

Enforcement of Non-Monetary Foreign Judgments in Australia

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Abstract

Under Australian conflict of law rules, courts can enforce foreign judgments for a sum of money, but not judgments that order a party to do or not to do an action. The article argues that the rule against enforcement of non-monetary judgments is no longer relevant in the modern world. It begins by setting out the Australian law on enforcement of foreign judgments and identifying the policies underlying enforcement. It then uses the Canadian Supreme Court decision *Pro Swing v Elta Golf*, overturning the bar against enforcement of non-monetary judgments, to argue that the policies underlying enforcement of foreign judgments support the enforcement of non-monetary judgments, particularly in light of modern technological developments. Finally, it looks at some practical issues that may arise in enforcing non-monetary foreign judgments.

1. Introduction

The world has changed since [conflict of law] rules were developed in 19th century England.... The business community operates in a world economy and... [a]ccommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.¹

Enforcement of foreign judgments is ‘the application of the [local] court’s powers to give effect to the [foreign court’s] decision’ without the plaintiff having to relitigate the merits of the dispute.² The rules on enforcement of foreign judgments developed over 200 years ago to deal with the problem of the ‘absconding debtor’.³ If a judgment debtor fled the jurisdiction in which a judgment had been delivered, a judgment creditor could take the judgment to the jurisdiction to which the debtor had fled and attempt to have it satisfied there. Courts treated foreign judgments as evidence of a debt and allowed the judgment creditor to bring

* BA LLB (Hons) (ANU). The author would like to thank Professor Kent Anderson and Professor Jim Davis, Australian National University College of Law, for their encouragement and helpful comments on earlier drafts.

1 *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1098 (La Forest J) (*‘Morguard’*).

2 British Columbia Law Institute (*‘BCLI’*), *Report on the Enforcement of Non-Money Judgments from Outside the Province*, Report No 8 (1999) at 6.

3 Reid Mortensen, ‘Judgments Extension Under CER’ [1999] *New Zealand Law Review* 237 at 239.

proceedings to recover the debt. As a result, the enforcement of foreign judgments was limited to those for a sum of money, barring the enforcement of non-monetary judgments such as specific performance, injunctions or the restitution of property.⁴

Much has changed since the 19th century. Today, the enforcement of foreign judgments is an area of significant practical importance.⁵ As globalisation has progressed and the ease with which people and property move across traditional state borders has increased, there has been a corresponding rise in transnational litigation.⁶ Thus, 'dispute resolution does not end with the obtaining of a paper judgment'⁷ — a plaintiff may have to enforce the judgment in another jurisdiction to obtain an effective remedy. The enforcement of foreign judgments is particularly important for business, with an Australian Law Reform Commission ('ALRC') report identifying it as an area of significant risk.⁸ The Hague Convention on Private International Law has attempted to harmonise disparate national laws on enforcement of foreign judgments, but so far with little success.⁹

Also of significant practical importance is access to non-monetary remedies. Courts have developed new non-monetary remedies such as Mareva orders.¹⁰ In cases where harm is difficult to quantify, non-monetary remedies are essential for a plaintiff to obtain an effective remedy. For example, in a case of breach of intellectual property rights, damages may be subsidiary to an injunction prohibiting further infringements.¹¹

Despite these developments, the rule prohibiting the enforcement of foreign non-monetary judgments has remained unchanged since the 19th century. Against this background, it is time to reassess the traditional rule against enforcement of non-monetary judgments. Indeed, the traditional bar has recently been overturned in Canada: in November 2006, the Canadian Supreme Court in *Pro Swing Inc v Elta Golf Inc* ('*Pro Swing*')¹² unanimously held that Canadian courts could enforce foreign non-monetary judgments in certain circumstances.

4 There may also be jurisdictional problems in enforcing equitable orders such as specific performance at common law: see Reid Mortensen, *Private International Law in Australia* (2006) at 137. This issue lies outside the scope of this article.

5 Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205 at 205.

6 Campbell McLachlan, 'International Litigation and the Reworking of the Conflict of Laws' (2004) 120 *Law Quarterly Review* 580 at 580–582.

7 H L Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 *International and Comparative Law Quarterly* 443 at 457.

8 Australian Law Reform Commission ('ALRC'), *Legal Risk in International Transactions*, Report No 80 (1996) at 97. See also Chief Justice James Jacob Spigelman, 'Transaction Costs and International Litigation', *Speech presented at 16th Inter-Pacific Bar Association Conference* (Sydney, 2 May 2006).

9 For a discussion of its latest convention, see Garnett, above n5.

10 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213. See generally Peter Biscoe, *Mareva and Anton Piller Orders: Freezing and Search Orders* (2005).

11 Other areas of law in which a non-monetary remedy may be vital include electronic commerce and trans-boundary environmental harm: see Richard Oppong, 'Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond' (2006) 39 *University of British Columbia Law Review* 257 at 276.

12 *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612 ('*Pro Swing*').

