>(4) ‘Questions appropriate for referral’ section of form</p> <p>Nil. [or, “There are no questions appropriate for referral in these proceedings.”]</p>	
<p>(5) ‘Mediation’ section of form</p> <p>The parties [have/have not] attempted to mediate and the plaintiff is [willing/unwilling] to mediate at an appropriate time.</p>	

<ul style="list-style-type: none"> <li>▪ Pay the filing fee: \$1,078.00 individuals; \$2,951.00 corporations. <i>For current Supreme Court fees and charges, see <a href="#">here</a>.</i></li> </ul>	
<p><b>(h) How to commence in the Federal Court</b></p>	
<ul style="list-style-type: none"> <li>▪ By <b>Application</b>, using <a href="#">Form 52</a>.</li> </ul>	
<ul style="list-style-type: none"> <li>▪ Pay the filing fee: \$1,290.00 individuals; \$3,745.00 corporations. <i>For current Federal Court fees and charges, see <a href="#">here</a>.</i></li> </ul>	
<p><b>(i) Evidence - <a href="#">s. 9 IAA</a></b></p>	
<p><i>Note: You should serve an <b>affidavit</b> with the summons (NSW) / application (FCA) so as to expedite enforcement.</i></p>	
1. Duly authenticated original award or a duly certified copy.	
<p>2. The original arbitration agreement under which the award purports to have been made or a duly certified copy.</p> <p><i>Notes: Due authentication or certification is satisfied under s. 9(2) if it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, or it has been otherwise authenticated or certified to the satisfaction of the court.</i></p>	
<p><b>Note: 1 and 2 above. A translation of any necessary documents.</b></p> <p><i>Note: if the award or a document (e.g. the arbitration agreement) is in a foreign language, a translation must obtained into English of the document or the part: s. 9(3). It must be certified to be a correct translation.” This requires either a consular or diplomatic agent in Australia of the foreign country to certify it (s.9(4)) or it must be proved accurate to the satisfaction of the court. The latter would require an expert (translator) to give a report in the usual form for expert reports including acknowledging the Expert Code of Conduct (Sch 7 UCPR) or the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 11 April 2007, and complying with the usual evidentiary rules for experts.</i></p>	
<p>3. Proof that place where arbitration is made is a Convention Country.</p> <p><i>Note: Download and annex to the list of parties from the website of UNCITRAL at <a href="http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html">http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html</a>. Note any reservations. The only alternative to this is a certificate signed by the Secretary of the Department of Foreign Affairs. See s. 10(1) IAA.</i></p>	
<p><b>Note on Currency.</b></p> <p><i>The foreign award will likely be in another currency than Australian dollars. A judgment can be entered by an Australian court in foreign currency.</i></p>	

**O. Arbitral awards to which the UNCITRAL Model Law (Part III of the *International Arbitration Act 1974*) applies**

<p><b>(a) Does the Model Law (Part III IAA) apply?</b></p>	
<p>UNCITRAL Model Law has the force of law in Australia: s. 16 IAA</p> <p><i>Note: For the text of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006), see Schedule 2 to the <a href="#">International Arbitration Act 1974 (Cth)</a> (“IAA”) <a href="#">here</a>.</i></p>	
<p>1. Does the New York Convention (Part II of IAA) apply?</p> <p><i>If Yes, go to section ‘N’ above. Model Law does not apply. See <a href="#">s. 20 IAA</a>.</i></p>	
<p>2. Was the award made pursuant to an arbitration agreement? Art 7</p>	
<p>– Australia chose Option 1 of the two definitions in the Model Law</p> <p>– It is “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement”</p>	
<p>– It must be in writing. First, see above for New York Convention.</p> <p><i>Note: Art 7 extends the definition of ‘in writing’ through examples, covering the circumstances mentioned by Allsop J in <a href="#">Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192 (20 December 2006)</a>, at [148]-[156].</i></p> <p>– An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means: Art 7(3)</p> <p>– The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract: Art 7(6)</p> <p>– The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy: Art 7(4)</p> <p>– An arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Art 7(5)</p>	

