Recognition and Enforcement of Foreign Family Law Decisions in Australian Courts

by Ian Kennedy AM and Amanda Humphreys

Divorce


Section 104 of the Family Law Act 1975 provides for the statutory recognition of overseas decrees for dissolution, annulment or legal separation in circumstances where requirements as to residence or nationality are met (with various detailed qualifications as to periods of residence) including where:

- The respondent was ordinarily resident in the overseas jurisdiction; or
- The applicant (or one of the joint applicants) was ordinarily resident in the overseas jurisdiction for not less than 1 year before the proceedings were commenced; or the last place of cohabitation of the parties was that jurisdiction; or
- Either or both parties were domiciled in or nationals of the overseas jurisdiction.

To the extent that the Family Law Act does not encapsulate the common law rules of private international law regarding the recognition of overseas decrees, s104(5) specifically preserves those principles in addition to the statutory basis for recognition.

The common law rules of private international law rely upon a test of “real and substantial connection” as the basis for recognising foreign decrees.¹ Preservation of the common law

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¹ The Family Court of Australia in Nicholson v Nicholson (1971) 17 FLR 47 and Dornom and Dornom (1984) FLC 91-556 has followed the English decision of Indyka v Indyka (1969) 1 AC 33, in which Lord Wilberforce set out the criteria applying to the common law test of “real and substantial connection” as the basis for recognition of overseas decrees.
means that foreign decrees may be recognised by an Australian court even if the statutory requirements as to residence are not met.\(^2\)

Section 104 also preserves the principles of common law *refusing* the recognition of overseas decrees in circumstances where a decree would not be recognised pursuant to those common law principles where one party had been denied natural justice (eg; denied the opportunity to be heard) or where recognition of the decree would be manifestly contrary to public policy (*ordre publique*)\(^3\).

Where a decree is recognised pursuant to s104, a party can remarry under Australian law regardless of whether the decree is recognised under the law of another jurisdiction\(^4\).

The definition of “matrimonial cause” in s4(1)(ca)(iii) of the *Family Law Act* conferring jurisdiction for proceedings relating to the property of parties to a marriage includes where a divorce, annulment or legal separation has been effected in accordance with the law of an overseas jurisdiction if that decree is recognised as valid in Australia under s104.

The common law principle of reciprocity provides a further possible basis for the recognition of foreign decrees in Australia. The principle, as set out by the English Court of Appeal in *Travers v Holly*\(^5\), was discussed with approval by the Family Court of Australia in *Barriga and Barriga (No 2)*\(^6\) however that case was distinguished on its facts. If accepted in Australia, the principle would require the recognition of foreign decrees made in the country of which an applicant was a national, even if the statutory residency requirements and common law test of “real and substantial connection” were not met.

**Division of property**

Australia is not party to any international agreement or convention governing the recognition and enforcement of orders in relation to the adjustment of property interests between spouses.

As proceedings for the adjustment of property interests are *in personam*, and not *in rem*\(^7\) and having regard to the terms of the provisions of the *Family Law Act*, an Australian court can make an order in respect of property wherever it may be located, whether in Australia or overseas. Accordingly, orders made in respect of overseas property are made by ordering a

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\(^2\) For example, *Dornom* (supra) where the applicant had been living in an overseas jurisdiction for a lengthy period but insufficient to meet the requirements of s104(3).

\(^3\) Section 104(4)

\(^4\) Section 104(9)

\(^5\) (1953) P 246

\(^6\) (1987), unreported

\(^7\) *In the marriage of Wallmann* [1982] FLC 92-204 at 77,076; and *In the Marriage of Wilkinson* [2005] FLC 93-22
party to deal with that property in a particular way, that is, orders *in personam*\(^8\). Likewise, orders for enforcement – including in relation to overseas property – are made *in personam*.

Judgements made in specified jurisdictions may be registered and enforced in Australia under the *Foreign Judgements Act 1991*.

A registered judgement has the same force and effect as if it were made by the Australian court.

“Judgements” include final or interlocutory orders made in civil proceedings and enforceable arbitral awards.

However the Act specifically provides that (unless the contrary intention appears) it does not apply to actions *in personam* including matrimonial causes or proceedings in connection with matrimonial matters.

Its provisions are accordingly, at best, of very limited value in enforcing overseas property orders in Australia.

However property orders made in a court of competent jurisdiction (and subject to the *ordre publique*) will be recognised and given appropriate weight – or even, for all practical purposes, replicated in the orders of the Australian court if that is considered just and equitable under the principles governing property division under the Australian legislation – but would not be enforceable in their own right.

Similarly an overseas agreement which did not meet the legislative requirements for a binding financial agreement under Australian law would not be enforceable (nor would it exclude the jurisdiction of the Australian courts in relation to its subject matter) but would be given appropriate weight in arriving at a just and equitable division of assets and resources in property proceedings.