Using *Pro Swing* as a starting point, this article argues that Australian courts should lift the restriction on the enforcement of non-monetary judgments so as to further the policies underlying enforcement of foreign judgments. Part Two sets out the general requirements for enforcing foreign judgments and the state of the rule prohibiting enforcement of foreign non-monetary judgments in Australia. Part Three extracts the policy reasons underlying the enforcement of foreign judgments in Australia. Part Four uses the decision in *Pro Swing* to argue that these policies are better given effect by the enforcement of non-monetary judgments, particularly in light of modern technology, and that this approach is consistent with other Australian developments. Finally, Part Five proposes restrictions on the enforcement of foreign non-monetary judgments based on practical concerns. The article concludes that enforcing non-monetary judgments would be an important step in modernising conflict of law rules.

2. *Enforcement of Foreign Judgments in Australia*

A. *General Requirements for Enforcement*

There are two ways in which a plaintiff can enforce a foreign judgment: common law or statute (*Foreign Judgments Act 1991* (Cth) ('FJA')). If the foreign judgment falls under the statute, it must be enforced under the statute;¹³ otherwise, it can only be enforced at common law. A plaintiff seeking to enforce a judgment at common law must show that the Australian court has jurisdiction over the enforcement claim.¹⁴ The main advantage of the *FJA* is that the same is not necessary.¹⁵

At common law and statute, there are four 'well established'¹⁶ requirements that a plaintiff must meet for a court to enforce a foreign judgment.¹⁷ First, the court giving the order must have had jurisdiction over the defendant. The test for jurisdiction in this context is 'international jurisdiction': it is not sufficient for the foreign court to have had jurisdiction over the defendant under its own rules — it must have had jurisdiction by the defendant's presence or submission to the jurisdiction. Second, the judgment must be final and conclusive — that is, determinative of the rights and obligations of the parties. Third, there must be identity of parties — the parties to the judgment must be the same as the parties to the enforcement proceedings. Finally, the judgment must be 'for a debt or a definite sum of money'.¹⁸

13 *Foreign Judgments Act 1991* (Cth) ('FJA') s 10.

14 Mortensen, *Private International Law in Australia*, above n4 at 129. In New South Wales and Tasmania, the mere fact that the proceedings concern the enforcement of a foreign judgment in that state allows the court to exercise jurisdiction over the defendant.

15 *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565.

16 *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 552.

17 See generally, Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 1 at 574–87; Mortensen, *Private International Law in Australia*, above n4 at 129–137; Peter Nygh & Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) at 169–180; Michael Tilbury, Gary Davis & Brian Opeskin, *Conflict of Laws in Australia* (2002) at 195–224.

18 Collins, above n17 at 574 citing *Sadler v Robins* (1808) 1 Camp 253; *Sadler v Robins* (1808) 170 ER 948.

Even if a judgment does not meet the requirements for enforcement, it may still be *recognised* by a domestic court. A foreign judgment can enliven the doctrine of *res judicata* to resist a claim in the same or a related matter, or to show that a judgment has already been satisfied.¹⁹ A foreign judgment can also form the basis of an issue estoppel argument to prevent the other party from raising a defence that was, or could have been, raised in earlier foreign proceedings.²⁰

B. The Rule against Enforcement of Non-Monetary Judgments

The rule that a judgment must be for a debt is 'clear and simple'.²¹ Perhaps for this very reason, it is difficult to find cases where courts have actually refused to enforce non-monetary orders such as injunctions or specific performance. The only Australian case cited in texts is *Jackman v Broadbent*,²² in which the South Australian Supreme Court confirmed that an order for specific performance was enforceable under the *Service and Execution of Process Act 1901* (Cth) only to the extent that it was a judgment for 'costs'.

R W White suggests, however, that courts have the power to enforce non-monetary foreign judgments when acting in *equitable* jurisdiction.²³ Indeed, in *White v Verkouille* ('*Verkouille*'),²⁴ the Queensland Supreme Court was asked to enforce a judgment from the District Court of Nevada appointing a receiver and giving him authority to bring proceedings to recover a debt. McPherson J concluded that equity could '[lend] its aid to the enforcement of a foreign judgment'²⁵ and made orders entitling the receiver to receive money from Australian banks.

Nevertheless, *Verkouille* is of limited value as authority for a broader equitable jurisdiction to enforce non-monetary judgments. First, it is not clear that the court enforced, rather than recognised, the judgment. The receiver had already been appointed by the Nevada court and was 'simply seeking recognition and effect locally for his appointment'.²⁶ Further, the case is confined to its subject matter. All of the case law discussed by McPherson J concerned receiverships or insolvency.²⁷ As Reid Mortensen points out, courts in Australia often recognise foreign appointments when acting in probate jurisdiction or in relation to insolvency.²⁸ There appear to be no cases since the passage of the *Judicature Acts*

19 See generally Enid Campbell, 'Res Judicata and Decisions of Foreign Tribunals' (1994) 16 *Sydney Law Review* 311.

20 Collins, above n17 at 579–583; Tilbury, Davis & Opeskin, above n17 at 172–178.

21 *Pro Swing* [2006] 2 SCR 612 at 623.

22 *Jackman v Broadbent* [1931] SASR 82, cited in Tilbury, Davis & Opeskin, above n17 at 224. The other Australian texts cited in above n17 do not provide an authority for this principle.

23 R W White, 'Enforcement of Foreign Judgments in Equity' (1980–1982) 9 *Sydney Law Review* 630.

24 *White v Verkouille* [1990] 2 Qd R 191 ('*Verkouille*').

25 *Verkouille* [1990] 2 Qd R 191 at 194. The non-monetary aspect of the order was not discussed.

