

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FOREIGN JUDGMENTS BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the
Honourable Michael Duffy MP)

27182/91 Cat. No. 91 3657 8



9 780644 211925

FOREIGN JUDGMENTS BILL 1991

OUTLINE

This Bill will replace existing State and Territory legislation which provides for the enforcement of foreign superior court civil judgments for payment of money by registration in State and Territory Supreme Courts. It will also permit implementation of arrangements agreed with New Zealand and with the United Kingdom for the enforcement of inferior court money judgments and with New Zealand for enforcement of non-money judgments (injunctions and orders) and judgments for revenue debts.

2. The Bill is largely modelled on the Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (ACT). All State and Territory legislation (except that in South Australia and the Cocos (Keeling) Islands) is substantially uniform legislation modelled on the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).

3. The basis of the scheme is reciprocity: the legislation will be applied with respect to judgments of courts of a particular country, by regulations, where the Governor-General is satisfied that substantial reciprocity of treatment will be given to the enforcement in that country of corresponding Australian judgments.

Financial Impact Statement

4. It is not expected that the Bill will have a significant financial impact. The Bill will permit some resource savings for the Commonwealth, States and Territories by removing multiplication of effort involved in each State and Territory having to implement arrangements under its own law. In the short to medium term savings at the Commonwealth level will be offset by the need to bring existing arrangements under the Commonwealth Act.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

5. This clause provides for the short title of the Act.

Clause 2: Commencement

6. The Act, other than section 21, is to commence on the day on which it receives the Royal Assent. Section 21, which amends the Foreign Proceedings (Excess of Jurisdiction) Act 1984, will commence 4 months after Royal Assent. This is to permit notice of the amendment to be given to the United Kingdom in accordance with an Agreement with that country.

Clause 3: Interpretation

7. This clause defines certain words and expressions used in the Bill. The principal definitions are:

"enforceable money judgment" is defined to exclude an amount payable under a revenue judgment unless it is payable in respect of New Zealand tax or recoverable Papua New Guinea income tax.

"judgment" is defined to include judgments or orders, whether final or interlocutory, of a court in civil proceedings, and judgments or orders of a court in criminal proceedings for the payment of compensation or damages to an injured person.

The definition also includes arbitral awards of a country, which have become enforceable in a court of that country as a judgment. This provision is necessary to give effect to an Agreement with the United Kingdom for reciprocal enforcement

of certain judgments, and to comply with existing arrangements with other countries. The definition does not extend to arbitral awards within the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

"New Zealand tax" is defined to mean all taxes and similar charges payable under the laws of New Zealand and to include penalty taxes and interest. This extends to all New Zealand revenue judgments.

The definition is included to implement an agreement with New Zealand for reciprocal enforcement of revenue judgments.

"Recoverable Papua New Guinea tax" is defined to mean tax payable under Papua New Guinea laws relating to taxes on income, but does not include penalty taxes or interest. This continues an arrangement reflected in current State and Territory laws.

8. Certain taxes payable under Papua New Guinea laws may be declared by regulations not to be recoverable Papua New Guinea income taxes, where the Governor-General is satisfied they are not properly taxes on income.

Clause 4: External Territories

9. The Act will extend to all the external Territories.

PART 2 - RECIPROCAL ENFORCEMENT OF JUDGMENTS

Clause 5: Application of this Part on the basis of reciprocity of treatment

10. This clause provides for regulations to be made extending Part 2 to a country where the Governor-General is satisfied that substantial reciprocity of treatment will be given in relation to the enforcement in that country of the money

judgments of all Australian superior courts. Where the regulations extend Part 2 to a country, that Part applies to money judgments of the superior courts of that country.

11. A court of a country to which Part 2 has been extended is taken to be a superior court if the regulations so provide. The purposes of this provision are to facilitate proof that a court is a superior court and to resolve borderline cases. The fact that a court is not named in the regulations does not mean that it is not a superior court.

12. The clause also provides for regulations to be made applying Part 2 to money judgments of all or some inferior courts of a country to which Part 2 extends. The inferior courts concerned are only those listed in the regulations. The Governor-General may make such regulations where satisfied that substantial reciprocity of treatment will be given in relation to the enforcement in that country of money judgments given in all or some Australian inferior courts.

