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Beyond Gutnick: Enforcement of foreign defamation judgments in Australia

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1 Introduction

Late in 2002, the High Court of Australia handed down its decision in *Dow Jones & Company Inc v Gutnick*,[1] which confirmed that, under Australian law, a cause of action in defamation arises wherever defamatory material is comprehended. Thus, media organisations may be sued under the laws of each place in which their publications are read.[2]

Dow Jones and the interveners in the *Gutnick* case had argued that this position would create an unacceptable situation for internet publishers, who would potentially have to consider, as the majority of the Court put it,[3] "every country from Afghanistan to Zimbabwe" to assess the legal risk arising from a single potentially

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defamatory publication.[4]

One of the important factors relied upon by the majority of the court in deciding that this rule would be unlikely to cause excessive uncertainty or legal costs for publishers was that:

> "The value that a judgment would have may be much affected by whether it can be enforced in a place in which the defendant has assets."[5]

That is, an internet publisher is only likely to be sued in a jurisdiction in which the publisher has assets or a jurisdiction the judgments of which can be enforced where the publisher has assets.

This proposition was not considered in detail by the Court, but it is clear that the majority had US publishers in mind (such as Dow Jones). US cases, discussed below, were cited.

This article considers Australian rules relating to the enforcement of foreign judgments and compares them to the US cases referred to by the High Court in the *Gutnick* case. It concludes that it is likely to be much easier to enforce foreign defamation judgments in Australia than in the US and that this may provide a disincentive for some internet publishers to invest in assets in Australia. It would be reasonable to suggest that this could potentially place Australia at a competitive disadvantage in attracting foreign investment in the media sector.

2 Australian law relating to enforcement of foreign judgments

Australia has a scheme for registration and enforcement of the judgments of foreign courts in jurisdictions which similarly enforce Australian laws. Judgments within this scheme include judgments of superior courts of the UK, New Zealand, Canada, Japan, Korea, Israel, Italy, Germany, Gibraltar and others.

Some important jurisdictions, such as the US, fall outside this scheme. Common law rules are applied by Australian courts to consider whether to enforce judgments of courts in such jurisdictions.

The statutory scheme and the common law rules each allow Australian courts to refuse to enforce judgments on public policy grounds. There is little judicial guidance as to when judgments will be refused on this ground. What little authority is available suggests that the scope of this public policy exception to enforcement is very narrow.

2.1 Foreign Judgments Act 1991

The *Foreign Judgments Act 1991* (Cth) (the "Act") was introduced as a uniform federal scheme replacing similar legislation already in operation in the various States and Territories. The Act provides for the enforcement of foreign judgments by "registration".

Judgments that may be registered under the Act are judgments of superior courts in the countries listed in the schedule to the regulations,[6] and a more limited number of inferior courts, also listed in the regulations[7]. The criteria for inclusion in the regulations is that the Governor-General must be satisfied that in the event that the benefits afforded by the Act are extended to the judgments of a foreign court, "substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts"[8].

Registration must occur within six years of the judgment or judgment on appeal.[9]

A judgment debtor may apply to the court to have the registration of a foreign judgment set aside on a number of specific grounds, for example, where the judgment has been fully satisfied, reversed on appeal, or where the original court lacked jurisdiction.[10] None of these would allow a court to refuse registration of a defamation judgment on the basis that it was based upon defamation laws less favourable to the publisher than those in Australia.

In addition to these specific grounds, the courts are given a discretion to set aside registration where enforcement of the judgment would be contrary to public policy.[11]

There has been little judicial consideration of this section of the legislation and, as such, there is little guidance as to what factors might be taken into account in considering whether enforcement of a particular foreign judgment is contrary to public policy.

The cases which have been decided suggest that quite extreme circumstances are required for a court to refuse to enforce a judgment on public policy grounds. The public policy clause in the Act was considered by the Queensland Supreme Court in *de Santis v Russo*[12], in the context of the registration of a child support order from the Court of Appeal in Rome. Atkinson J acknowledged that while recognised aspects of Italian family law were significantly different to Australian law, this was not, of itself, contrary to public policy. Following Tamberlin J in *Stern v National Australia Bank*[13] (discussed below), Atkinson J considered that the public policy interests would have to be of a high order before the court would consider setting aside a duly registered judgment on public policy grounds, remarking "courts are slow to invoke such a policy"[14]. Atkinson J found that nothing in the Italian judgment so offended the principles of justice as to warrant having the registration set aside.