In circumstances of non-compliance with orders made by an overseas court relating to property or funds in Australia, a party may need to issue subsequent proceedings in Australia to give effect to or enforce the overseas orders. Such an application does not preclude the applicant from objecting to the appropriateness of Australia as a forum for the adjudication of matters that have already been concluded or remain pending overseas\(^9\) - and the enforcement may be frustrated by the doctrine of *res judicata*.

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\(^8\) *In the marriage of Caddy and Miller* [1986] FLC 91-720 at 75,231

\(^9\) *Kemeny* from para 12.4.9
Maintenance - child and spousal support

Australia is party to a number of international agreements and conventions in relation to the recognition and enforcement of maintenance obligations, including:

- **Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance.**

  This agreement provides for the collection of child support under administrative assessments made in each country and for the collection and enforcement of spousal maintenance obligations. The contracting State where the payee is habitually resident will issue and administer the assessment, and the contracting State where the payer resides will be responsible for collection.


  Australia became a contracting State on 1 February 2002. The other signatories to the Hague Convention are mainly European countries with which Australia previously had no reciprocal arrangement (and prior to the Hague Convention had to rely on applications to these countries being sent under UNCRAM).

  The Convention applies to both spousal and child support obligations, and establishes reciprocal agreements between contracting States to recognise and enforce maintenance decisions made by judicial or administrative authorities in Convention countries.

  Provided that the laws of the other State permit, the Convention provides for the recognition of administrative assessments (rather than just court orders or court registered agreements) and provides for relatively simple and speedy enforcement of existing liabilities by overseas courts and administrative authorities – and of overseas orders and assessments in Australia.

- **The Agreement between the Government of Australia and the Government of the United States of America for the Enforcement of Maintenance (Support) Obligations.**

  This Agreement came into force on 12 December 2002. It replaced earlier non-treaty arrangements between Australia and certain individual States of the USA.

  The agreement:

  - Deals with the enforcement of court orders and administrative assessments;
- Provides for a liability to be created in and varied in the country in which the payee is resident (except where the payer has had no or little connection with Australia, in which case the individual State of the USA where the liable parent resides would claim personal jurisdiction where a new liability is sent to it, and the payee in Australia would have to petition the USA requesting a liability to established in the USA). Where a US liability is registered in Australia and the payee still lives in the State where the liability was initiated, that State will claim continuing jurisdiction over the liability. Therefore the USA cannot recognise an Australian court variation to the liability, in spite of this being available to the liable parent in Australia and recognised in Australia;

- Obliges each country to assist in locating payers, serving notices and providing advice; and

- Provides for the protection of privacy and for information sharing.

For Australia, the agreement applies throughout Australia, Norfolk Island and the territories of Christmas and Cocos (Keeling) Islands. For the USA, the agreement applies in the fifty states, American Samoa, the District of Columbia, Guam, Puerto Rico, The US Virgin Islands and any other jurisdiction of the United States participating in Title IV-D of the Social Security Act.

- **The United Nations Convention on the Recovery Abroad of Maintenance (UNCRAM).**

The provisions of the Convention, which have force through provisions of the *Family Law Act*\(^\text{10}\) and *Family Law Regulations*\(^\text{11}\), provide for a payee in one UNCRAM country to apply to another, in which a payer resides, seeking to establish a maintenance liability.

The current Convention countries in addition to Australia are:-

- Algeria
- Argentinas
- Austria
- Barbados
- Belarus
- Belgium
- Bosnia & Herzegovina
- Brazil
- Burkina Faso
- Cape Verde
- Central African Republic
- Chile
- Federal Republic of Yugoslavia (Serbia and Montenegro)
- Finland
- Former Yugoslav Republic of Macedonia
- France
- Germany
- Greece
- Guatemala
- Haiti
- Holy See
- Morocco
- Netherlands
- Niger
- Norway
- Pakistan
- Philippines
- Poland
- Portugal
- Republic of Ireland
- Romania
- Slovak Republic
- Slovenia

\(^{10}\) Section 111

\(^{11}\) Regulations 40-56
Some countries (but not Australia) will register an existing liability under this Convention where their domestic law allows it. Generally, Australia will only rely upon UNCRAM where other reciprocal arrangements implemented under the Child Support Scheme are not effective.

A fuller explanation as to the way in which each of these agreements operate in Australia, together with the full text of the Agreements and Conventions themselves, can be found in the Australian Child Support Agency's most helpful on-line resource "the Guide", at Chapter 1.5.2.12

Prior to July 2000, it was necessary for overseas maintenance orders and agreements to be registered with an Australian court for enforcement. However, since 2000, Australia has had in place arrangements that provide for most overseas child support and spousal maintenance cases to be registered and administered by the Australian Child Support Agency (CSA) rather than through the courts.