26 *Verkouille* [1990] 2 Qd R 191 at 196.

27 See discussion, *Verkouille* [1990] 2 Qd R 191 at 194–196.

28 Mortensen, *Private International Law in Australia*, above n4 at 137.

(1873 and 1875) in which a court of equity has enforced a non-monetary order such as specific performance or injunction.²⁹

C. *Exceptions to the Rule against Enforcement of Non-Monetary Judgments*

While the common law rule has remained unchanged since it was established in *Sadler v Robins*³⁰ 200 years ago, there are some statutory exceptions. Non-monetary judgments from Australian courts can be enforced in other Australian jurisdictions under the *Service and Execution of Process Act 1992* (Cth) ('SEPA').³¹ If a plaintiff lodges a judgment from another Australian court with the appropriate court registry, that court must register the judgment if it is enforceable in the jurisdiction in which the judgment was made. The registered judgment has the same force and effect as if it had been made in that jurisdiction.³² SEPA's definition of 'judgment' explicitly includes judgments under which 'a person is required to do or not to do an act or thing'.³³ Peter Nygh and Martin Davies observe that there have not been any cases confirming that SEPA extends to non-monetary judgments,³⁴ but the definition of 'judgment' is clear on its face.

Some non-monetary judgments from New Zealand can also be enforced. The Federal Court can enforce New Zealand High Court judgments made in certain competition proceedings relating to the trans-Tasman market. This includes non-monetary judgments, as well as interim and interlocutory orders.³⁵ The Trans-Tasman Working Group, composed of representatives from the Australian Attorney-General's Department and the New Zealand Ministry of Justice, has also recommended the enforcement of non-monetary judgments between Australia and New Zealand.³⁶ This recommendation was adopted in the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement signed in July 2008, with legislation expected to be introduced in both countries in 2009.³⁷

The FJA itself envisions the enforcement of some foreign non-monetary judgments. The Government may make regulations for the enforcement of non-money judgments from prescribed courts if it is satisfied that 'substantial reciprocity of treatment' will be given to Australian non-money judgments by those courts.³⁸ To date, no such regulations have been made.

29 Ibid. See also Oppong, 'Enforcing Foreign Non-Money Judgments', above n11 at 260–262, arguing that the pre-*Judicature Acts* cases are 'questionable authority' for the existence of this jurisdiction in modern times.

30 *Sadler v Robins* (1808) 1 Camp 253; *Sadler v Robins* (1808) 170 ER 948.

31 See also *Australian Constitution* s 118.

32 *Service and Execution of Process Act 1992* (Cth) ('SEPA') s 105.

33 SEPA 1992 (Cth) s 3.

34 Nygh & Davies, above n17 at 213.

35 See Mortensen, *Private International Law in Australia*, above n4 at 158–159.

36 Australian Attorney-General's Department and New Zealand Ministry of Justice ('Trans-Tasman Working Group'), *Trans-Tasman Court Proceedings and Regulatory Enforcement: A Report by the Trans-Tasman Working Group* (2006) at 14.

37 Robert McClelland & Lianne Dalziel, 'Treaty to Improve Trans-Tasman Legal Co-operation' (Press Release, 23 July 2008).

38 FJA 1991 (Cth) s 5(6).

These exceptions, however, only allow limited enforcement of foreign non-monetary judgments. As was the case in 1808, it is unlikely that a plaintiff will be able to enforce a foreign non-monetary judgment in Australia.

3. *Policies Underlying Enforcement of Foreign Judgments*

A. *Traditional Rationale for Prohibition of Enforcement of Non-Monetary Judgments*

In Australia, commentators submit that the enforcement of foreign judgments is based on an obligation theory.³⁹ This holds that the judgment of a legitimate foreign court imposes a duty on the defendant to pay the judgment sum and that other courts are bound to enforce this duty.⁴⁰ As H L Ho points out, however, the obligation theory offers an ‘inadequate, misleading and simplistic’ basis for enforcement.⁴¹ While the theory argues that the foreign judgment imposes an obligation on the defendant, it fails to explain *why* the foreign judgment should be recognised as creating that obligation⁴² or *which* foreign judgments give rise to the obligation.⁴³ There are a number of competing policies influencing the willingness or reluctance of courts to enforce foreign judgments. As well as the interests of the parties in a particular case, the rules on enforcement reflect broader international political and commercial concerns.⁴⁴

‘Every rule of law, and this is no less true of rules of private international law, should, of course, be based upon, and reflect, policy considerations.’⁴⁵ Thus it is necessary to identify these policies to evaluate the rule against enforcement of non-monetary judgments.

B. *Principles Underlying Enforcement*

Compared with the commentary on issues of jurisdiction and choice of law, commentary on enforcement of foreign judgments is a ‘scholarly desert’.⁴⁶ There is no discussion in Australian case law or commentary about *why* Australian courts enforce foreign judgments. Nonetheless, it is possible to identify some policy grounds by looking at the law on enforcement of foreign judgments, as well as other areas of conflict of laws.

39 See Mortensen, *Private International Law in Australia*, above n4 at 129. See also *Adams v Cape Industries plc* [1990] Ch 433 (‘Cape’) at 513, cited in Tilbury, Davis & Opeskin, above n17 at 179; Horace Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938) at 52–122.

40 *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159 (Blackburn J).