13. Existing State and Territory law does not provide for the application of the legislation to judgments of inferior courts of countries. This clause enables effect to be given to agreements reached with New Zealand and the United Kingdom for reciprocal enforcement of inferior court judgments (and for arrangements to be made with other countries in future).

14. The clause further provides for regulations to be made applying Part 2 to such non-money judgments given in courts of a country to which Part 2 extends as are prescribed, where the Governor-General is satisfied that substantial reciprocity of treatment will be given in relation to the enforcement in that country of all or some non-money judgments given in Australian courts.

15. Existing State and Territory law does not provide for the application of the legislation in relation to non-money judgments. This clause enables effect to be given to an agreement reached with New Zealand for reciprocal enforcement of non-money judgments (and for arrangements to be made with other countries in future).

16. Regulations under this clause are to operate prospectively, that is, to judgments given after the regulations apply Part 2 to the relevant country, court or judgment, except in the case of New Zealand and United Kingdom judgments and judgments that were, before the coming into force of the relevant regulations, registrable under a State or Territory law.

17. Part 2 does not apply to judgments given in proceedings involving a matter for determination under sections 36A, 98H or 99A of the Commerce Act 1986 of New Zealand. These sections relate to certain trans-Tasman trade practices matters. Enforcement of judgments given in these proceedings is already dealt with comprehensively in Part IIIA of the Federal Court of Australia Act 1976.

Clause 6: Application for, and effect of, registration of foreign judgments

18. This clause provides that an application for registration of a foreign judgment must be made within 6 years from the date of the judgment or from the last judgment by way of appeal from a judgment.

19. All money judgments registrable under the Bill may be registered in State and Territory Supreme Courts. A money judgment given in proceedings involving a matter for determination under the Commerce Act 1986 of New Zealand (other than under sections 36A, 98H or 99A) may also be registered in the Federal Court of Australia.

20. Non-money judgments are to be registered in State and Territory Supreme Courts except such judgments given in proceedings involving a matter for determination under the Commerce Act (other than under sections 36A, 98H or 99A). Such judgments, which relate to trade practices matters, are only to be registrable in the Federal Court.

21. On registration a judgment is to be treated as if it were a judgment of the court in which it is registered, given on the date of its registration. Once a judgment is registered under this Act it will be registrable under Part IV of the Service and Execution of Process Act 1901 in the Supreme Court of another State or Territory, unless an order has been made for a stay of enforcement of the judgment. This will remove the need for a separate application under this Act where registration is sought in more than one State.

21. The clause also provides that where a judgment is in a foreign currency the judgment creditor has the option of having the judgment registered for an equivalent amount in Australian currency, based on the rate of exchange at the date of the application for registration, or of having the judgment registered in the foreign currency. In the latter case the amount owing under the judgment would be converted to Australian currency at the date of payment or execution. This accords with modern practice with respect to local judgments.

22. The registration of a judgment is to include the reasonable costs of obtaining its registration and any interest due under the judgment at the time of registration.

Clause 7: Setting aside a registered judgment

23. This clause enables a party against whom a registered judgment is enforceable to seek to have its registration set aside. The application may be made either to the court in which the judgment was registered under the Act or to a court in which it has been subsequently registered under the Service and Execution of Process Act 1901.

24. The court must set the registration of the judgment aside if it is satisfied of any of the grounds set out in paragraph 7(2)(a), and may do so if it is satisfied of the ground set out in paragraph 7(2)(b). The grounds are, with one exception, similar in effect to those in the uniform legislation. The exception is in subparagraph 7(2)(a)(xi) which requires the court to set a registered judgment aside

where its enforcement would be contrary to public policy. Subparagraph 7(2)(a)(xi) does not apply with respect to New Zealand revenue judgments.

