

Joint Submission to the Attorney-  
**General's Department on the *Hague***  
*Conference Judgments Project:*  
*Recognition and Enforcement of*  
*Foreign Judgments* Public  
Consultation Paper (March 2018)

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## Table of Contents

Submission .....	2
General submissions: accession and implementation .....	3
1. General submission.....	3
2. Form of implementation.....	3
3. New Zealand.....	4
Questions from the Consultation Paper .....	6
Question 1: Problems, benefits and risks of recognition and enforcement .....	6
Question 2: Issues and inconsistencies with current foreign judgment regimes in Australia and abroad.....	8
Question 3: Scope of draft Convention .....	10
Question 4: Bases for recognition and enforcement .....	12
Question 5: Grounds for refusing recognition or enforcement.....	14
Question 6: Preliminary questions, damages and costs of proceedings.....	17
Conclusion .....	18
Table 1: Bases for recognition and enforcement in Convention and <i>Foreign Judgments Act 1991</i> (Cth) .....	19
Table 2: Grounds for refusing recognition or enforcement in Convention and <i>Foreign Judgments Act 1991</i> (Cth).....	21

## Submission

The submission broadly supports accession to and implementation of the Convention, taking the text of it as given. This submission addresses:

1. General issues concerning accession to and implementation of the Convention; and
2. Questions 1-6 in the Judgments Project Consultation Paper.

We make no submission on the general question of the inclusion of intellectual property judgments in the Convention, and do not address Questions 7-10.

## General submissions: accession and implementation

### 1. General submission

Assuming that the Convention is adopted by a diplomatic session of the Hague Conference on Private International Law, we submit that Australia should accede to and implement that Convention.

The reasons for our support for the draft Convention are set out in the rest of this Submission.

### 2. Form of implementation

We submit that, if Australia were to implement the draft Convention –

- The legislative structure should be the simplest that is possible to incorporate both the provisions of the Convention and the bilateral agreements that are currently given effect in the *Foreign Judgments Act 1991* (Cth); and
- The enforcement of a judgment that is recognised under Article 5 or 6 of the draft Convention should take place by registration.

Australia currently has schemes for the recognition and enforcement of cross-border judgments under the *Service and Execution of Process Act 1992* (Cth), the *Trans-Tasman Proceedings Act 2010* (Cth) and the *Foreign Judgments Act 1991* (Cth) ('FJA') – as well as allowing enforcement at common law when foreign judgments are not captured by any of these statutes. In implementing the Convention, we submit that any additional and unnecessary complexity should be avoided. The *Service and Execution of Process Act* and the *Trans-Tasman Proceedings Act* set up a scheme of a different kind: **they are 'double conventions' that deal** with both adjudicative jurisdiction (ie, the power to judge) and enforcement jurisdiction (ie, the ability to enforce). So far as the jurisdiction of the court of origin is concerned, these two statutes give common rules and principles of adjudicative jurisdiction and the right of courts to render judgment is not challengeable at the point of enforcement in the requested State. These are schemes **of 'direct jurisdiction', and should** remain unaffected by the implementation of the Convention.

**In contrast, the FJA and the draft Convention are both schemes of 'indirect jurisdiction'** where, by the law of the requested State, the entitlement of the court of origin to render

judgment is challengeable in the requested State. It is for the Attorney-General's Department to determine the best legislative form for implementing the Convention. We are therefore indifferent to whether the Convention should be added to the FJA, or implemented through a new *International Civil Law Act* or some other legislative structure. However, we believe that it is best to minimise the number of statutes that deal with the enforcement of foreign judgments so as also to reduce the risk of confusion. It would be unfortunate if it were necessary to know which statute applies to which foreign country's judgments before consulting the relevant statute.<sup>1</sup> In whatever legislative form the Convention is to be implemented, we therefore submit that the terms of the Convention and of the FJA are included in the one statute. This would mean that differences in the jurisdictional bases for recognition and enforcement under the Convention and the existing provisions of the FJA must be made explicit.<sup>2</sup>

**To fulfil the Convention's aims of predictability and efficiency,** we submit that enforcement in Australia should take place by the standard registration procedure that is already used in the *Service and Execution of Process Act*, the *Trans-Tasman Proceedings Act* and the FJA. The draft Convention allows this [Article 14(1)], and can be made compatible with the production of documents that are required by Article 13. It is a procedure that eliminates the need for litigation to enforce a judgment that has already emerged from litigation, and the need again to establish adjudicative jurisdiction over the judgment debtor. Naturally, we would expect that *recognition* of a judgment in Australia did not require registration, and that as long as a judgment qualified for recognition under Article 5 or 6, it could be pleaded as a defence or counterclaim in legal proceedings without the need for separate registration.<sup>3</sup> The grounds on which enforcement *may* be refused in Article 7 would therefore have to be raised in separate proceedings to set aside registration.<sup>4</sup>

### 3. New Zealand

We submit that, if Australia were to accede to the draft Convention, it declare that the Convention does not apply to judgments made by New Zealand courts.

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<sup>1</sup> We have in mind the confusing position in the United Kingdom where, in addition to the residue of common law enforcement, at least four very different legislative instruments apply to civil and commercial judgments: the *Administration of Justice Act 1920* (UK), the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK), the *Civil Jurisdiction and Judgments Act 1982* (UK) and the *Brussels I Recast Regulation* (EU). A statute book like this should be avoided.