41 Ho, above n7 at 443.

42 *Id* at 445.

43 Collins, above n17 at 569.

44 Ho, above n7 at 444. See also Michael Whincop, ‘The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments’ (1999) 23 *Melbourne University Law Review* 416; Mark Rosen, ‘Should “Un-American” Foreign Judgments Be Enforced?’ (2004) 88 *Minnesota Law Review* 783, explaining enforcement from a game theory perspective.

45 P B Carter, ‘The Role of Public Policy in English Private International Law’ (1993) 42 *International and Comparative Law Quarterly* 1 at 1.

46 Whincop, above n44 at 416.

(i) *Pro-Enforcement Policies*

The pro-enforcement policies explain generally why Australian courts are willing to treat foreign judgments as final and enforce foreign judgments.

(a) Comity

One of the main principles underlying enforcement of foreign judgments is comity. The seminal definition of comity is found in *Hilton v Guyot*:⁴⁷

“Comity”... is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens.⁴⁸

Comity essentially means ‘co-operation, goodwill, courtesy and mutual respect among States’.⁴⁹ In the context of enforcement it means that an Australian court will enforce a foreign judgment out of respect for the foreign court, an act described by Richard Oppong as a ‘remarkable act of international judicial co-operation’.⁵⁰ *Schibsby v Westenholz*,⁵¹ which established the obligation theory as the basis of enforcement in England, rejected comity as the basis of enforcement.⁵² Comity is nonetheless a relevant principle in developing enforcement rules.⁵³ In Australia, the High Court has recognised comity as a foundational principle in other areas of conflict of laws, including anti-suit injunctions⁵⁴ and the act of state doctrine.⁵⁵

(b) Reciprocity and Retaliation

Similar to comity are the policies of reciprocity and retaliation.⁵⁶ If we enforce the judgments of another country, it is argued, then they will be more inclined to reciprocate and enforce ours. Conversely, one reason for enforcing foreign judgments is the concern that, if we do not enforce judgments from foreign courts, these courts will retaliate by not enforcing ours. At times, these policies provide reasons not to enforce foreign judgments — for example, to retaliate against a foreign court that does not enforce Australian judgments.⁵⁷

47 *Hilton v Guyot* (1895) 159 US 113.

48 *Hilton v Guyot* (1895) 159 US 113 at 163–164.

49 Ho, above n7 at 451.

50 Richard Oppong, ‘Canadian Courts Enforce Foreign Non-Money Judgments’ (2007) 70 *Modern Law Review* 670 at 670.

51 *Schibsby v Westenholz* (1870) LR 6 QB 155.

52 Jonathan Harris, ‘Recognition of Foreign Judgments at Common Law: The Anti-Suit Injunction Link’ (1997) 17 *Oxford Journal of Legal Studies* 477 at 480. See also Read, above n39 at 52–58.

53 See, for example, Harris, above n52 at 481–482; Oppong, ‘Enforcing Foreign Non-Money Judgments’, above n11 at 274; Collins, above n17 at 569.

54 *CSR Ltd v Cigna Insurance Australia Ltd* (1996) 189 CLR 345 at 395–396.

55 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (‘*Spycatcher*’) at 41 (referring to *Buttes Gas & Oil Co v Hammer* [1982] AC 888).

56 Reciprocity is often linked to comity: see, for example, Tilbury, Davis & Opekin, above n17 at 179.

Reciprocity and retaliation underpin the *FJA*. The *FJA* operates on a reciprocal basis: it allows for the enforcement of judgments from foreign courts only when they have agreed to enforce ours.⁵⁸ Provision is also made for retaliation: the Government can make regulations prohibiting enforcement of judgments from a foreign court if it is satisfied that the foreign court's treatment of Australian judgments is 'substantially less favourable' than the Australian courts' treatment of the foreign judgments.⁵⁹ However, reciprocity has never been a requirement under the common law. Courts have never looked to whether a foreign court enforces its judgments when deciding whether to enforce the foreign court's judgment.⁶⁰

(c) Promoting International Trade

The free movement of judgments is an important element in promoting a free market;⁶¹ it is often businesses operating across different jurisdictions that need to enforce a foreign judgment. International trade is subject to transaction costs that domestic trade is not. As well as costs inherent in international transactions, such as language difficulties and unfamiliarity with foreign laws, conflict of law rules may comprise a significant proportion of international transaction costs for business.⁶²

Permissive rules on enforcement of foreign judgments decrease international transaction costs in two ways. First, they reduce the costs required for business to secure legal rights. If a company cannot enforce a judgment in a foreign court, it incurs additional costs in bringing separate actions in each state in which it operates to re-secure legal rights and remedies.⁶³ Second, liberal enforcement laws decrease risk, and therefore costs, by increasing certainty and consistency of legal rights. Under a liberal enforcement scheme, the obligations of the parties remain the same in every country under the enforcement scheme.⁶⁴ Decreased transaction costs lead to decreased prices and, ultimately, an increase in the number of international transactions.⁶⁵

The importance of judgments to free trade was recognised by scholars as early as 1911, but was invigorated by the formation of what was then the European

57 Ho, above n7 at 454.

58 *FJA 1991* (Cth) s 5 (headed 'Application of this Part on reciprocity of treatment').

59 *FJA 1991* (Cth) s 13 (headed 'Money judgments unenforceable if no reciprocity').