<p>3. If “Yes” to 2, was the award made in <u>international commercial arbitration</u>? Art 1(3) [<i>Note: A ‘Yes’ to any of (a) to (d) will suffice</i>]</p>	
<p>(a) <b>Parties in different States:</b> Do the parties to the agreement have, at the time of the conclusion of that agreement, their places of business in different States?</p> <p><i>Note: Pursuant to Art 1(4), if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and if a party does not have a place of business [e.g. natural person], reference is to be made to his habitual residence.</i></p>	
<p>(b) <b>Arbitration is in a third State, different to the State of the parties’ place of business:</b> Is the place (seat) of the arbitration in a third state, as determined in or pursuant to the agreement? (Art 1(3)(b)(i))</p>	
<p>(c) <b>Place or performance in Third State:</b> Is a substantial part of the obligations to be performed or the place with which the subject-matter of the dispute is most closely connected, in a third state? (Art 1(3)(b)(ii))</p>	
<p>(d) <b>Agreement it relates to a Third State:</b> Have the parties expressly agreed that the subject-matter of the arbitration agreement relates to more than one country? (Art 1(3)(c))</p>	
<p>4. If “Yes” to 2 and 3, was the award made in <u>international commercial arbitration</u>? Art 1(3)</p> <p><i>Note: According to the note to the Convention, “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.”</i></p> <p><i>According to Art 2, “arbitration” means any arbitration whether or not administered by a permanent arbitral institution, and “arbitral tribunal” means a sole arbitrator or a panel of arbitrators.</i></p>	
<p><i>If “No” to 2 <u>or</u> all of 3(a)-(d) <u>or</u> 4, the Model Law does not apply.</i></p> <p><i>If “Yes” to 2 <u>and</u> any one of 3(a)-(d) <u>and</u> 4, the Model Law applies, subject to 5.</i></p>	
<p>5. Have the parties agreed in writing to settle their disputes otherwise than in accordance with the Model Law?</p> <p><i>If “Yes”, the Model Law does not apply. <a href="#">s. 21 IAA.</a></i></p>	

<b>(b) Are there any grounds for refusal? Art 36</b>	
<p>As for New York Convention. See above.</p> <p>— There is no residual discretion. See <a href="#">s. 8(3A) IAA</a>.</p> <p>— Note that <a href="#">s. 19 IAA</a> provides that awards affected by fraud or corruption, or in which there has been a denial of natural justice, are contrary to public policy and may be refused recognition and enforcement.</p>	
<b>(c) Where to commence (NSW, FCA)</b>	
As for 1958 New York Convention.	
<b>(d) How to commence (NSW, FCA)</b>	
As for 1958 New York Convention.	
<b>(e) Evidence</b>	
As for 1958 New York Convention. See Art 35 for contents.	
<b><i>Special Provisions of Note if Model Law applies to the arbitration itself</i></b>	
— <a href="#">s.20</a> : <b>Scope:</b> If Part II (New York Convention) applies, do not use Model Law.	
— <a href="#">s.25</a> : Interest may be awarded from the date cause of action accrued until the date of the award (unless parties agree otherwise in writing – see <a href="#">s. 22(2) IAA</a> ) at a reasonable rate.	
— <a href="#">s.26</a> : Interest may be awarded from award onwards (unless parties agree otherwise in writing– see <a href="#">s. 22(2) IAA</a> ) at a reasonable rate.	
— <a href="#">s.27</a> : Costs awards are in the discretion of the arbitrator (unless the parties agree otherwise in writing– see <a href="#">s. 22(2) IAA</a> ).	

## **P. Arbitral awards other than under the *International Arbitration Act 1974 (Cth)***

- Recognition and Enforcement: According classic conflict of laws rules, a foreign arbitration award is enforceable at common law, or capable of being a defence to a claim, if the award is made:
  - (a) in accordance with an arbitration agreement that is valid by its applicable law; and
  - (b) valid and final according to the law governing the arbitration proceedings (the *lex arbitrationis*).