<sup>2</sup> The jurisdictional bases in the draft Convention are both general [Article 5(1)(a)-(h), (m)] and specific [Article 5(1)(i)-(l)], compared with the general split between *in personam* and *in rem* judgments in the FJA: See Table 1.

<sup>3</sup> See the comparable effect of recognition in the *Foreign Judgments Act 1991* (Cth) s 12(1).

<sup>4</sup> Cf *Foreign Judgments Act 1991* (Cth) s 7(1).

Together, the *Service and Execution of Process Act*, the *Jurisdiction of Courts (Cross-vesting) Acts* and the *Trans-Tasman Proceedings Act* create a scheme by which:

- (a) Initiating process of any federal state, territory or New Zealand court circulates freely (ie may be served) anywhere in the Tasman world (ie Australia and New Zealand);
- (b) The exercise of jurisdiction by any federal state, territory or New Zealand court is coordinated by either the transfer or stay of proceedings in favour of the appropriate court or the court exclusively chosen by the parties; and
- (c) The judgment of any federal state, territory or New Zealand court circulates freely anywhere in the Tasman world, except that a New Zealand judgment may be resisted in Australia on the ground of public policy and *vice versa*.

As a result of the treaty between Australia and New Zealand on civil jurisdiction and judgments – the *Christchurch Agreement*<sup>5</sup> – the effective inclusion of New Zealand in the intra-Australian scheme on civil jurisdiction and judgments is an acknowledgement of **'each Party's confidence in the judicial and regulatory institutions of the other Party'** and a **'shared commitment to effective resolution of trans-Tasman civil disputes and increased regulatory cooperation'**.<sup>6</sup> Implemented by the *Trans-Tasman Proceedings Act*, this arrangement ensures that New Zealand judgments circulate more freely in Australia than other foreign judgments. It is a much more efficient means of enforcing cross-border judgments than the scheme set out in the draft Convention, and we submit that it should not be compromised by implementation of the Convention.

Although the operation of the *Service and Execution of Process Act* and the cross-vesting scheme may remain unaffected by the Convention under Article 24(2), we submit that Australia should declare that, if New Zealand becomes party to the Convention, it considers the Convention inapplicable to the enforcement of New Zealand judgments in Australia. While Article 25 of the draft Convention would leave the *Christchurch Agreement* unaffected,<sup>7</sup> a declaration should still be sought to avoid any lingering doubts about the scheme it creates. The declaration could be phrased along the lines of section 5(10) of the FJA: **'This Convention does not apply to a judgment given by a court of New Zealand.'**

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<sup>5</sup> *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013) (**'Christchurch Agreement'**).

<sup>6</sup> *Christchurch Agreement*, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013) Preamble paras 4-5.

<sup>7</sup> See *Christchurch Agreement*, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013).

## Questions from the Consultation Paper

### Question 1: Problems, benefits and risks of recognition and enforcement

Key problem: satisfying the requirement for jurisdiction in the international sense

The kinds of dispute leading to enforcement proceedings in Australia typically involve cross-border litigation in the foreign court. The foreign court may have exercised long-arm jurisdiction over the defendant.<sup>8</sup>

The exercise of long-arm jurisdiction by an Australian court is a justifiable foundation for *res judicata*.<sup>9</sup> The same cannot be said for most foreign judgments.<sup>10</sup> Recognition and enforcement depends on the foreign court having exercised jurisdiction 'in an international sense', which requires the defendant's presence in the foreign court's territorial jurisdiction or submission to the foreign court.<sup>11</sup>

For example, in *Lucasfilm Limited v Ainsworth*, the English Court of Appeal considered enforcement of a United States ('US') judgment where the judgment debtor was not present in the US jurisdiction and had not submitted to the US court.<sup>12</sup> The judgment debtor was responsible for a website, which made IP-infringing products available for sale in the US. This did not satisfy the requirements for jurisdiction in the international sense. **The Court upheld the primary judge's refusal to enforce the US judgment.**<sup>13</sup>

Against that backdrop, the expanded grounds for jurisdiction in art 5(1) of the draft Convention are commendable.

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<sup>8</sup> Pursuant, perhaps, to rules analogous to pt 11 and sch 6 to the *Uniform Civil Procedure Rules 2005* (NSW).

<sup>9</sup> **It was recently observed that '[I]itigation between residents of different states is a routine incident of modern commercial life':** *Abela v Baadarani* [2013] 1 WLR 2043, 2062 [53] (Lord Sumption).

<sup>10</sup> Cf *Trans-Tasman Proceedings Act 2010* (Cth).

<sup>11</sup> *Contra Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218 (20 October 2010).

<sup>12</sup> [2010] Ch 503.

<sup>13</sup> See *Lucasfilm Limited v Ainsworth* [2010] Ch 503, 551–3 [187]–[195].

### Practical problem: finding information

One of the authors acted on a matter where the client was interested in whether an Australian judgment could be recognised or enforced in a certain foreign jurisdiction. This required consideration of the private international law applicable in that jurisdiction. Ideally, this kind of problem would be considered by a person with expertise in respect of that foreign jurisdiction; that was not possible here due to costs and time constraints. So **the author sought to get across 'foreign' private international law. The author did not have access to the legal research resources that are readily available in respect of Australian private international law. Had the foreign jurisdiction been party to something like the draft Convention, the author's task would have been much easier. It would have saved the Australian client time and money.**

### Benefits and risks

As the Public Consultation Paper recognises, for an Australian party to cross-border litigation who obtains the benefit of an Australian judgment, the recognition and enforcement of that judgment abroad will benefit that party by providing a pathway to obtaining meaningful relief.<sup>14</sup> The draft Convention provides a clearer pathway for Australian judgment creditors to access the assets of judgment debtors in the jurisdictions in which those assets are located.