These arrangements apply where a child lives with a parent in Australia; or where a child lives with a parent in a reciprocating jurisdiction and the payer parent is resident in Australia. The general principle behind the arrangements is that maintenance liabilities should be made and administered in the country in which the payee lives, and that the country in which the payer resides should be responsible for collection of support.

By way of summary, under these arrangements, the Australian Child Support Agency, as the central authority in Australia for most overseas child support and spousal maintenance matters, can:

- Make and continue an assessment of child support for an eligible child where a payee parent resides in Australia and the payer resides in a reciprocating jurisdiction;
- Accept an application for assessment from a payee or payer overseas, transmitted through the overseas central authority;
- Accept an application for assessment from an overseas central authority applying on behalf of a payee in a reciprocating jurisdiction or directly from such a payee;

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- Register and enforce an overseas maintenance assessment, overseas maintenance agreement, overseas agency reimbursement liability or overseas maintenance agreement;

- Register and enforce arrears that have accumulated under an overseas maintenance liability;

- Transmit an application for review or variation of a liability made overseas; and

- Assist overseas authorities with location and service requests for parents in Australia.

Reciprocating jurisdictions are listed in Schedule 2 of the *Child Support (Registration and Collection) Regulations 1988* and comprise:

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Brunei Darussalam, Niue, Papua New Guinea, the Cook Islands, Israel and Samoa are excluded jurisdictions for the purpose of CSA making a child support assessment where the payee resides in Australia but the payer resides in that jurisdiction. For Canada, so too is the Yukon (and Montréal does not appear at all). A court order under the *Family Law Act* is still required for those excluded jurisdictions which, pursuant to their domestic laws, cannot recognise administrative assessments and can only proceed on the basis of a formal order. In that situation, a payee may seek an order under UNCRAM.

Upon registration of an overseas maintenance liability, the liability becomes a debt payable to the Commonwealth of Australia and will be collected and enforced by CSA on behalf of the payee.

CSA has a discretion to refuse to register an overseas maintenance liability if satisfied it is inconsistent with the international maintenance arrangement upon which the applicant relies.  

### Ending of overseas maintenance liabilities

A registered overseas maintenance liability will cease to have effect in Australia if:

- CSA registers a subsequent overseas maintenance liability;  
- CSA accepts an application for a child support assessment;  
- Both parties cease to be residents of Australia; or either party ceases to be a resident of either Australia or a reciprocating jurisdiction.

In each case, any arrears remain payable and enforceable in Australia.

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13 Section 25(2B) *Child Support (Registration & Collection) Act*
14 Section 30AA(1) *Child Support (Registration & Collection) Act*
15 Section 152(2), *Child Support (Assessment) Act*
16 Section 4(1), *Child Support (Registration & Collection) Act*
Whilst these provisions avoid dual liabilities in Australia, there may remain a second liability (or even multiple liabilities) enforceable in the jurisdiction in which the overseas liability arose.

**Variation of overseas maintenance liabilities**

CSA cannot vary an overseas maintenance liability administratively.

A party in Australia may apply to an Australian court to vary an overseas maintenance liability in certain circumstances. Those circumstances include:

- Overseas maintenance orders registered with the Family Court of Australia prior to 1 July 2000;
- A maintenance order made by, or a maintenance agreement registered by, a judicial authority of a reciprocating jurisdiction, registered with CSA after 1 July 2000; or
- An overseas maintenance entry liability (non-periodic support).

An application may be made to an Australian court with respect to those liabilities pursuant to the *Family Law Regulations* to discharge, suspend, revive or vary such a liability – and can be made by the payer or the payee. The law to be applied to the determination of such an application is the law in force in Australia under the *Family Law Act*.

Any order made in Australia with respect to an overseas maintenance liability is provisional with respect to particular identified reciprocating jurisdictions, requiring confirmation by the foreign court where the liability originated to have effect. However, in other reciprocating jurisdictions (including, for example, the United States of America) such an order is final and does not require confirmation.

It is important to note that the jurisdiction which made the original order may not recognise the Australian variation, in which case arrears would continue to accrue overseas. In such cases, it may be necessary to seek a variation in that jurisdiction rather than in Australia.

Parents in Australia may also apply for a variation in the overseas jurisdiction in which the liability arose (for example, to avoid the situation just described). In this case a parent may request the CSA to transmit a claim for variation to a reciprocating jurisdiction.\(^\text{17}\) If an overseas maintenance liability arises under an overseas maintenance assessment rather than a court order or registered agreement, a party would need to apply to the relevant overseas authority to vary the liability.

