

Australia

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1. What are the basic criteria for the courts of your jurisdiction to allow enforcement of a foreign judgment?

Foreign judgments can be enforced in Australia through treaties and reciprocal enforcement arrangements agreed with certain other states or at common law.

Treaties

Australia is not a signatory to any multilateral treaties for the reciprocal recognition of foreign judgments.

Australia is party to the 1994 Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Treaty with the United Kingdom which provides for the mutual recognition of civil and commercial judgments involving the payment of money, except judgments concerning taxes or other charges, or orders requiring the payment of maintenance.

Australia is also party to the Trans-Tasman Agreement of 2010 with New Zealand providing for the mutual recognition of a range of civil judgments. Amongst the judgments which are excluded from this agreement are those concerned with probate and the administration of estates, guardianship and the welfare of a child.

Reciprocal enforcement of foreign judgments

Certain foreign judgments can be recognized and enforced through the *Foreign Judgments Act 1991* (Cth) (**FJA**) and the *Foreign Judgments Regulations 1992* (Cth) (**FJR**).

To be enforced under this legislation, the country in which the judgment was issued must be prescribed in the FJR. There must also be substantial reciprocity of treatment in relation to the enforcement of judgments between Australia and the superior courts and specified inferior courts (s 5 of the FJA).

The currently prescribed jurisdictions are: Alberta, Bahamas, British Columbia, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, Korea, Malawi, Manitoba, Montserrat, Papua New Guinea, Poland, St. Helena, St. Kitts and Nevis, St. Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, United Kingdom and Western Samoa.

The process requires a qualifying foreign judgment to be registered with the Australian courts. Once registered, it can be enforced in the same way as an Australian judgment.

‘Judgment’ is defined by s 3 of the FJA to include:

- a final or interlocutory judgment or order made by a court in civil proceedings;
- a judgment or order for compensation or damages to an injured party made by a court in criminal proceedings; or
- an award in an arbitration which has become enforceable in a court of that country in the same manner as a judgment.

Section 6 of the FJA also requires that the foreign judgment:

- be for payment of a sum of money;
- be final and conclusive;
- be enforceable in the foreign court in which it was made; and
- has not yet been discharged or wholly satisfied.

A judgment can still be considered ‘final and conclusive’ if it is subject to an appeal. However, the Australian court may stay enforcement of the judgment if it is satisfied that the judgment debtor has appealed or intends to expeditiously appeal the judgment.

Non-monetary judgments are not currently covered by the legislative scheme and must be enforced at common law.

The FJA also does not apply to amounts payable in respect of taxes, fines or other penalties except for judgments from New Zealand or Papua New Guinea tax matters.

When applying for registration, an authenticated copy of the judgment and, if the judgment is not in English, a certified translation of it, are required to be provided under the FJA.

There is no requirement to inform the judgment debtor of the application to register the judgment. Once a foreign judgment has been registered, the judgment creditor must serve a notice of registration on the judgment debtor and inform them of their right to apply to set aside the registration.

The judgment debtor can then apply to the court to set aside the registration if there are grounds upon which the registration can be challenged. The grounds are limited and could include the judgment not meeting the requirements of the FJA or that it is in some

way contrary to public policy. Australian courts have held that 'an application to set aside registration of a foreign judgment is not an occasion for a court to review the merits of the foreign decision by reference to the law of the relevant jurisdiction': *Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150.

Common law

Where a foreign judgment cannot be enforced pursuant to treaty or the FJA, foreign judgment creditors must rely on common law principles for recognition and enforcement.

If a judgment is for a fixed or readily calculable sum of money, at common law it is capable of recognition and enforcement. Certain non-monetary judgments may be enforceable in equity.

The judgment creditor obtains recognition of the judgment in Australia by suing the judgment debtor upon the cause of action created by the foreign judgment. Assuming those proceedings are successful, the creditor obtains a judgment of the Australian court which mirrors the foreign one and can be enforced in all of the usual ways.

To succeed in the proceedings, the judgment creditor needs to demonstrate that:

1. The foreign court exercised a jurisdiction over the judgment debtor recognized by Australian courts.
2. The judgment is final and conclusive.
3. The parties to the enforcement proceedings are the same as those in the foreign judgment.
4. The judgment is for a fixed monetary amount (subject to certain exceptions).