The risk for an Australian party contesting the recognition or enforcement of a foreign judgment in Australia is that the foreign judgment is less favourable than an Australian judgment would have been had an Australian court determined the same dispute. This risk is of the essence in private international law. It is well established that though Australian law would have produced a different result to the law of the relevant foreign jurisdiction that is not in itself sufficient to establish that registration or enforcement would be contrary to public policy.<sup>15</sup> This risk may be tolerable on utilitarian grounds; the society of nations will work better if foreign judgments are enforceable in countries where the defendant or **the defendant's assets are located.**<sup>16</sup>

Another risk for Australian parties arises where a foreign judgment is recognised or enforced overseas, in a third jurisdiction. To illustrate, consider a judgment by a court of State X, in respect of an Australian judgment debtor; the judgment creditor then seeks to

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<sup>14</sup> Public Consultation Paper, 7 [1.3].

<sup>15</sup> *Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150 (14 August 2017) [5] (Martin CJ); *Loucks v Standard Oil Co of New York*, 120 NE 198, 201-2 [5] (Cardozo J) (NY, 1918).

<sup>16</sup> *Adams v Cape Industries plc* [1990] Ch 433, 552 (Slade LJ).

enforce the judgment in State Y. The courts of State Y may take an approach to the grounds for refusing recognition or enforcement which is distinguishable from the approach of Australian courts. The permissive language of Article 7 of the draft Convention ('*may be refused*')<sup>17</sup> means that this risk may materialise.

**For example, some courts may take a different view on the scope of the 'public policy' defence in Article 7(1)(c).** Australian courts are distinctly reluctant to entertain arguments on the basis of public policy,<sup>18</sup> but if they were to entertain a public policy argument it would be the public policy *of Australia*. Naturally, given that the ground refers to the public policy *of the requested State* it is quite possible that a judgment made in State X might be recognised and enforced in Australia, but the same judgment may be refused **recognition in State Y where the courts consider it to be manifestly incompatible with Y's public policy.**<sup>19</sup> That is the inevitable consequence of the assertion of individual national sovereignty that this ground permits.

## Question 2: Issues and inconsistencies with current foreign judgment regimes in Australia and abroad

Issue: differing approaches to jurisdiction

Even within common law countries, different regimes for recognition and enforcement of foreign judgments take different approaches to the requirement for the foreign court to have exercised jurisdiction in an international sense.

In Canada, for example, the Supreme Court held that '**it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.**'<sup>20</sup> This is consistent with Denning LJ's suggestion

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<sup>17</sup> See Public Consultation Paper, 19 [4.12].

<sup>18</sup> *Jenton v Overseas Investment Pty Ltd v Townsing* (2008) 21 VR 241, 246 [20] (Whelan J); *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV [No 3]* (2013) 300 ALR 741, 750 [44] (Edmonds J); *Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150 (14 August 2017) [17] (Martin CJ).

<sup>19</sup> Similarly, an Australian court might deny enforcement of a judgment with reference to the prohibition on misleading or deceptive conduct in s 18 of the *Australian Consumer Law ('ACL')*; however, the courts of State Y are less likely to afford the ACL extraterritorial effect. See generally *Valve Corporation v Australian Competition and Consumer Commission* [2018] HCASL 99 (19 April 2018); *Valve Corporation v Australian Competition and Consumer Commission* (2017) 351 ALR 584; *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647 (Edelman J); cf *Stern v National Australia Bank* [1999] FCA 1421 (15 October 1999).

<sup>20</sup> *Beals v Saldanha* [2003] 3 SCR 416, 438 [29] (Major J).

that reciprocity be the basis for jurisdiction in recognising and enforcing foreign judgments.<sup>21</sup>

Issue: differing approaches to the fixed sum rule and enforcement in equity

Canadian courts have taken a different approach to the so-called 'fixed sum rule'. In *Pro Swing Inc v Elta Golf Inc*,<sup>22</sup> the Canadian Supreme Court held that this traditional rule should be changed, observing:

For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.<sup>23</sup>

In Australia, some support can be found allowing:

- Certain non-money foreign judgments to be recognised *in equity*,<sup>24</sup> and
- Australian courts to exercise their inherent jurisdiction to freeze assets (via a *Mareva* order) to protect a prospective judgment of a foreign court.<sup>25</sup>

Given the uncertainty surrounding the enforcement of non-money judgments in equity,<sup>26</sup> the draft Convention is to be welcomed.

### **Issue: enforceability of 'global injunctions'**

There has been a recent uptake in litigation where plaintiffs seek injunctions to have content removed from the internet. Although these orders operate *in personam*, they are directed towards conduct occurring outside of the jurisdiction and often depend on action by persons located outside of the jurisdiction. For example, in *X v Twitter Inc*, the Supreme Court of New South Wales enjoined the American and Irish companies behind Twitter to

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<sup>21</sup> *Re Dulles' Settlement [No 2]* [1951] Ch 842, 851.

<sup>22</sup> [2006] 2 SCR 612.

<sup>23</sup> *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612, 633 [31] (Deschamps J).