60 *Cape* [1990] 1 Ch 433 at 522, cited in Ho, above n7 at 455.

61 See, for example, Harris, above n52 at 482; Mortensen, 'Judgments Extension under CER', above n3 at 237.

62 See generally Dieter Schmidtchen, Roland Kirstein & Alexander Neunzig, 'Conflict of Law Rules and International Trade: A Transaction Costs Approach' *Centre for the Study of Law and Economics Discussion Paper 2004-01* (March 2004); ALRC, above n8.

63 Louisa Childs, 'Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law' (2005-2006) 38 *New York University Journal of International Law and Politics* 221 at 226.

64 Mortensen, 'Judgments Extension under CER', above n3 at 240-241; Leif Gamertsfelder, 'Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Money Judgments in Japan' (1998) 17 *Australian Bar Review* 161 at 162.

65 Childs, above n63 at 226.

Community.⁶⁶ One of the primary aims of the Brussels Regulation, which provides rules for jurisdiction and enforcement within the European Union ('EU'), was to ensure that the EU economy would not be disturbed by difficulties in enforcing judgments.⁶⁷ The importance of free movement of judgments to international trade underlies the work of the United Nations Commission on International Trade Law ('UNCITRAL') in promoting harmonised laws on the enforcement of commercial arbitral awards.⁶⁸ Support for a free market was one of the aims in creating the scheme for intra-Australian enforcement⁶⁹ and also motivates the recommendations made by the Trans-Tasman Working Group.⁷⁰

(d) Efficient Use of Judicial Resources

The enforcement of foreign judgments also promotes efficiency in the use of judicial resources. As well as creating additional costs for the parties, re-litigation in a domestic court of an issue that the parties have already litigated in a foreign court is a waste of the domestic court's judicial resources.⁷¹ Further, liberal enforcement laws create overall efficiencies in the use of judicial resources by encouraging the parties to resolve all issues in the first set of proceedings. Where a defendant knows that a foreign court will treat the judgment from the first proceeding as final, this gives the defendant incentive to raise all issues at this first trial, rather than withholding evidence or arguments in the hope of relying on favourable laws in the foreign jurisdiction. As well as saving time, costs and convenience for the parties, this saves judicial resources otherwise required in re-opening a foreign judgment.⁷²

(e) Abuse of Process

The enforcement of foreign judgments also prevents abuse of the court's process in the same way that *res judicata* seeks to prevent abuse of process domestically. The re-litigation of an issue to recontest its merits is an abuse of process because the rights and obligations of the parties have already been determined.⁷³ As Enid Campbell explains, without finality in litigation, a 'rich and malicious' defendant could re-litigate an issue indefinitely, eventually forcing the plaintiff to give up his or her claim because of expenses.⁷⁴ The prevention of abuse of process generally promotes respect for the courts' role in deciding and terminating disputes.⁷⁵

66 Mortensen, 'Judgments Extension under CER', above n3 at 238–239.

67 Ho, above n7 at 458.

68 See, for example, *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205(XXI), UN Doc A/Res/2205(XXI) (1966).

69 Mortensen, 'Judgments Extension under CER', above n3 at 262.

70 Trans-Tasman Working Group, above n36 at 8.

71 Oppong, 'Enforcing Foreign Non-Money Judgments', above n11 at 272–273; Celia Fassberg, 'Rule and Reason in the Common Law of Foreign Judgments' (1999) 12 *Canadian Journal of Law and Jurisprudence* 193 at 211.

72 Mortensen, 'Judgments Extension under CER', above n3 at 239–240.

73 Campbell, above n19 at 311.

74 Ibid. See also Tilbury, Davis & Opeskin, above n17 at 176; BCLI, above n2 at 5.

75 Campbell, above n19 at 311; BCLI, above n2 at 5.

(f) Fairness to the Plaintiff

Finally, the policy of fairness to the plaintiff also underlies enforcement.⁷⁶ Concepts such as ‘fairness’ or ‘justice’ are difficult to apply because they are inherently nebulous. Nevertheless, there is a sense that enforcement may provide fairness to a plaintiff in a particular case. Apart from the broader policies underlying enforcement, an individual plaintiff who has endured the time, expense and inconvenience of one legal action should not have to do so again.⁷⁷ This view was expressed by La Forest J in *Morguard Investments Ltd v De Savoye* (‘*Morguard*’):⁷⁸

It is anarchic and unfair that a person should be able to avoid legal obligations arising in one [jurisdiction] simply by moving to another [jurisdiction]. Why should a plaintiff be compelled to begin an action in the [jurisdiction] where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another [jurisdiction]?⁷⁹

The enforcement of a foreign judgment may be particularly significant to a plaintiff in cases where delay in re-litigation can lead to further loss.⁸⁰

Oppong has suggested that restrictions on the enforcement of foreign judgments could even breach a plaintiff’s human right of access to justice.⁸¹ The right of fair trial in the *Human Rights Act 1998* (UK) has been interpreted as including the right of access to justice. In *AIG Capital Partners Inc v Republic of Kazakhstan*,⁸² a United Kingdom court agreed that a sovereign immunity statute restricting the plaintiff’s ability to enforce an arbitral award infringed this right. However, the court also held that the infringement was reasonable and proportionate.⁸³ In Australia, only the Australian Capital Territory and Victoria have bills of rights. It is unclear whether the right of fair trial in those bills⁸⁴ would be similarly interpreted to include a right of access to justice, and further, whether courts would consider any restrictions on that right unjustified.⁸⁵

(ii) *Contra-Enforcement Policies*

These policies explain the reluctance of Australian courts to enforce foreign judgments, and provide the basis of the defences to enforcement.