25. At common law a foreign revenue judgment would not be enforced, as a matter of public policy. The statutory provision for enforcement of Papua New Guinea income tax judgments and New Zealand revenue judgments makes it clear that enforcement of these kinds of revenue judgments is not as such contrary to public policy. These provisions would not, however, by themselves prevent other public policy grounds being argued in relation to individual judgments. The exclusion of New Zealand revenue judgments from the public policy ground for setting aside registration makes it clear that no questions of public policy may be raised as a barrier to enforcement of New Zealand revenue judgments.

26. The clause also sets out the circumstances in which the courts of the country in which the judgment was given are taken to have had jurisdiction and circumstances in which they are taken not to have had jurisdiction. These are similar to those set out in the uniform legislation except that where the judgment is a New Zealand revenue judgment, the court will be taken to have had jurisdiction. This provision has been added because the other bases of in personam (against the person), jurisdiction, which are found in the uniform legislation, are naturally directed rather to presence or commercial transactions within the jurisdiction, than to the incurring of taxation liabilities.

Clause 8: Stay of enforcement of a registered judgment

27. This clause provides that enforcement of a registered judgment may be stayed pending the final determination of an appeal. The stay may be granted if the court is satisfied the judgment debtor has appealed, or is entitled and intends to do so, and may be for a particular period or until a particular date. A condition of every such order is that the judgment debtor must pursue the appeal expeditiously and the court must require a person intending to appeal to do so by a particular

day or within a particular period as a condition of its order. It may make its order subject to further conditions, including the giving of security.

28. By expressly providing for a stay of enforcement of a registered judgment clause 8 provides a more direct method of dealing with appeals from the foreign judgment than does the uniform legislation. Under the uniform legislation the court either sets aside the registration or adjourns the hearing of the application until after a period the court considers to be adequate for the appeal to be disposed of.

Clause 9: Re-registration of certain judgments which have been set aside

29. This clause provides that the court must re-register a judgment where its registration has been set aside because it was registered for an amount greater than that payable at the date of registration. It will be re-registered for the amount owing at the date of the application for re-registration. A judgment which is set aside solely because it was unenforceable in the country in which it was given at the date of the application for registration, may be re-registered if the judgment becomes enforceable in that country.

Clause 10: Registrable judgments not to be otherwise enforceable

30. This clause provides that the only means of enforcement in Australia of a judgment to which Part 2 applies, other than an award enforceable under the International Arbitration Act 1974, is by proceedings under the Act for registration of the judgment.

PART 3 - MISCELLANEOUS

Clause 11: Judgments to which Part 2 does not apply

31. This clause deals with foreign judgments to which Part 2 does not apply given in an action in personam. It provides that, for the purposes of proceedings in Australia to recover

money under such a judgment (that is, an action at common law on the judgment), the same rules apply as are set out in subclause 7(5) (voluntary submission to jurisdiction) in relation to judgments to which Part 2 does apply.

Clause 12: General effect of certain judgments

32. This clause provides for the recognition of foreign judgments in Australia. It applies both to judgments registrable under the Bill, and also to non-money judgments which, although not registrable under the Bill, would have been registrable if they had been money judgments. This encompasses non-money judgments of courts whose money judgments are registrable under the Bill.

33. The clause provides that judgments within the clause must be recognised in any Australian court as conclusive between the parties in all proceedings based on the same cause of action. However, the clause does not apply to foreign judgments where the courts of the foreign country did not have jurisdiction, the judgment debtor did not receive notice of the proceedings in sufficient time to enable him or her to defend them and did not appear, the judgment was obtained by fraud, the judgment has been reversed or set aside, or enforcement of the judgment would be contrary to public policy.

34. This clause does not prevent an Australian court recognising a foreign judgment as conclusive of a matter of law or fact where that judgment would be recognised as conclusive under the common law.

Clause 13: Money judgments unenforceable if no reciprocity

35. This clause enables regulations to be made having the effect of preventing proceedings being entertained by an Australian court for the recovery of money alleged to be payable under judgments given in a particular country. This prohibition does not affect the enforcement of awards under the International Arbitration Act 1974 and may be subject to exceptions set out in the regulations.

36. Regulations may be made under this clause where the Governor-General is satisfied that the courts of a foreign country give substantially less favourable treatment in respect of recognising and enforcing money judgments of Australian superior courts than Australian superior courts give in respect of recognising money judgments of the superior courts of the foreign country.