Defenses are available to a defendant against whom a foreign judgment has been enforced; for example, if the judgment was obtained by fraud, or the foreign court acted in a way that was contrary to natural justice.

2. What other considerations may apply to enforcement of a foreign judgment against a state in your jurisdiction, e.g. notice provisions?

Sections 23 and 24 of the *Foreign States Immunities Act 1985* (Cth) (**FSIA**), prescribe that service of the originating process must be effected in two ways:

- by agreement; or
- by delivery to the Commonwealth Attorney-General for transmission via the Department of Foreign Affairs and Trade to the equivalent diplomatic channel of the foreign state.

	<p>Section 25 of the FSIA provides that all other service otherwise than as allowed under ss 23 or 24 of the FSIA is ineffective.</p> <p>Section 27 of the FSIA states that a judgment in default of appearance cannot be obtained against a foreign state unless it has been served in accordance with ss 23 and 24 and the court is satisfied that it does not have sovereign immunity.</p> <p>However, this does not apply to proceedings seeking to register a foreign judgment against a foreign state under the FJA. This is because the ex parte application for registration does not lead to a judgment in default against the foreign state as the state has the opportunity to challenge the basis of registration (<i>Firebird Global Master Fund II Ltd v Republic of Nauru</i> (2015) 258 CLR 31).</p> <p>Pursuant to s 28 of the FSIA, an order for the registration of a foreign judgment, or the recognition or enforcement of a foreign award is not generally capable of being enforced against a foreign state until 2 months after the date on which service of the following has been effected:</p> <ul style="list-style-type: none"> • a copy of the sealed/certified judgment/order, or • where English is not the official language of the foreign state – a certified translation of the judgment/order into an official language of the foreign state. <p>However, a party can apply for the court to exercise its discretion and enforce the judgment or order before the 2 month period has expired (s 28(6) of the FSIA).</p>
<p>3.</p>	<p>What special considerations apply where the defendant/debtor in enforcement proceedings is a state, e.g. doctrine of sovereign immunity?</p>
	<p>Under s 9 of the FSIA, a foreign state is generally immune from the jurisdiction of the courts of Australia in a proceeding.</p> <p>The head of a foreign state or their spouse also have the same immunity as the head of a diplomatic mission under the <i>Diplomatic Privileges and Immunities Act 1967</i> (Cth) pursuant to s 36(1) of the FSIA.</p> <p>The effect is that the head of a foreign state will enjoy criminal and civil immunity in respect of acts done in their private capacity, including immunity from measures of execution, in all cases other than an action relating to private immovable property (unless held on behalf of a foreign state), an action relating to succession where the head of state is the executor, administrator, heir or legatee, or an action relating to any professional or commercial activity in Australia undertaken in a private capacity.</p> <p>'Separate entities' are in principle also entitled to immunity under the FSIA. Section 3 defines a separate entity as a natural person (other than an Australian) or a foreign body corporate that is an agency or instrumentality which is not a department or organ of the executive government of the foreign state. Separate entities cannot claim immunity in respect of intergovernmental commercial and arbitration agreements and disputes concerning membership of foreign corporations of which governments are the only shareholders.</p>