⁷⁶ See, for example, McLachlan, ‘International Litigation and the Reworking of the Conflict of Laws’, above n6 at 581–582, arguing that one of the fundamental concerns of conflict of laws is to provide effective and fair remedies to plaintiffs.

⁷⁷ Oppong, ‘Enforcing Foreign Non-Monetary Judgments’, above n11 at 270.

⁷⁸ *Morguard* [1990] 3 SCR 1077.

⁷⁹ *Morguard* [1990] 3 SCR 1077 at 1102–1103.

⁸⁰ BCLI, above n2 at 3; Oppong, ‘Canadian Courts Enforce Foreign Non-Money Judgments’, above n50 at 674.

⁸¹ Oppong, ‘Enforcing Foreign Non-Money Judgments’, above n11 at 271.

⁸² *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 All ER 284 (QB).

⁸³ *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 All ER 284 (QB) at 306–311.

⁸⁴ *Human Rights Act 2004* (ACT) (‘HRA’) s 21; *Charter of Rights and Responsibilities Act 2006* (Vic) (‘Charter’) s 24.

⁸⁵ *HRA 2004* (ACT) s 28; *Charter 2006* (Vic) s 7.

(a) Territorial Sovereignty

As the ALRC has pointed out, 'at the heart of all the issues about the conduct of international litigation is the question of sovereignty.'⁸⁶ Sovereignty is linked closely to territoriality: generally, while a foreign sovereign has absolute control within its territory, including freedom from external interference, its actions have no effect outside its jurisdiction.

Under the obligation theory, a foreign judgment can be regarded as a command of the foreign sovereign.⁸⁷ Thus, a foreign judgment has no effect extraterritorially, unless and until it is given effect by a local court.⁸⁸ The enforcement of a foreign judgment by a local court gives the foreign judgment extraterritorial effect, allowing it to interfere in the local sovereign's territory. At its most extreme, therefore, sovereignty dictates that courts do not enforce any foreign judgments but retry all disputes within the jurisdiction. In fact, this is the position in some countries.⁸⁹

While Australian courts do enforce foreign judgments, one key area in which sovereignty is reflected is the rule that an Australian court will not enforce a judgment if to do so would be to enforce a foreign penal, revenue or other public law.⁹⁰ The rationale for the exclusion of these laws is that they concern key governmental interests or the exercise of governmental power and therefore should not have extraterritorial operation.⁹¹

(b) Distrust

The second main policy underlying a strict approach to enforcement is distrust of another nation's laws and judicial system. A prime example of this is the statement by Spigelman CJ of the New South Wales Supreme Court ('NSWSC') that '[o]ne of the difficult issues which impedes further development in [harmonising conflict of law rules] is the variation in the quality, independence and impartiality of the judiciaries of different nations.'⁹² This distrust of other nations, and the corresponding need to protect local citizens, is evident in the defences to enforcement — fraud, natural justice and public policy.⁹³

A defendant can argue that the foreign judgment was affected by fraud — for example, that the plaintiff lied in court. Australian courts will allow defendants to

86 ALRC, above n8 at 139.

87 Tilbury, Davis & Opeskin, above n17 at 178.

88 Ho, above n7 at 449.

89 Id at 448 (see footnote 33, referring to the Netherlands, Norway, Austria and Indonesia).

90 See *Huntington v Attrill* [1893] AC 150 (exclusion of penal laws); *Government of India v Taylor* [1955] AC 509 (exclusion of revenue laws); *Spycatcher* (1988) 165 CLR 30 (exclusion of other public laws). Note, however, that New Zealand and Papua New Guinea revenue laws are included in the definition of 'enforceable money judgment' under *FJA 1991* (Cth) s 3.

91 Mortensen, *Private International Law in Australia*, above n4 at 210–211. See also *Spycatcher* (1988) 165 CLR 30 at 43.

92 Spigelman, above n8.

93 Ho, above n7 at 453. Some countries also allow re-examination of merits to a greater extent than Australia: see Spigelman, above n8.

argue that fraud affected the foreign judgment even if fraud was also alleged in the foreign proceedings.⁹⁴ In *Yoon v Song*,⁹⁵ the defendant was allowed to argue fraud, even though it had been argued in the original proceedings and there were significant linguistic and cultural difficulties in understanding the foreign proceedings, which had taken place in Korea.

Another exception to enforcement is breach of natural justice. At a minimum, natural justice requires that the defendant had notice of proceedings, was given a fair opportunity to present a case, and that the foreign judge did not have a personal interest in the outcome of the proceeding.⁹⁶ These requirements recognise the varying standards of legal systems in foreign countries and thus impose minimum procedural standards on foreign proceedings before a foreign judgment will be enforced.