See *Norske Atlas Ins. Co Ltd v London General Insurance Co Ltd* (1927) 43 TLR 541, 542.

- Defences: At common law, the defences to recognition and enforcement of a foreign award that is final and valid (perhaps because of limitations in the *lex arbitri*), and the subject of a valid arbitration agreement, are:
  - (a) that under the arbitration agreement and the *lex arbitri* the arbitrators had no jurisdiction to make the award. It is for the party seeking enforcement to demonstrate that award itself was within the terms of the agreement to submit it to jurisdiction;
  - (b) that the award was obtained by fraud;
  - (c) that recognition and enforcement would be contrary to public policy; or
  - (d) breach of natural justice.

See Rule 61, *Dicey & Morris* (13 ed), p 628.

- How to Commence: By statement of claim. See the precedent pleadings within the Commercial List Statement in subsection N.(g)(ii)(3) above as a guide.

## Q. Enforcing Arbitration Agreements by Staying Local Proceedings and Enjoining Foreign Proceedings

### (a) International Arbitrations within s. 7 IAA and stay of local proceedings

- [Section 7 IAA](#) provides a mechanism to enforce an (international) arbitration agreement by preventing the continuation of proceedings in an Australia court falling within (or partly within) the scope of the arbitration agreement. This gives effect to Australia's obligations under Article II(3) of the [1958 New York Convention](#), and reflects the force of law given to Art 8(1) of the [UNCITRAL Model Law](#) (which is in the same terms).
- Section 7(2) provides that the court must stay local proceedings (on such conditions as it thinks fit) in whole or in relevant part, and refer the parties to arbitration where:

*(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*

*(b) the proceedings [or part thereof] involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration*

- The section applies by s. 7(1) in any of the following circumstances, which cover both the NY Convention and the Model Law:
  - The procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a [1958 New York] Convention country.
  - The procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a [1958 New York] Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia.
  - A party to an arbitration agreement is the Government of a [1958 New York] Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends.
  - A party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily

resident in a country that is a [1958 New York] Convention country.

- The order is not made if the arbitration agreement is null and void, inoperative or incapable of being performed: s. 7(5).
- There is considerable case law on this section. See in particular the decision of the Full Court of the Federal Court of Australia in [Comandate Marine Corp v Pan Australia Shipping Pty Ltd \[2006\] FCAFC 192 \(20 December 2006\)](#).

(b) **International Arbitrations not within s. 7 IAA and stay of local proceedings**

- These can be stayed, as with domestic arbitrations, by using the Uniform Commercial Arbitrations Act (e.g. [s. 53](#) NSW Act).
- The relevant State or Territory Act applies to Federal Court proceedings in that State or Territory through s. 79 [Judiciary Act 1903](#) (Cth).

(c) **International Arbitrations where there are foreign proceedings and a local defendant**

- An arbitration agreement can be enforced through an anti-suit injunction. See *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (EWCA); *The Front Comor* [2005] 2 Lloyd's Rep 257. Cf. *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; *Timoney Technology Limited Anor v ADI Limited* [2007] VSC 402.

## **Part VII: Further Research**

### **R. General reference works**

- Conflict of Laws (Australia)  
Davies, Bell & Brereton, *Nygh's Conflict of Laws in Australia* (8 ed, Butterworths, 2010), (esp) Chs. 40-43.
- Conflict of Laws (UK)  
L Collins (Gen Ed), *Dicey & Morris' The Conflict of Laws* (14 ed, 2006) plus cumulative supplements.
- Foreign Judgment and Res Judicata  
P Barnett, *Res Judicata, Estoppel and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (OUP, 2001).