Clause 14: Registered judgments cease to be enforceable in certain circumstances

37. This clause provides that a judgment ceases to be enforceable under the Act, whether or not it has already been registered, once it ceases to be a judgment to which Part 2 applies by reason of regulations made under subclause 3(2) (Papua New Guinea income tax) or the amendment or repeal of regulations made under subclause 5(1), (3), (6) or (7) (application of Part 2). Regulations under subclause 3(2) may preserve the application of Part 2 to specified judgments which have been registered or in respect of which applications have been made for registration.

Clause 15: Issue of certificates of judgments obtained in Australian courts

38. This clause enables a judgment creditor to obtain documents from the Registrar of an Australian court, in order to enforce an Australian judgment overseas.

Clause 16: Regulations

39. This clause enables the Governor-General to make regulations for carrying out or giving effect to the Bill.

Clause 17: Rules of Court

40. This clause enables superior courts to make rules of court in order to carry out or give effect to the Bill.

PART 4 - TRANSITIONAL PROVISIONS

Clause 18: Registration of judgments recognised under State or Territory law

41. This clause provides for the continued operation of State and Territory laws on enforcement of foreign judgments during a transitional period of up to 2 years from the commencement of this Bill. The clause applies to judgments of courts of countries pending extension of Part 2 of the Act to those countries by regulation. The period of 2 years is intended to enable the Commonwealth to negotiate revised arrangements, where necessary, with other countries before applying Part 2 in relation to those countries.

42. The clause enables a judgment of a country that is not prescribed for the purposes of subclause 5(1) (which applies Part 2 with respect to a country) but which would be registrable under existing State or Territory legislation to be registered under the relevant State or Territory law during the transitional period. Regulations may be made excluding the courts of certain countries from the operation of the clause. This is to permit termination of the application of State and Territory legislation with respect to a country when a decision has been made that this Act will not be applied with respect to that country.

Clause 19: Enforcement of judgments registered under State or Territory law after commencement of this Act

43. This clause provides that this Act does not apply to judgments already registered under State or Territory law before the commencement of the Act, or registered under State or Territory law under clause 18 after the commencement of the Act. Such judgments continue to be governed by the State or Territory law under which they are registered.

Clause 20: Rules of Court

44. This clause provides for rules of court relating to registration or enforcement of foreign judgments under existing State or Territory laws to apply, with necessary modifications, to proceedings under this Act. This will continue until either the relevant court makes new rules of court under clause 17, or the expiration of one year from commencement of the Act.

PART 5 - AMENDMENTS OF OTHER ACTS

Clause 21: Amendment of the Foreign Proceedings (Excess of Jurisdiction) Act 1984

45. This clause introduces new subsection 9A into the Foreign Proceedings (Excess of Jurisdiction) Act 1984 to enable the Federal Court to make rules of court in relation to fixing a period within which an application may be made to have the registration of a judgment set aside, and for the extension of any such period.

Clause 22: Amendment of the Federal Court of Australia Act 1976

46. This clause amends section 32W of the Federal Court of Australia Act 1976 to provide that where a judgment is in New Zealand currency the judgment creditor has the option of having the judgment registered for an equivalent amount in Australian currency, based on the rate of exchange at the date of the application for registration, or of having the judgment registered in New Zealand currency. In the latter case the amount owing under the judgment would be converted to Australian currency at the date of payment or execution. This amendment brings section 32W into line with clause 6(11) of this Act.

CORRECTION

FOREIGN JUDGMENTS BILL 1991

EXPLANATORY MEMORANDUM

CLAUSE 21 AMENDMENT OF THE FOREIGN PROCEEDINGS (EXCESS OF JURISDICTION) ACT 1984

First line - omit 'new subsection 9A', substitute 'new subsection 12(9A)' to correct a typographical error in the Explanatory Memorandum.

(Circulated by authority of the
Attorney-General, the Honourable Michael Duffy MP)



9 780644 213738

Printed by Authority by the Commonwealth Government Printer

27251 Cat. No. 91 3700 5