Finally, a court can also refuse to enforce a foreign judgment if it would be contrary to the domestic forum's public policy. Courts have interpreted 'public policy' in this context to refer not to the usual sense of 'low-level' domestic public policy, but rather 'deep-rooted or fundamental public policy', often referred to in conflict of laws literature as *ordre publique international*.⁹⁷ P B Carter identifies three main situations in which the exception applies: where the content of the rule is 'unacceptably repugnant', where enforcement would be detrimental to national interests (generally in foreign affairs) and where the result of the particular case would be unacceptably unjust.⁹⁸ Thus, the public policy defence provides a judicial escape hatch for the courts to protect against judgments that it 'simply cannot accept'.⁹⁹ That the defence is so rarely successfully invoked¹⁰⁰ is an indication of the high standards of foreign courts as well as the respect and tolerance accorded other nations.¹⁰¹

These defences are often limited in enforcement schemes between jurisdictions with similar cultural and historical backgrounds and therefore high levels of trust. *SEPA* does not allow *any* defences to the enforcement of a foreign judgment. If a judgment is enforceable in the State or Territory in which it is made, then it is enforceable in every other State or Territory.¹⁰² Similarly, the Trans-Tasman Working Group noted that Australia and New Zealand:

94 *Yoon v Song* (2000) 158 FLR 295 ('Yoon'). For a criticism of this rule, see Fassberg, above n71; Kent Anderson & Jim Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2000-2003' (2005) 24 *Australian Yearbook of International Law* 443 at 46-63.

95 *Yoon* (2000) 158 FLR 295.

96 Mortensen, *Private International Law in Australia*, above n4 at 140-141.

97 Tilbury, Davis & Opeskin, above n17 at 375. References to 'public policy' or 'domestic public policy' in this article should be taken to refer to lower level public policy rather than *ordre publique*.

98 Carter, above n45.

99 Ho, above n7 at 453. See also Carter, above n45 at 1.

100 Tilbury, Davis & Opeskin, above n17 at 375.

101 Ho, above n7 at 453.

102 *SEPA 1992* (Cth) s 105.

share a common law heritage and very similar justice systems. For these reasons, and because of the confidence that both countries have in each other's judicial and regulatory institutions, many of the safeguards required for interaction with more distant, dissimilar countries are unnecessary.¹⁰³

Under the enforcement scheme proposed by the Working Group, a defendant could raise fraud and natural justice only with the original court.¹⁰⁴

4. *Expanding Enforcement to Non-Monetary Judgments*

Having identified the policies underlying enforcement generally, this part uses the framework of the decision in *Pro Swing* to explore whether the enforcement of non-monetary judgments is consistent with those policies.

A. *Canadian Developments: Pro Swing v Elta Golf*

(i) *Background*¹⁰⁵

Pro Swing was the owner of the trademark 'Trident' in the United States ('US'). Elta Golf, which was incorporated in Ontario, Canada, sold golf clubs through its website, including to US customers. In 1998, Pro Swing filed a claim against Elta in Ohio, a state of the US, alleging, *inter alia*, that Elta had violated the Trident trademark by selling 'Rident' golf clubs. The parties settled the claim, which was endorsed by a consent order from the Ohio District Court. Four years later, Pro Swing brought a claim for contempt of court, alleging that Elta had violated the consent order. Elta did not appear and the District Court issued a contempt order.

Pro Swing began proceedings in Ontario to enforce the consent order and contempt order.¹⁰⁶ The orders prohibited Elta from purchasing, marketing, selling or using clubs with the Trident trademark or a confusingly similar mark in the future. Further, Elta was to deliver to Pro Swing all clubs, components and marketing materials that breached the trademark, account for all infringing clubs sold and provide the names and contact information for the suppliers and purchasers of the Rident clubs to enable a corrective mailing.

The Ontario District Court at first instance¹⁰⁷ and the Ontario Court of Appeal¹⁰⁸ held that it could enforce non-monetary judgments. The Supreme Court was unanimous in agreeing that the traditional rule barring enforcement of non-monetary judgments should be overturned. However, the Court split four to three on whether to enforce the orders in question. The majority¹⁰⁹ refused to enforce the orders because of insufficient clarity in the foreign order, the quasi-criminal

103 Trans-Tasman Working Group, above n36 at 8.

104 *Id* at 10.

105 The facts are set out in *Pro Swing* [2006] 2 SCR 612 at 619–624.

106 Both orders are set out in full in *Pro Swing* [2006] 2 SCR 612 at 665–668.

107 *Pro Swing v Elta Golf* (2003) 68 OR (3d) 443.

108 *Pro Swing v Elta Golf* (2004) 71 OR (3d) 566.

109 Deschamps J, LeBel, Fish & Abella JJ concurring. The minority judgment was delivered by McLachlin CJ, Bastarache & Charron JJ concurring.

and public law nature of the contempt order, concerns about use of judicial resources, and public policy concerns relating to the constitutional protection of personal information.¹¹⁰

(ii) *Reasoning*

The Court identified two particular areas of concern that arise in relation to enforcing non-monetary judgments: sovereignty and efficiency.