### **S. Links (Austlii)**

- *Federal Court Rules 2011* (Cth), *Order 74*  
[HTML](#)
- *Foreign Judgments Act 1991*(Cth)  
[HTML](#); [RTF](#)
- *Foreign Judgments Regulation 1992* (Cth)  
[HTML](#); [RTF](#)
- *Foreign Proceedings (Excess Of Jurisdiction) Act 1984*  
[HTML](#); [RTF](#)
- *Service and Execution of Process Act 1992* (Cth)  
[HTML](#); [RTF](#)
- *International Arbitration Act 1974* (Cth)  
[HTML](#); [RTF](#)
- *Commercial Arbitration Act 2010* (NSW)  
[HTML](#)

### **T. FJA registration rules in Australian Courts**

- FCA – [Federal Court Rules, O 74](#).
- NSW – [Uniform Civil Procedure Rules 2005, Pt 53](#)
- Qld – [Uniform Civil Procedure Rules 1999, Ch 20A](#)

- Vic – [Supreme Court \(Miscellaneous Civil Proceedings\) Rules 1998, O 11](#)<sup>7</sup>
- Tas – [Supreme Court Rules 2000, Pt 28](#)
- WA – [Rules of the Supreme Court 1971, O 44](#)
- SA – [Supreme Court Civil Rules 2006](#) (in force 4 Sep 06)
- NT – [Supreme Court Rules](#), Ch 9
- ACT – [Civil Procedure Rules 2006, Part 3.8 \(rr 3470-3483\)](#)

## U. Global enforcement resources

- Enforcing Judgments in the United Kingdom  
L Collins (Gen Ed), *Dicey & Morris' The Conflict of Laws* (13 ed, 2000) (plus 4<sup>th</sup> Cumulative Supplement, 2004); (14 ed, 2006), Ch 14.
- United States  
J Hogan-Doran, “Enforcing Australian Judgments in the United States (and Vice Versa): How the Long Arm of Australian Courts reaches across the Pacific” (2006) 80 *ALJ* 361.
- Japan  
L Gamertsfelder “Cross Border Litigation: Exploring the Difficulties Associated with Enforcement Australian Money Judgments in Japan” (1998) 17 *Aust Bar Rev* 161.
- Germany  
Schweizer Kobras, “German Law - Recognition and Enforcement of Australian Judgments in the Federal Republic of Germany” 2005 paper available at <http://www.schweizer.com.au/articles.shtm>.
- Korea  
Sung Hoon Lee, Foreign Judgment Recognition and Enforcement System of Korea, 6 *Journal of Korean Law* 110 (2006-2007)
- World-wide enforcement resources  
L Garb & J Lew (eds), *Enforcement of foreign judgments* (Kluwer, 1996-), (Looseleaf service) (copy located in University of Sydney Law Library).  
P Hopkins (ed), *International Enforcement of Judgments* (Lulu Press, 2006)

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<sup>7</sup> Cf. Evans, “Registration of Foreign Judgments in Victoria” (2000) 74(4) *Law Institute Jnl* 66.

## ANNEXURE A – FORMS

*Note: SCR forms 69A and 69B should be adopted into UCPR format. As such, use the general UCPR [Form 01](#), using the content of the SCR form.*

### Item 1 – SCR, Form 69A

#### **Form 69A (with completion)**

**(Pt 59A r 5)**

#### **ORDER**

#### THE COURT ORDERS THAT:

1. The judgment dated (*date*) of the (*court*) by which it was adjudged that (*name*) pay money to (*name*) (*or state shortly the terms of and identify the judgment*) be registered under Part 2 of the Foreign Judgments Act 1991 of the Commonwealth for:
  - (a) (*specify the terms of the judgment that are to be registered and, where a sum of money is payable under a term, include the sum of (amount)*);
  - (b) (*where, by the law of the country of the original court, interest becomes due under the judgment, specify amount of interest that will become due up to time of registration or how interest is to be calculated*);
  - (c) the costs of and incidental to the application for this order and of registration of the judgment.
2. (*name*) may, within .... days after service upon him of notice of registration, apply to set aside the registration;  
(*if the terms of the judgment to be registered are enforceable in full*)
3. the judgment may be enforced to the full extent of the terms that are to be registered.)  
*[otherwise*
  3. (*specify extent to which judgment may be enforced*);  
(*if applicable*)
4. the judgment may also be enforced for the interest and costs for which judgment is registered.)]