On appeal[15], the Court of Appeal agreed because, in the absence of evidence, it felt that:

> "it would be wrong for this Court to make policy strictures on the legal system of another country without having an informed understanding of the philosophy or rationale that underlies the legal rules in question and how they compare with our own."[16]

Although *de Santis v Russo* offers some commentary on the application of public policy it offers little guidance on what factors the courts of other jurisdictions would consider in setting aside a registered defamation judgment on public policy grounds. It appears, however, that the defamation

laws of the place in which the judgment was obtained would need to be substantially more restrictive than those in Australia for an Australian court to consider refusing to enforce the judgment on public policy grounds.

2.2 Common law

Courts may recognise and enforce judgments *in personam* of competent foreign courts to which the Act does not apply in accordance with the common law rules of private international law. This would generally require that the judgment be a final and conclusive judgment of a court of a recognised State with jurisdiction over the person against whom the judgment is to be enforced.[17] As with the statutory scheme, foreign judgments may be set aside on a number of grounds, for example, fraud[18] or public policy[19]. Again, the public policy ground seems the most likely to be argued in relation to a defamation judgement given under different defamation laws.

The common law rules remain important notwithstanding the Act for the simple reason that the Act applies only to those jurisdictions listed in the schedule to the *Foreign Judgments Regulations*[20]. Whilst the regulations list some 36 jurisdictions, as already discussed, there are notable exceptions, such as the US.

It is also helpful to look to the foreign judgment cases at common law for guidance on how courts may consider public policy factors in setting aside foreign judgments under the Act. In *Stern v National Australia Bank*[21], it was claimed that the National Australia Bank ("the NAB") had engaged in conduct outside Australia that would have amounted to misleading and deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth). As a result of this conduct, it was claimed, the NAB obtained a judgment against the "victims" of the alleged misleading conduct in a Californian court. As such, the public policy consideration in enforcing the Californian judgment was whether it was contrary to public policy to permit the judgment to be enforced when the "victims" were unable to pursue the misleading and deceptive conduct allegations as a defence in the Californian court.

Tamberlin J's judgment set out the relevant passages from the leading texts, including *Dicey and Morris on The Conflict of Laws* - noting that the authors of that text observe that "there are very few reported cases in which foreign judgments *in personam* have been denied enforcement or recognition for reasons of public policy."[22] The relevant passage included from Professor Nygh's text, *Conflict of Laws in Australia*[23], says

> "a foreign judgment may be contrary to public policy because it is founded on a law which is not acceptable to the public policy of the forum, such as the judgment for the wages of a prostitute... A foreign judgment may also be contrary to public policy because it was obtained in a manner obnoxious to the law of the forum such as duress, or undue influence."[24]

Tamberlin J also referred to some of the UK authorities, a jurisdiction which has more extensive jurisprudence on the topic. Tamberlin J cited *Soleimany v Soleimany*[25], a UK Court of Appeal case where the court refused to enforce an arbitrator's award that would have resulted in carpets being illegally smuggled out of Iran. The Court refused to enforce the award on the ground that it would be contrary to public policy.

On analysis of these primary and secondary sources, Tamberlin J concluded:

> "The thread running through the authorities is that the extent to which the enforcement of the foreign judgement is contrary to public policy must be of high order to establish a defence. A number of cases involve questions of moral and ethical policy; fairness of procedure, and illegality, *of a fundamental nature.*"[26]

As such, Tamberlin J found that the enforcement of the Californian judgment was not against fundamental Australian public policy.

Stern v National Australia Bank, as the most comprehensive Australian judicial examination of public policy as a defence to enforcement of foreign judgments, suggests that the public policy considerations would need to be quite grave before an Australian court would refuse to enforce an otherwise valid foreign judgment. It is conceivable that an even stricter approach will be taken under the Act in view of the fact that the Act is designed to facilitate enforcement of foreign judgments.