	<p>At common law, members of a foreign state's armed forces temporarily stationed with the Australian government's consent are exempt from the jurisdiction of Australian courts to the extent necessary to maintain an efficient force available to serve that state. This exemption does not extend to debts contracted by a member of the force with a local civilian or to any civil wrongs that a member may have committed.</p> <p>A foreign state is not immune in a proceeding where it has submitted to the jurisdiction, whether by agreement or otherwise (s 10 of the FSIA).</p> <p>Foreign states will also not be granted immunity in cases involving, <i>inter alia</i>:</p> <ul style="list-style-type: none"> • commercial transactions; • contracts of employment, including where a state may be held vicariously liable for acts of its employees; • personal injury and possession, and • use of property (ss 11 to 14 FSIA). <p>The High Court of Australia has held that where the Australian proceedings are solely for the registration against the foreign state of a judgment obtained overseas, the court should have regard to the underlying foreign proceedings to determine whether the proceedings involve a commercial transaction: <i>Firebird Global Master Fund II Ltd v Republic of Nauru</i> (2015) 258 CLR 31.</p> <p>The defense of foreign state immunity is commonly invoked through s 40 of the FSIA. This permits an application to the Minister of Foreign Affairs and Trade for a certificate that a specific country, territory, or person was, at the relevant date, a foreign state, or part of a foreign state. The certificate, once issued, is conclusive (<i>Duff Development Co Ltd v Government of Kelantan</i> [1924] AC 797). In circumstances where a certificate is not granted, or where the certificate is ambiguous, the court must determine the existence of a disputed sovereignty on the evidence available to it like any other disputed question of fact (<i>Anglo-Czechoslovak & Prague Credit Bank v Janssen</i> [1943] VLR 185).</p>
<p>4.</p>	<p>What exceptions may apply where the claim results from improper actions of the defendant state, e.g. wars of aggression?</p>
	<p>There are no express exceptions for improper actions of a foreign state such as wars of aggression or torture. Foreign state immunity can deprive an individual of their ability to seek recompense for harm done to them by a foreign state, by curtailing the means by which they can pursue a foreign state for violation of their human rights. It has been held, with reference to torture, that foreign state immunity extends to members of the foreign government through whom the relevant foreign state acts (<i>Zhang v Zemin</i> [2008] NSWSC 1296 at [23]).</p>
<p>5.</p>	<p>What due process standards and exceptions may apply in proceedings for enforcement of judgment against a state?</p>
	<p>Australia does not have specific due process standards or exceptions that apply to foreign states. A party is prima facie entitled to enforce a judgment of a foreign court, if the judgment is final and conclusive and delivered by a court of competent jurisdiction.</p>

a.	<i>What standard will the court apply in the enforcement proceedings when assessing whether the service requirements have been met in the original proceedings against a state?</i>
	<p>In proceedings brought under the FJA, service of the original proceedings will be reviewed. The same standard will apply when the judgment debtor is a foreign state.</p> <p>The FJA, at s 7(2)(a)(v) provides that where a judgment debtor applies to have the registration of the judgment set aside, the court must do so if it is satisfied that the judgment debtor did not (whether or not the process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear.</p>
b.	<i>What exceptions may apply where conventional forms of service against a state are impossible, e.g. due to absence of diplomatic relations?</i>
	There are no exceptions.
c.	<i>What standard will the court apply in the enforcement proceedings when assessing whether the right to representation requirements have been met in the original proceedings against a state?</i>
	There is no specific standard as to a right to representation.
d.	<i>What exceptions may apply where the defendant state cannot find legal representation, or chooses not to be represented?</i>
	There are no specific exceptions.
6.	What assets may be subject of enforcement if the claim is against a state and what are the requirements, e.g. enforcement against assets of state-owned entities?
	<p>The FSIA provides guidance for the enforcement of judgments against the property of a foreign state.</p> <p>Section 30 of the FSIA provides that, subject to specific exceptions, the property of a foreign state is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award.</p> <p>Section 30 does not apply to commercial or immovable property. Under s 32(3)(a) of the FSIA, commercial property is defined as:</p> <ul style="list-style-type: none"> • property other than diplomatic property or military property that is in use by the foreign state substantially for commercial purposes, and • property that appears vacant or not in use is taken as being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

Determining the character of commercial property can be complex. In *Firebird Global Master Fund II Ltd v Republic of Nauru* (ibid.), the High Court of Australia prevented enforcement against a state's bank accounts in Australia because the bank accounts were used for governmental, non-commercial purposes.

However, the property of a separate entity, other than a central bank or monetary authority, is not immune from execution unless the separate entity would, but for its submission to the litigation, have been entitled to immunity. This means that a state trading corporation sued in respect of a commercial transaction is liable to execution in respect of all its assets whether used for commercial purposes or not.

Immunity from execution can also be waived by the foreign state. The fact that the state may have submitted to the jurisdiction of the court in relation to the dispute itself does not constitute a waiver of immunity from execution.