Ordered 7 May 20\_\_ and entered 11 May 20\_\_.

(Judge), (*or* Master), (*or* by the Court  
Registrar (*or* Chief Clerk)

**Form 69B**  
**(Pt 59A r 7)**

**NOTICE OF REGISTRATION OF JUDGMENT**

To: *(name)*

1. The judgment of *(here follow the terms of the order)* has been registered in this Court under Part 2 of the Foreign Judgments Act 1991 of the Commonwealth for:
  - (a) *(specify the terms of the judgment that have been registered and, where a sum of money is payable under a term, include the sum of (amount));*
  - (b) *(where applicable interest of (amount));*
  - (c) *costs of (amount).*
2. the judgment may be enforced to the full extent of the terms that are registered *(or specify extent to which judgment may be enforced).*
3. You may, within .... days after the service of this notice upon you, file notice of motion to set aside the registration.  
*(If applicable and see Part 59A rule 7 (4),*
4. The address for service of the above plaintiff, the judgment creditor, is *(address).*

Dated:

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*Solicitor for the Plaintiff*

**ANNEXURE B**  
**Extracts from Foreign Judgments Regulations 1992 (Cth)**

Item 1 – Superior Courts listed in Schedule to Foreign Judgments Regulations 1992 (Regulation 5)

Item	Country	Courts
1A	Province of Alberta, Canada	Supreme Court of Canada Court of Appeal of Alberta Court of Queen’s Bench of Alberta
2	Bahamas, The Commonwealth of the	Court of Appeal Supreme Court
3	Province of British Columbia, Canada	Supreme Court of Canada Court of Appeal of British Columbia Supreme Court of British Columbia
4	British Virgin Islands	Eastern Caribbean Supreme Court
5	Cayman Islands	Grand Court
6	Dominica, Commonwealth of	Eastern Caribbean Supreme Court Court of Appeal High Court of Justice
7	Falkland Islands	Court of Appeal Supreme Court
8	Fiji, Republic of	Supreme Court Court of Appeal High Court
9	France (French Republic)	Cour de Cassation Cours d’Appel Tribunaux de grand instance Tribunaux de commerce Cours d’assise Tribunaux correctionnels
10	Germany, Federal Republic of	Bundesgerichtshof Oberlandesgerichte Bayerische Oberste Landesgericht Landgerichte
11	Gibraltar	Court of Appeal Supreme Court

<b>Item</b>	<b>Country</b>	<b>Courts</b>
12	Grenada	Supreme Court (consisting of the: Court of Appeal; High Court)
13	Hong Kong Special Administrative Region of the People's Republic of China, The	Court of Final Appeal High Court (consisting of the: Court of Appeal; Court of First Instance)
14	Israel, State of	Supreme Court District Courts Moslem Religious Courts Druze Religious Courts
15	Italy (Italian Republic)	Corte Suprema di Cassazione Corte di Assise Corte d'Appello Tribunale
16	Japan	Supreme Court High Courts District Courts Family Courts
16A	Korea, Republic of	Supreme Court Appellate Courts District Courts Family Court Patent Court Administrative Court
16B	Malawi	High Court Supreme Court
17	Province of Manitoba, Canada	Court of the Queen's Bench of Manitoba
18	Montserrat	Privy Council Eastern Caribbean Court of Appeal High Court of Montserrat
19	Papua New Guinea	Supreme Court of Justice National Court of Justice
19A	Poland, Republic of	Supreme Court Commercial Courts Courts of Appeal Provincial Courts
20	St Helena	Supreme Court
21	St Kitts and Nevis, Federation of	Privy Council Eastern Caribbean Court of