<sup>24</sup> *White v Verkouille* [1990] 2 Qd R 191.

<sup>25</sup> See, eg, *BCBC Singapore Pte Ltd v PT Bayan Resources TBK [No 3]* [2013] WASC 239 (26 June 2013).

<sup>26</sup> See further R W White, 'Enforcement of Foreign Judgments in Equity' (1982) 9 *Sydney Law Review* 630; Kim Pham, 'Enforcement of Non-Monetary Foreign Judgments in Australia' (2008) 30 *Sydney Law Review* 663.

remove content from the platform to protect the plaintiff's confidential information.<sup>27</sup> That is, the global injunction was the remedy for a breach of confidence.

These kinds of injunctions are likely to be met with hostility in certain foreign jurisdictions, as recently demonstrated by the Google-Equustek litigation.<sup>28</sup> In *Google Inc v Equustek Solutions Inc*, the Supreme Court of Canada made an analogous global injunction to restrain breach of confidence, compelling Google to de-index websites from its search results.<sup>29</sup> Soon after, Google went forum shopping to California, where it sought a kind of *post hoc* anti-suit injunction. It brought a motion 'for preliminary injunctive relief' to prevent enforcement of the global injunction upheld by the Supreme Court of Canada. In November 2017, the United States District Court for the Northern District of California upheld Google's motion, holding that the Canadian order was likely inconsistent with US law.<sup>30</sup>

Even where intellectual property, privacy and defamation are not the subject matter of a 'global injunction', there is a risk that these orders will be treated with hostility in foreign jurisdictions, denying successful Australian plaintiffs meaningful relief.

### Question 3: Scope of draft Convention

We endorse the scope of the draft Convention, subject to –

- Our general submission that, for Australia, the Convention not apply to New Zealand judgments;
- The exclusion (at least for the time being) of privacy / unauthorised disclosure of information relating to private life in the proposed Article 2(1)(I) from the Convention; and
- Our making no submissions on the inclusion of intellectual property judgments.

Most exclusions from the draft Convention's scope are the same as or closely analogous to those exclusions in the FJA. The excluded matters falling within this category include:

- Matrimonial matters;<sup>31</sup>

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<sup>27</sup> [2017] NSWSC 1300 (28 September 2017).

<sup>28</sup> *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824.

<sup>29</sup> [2017] 1 SCR 824.

<sup>30</sup> *Google LLC v Equustek Solutions Inc* (ND Cal, No 5:17-cv-04207-EJD, 2 November 2017). See especially Michael Douglas, 'A Global Injunction against Google' (2018) 134 (Apr) *Law Quarterly Review* 181.

<sup>31</sup> See *Foreign Judgments Act 1991 (Cth) s 3(1) (definition of 'action in personam', para (a))*. Although note the apparent ability to register annulments or declarations of the validity of marriage

- Succession;<sup>32</sup>
- Bankruptcy and insolvency of natural persons;<sup>33</sup> and
- Company wind-ups.<sup>34</sup>

The general effort at incorporating judgments made in all civil and commercial matters is welcomed, and should be the natural priority of a broad-based multilateral Convention. The express exclusions of Articles 1(1), 2(1) and 2(3) are generally compatible with the general coverage of civil and commercial matters. It is, perhaps, possible to question the exclusion of defamation judgments in Article 2(1)(k). Although the influence of the *Brussels I Recast Regulation* (EU)<sup>35</sup> (and its predecessors) in the draft Convention is evident, the *Brussels I Recast* does not exclude defamation judgments.<sup>36</sup> However, we are conscious of the sensitivity of enforcing defamation judgments and the extraterritorial imposition of standards of expression; the use of defamation proceedings to silence political dissent or opposition in some countries, and the constitutional difficulties of enforcing non-American defamation judgments in the United States.<sup>37</sup> We are therefore prepared to endorse the exclusion. Similarly, although the *Brussels I Recast* includes judgments for the violation of privacy rights,<sup>38</sup> we consider that the parallel they have with defamation judgments justifies the exclusion of judgments concerning privacy / unauthorised disclosure of information relating to private life in the proposed Article 2(1)(l). It would be best to leave questions of the enforcement of judgments captured by Article 2(1)(k) and (l) to a subsequent Convention.

We consider that the exclusion of family law judgments is unexceptional, especially since they are already addressed under an extensive scheme of Hague Conventions.<sup>39</sup> It parallels exclusions under the FJA.<sup>40</sup> The exclusion of judgments relating to the status and legal capacity of natural persons is also conventional and made under the FJA.<sup>41</sup>

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made in New Zealand under the *Trans-Tasman Proceedings Act 2010* (Cth) ss 4, 67-8; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2015) 353.

<sup>32</sup> *Foreign Judgments Act 1991* (Cth) s 3(1) (definition of 'action in personam', para (b)).

<sup>33</sup> *Ibid* s 3(1) (definition of 'action in personam', para (c)).

<sup>34</sup> **Ibid** s 3(1) (definition of 'action in personam', para (d)).

<sup>35</sup> *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L351/1 ('Recast').

<sup>36</sup> Case C-68/93, *Shevill v Presse Alliance SA* [1995] ECR I-415.

<sup>37</sup> See, eg, *Securing the Protection of Our Enduring and Established Constitutional Heritage Act*, 28 USC §§ 4101-4105 (2010) (the 'SPEECH Act').

<sup>38</sup> Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Martinez v MGN Limited* [2011] ECR I-10302.