\(^{17}\) Regulation 18, *Child Support Regulations*
Whilst collection and enforcement of overseas maintenance liabilities is now generally undertaken administratively by CSA in Australia, there is one exception. Where an overseas maintenance liability provides for the payment of non-periodic support (an overseas maintenance entry liability), a payee can apply for the liability to be registered with CSA, in which case it will form a debt due to the payee rather than the Commonwealth. Alternatively, a payee can elect to recover such a liability through an Australian Court, either by making an application personally or requesting the Attorney-General’s Department to do so on their behalf.

Outside of the Child Support Scheme administered by CSA and the family law courts, it may also be possible to seek enforcement of an overseas maintenance order made in a non-reciprocating jurisdiction, in a civil court pursuant to common law principles of enforcement of foreign judgments. However, the ability to seek a variation of most maintenance orders limits this avenue of enforcement, which is restricted to final and conclusive orders for a fixed debt made by a foreign court exercising jurisdiction which Australian courts will recognise.

**Superannuation interests (pension entitlements)**

The splitting of superannuation (pension) interests (prior to payment phase) in Australia cannot be achieved other than by way of a court order or superannuation agreement made in Australia pursuant to the Family Law Act. The trustee of an Australian superannuation fund can only, pursuant to the Superannuation Industry (Supervision) Regulations 1994, implement the splitting of superannuation interests in this manner.

However, once superannuation interests are realised and become property in the hands of a party as superannuation payments (whether as a lump sum or as periodic payments) they can be the subject of orders akin to other forms of property, directed at the recipient in personam rather than to the trustee of the superannuation fund.

**Children**

Australia may register overseas child orders received from a prescribed overseas jurisdiction if the child or a parent is in Australia.

Once registered, such an order has effect as if it were an order of the Australian court and is enforceable throughout Australia – but may be varied by an Australian court, if the child’s

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18 Section 25A, Child Support (Registration and Collection) Act
19 Regulation 30, Family Law Regulations
20 CCH ¶55-680 "Enforcement in Australia of overseas maintenance orders from jurisdictions that are neither reciprocating jurisdictions nor jurisdictions with restricted reciprocity"
21 s70G, Family Law Act
22 s70H, Family Law Act
welfare requires that to be done, or the circumstances of the child have changed to such a degree that a fresh order should be made\textsuperscript{23}.

Orders may be registered administratively\textsuperscript{24} (through the responsible central government department) or privately\textsuperscript{25}.

An “overseas child order”\textsuperscript{26} is an order made by a court of a prescribed overseas jurisdiction determining:

- With whom a child is to live (or who is to have custody of the child); and/or
- The time a child is to spend with any person or persons (and the contact a person is to have with the child).

The categories of prescribed overseas jurisdictions\textsuperscript{27} are restricted and comprise:

- Austria
- New Zealand
- Papua New Guinea
- Switzerland
- The following parts of the United States of America:
  - Alabama
  - Alaska
  - Arizona
  - Arkansas
  - California
  - Colorado
  - Connecticut
  - Delaware
  - District of Colombia
  - Florida
  - Georgia
  - Hawaii
  - Idaho
  - Illinois
  - Indiana
  - Iowa
  - Kansas
  - Kentucky
  - Louisiana
  - Maine
  - Maryland
  - Massachusetts
  - Michigan
  - Minnesota
  - Mississippi
  - Montana
  - Nebraska
  - Nevada
  - New Hampshire
  - New Jersey
  - New York
  - North Carolina
  - North Dakota
  - Ohio
  - Oklahoma
  - Oregon
  - Pennsylvania
  - Rhode Island
  - South Carolina
  - Tennessee
  - Texas
  - Utah
  - Vermont
  - Virginia
  - Washington
  - West Virginia
  - Wisconsin
  - Wyoming

The registration process is particularly important for many US custody/visitation orders where the child has moved to Australia. However the Australian court may still receive evidence of (and, if appropriate, act in accordance with) a custody or access order from non-prescribed jurisdictions if that would be in the best interests of the child\textsuperscript{28}.

\textsuperscript{23} s70J(2), Family Law Act
\textsuperscript{24} reg 23(1), Family Law Regulations
\textsuperscript{25} reg 26(6), Family Law Regulations
\textsuperscript{26} s4(1), Family Law Act
\textsuperscript{27} Schedule 1A, Family Law Rules
\textsuperscript{28} reg 23(8), Family Law Regulations

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Australia is also a signatory to the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children* signed at the Hague on 19 October 1956 under which it may – either on its own motion or at the request of another Convention country – take measures directed to the protection of a child in various circumstances (including where there are connecting factors relating both to the parents and the child) and subject to various limitations 29.

However subject to these limited exceptions, overseas children orders will not normally be enforced in Australia in their own right, and the Australian courts will deal with issues concerning parental responsibility and the care, welfare and development of the children in accordance with the Australian statutory provisions.

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29 division 4, of Part XIII AA, *Family Law Act*