<b>Item</b>	<b>Country</b>	<b>Courts</b>
		Appeal High Court (Saint Christopher Circuit) High Court (Nevis Circuit)
22	St Vincent and the Grenadines	Eastern Caribbean Supreme Court (consisting of the: Court of Appeal, High Court)
23	Seychelles, Republic of	Court of Appeal Supreme Court
24	Singapore, Republic of	Privy Council: in respect of orders made on appeals from the Singapore Supreme Court and filed with the Court of Appeal of Singapore Supreme Court of Singapore (consisting of the: Court of Appeal; High Court)
25	Solomon Islands	Court of Appeal High Court
25A	Sri Lanka	Supreme Court Court of Appeal High Court District Court
25AA	Switzerland	Bundesgericht Kantonale Obere Gerichte Handelsgerichte
25AB	Taiwan	Supreme Court High Courts District Courts
25B	Tonga	Court of Appeal Supreme Court
26	Tuvalu	Court of Appeal High Court
27	United Kingdom, The	Supreme Court of the United Kingdom Senior Courts of England and Wales Court of Judicature of Northern Ireland Court of Session
28	Western Samoa	Court of Appeal Supreme Court of Western Samoa

*Note* The Eastern Caribbean Supreme Court is constituted by Statutory Instrument 1967 No. 223, as amended by Statutory Instrument 1983 No. 1108, of the United Kingdom. The Court is differently described in the usage of the countries mentioned in the Schedule in relation to which it is listed as a superior court. The description used by each of those countries is set out in column 3 of the relevant item in the Schedule.

## Item 2 – Inferior Courts in Reg 5, Foreign Judgments Regulations 1992

### 5 Specified inferior courts

- (1) ...[deleted]...
- (2) Part 2 of the Act extends in relation to the following inferior courts of the United Kingdom:
  - (a) County Courts (England and Wales);
  - (b) County Courts (Northern Ireland);
  - (c) Sheriff Courts (Scotland).
- (3) Part 2 of the Act extends in relation to the following inferior courts of Canada:
  - (a) the Provincial Court of Alberta;
  - (b) the Provincial Court of British Columbia;
  - (c) the Provincial Court of Manitoba.
- (4) Part 2 of the Act extends in relation to the following inferior courts of Switzerland:
  - (a) Bezirksgerichte;
  - (b) Erstinstanzliche Gerichte;
  - (c) Arbeitsgerichte;
  - (d) Mietgerichte.
- (6) Part 2 of the Act extends in relation to each District Court of the Republic of Poland.

## **ANNEXURE C – Precedents**

### **Item 1 – Affidavit in support of Application for Registration under the FJA – NSW (UCPR 53.2)**

*[In form appropriate to registering jurisdiction]*

*[Remember that parties are the Judgment Creditor and the Judgment Debtor – UCPR 53.2]*

On the [Day] of [Month], 2xxx, I, [Name], [Solicitor etc.] of [professional address] affirm / make oath and say:–

1. I affirm/swear\*\* this affidavit for the purposes of UCPR Pt 53.3 in support of the application by the Judgment Creditor to register a foreign judgment under s 6 of the *Foreign Judgments Act 1991* (Cth) (the “**Act**”).
2. Exhibited to me and marked “[ABC]-1” is judgment of the [*name of court*], a court of [*country of judgment*] dated [*date*] that I am informed and verily believe is certified by [*e.g. the registrar of the court*] (the “**Judgment**”).
3. Exhibited to me and marked “[ABC]-2” is a translation of the Judgment, certified by a notary public.\*\*

*Alternatively, a separate affidavit will be needed from an expert translator. The person should be suitably qualified, should describe their qualifications in the affidavit, and exhibit the Judgment and a translation of it...*

I refer also to the affidavit of [name of translator] affirmed/sworn\*\* on [*date*].\*\*