It is likely that an Australian Court would refuse on a public policy basis to enforce defamation judgments which result from corrupt or oppressive regimes, for example, a judgment obtained by a corrupt dictator under laws which unfairly suppress political speech. It is much less likely that an Australian court would decline to enforce a judgment solely on the basis that it arose from a system with slightly fewer or narrower defences than those available in Australia.

3 Enforcement of foreign judgments in the US

On the basis of the authorities above, it is clear that mere differences in judicial approach to a particular legal issue across jurisdictions would not normally be enough to cause an Australian court to set aside an otherwise valid judgment of a competent foreign court on public policy grounds. It would be reasonable to expect that in the context of a foreign defamation judgment, Australian courts would apply this strict approach.

Courts in the US, however, have exhibited a greater willingness to refuse to enforce foreign defamation judgments because of inter-jurisdictional differences in the law. The First Amendment protection of free speech has, on occasion, resulted in US courts refusing to enforce foreign judgments on the basis that they may "chill" free speech. Even where the First Amendment has not been relied upon, US courts have found foreign defamation laws are "repugnant" to relevant State laws.

The three cases cited by the High Court in *Gutnick* provide sound examples. The first, *Yahoo! Inc v La Ligue Contre Le Racisme Et L'Antisemeitisme*[27], related to a French finding that advertisements for Nazi related objects on the Yahoo! internet auction site breached the French Criminal Code, which prohibits exhibition of Nazi propaganda and artefacts for sale. The French court entered an order requiring Yahoo! to eliminate French citizens' access to advertisements for those objects and to take other related steps. Yahoo! appealed to the United States District Court in California, which declared that the First Amendment precludes enforcement within the US of a French order intended to regulate the content of US generated speech over the internet.

In the second case, *Matusevitch v Telnikoff*[28], a US court declined to enforce a British defamation judgment because it found that to do so would be inconsistent with the defendant's constitutional (First Amendment) rights.

In the third case, *Bachchan v India Abroad Publications Inc*[29], an Indian national sued for defamation in an article written by a London reporter and published by a New York news service exclusively to India. The New York Supreme Court refused to enforce the British defamation judgment on the basis of the "significant difference" between the defamation laws of the two jurisdictions. The court held:

> "[t]he protection to free speech and press... would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed antithetical to the protections afforded the press by the US Constitution."[30]

This demonstrates that US courts are prepared to refuse to enforce judgments even where the primary market for the defamatory material is outside the US.

The Australian legal and constitutional tradition, of course, recognises only a very limited constitutional protection to speech, restricted to an implied freedom of political communication.[31] Whether this freedom could be used to set aside a judgment of an otherwise competent foreign court on public policy grounds remains to be seen.

If this is correct, then Australian courts are more likely than their US counterparts to enforce foreign defamation judgments.

Australian courts will also have this tendency by virtue of the fact that Australian defamation laws are less 'defendant friendly' than those of the US. Conservative defamation laws of a jurisdiction such as the UK, the judgments of which have not been enforced in the US, are very similar to Australian laws and would almost certainly be enforced in Australia on that basis.

4 Does it really make any difference?

News and gossip related publications most commonly give rise to defamation claims. It is rare for other types of publication, such as fiction, to do so.

The content for such publications is expensive to prepare. Preparation of news requires people to identify newsworthy topics, investigate them and prepare and edit news items. Pictures or footage must be obtained either by licensing them or by employing cameramen. And legal advice must ordinarily be obtained to ensure that the content is not in contempt of court and is unlikely to expose the publisher to liability under defamation, copyright and other relevant laws. It therefore makes sense that traditional media organisations (such as newspaper publishers, magazine publishers and television broadcasters) appear to be the publishers of most high quality, informative internet sites with local news and gossip content. Internet publishers which can only profit from content through internet advertising sales or subscriptions are unlikely to have the resources to create or purchase the rights to use content of comparable quality. If they did have such resources, then it would make sense for them to use them in media other than the internet (for example, by starting a magazine or newspaper).

In view of this fact, it could be asked whether divergent approaches to enforcement of defamation judgments would make any difference. It is unlikely that any major Australian publisher will move its operations off shore to avoid potential liability for internet content. It employs people in Australia who need to remain in Australia to quickly obtain and publish local news.