<sup>39</sup> Mortensen, Garnett and Keyes, above n 31, 353, 377-8, 393-4, 407-10. See also the *Convention on the Recovery Abroad of Maintenance* (the 'New York Maintenance Convention').

<sup>40</sup> *Foreign Judgments Act 1991* (Cth) s 3(1) (definition of 'action in personam', para (f)).

<sup>41</sup> **Ibid** s 3(1) (definition of 'action in personam', para (e)).

## Question 4: Bases for recognition and enforcement

We endorse the bases of recognition and enforcement in Article 5 of the Convention, and the exclusive bases in Article 6, subject to our making no submissions on the inclusion of the proposed Articles 5(3) and 6(a) relating to jurisdiction in intellectual property matters.

An underlying assumption of our submission is that, internationally, the rule of law is promoted when easing the circulation of judgments made by independent courts that exercise legitimate and proportionate jurisdictions, and where concurrent proceedings and incompatible judgments can be avoided. Further, we are conscious that one of the more common means of resisting enforcement of a foreign judgment in the requested State is **to challenge the court of origin's 'international jurisdiction'** - ie the competence that the law of the requested State recognises that a foreign court must have if its judgments are to be enforceable in the requested State. As the Hague Conference has not been able to negotiate a double convention (which deals with both adjudicative and enforcement jurisdiction), we recognise that the Convention must still include bases of international jurisdiction that are to be satisfied before a judgment is presumed to be enforceable in a requested State. However, we submit that the bases of international jurisdiction in the Convention represent a significant improvement on those currently applicable in Australia under the FJA or at common law, because –

- In making habitual residence or the principal place of business [Article 5(1)(a)-(b)] the basis of recognising international jurisdiction over natural persons, the Convention actually demands a *thicker* connection with the State of origin than the FJA or the common law demand.<sup>42</sup>
- In limiting international jurisdiction in claims against a corporate person to those **that have concerned 'the activities' of that corporate person in the State of origin [Article 5(1)(d)], the Convention does not recognise the more exorbitant 'doing business jurisdiction' that the FJA and the common law do** – ie, jurisdiction over any person that does business in the State of origin even if the subject matter of the claim does not arise there.<sup>43</sup>

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<sup>42</sup> 'Presence' in the State of origin at the time of service being sufficient at common law: see Mortensen, Garnett and Keyes, above n 31, 132; and 'residence' (not necessarily habitual) being sufficient under the *Foreign Judgments Act 1991* (Cth) s 7(3)(a)(iv). This itself may equate to 'presence': Mortensen, Garnett and Keyes, above n 31, 154.

<sup>43</sup> See generally Mortensen, Garnett and Keyes, above n 31, 132, 154; *Foreign Judgments Act 1991* (Cth) s 7(3)(a)(iv).

- The Convention recognises that, in defined cases, a connection that the subject matter of the claim has with the State of origin is itself sufficient for the recognition of international jurisdiction [Article 5(1)(g)-(k)], even in the absence of any personal connection between the defendant and the State of origin. In actions *in personam*, these are not sufficient under the FJA or at common law, despite acceptance since the nineteenth century that a State has a legitimate interest in exercising adjudicative jurisdiction where there is a connection between the subject matter of a claim and the State. These nevertheless avoid recognising the exorbitant jurisdictions that arise where a connection merely serves as a proxy for *the claimant's residence in the State of origin, such as the 'damage suffered wholly or in part' of the State head of jurisdiction that is often claimed as a basis of adjudicative jurisdiction in Australia.*<sup>44</sup>
- In a federation or composite nation, the international jurisdiction of a court of a **'territorial unit'** – such as a state in a federation – is only recognised if the habitual residence, principal place of business or connection is with the territorial unit itself, and not just with the nation as a whole (Article 24). The Convention therefore – in our view correctly – regards the kinds of jurisdiction now being promoted in Australia under the *Harmonised Rules* as exorbitant. Eg, the **NSW Supreme Court's assertion of adjudicative jurisdiction in matters relating to any tort that occurs anywhere in Australia as a whole**<sup>45</sup> would not give rise to an enforceable judgment under the Convention – unless the act or omission giving rise to the judgment occurred in NSW itself [Article 5(1)(j)].

The FJA is based on the legislative model established by the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK), which has been influential throughout the Commonwealth and serves as the basis of enforcement of Australian judgments in many other Commonwealth countries – including the United Kingdom, some Canadian provinces and Singapore. As Table 1 shows, the Convention positions international jurisdiction differently to the Commonwealth scheme, requiring thicker personal connections for international jurisdiction but allowing subject matter connections that the Commonwealth scheme does not. It follows that, if the Convention were to replace any of the bilateral reciprocal enforcement of judgments arrangements that Australia gives effect to under the FJA, some Australian judgments that are currently enforceable extraterritorially under the Commonwealth scheme would no longer be enforceable. However, a larger range of judgments that rest on the connection of the subject matter with Australia, or an Australian

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<sup>44</sup> See especially Mortensen, Garnett and Keyes, above n 31, 62-4.

<sup>45</sup> *Uniform Civil Procedure Rules 2005* (NSW) Sch 6 (a)(i). See generally Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

state or territory, would be. In general, we consider the enforcement jurisdiction that is available under the Convention to be more proportionate and adapted to contemporary litigation than those recognised under the Commonwealth scheme.