4. The Judgment arose from proceedings [no. or other identifying name etc. of the foreign proceedings] (the “**Foreign Proceedings**”).
5. The Foreign Proceedings were between [*e.g. XYZ, Inc., widget manufacturer*] of [*address*], the Judgment Creditor, and [*name and ACN if any, e.g. ABC Pty Ltd (ACN 123 456 789); or John Albert Smith*], widget importer of [*address*], the Judgment Debtor.
6. The name, [trade / business]\*\* and last known [abode / place of normal

business\*\*] of the Judgment Debtor is [*name, trade or business, address*]. Exhibited to me and marked “[ABC]-#” is an extract of [*e.g. an ASIC search, Business Name search etc.*] which I caused to be performed in respect of the Judgment Debtor. Its registered office is at [*insert address*]. Its principal place of business is at [*insert address*].

Or

Exhibited to me and marked “[ABC]-#” is a White Pages search I performed of [*individual – e.g. “John Albert Smith”*].

And/Or

[*Give better or further evidence as to last known place of abode or place of business likely to satisfy the Court that the person and his/her/its address are correctly identified*].

7. The Judgment Creditor carries on the [trade / business\*\*] of [*specify*] at [*address*] so far as I am aware.

[*While not strictly necessary, you could do as for para 6 to put the affidavit into proper form*].

8. The part of the Judgment the subject of this application [is/are] [*identity what parts – e.g. ‘orders numbered 1 and 3’*]. The Judgment is for a fixed sum of money, namely [####] in accordance with order[s] [#####] made by the [court] on [date] (the “**Judgment Debt**”).

*Note: If you are seeking to enforce the costs order, it will have to be finalised as well, per the foreign law. If there is a separate judgment for it, you will want to have both the main and costs judgments registered. There is no rule against putting both judgments into the one affidavit.*

9. The amount owing under the Judgment as at this date is [insert amount in foreign currency, e.g. GBP 1,000,000].
  
10. I am informed [*how?*] and verily believe that interest on judgments before [foreign court] is at the rate of [##%]. The amount of interest which has become due under the judgment up to the date of this affidavit is [e.g. GBP ###]. The daily amount of interest which, subject to any future payment on account of the judgment, will accrue after the [date of this affidavit / date of this application] is [e.g. GBP ###] per day.

*WARNING: For paras 10-11 following, see Section 'I', note 2 in this Guide.*

11. Exhibited to me and marked “[ABC]-#” are three quotations I caused to be obtained from foreign exchange dealers as to the rate of exchange at 11 AM on the morning of [date – note: must be 2 business days (as defined) prior to the date of application]. I am informed and verily believe that each of the foreign exchange dealers is an authorised foreign exchange dealer within the meaning of s 6(11A) of the Act. The average rate is [e.g 1 GBP = 0.7451 AUD]. [*Note – could use RBA published figures alternatively.*]
  
12. Accordingly, the amounts due or to be due by way of unsatisfied judgment and interest is, as at the date of this affidavit / the application date:

- |    |   |   |
|----|---|---|
| A. | Judgment Debt:                                      | [AUD ###]   |
| B. | Amounts paid in respect thereof:                    | [(AUD ###)]   |
| C. | Interest to date of Application/Affidavit:          | [AUD ###]   |
| D. | Total due at date of Application/Affidavit (A+B-C): | <div style="border-top: 1px solid black; display: inline-block; width: 100px;"></div> [AUD ###] |

E. Interest accruing daily thereafter: [AUD ###]

13. By reason of the facts set out above, the Supreme Court of New South Wales is the appropriate court under s 6(1) of the Act.

14A. To the best of my information and belief:

- (a) the Judgment Creditor is entitled to enforce the judgment;
- (b) at the date of swearing this affidavit the judgment can be enforced by execution in [*country of judgment*];
- (c) if registered in this Court, the judgment would not be liable to be set aside for any of the matters set out in s 7 of the *Foreign Judgments Act 1991* (Cth).

[*Note: To put the above into better form, especially in anticipation of a possible challenge, see as follows*].