Consider, however, a publisher with its head office in the US. If such a publisher wishes to include Australian content in a publication, then it might consider buying content from another publisher or investing in an Australian office with local employees. The latter option is likely to require investment in assets in Australia. In contrast to its US assets, the Australian assets could be the subject of an Australian court order enforcing not only Australian defamation judgments, but also those of similarly conservative jurisdictions such as Canada and the UK. That vulnerability could well tip the balance in circumstances where the scales are otherwise evenly balanced between the two options.

5 Conclusion

Australian courts are yet to consider the circumstances (if any) in which they will decline to enforce foreign defamation judgments on a public policy basis. It seems likely, however, that they will be much more willing than their US counterparts to enforce foreign defamation judgments.

It is clear that the reluctance of US courts to enforce foreign defamation judgments provides real protection to publishers whose assets are in the US. So long as they do not intend to have assets in other countries more willing to enforce foreign defamation laws and are prepared to ignore a foreign judgment, the risk of not taking foreign defamation laws into account is slight.

Australian courts would need to depart significantly from the approach taken in enforcement cases to date to similarly refuse to enforce the laws of jurisdictions such as the UK on a public policy basis. It is therefore doubtful whether enforcement will limit significantly the laws which Australian publishers must taken into

account.

Such a divergence in approach may well become a factor considered by media content providers and their advisers when deciding how to structure their enterprises globally. An internet publisher with assets in Australia must take into account a larger number of potentially applicable laws than a US publisher when assessing risk and is more likely to have foreign judgements enforced against it.

Like the US' more defendant friendly defamation laws and its single publication rule, this divergence is likely to reinforce the position of the US as the jurisdiction of choice for internet publishers.

1 [2002] HCA 56.
2 *Dow Jones & Company Inc v Gutnick* supra at paragraph 44 (Gleeson CJ, McHugh, Gummow and Hayne JJ).
3 *Dow Jones Company Inc v Gutnick*, supra, at paragraph 54 per Gleeson CJ, McHugh, Gummow and Hayne JJ.
4 Other laws, such as contempt, could also have to be considered in relation to each jurisdiction in which material is read.
5 *Dow Jones Company Inc v Gutnick*, supra, at paragraph 53 per Gleeson CJ, McHugh, Gummow and Hayne JJ.
6 *Foreign Judgments Act 1991* (Cth), s 5(1).
7 *Foreign Judgments Act 1991* (Cth), s 5(2).
8 *Foreign Judgments Act 1991* (Cth), s 5(1).
9 *Foreign Judgments Act 1991* (Cth), s 6(1).
10 See *Foreign Judgments Act 1991* (Cth), ss 7(2)(a)(i)-(x).
11 *Foreign Judgments Act 1991* (Cth), s 7(2)(a)(xi).
12 [2000] QCS 065.
13 [1999] FCA 1421.
14 *de Santis vRusso* [2000] QSC 065 at [19] (Atkinson J).
15 *de Santis v Russo* [2002] 2 Qd R 230.
16 Ibid, at [7] (Mc Pherson, Thomas JJA and Cullinane J).
17 For full discussion of enforcement of foreign judgments at common law, see P E Nygh and Martin Davies, *Conflict of Laws In Australia* (7th ed, 2002), Chapter 9.
18 *Keele v Findley* (1990) 21 NSWLR 445.
19 *Re Macartney; Macfarlane v Macartney* [1921] 1 Ch 522.
20 *Foreign Judgments Regulations 1992* (Cth).
21 Note 13 above.
22 Dicey & Morris, *Conflict of Laws*, Volume 1, 13th edition, Sweet & Maxwell Limited, London, 2000 at page 525.
23 Note 17 above
24 *Stern v National Australia Bank* [1999] FCA 1421 at [138] – [139] (Tamberlin J).
25 [1999] QB 785.
26 Ibid, at [143] (Tamberlin J).
27 145 F Supp 2d.
28 877F Supp 1, 4 (DDC 1995).
29 154 Misc. 2d 228 (N.Y. Sup. Ct 1992).
30 585 N.Y.S. 2d 661 (Supp 1992) at 665.
31 See, for example, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.