**In addition, the more that (outside Australia and New Zealand) Australian courts' extraterritorial enforcement jurisdiction were to rest on the Convention, the less incentive litigants would have to invoke the exorbitant adjudicative jurisdictions that have been growing in Australia since the 1970s. In our view, this would be a welcome development.**

As the Convention is structured to deal with jurisdiction indirectly, it can do little to discourage concurrent proceedings in different countries. It therefore can do little to prevent the rendering of potentially incompatible judgments by courts that, under Article 5, would be exercising recognised international jurisdictions. We nevertheless submit that incompatible judgments are dealt with effectively under Article 7 (see Question 5).

## Question 5: Grounds for refusing recognition or enforcement

We endorse the grounds in Article 7 on which recognition and enforcement may be refused, subject to our making no submissions on the inclusion of the proposed Article 7(1)(g) relating to intellectual property judgments.

As Table 2 shows, the seven grounds on which one country may refuse to recognise or enforce judgments of another contracting country are largely compatible with the current Australian framework set out in the FJA. We make only two brief observations about these grounds, and a more detailed comment about Article 7(1)(b):

- **The refusal to enforce a judgment on the ground 'public policy' [Article 7(1)(c)] is always problematic, given the vagaries of the term and its potential to become 'a very unruly horse'.<sup>46</sup> Although one of us (Mortensen) has consistently criticised the inclusion of public policy in the *Trans-Tasman Proceedings Act* as a reason for refusing enforcement of a New Zealand judgment,<sup>47</sup> we all agree that this is a sensible inclusion for the draft Convention. The potential States Parties to the Convention cannot be known in advance, and the possibility of Parties that have**

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<sup>46</sup> *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303 (Burrough J).

<sup>47</sup> **Reid Mortensen, 'A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market' (2011) 16 *Canterbury Law Review* 61; Reid Mortensen, 'Together Alone: Integrating the Tasman World' in Andrew Dickinson, Mary Keyes and Thomas John (eds), *Australian Private International Law in the 21<sup>st</sup> Century* (Hart Publishing, 2014) 113.**

fundamentally different understandings of the basic conceptions of justice cannot **be dismissed**. The draft Convention's public policy ground is also properly qualified by requiring recognition or enforcement of a judgment to be 'manifestly incompatible' with the public policy of the requested State, a threshold that is not found in either the FJA or the *Trans-Tasman Proceedings Act*.<sup>48</sup> The inclusions concerning procedural fairness and national security or sovereignty should also help to reduce the vagaries of the term. Finally, we take comfort in the Australian courts' marked unwillingness to accept arguments on the basis of public policy and hope that that precedent minimises its use in Australia in any attempt to resist enforcement under the Convention.<sup>49</sup>

- As mentioned in our submission on Question 4, as a Convention that addresses **the court of origin's jurisdiction only indirectly** (ie, at enforcement in the requested State), there is little that the Convention can offer to prevent incompatible judgments arising from different courts that nevertheless deliver judgments capable of recognition under Article 5. However, we submit that Articles 7(1)(e)-(f) and 7(2) address this issue as well as could be hoped. In this respect, the draft Convention is in marked contrast to the *Service and Execution of Process Act* and the *Trans-Tasman Proceedings Act* which, incomprehensibly, do not deal with incompatible judgments at all. First, as in the FJA,<sup>50</sup> the priority given to the judgment rendered first (and capable of recognition under the Convention) is an important disincentive to pursuing litigation in a different country simply because of a litigant's dissatisfaction with an outcome that has already been determined [Article 7(1)(f)]. It reinforces the principle of *res judicata* in the international setting. Secondly, the principle of *res judicata* is further reinforced by only allowing refusal to recognise or enforce a foreign judgment when pending local proceedings began *before* those that led to the foreign judgment. Again, this is a disincentive to commencing local proceedings merely because of dissatisfaction with the foreign judgment – yet, at the same time, it is an incentive to commence proceedings in another country and a rush to judgment before the Australian court could determine the claim.

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<sup>48</sup> *Foreign Judgments Act 1991* (Cth) s 7(2)(a)(xi); *Trans-Tasman Proceedings Act 2010* (Cth), s 72(1)(a).

<sup>49</sup> See generally Mortensen, Garnett and Keyes, above n 31, 142-3, 157-8.

<sup>50</sup> *Foreign Judgments Act 1991* (Cth) s 7(2)(b).

Issue: treatment of the fraud ground for refusing recognition and enforcement

The carve out for fraud in Article 7(1)(b) of the draft Convention warrants specific comment.

Even within Australian law, inconsistent views have been expressed on the kind of fraud which would justify a defence to recognition or enforcement at common law.

The controversy is whether extrinsic or intrinsic fraud will suffice for the purposes of a fraud defence.<sup>51</sup> **'Extrinsic' fraud denotes matters which arise out of evidence discovered after the foreign judgment was entered.**<sup>52</sup> **'Intrinsic' fraud denotes matters which were considered, or should have been considered, by the foreign court in making the foreign judgment.**

Historically, English courts would consider *intrinsic* fraud as a basis for resisting enforcement of a foreign judgment, effectively holding that a foreign judgment is not *res judicata* on the question of fraud.<sup>53</sup> That view has been followed by some Australian courts.<sup>54</sup>

In *Keele v Findley*,<sup>55</sup> Rogers CJ Comm D preferred the contrary view that only extrinsic fraud could found a defence. This position has received recent support in Australia.<sup>56</sup>

The carve out for fraud in Article 7(1)(b) of the draft Convention does not specify the kind of fraud which would justify refusal of recognition or enforcement. This ambiguity might well be desirable; it would allow Australian courts to adapt the scope of the fraud defence to provide justice in individual cases.

