CHAPTER 10

Common Law versus Statutory Approaches to Enforcing Foreign Judgments: The Australian Experience

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1 Introduction

This chapter considers common law versus statutory approaches to enforcing foreign judgments through an Australian lens, albeit a lens that analyses how the general approaches of Australian and other common law countries affect the United States. It emphasizes, in particular, the long-arm jurisdictional double standard and how that works, mentions some U.S. responses to this, and, not without trepidation by the author, draws some conclusions about the utility of a U.S. Federal statute. It draws attention, finally, to some Trans-Tasman developments, and some Trans-Pacific possibilities.

2 Recognition and Enforcement of Foreign Judgments in Australia

Let me begin by outlining the way Australian law deals with the recognition and enforcement of foreign judgments. As is the case in the U.S., up until relatively recently recognition and enforcement of foreign country judgments was a matter of state law, both statutory law and the common law.

Each of the (six) Australian States and the (two) Federal Territories had Acts modeled on either or both of the United Kingdom’s Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Administration of Justice Act 1920. Each was based on the notion of reciprocity.1

The Acts provided, in essence, for the registration in the relevant state of judgments of United Kingdom courts, and courts of other countries subject to executive designation that the courts of those other countries would extend reciprocity of treatment to relevant Australian judgments.

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1 See, for example, Foreign Judgments Act 1962 (Vic); Foreign Judgments Act 1973 (NSW).
Judgments from non-UK courts, or from countries which had not been designated by executive order, fell to be enforced at common law.

Australian courts would recognize a foreign judgment at common law where the rendering forum had personal jurisdiction over the defendant, judged against the rather narrow common law standards derived from 19th century English law. Accordingly, a foreign judgment could be enforced at common law in Australia only insofar as—

- the foreign court had exercised “international jurisdiction”, which is to say a jurisdiction acceptable to an Australian court;
- the foreign judgment was final and conclusive;
- there was an identity of parties; and
- if based on a judgment in personam, the foreign judgment was for a fixed debt.

The reference to “international jurisdiction” in the Australian context is really a reference to the exercise of personal jurisdiction based on no more than the defendant’s presence in the jurisdiction, submission to the exercise of jurisdiction, or (in the case of movable or immovable property) presence of the property in the jurisdiction at the relevant time.

I speak of restrictive 19th century jurisdictional standards. Not much has changed. I will return to the implications, particularly the implications for United States judgments, of these narrow bases for enforcement of foreign judgments at common law in Australia.

However, in 1991 the Australian Federal Parliament passed the Foreign Judgments Act. This Federal statute was enacted to provide a framework for the enforcement of foreign civil judgments in Australia by a simple registration process, and to give effect to arrangements agreed to with New Zealand as part of closer economic relations, and an agreement entered into by Australia with the United Kingdom in 1990. It replaced the State and Territories-based system of registration that until then had applied. Its aim was to avoid the multiplication of effort involved in implementing and keeping up to date arrangements under various State and Territory laws. It was considered by its propounders

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2 See the discussion in Justin Hogan-Doran, Enforcing Australian judgments in the United States (and vice versa): How the long arm of Australian courts reaches across the Pacific, 80 AUSTRALIAN LAW JOURNAL 361, 362 (2006).

3 Benefit Strategies Group Inc. v Prider (2005) 91 SASR 544, 552. See also the discussion in Davies, Bell & Brereton, NYGH’S CONFLICT OF LAWS IN AUSTRALIA (2010), [40.2].

4 Yoon v Song (2000) NSWSC 1147, [12].