14B. I am informed and verily believe [*by who and how? e.g. “by ####, the solicitor for the Judgment Creditor in the Foreign Proceedings”*], that [e.g. the Judgment has not been appealed by the Judgment Debtor], and so that, as at this date, the Judgment is enforceable in [country].

15. I have informed myself of the grounds for making an application to set aside the registration of this judgment under s 7 of the Act.

- (a) For the reasons set out above, the Judgment is one to which Part 2 of the Act applies.
- (b) The [*whole of the\**] Judgment Debt and the interest payable upon it is the amount due and payable. I am informed by [insert] and verily

believe that [none of the Judgment Debt has been paid / the amount of {insert} only has been paid by the Judgment Debtor to the Judgment Creditor].

- (c) I am informed and verily believe [*how and by whom?*] that the Judgment Debtor:

[submitted to the jurisdiction of the foreign court by {insert how}]\*\*

[the Judgment Debtor was the plaintiff/complainant or a cross-claimant in the Proceedings {identify by reference to judgment or document}]\*\*

[the Judgment Debtor agreed to submit to the jurisdiction of the {court}. Exhibited to me and marked “[ABC]-4” is a copy of a contract dated [date] between the Judgment Creditor and the Judgment Debtor. I refer in particular to clause [number] of that contract.]\*\*

[the Judgment Debtor was resident in the jurisdiction of the [court] at the time of commencement of the proceedings]\*\*

[the Judgment Debtor had its principal place of business in the jurisdiction of the [court] at the time of commencement of the proceedings]\*\*

- (d) There was no agreement between the Judgment Creditor and Judgment Debtor such that the Proceedings were contrary to any exclusive jurisdiction clause or arbitration agreement [*or, set out how they came not to be applicable*].

- (e) The Judgment Debtor had sufficient notice of the Proceedings [*insert how you know this, e.g. “as it defended the proceedings...”*].
- (f) The Judgment has not been varied, set aside, discharged or satisfied [except as set out above etc.].

16. I believe the contents of this affidavit to be true and correct.

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#### Notes on Revisions to this Document

v 1.0 - 15 September 2006.

v 1.1 - 25 September 2006. Correction edits to Section E at para 11. Links between TOC and body of document (Section Headings and Annexures).

v 1.2 - 3 October 2006. Edits to Introduction, further explaining application of s 12 FJA and adding note re *Mareva* relief. Addition of intro paragraphs to some sections for ease of understanding.

v 2.0 - 20 April 2008. Addition of Part V (Foreign Arbitral Awards). Update to form references for Summons and Notice of Motion in line with new numbering of forms from 29 Jan 2008. Update to fees. Various links inserted.

v 3.0 - 01 October 2010. Re-explanation of impact of FJA on matrimonial causes and other causes excluded from the definition of ‘actions *in personam*’ for the purposes of s. 7. Update to case law. Updates to arbitration section given amendments to the *International Arbitration Act 1974* (Cth) by the *International Arbitration Amendment Act 2010*.

v 4.0 - 1 May 2014. Addition of Part III on *Trans-Tasman Proceedings Act 2010* (Cth). Minor amendment reflecting commencement of *Commercial Arbitration Act 2010* (NSW).

v 5.0 – 5 September 2016. Various amendments including updating links to forms, rules etc. Addition of case law since 2014 concerning the FJA.

#### Note

This document is a guide only. Nothing in this document should be taken as advice on the legal matters addressed herein, without express written notice to contrary effect given by the author. In reading and making use of this document, the reader undertakes to check the information contained in this document against the rules, regulations, legislation and case law contained herein and to form his or her own view as to the correctness of the material set out. Note that provisions of the rules, regulations and legislations (including prescribed forms), as well as the effect of case law, are subject to change from time to time without notice. This document was last edited on **1 September 2016**. Version 5.0 includes a review of all legislation, rules and forms (and their numbering) referred to herein, and is up to date to 1 September 2016.

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