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<sup>51</sup> See Mortensen, Garnett and Keyes, above n 31, 139–42.

<sup>52</sup> See *Wentworth v Rogers [No 5]* (1986) 6 NSWLR 534, 539–9 (Kirby P).

<sup>53</sup> See *Doe v Howard* [2015] VSC 75 (6 March 2015) [123]. See, eg, *Vadala v Lawes* (1890) 25 QBD 310; *Re Foreign Judgments (Reciprocal Enforcement) Act 1933*; *Syal v Heyward* [1948] 2 KB 443.

<sup>54</sup> *Norman v Norman [No 2]* (1968) 12 FLR 39 (Fox J). See also *Yoon v Song* (2000) 158 FLR 295.

<sup>55</sup> (1990) 21 NSWLR 444.

<sup>56</sup> *Quarter Enterprises Pty Ltd v Allardyce Lumber Company Ltd* (2014) 85 NSWLR 404; *Doe v Howard* [2015] VSC 75; arguably, a recent unanimous decision of the High Court is consistent with this view: see *Clone Pty Ltd v Players Pty Ltd (in liq) (rec and mgr apptd)* [2018] HCA 1 (21 March 2018) [55] n 77.

## Question 6: Preliminary questions, damages and costs of proceedings

We endorse Articles 8 (dealing with judgments on preliminary questions), 10 (giving the enforcing court a discretion to refuse recognition and enforcement on the basis that the damages awarded do not compensate for actual harm suffered), and 15 (stating that security cannot be required against the judgment creditor on the sole basis of its connections to a foreign country).

Article 8 states that any ruling by a court on a preliminary matter which is outside the scope of the Convention shall not be recognised or enforced under the Convention. We support this exclusion which is consistent with the Australian statutory schemes.<sup>57</sup>

Relatedly, we endorse Article 9 which makes it clear that a severable part of a judgment may be recognised and enforced, where only a part of a judgment is sought to be recognised and enforced, or is capable of being recognised and enforced. This is consistent with the current Australian statutory schemes, which enable registration of judgments which have been partly satisfied.<sup>58</sup>

Article 10 gives the receiving court a discretion to refuse to recognise or enforce a judgment to the extent that it awards damages that do not compensate the award creditor for actual loss or harm suffered. This provision is no doubt intended to enable a court to refuse to recognise or enforce a United States judgment imposing treble damages under US laws. Article 10 enables the receiving court to refuse recognition of judgments that award exemplary or punitive damages. It will take time for a consensus to emerge internationally about the interpretation of this provision; even then, the provision does not oblige the receiving court to refuse recognition and enforcement, but merely gives the court the discretion to do so. In our view, this is appropriate and is consistent with the current Australian common law, according to which such judgments may be refused recognition if the judgment enforces a foreign penal law.<sup>59</sup> We particularly consider that this provision is appropriate given that the Convention will be a single, rather than a double, Convention.

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<sup>57</sup> *Foreign Judgments Act 1991* (Cth) s 7(2)(a)(i).

<sup>58</sup> *Foreign Judgments Act 1991* (Cth) s 6(12), *Trans-Tasman Proceedings Act 2010* (Cth) s 70. See also *Trans-Tasman Proceedings Act 2010* (Cth) s 71(1) (in relation to registration of judgments which are only partly within the scope of the Act).

<sup>59</sup> See generally Mortensen, Garnett and Keyes, above n 31, 226-228. See, eg, *Schnabel v Lui* [2002] NSWSC 15 (1 February 2002); *Surgibit IP Holdings Pty Ltd v Ellis [No 2]* [2017] NSWSC 1379 (11 October 2017).

Article 15 provides that a party who applies for enforcement under the Convention cannot be required to give security, a bond, or a deposit solely on the ground that they are a foreign national, or not domiciled or resident in the State in which enforcement of the judgment is sought. This non-discrimination provision is in our view entirely appropriate and is consistent with the current Australian law. It is of course consistent with this provision that the enforcing party may be required to give security as long as their lack of connection to the enforcing state is not the only reason for requiring the security.

## Conclusion

We would welcome an opportunity to expand upon this written submission.

Table 1: Bases for recognition and enforcement in Convention and *Foreign Judgments Act 1991* (Cth)

Draft Convention	<i>Foreign Judgments Act 1991</i> (Cth)
<i>Person against whom recognition or enforcement is sought:</i>	<i>Judgment debtor – person against whom recognition or enforcement is sought</i>
<ul style="list-style-type: none"> <li>Habitual residence: Art 5(1)(a)</li> </ul>	<ul style="list-style-type: none"> <li>Residence: s 7(3)(a)(iv)</li> </ul>
<ul style="list-style-type: none"> <li><b>Natural person’s</b> principal place of business: Art 5(1)(b)</li> </ul>	<ul style="list-style-type: none"> <li><b>Corporation’s</b> principal place of business: s 7(3)(a)(iv)</li> </ul>
<ul style="list-style-type: none"> <li>Maintained branch, agency, or other establishment; claim arose out of its activities: Art 5(1)(d)</li> </ul>	<ul style="list-style-type: none"> <li><b>Corporation’s</b> principal place of business: s 7(3)(a)(iv)</li> </ul>
<ul style="list-style-type: none"> <li>Brought the claim, other than a counterclaim: Art 5(1)(c)</li> </ul>	<ul style="list-style-type: none"> <li>Brought the claim (<i>or</i> counter-claimed in): s 7(3)(a)(iv)</li> </ul>
<i>Defendant:</i>	<i>Defendant:</i>
<ul style="list-style-type: none"> <li>Maintained branch, agency, or other establishment; claim arose out of its activities: Art 5(1)(d)</li> </ul>	<ul style="list-style-type: none"> <li>Transaction effected through or at an office or place of business in country of court: s 7(3)(a)(v)</li> </ul>
<ul style="list-style-type: none"> <li><b>Voluntary submission to court’s</b> jurisdiction: Art 5(1)(e)-(f)</li> </ul>	<ul style="list-style-type: none"> <li>Voluntary submission to <b>court’s</b> jurisdiction: s 7(3)(a)(i)<sup>60</sup></li> </ul>
<i>Judgment ruled on:</i>	<i>Judgment ruled on:</i>
<ul style="list-style-type: none"> <li>Contractual obligation, performance of which occurred in State (per <b>parties’ agreement or as applicable law</b>): Art 5(1)(g)</li> </ul>	<ul style="list-style-type: none"> <li>Contractual obligation, eg choice of forum clause: s 7(3)(a)(iii)</li> </ul>
<ul style="list-style-type: none"> <li>Rights <i>in rem</i> in immovable property situated in state of origin: Art 6(b) (exclusive bases for recognition and enforcement)</li> </ul>	<ul style="list-style-type: none"> <li>Immovable property or action <i>in rem</i> where subject matter is movable property located in country of court: s 7(3)(b)</li> </ul>
<ul style="list-style-type: none"> <li>[Registration or validity of intellectual property right granted or registered or deemed to have been granted or registered in state of origin: Art 5(3)(a)-(c); Art 6(a)]</li> </ul>	
<ul style="list-style-type: none"> <li>Tenancy of immovable property located in state of origin: Art 5(1)(h); Art 6(c) (tenancy longer than six months)</li> </ul>	<ul style="list-style-type: none"> <li>Immovable property or action <i>in rem</i> where subject matter is movable property located in country of court: s 7(3)(b)</li> </ul>
<ul style="list-style-type: none"> <li>Contractual obligation secured by right <i>in rem</i> in immovable property: Art 5(1)(i)</li> </ul>	

<sup>60</sup> See *Foreign Judgments Act 1991* (Cth) s 7(5) for what does not constitute voluntary submission.

<ul style="list-style-type: none"> <li>• Non-contractual obligation (death, physical injury, damage or loss of tangible property); act or omission occurring in state of origin: Art 5(1)(g)</li> </ul>	<ul style="list-style-type: none"> <li>• Unclassified proceeding, provided international jurisdiction otherwise established: s 7(3)(c)</li> </ul>
<ul style="list-style-type: none"> <li>• Disputes internal to trust: Art 5(1)(k)</li> </ul>	<ul style="list-style-type: none"> <li>• Unclassified proceeding, provided international jurisdiction otherwise established: s 7(3)(c)</li> </ul>
<ul style="list-style-type: none"> <li>• Counterclaim: Art 5(1)(l)</li> </ul>	<ul style="list-style-type: none"> <li>• Counterclaim: s 7(3)(a)(iv)</li> </ul>
<ul style="list-style-type: none"> <li>• Non-exclusive jurisdiction clauses: Art 5(1)(m)</li> </ul>	

Table 2: Grounds for refusing recognition or enforcement in Convention and *Foreign Judgments Act 1991* (Cth)

Draft Convention	<i>Foreign Judgments Act 1991</i> (Cth)
<ul style="list-style-type: none"> <li>Denial of procedural fairness (ie, notice): Art 7(1)(a)</li> </ul>	<ul style="list-style-type: none"> <li>Denial of procedural fairness (ie, notice): s 7(2)(a)(v)</li> </ul>
<ul style="list-style-type: none"> <li>Judgment obtained by fraud: Art 7(1)(b)</li> </ul>	<ul style="list-style-type: none"> <li>Judgment obtained by fraud: s 7(2)(a)(vi)</li> </ul>
<ul style="list-style-type: none"> <li>Manifest incompatibility with public policy: Art 7(1)(c)</li> </ul>	<ul style="list-style-type: none"> <li>Contrary to public policy: s 7(2)(a)(xi)</li> </ul>
<ul style="list-style-type: none"> <li>Proceedings contrary to choice of court agreement or designation in trust instrument: Art 7(1)(d)</li> </ul>	<ul style="list-style-type: none"> <li>Absence of jurisdiction: s 7(2)(a)(iv)</li> </ul>
<ul style="list-style-type: none"> <li>Inconsistent judgments in requested State: Art 7(1)(e)</li> </ul>	<ul style="list-style-type: none"> <li>Incompatible judgments: s 7(2)(b)</li> </ul>
<ul style="list-style-type: none"> <li>Inconsistent judgments in another State: Art 7(1)(f)</li> </ul>	
<ul style="list-style-type: none"> <li>[Rules of infringement of intellectual property right, applying law other than internal law of state of origin: Art 7(1)(g)]</li> </ul>	<ul style="list-style-type: none"> <li>Immovable proceedings situated outside country of original court: s 7(4)(a)</li> </ul>