(a) Territorial Sovereignty

The Court found that the enforcement of a foreign non-monetary judgment is inconsistent with territorial sovereignty because it allows the foreign state to regulate behaviour outside its jurisdiction, giving effect to the domestic policy of the foreign state. Unlike a monetary judgment, which merely mandates payment of a sum of money, a non-monetary order dictates the behaviour of a defendant in accordance with the foreign jurisdiction's laws.¹¹¹

A foreign law is an expression of public policy interests — laws reflect a foreign state's choice of how to balance competing interests in any given matter. These are not necessarily the governmental interests that are excluded from enforcement under the 'penal, revenue and other public law' exception to enforcement, but any interests in relation to law regulating private obligations. For example, Campbell McLachlan notes the wide divergent standards in local defamation laws.¹¹² These differences are not accidental, he argues, but have been 'consciously fashioned' to express the weight each country accords to the right of freedom of expression as against the right to reputation.¹¹³ Thus in enforcing a defamation judgment in Australia, a local court would be giving effect to the foreign court's public policy in the level of protection given to reputation.

More importantly, giving effect to the foreign public policy may infringe Australian sovereignty where there is a difference between the foreign public policy and domestic public policy. Where there is a difference between the foreign and domestic public policy, the enforcement of the foreign judgment is inconsistent with the domestic sovereign's absolute control within its jurisdiction. Continuing with the example of defamation, a foreign court might issue a judgment ordering a defendant to stop making statements that it considers defamatory under its own laws. However, that country's defamation law might be stricter than Australia's. The same statement may not be considered defamation in Australia (for example, because of a defence of public interest).¹¹⁴ Hence, enforcing such an order might be inconsistent with Australian public policy in relation to defamation and therefore with Australian sovereignty.

110 *Pro Swing* [2006] 2 SCR 612 at 634–643.

111 Vaughan Black, 'Enforcement of Foreign Non-Money Judgments: *Pro Swing v Elta*' (2005) 42 *Canadian Business Law Journal* 81 at 89; *Pro Swing* [2006] 2 SCR 612 at 624–625.

112 Campbell McLachlan, 'From Savigny to Cyberspace: Does the Internet Sound the Death-Knell for the Conflict of Laws?' (2006) 11 *Media and Arts Law Review* 418 at 423. The other areas of law specifically identified by McLachlan are privacy and copyright.

113 *Id* at 422.

Territorial sovereignty is only an issue in cases where the behaviour mandated by the foreign judgment has effect both in the foreign jurisdiction *and* in Australia. Sovereignty is territorially restricted, and thus is only infringed if enforcing the foreign judgment affects the pursuit of Australian public policy *within Australia*.¹¹⁵ If it is possible for the order to be enforced in such a way that the defendant's behaviour does not affect the operation of Australian public policy in Australia, then there is no inconsistency with Australian public policy, and therefore no breach of sovereignty. In *Pro Swing*, it may have been possible for Elta not to breach the American trademark by not selling the infringing golf clubs *in the US*, but to continue to sell golf clubs in Canada. In this situation, enforcing the foreign judgment would not have breached local Canadian public policy.

In other cases, however, the defendant's behaviour will have effect in both jurisdictions. Stopping defamation in one jurisdiction would often require stopping speech in another. The ineffectiveness and expense of geographic filtering technology means that it is extremely difficult to limit internet speech from reaching a particular jurisdiction.¹¹⁶ A statement made in one jurisdiction can also have effect in another jurisdiction purely by the fact that the subject of the statement resides in another jurisdiction, and it is there that the statement has caused harm by damaging the reputation.¹¹⁷

Some commentators have dismissed sovereignty concerns. Ho argues that there are no concerns about sovereignty because a foreign judgment has no direct application until a local court chooses to enforce it.¹¹⁸ Oppong argues that a foreign judgment is only evidence of the defendant's obligations; a mere evidentiary fact cannot breach sovereignty.¹¹⁹ In Stephen Pitel's view, a non-monetary judgment is no less intrusive than a monetary judgment; it is no more intrusive to order a defendant to pay a sum of money than to mandate behaviour.¹²⁰ However, these arguments do not sufficiently account for the point argued above — that, in practice, in regulating behaviour in Australia, the enforcement of non-monetary judgments can breach sovereignty by having an impact on the pursuit of public policy within Australia.

Nevertheless, the ability of foreign states to impose their public policy abroad is limited by other conflict of law rules. The international jurisdiction requirement

114 American courts have refused to enforce foreign judgments because they are inconsistent with the freedom of expression in the First Amendment of the *United States Constitution*: see the cases discussed in Rosen, above n44. See also Molly van Houweling, 'Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next *Yahoo! v Licra*' (2003) 24 *Michigan Journal of International Law* 697.

115 Compare Nelson Enonchong, 'Public Policy in the Conflict of Laws: A Chinese Wall around Little England?' (1996) 45 *International and Comparative Law Quarterly* 633 at 653–654.

116 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 ('*Gutnick*') at 617–618 (Kirby J); van Houweling, above n114 at 710–712.

117 See *Gutnick* (2002) 210 CLR 575.

118 Ho, above n7 at 449–450.

119 Oppong, 'Enforcing Foreign Non-Money Judgments', above n11 at 285.

120 Stephen Pitel, 'Enforcement of Foreign Non-Monetary Judgments in Canada (and Beyond)' (2007) 3 *Journal of Private International Law* 241 at 247.

requires the foreign court to have had jurisdiction over the plaintiff through presence or submission — that is, the foreign court must have had territorial jurisdiction over the defendant in the original proceedings.¹²¹ Further, choice of law rules mean that a foreign court will not always apply its own law to the case, but may in fact be applying the law of another jurisdiction. These rules mean that a foreign state will only be able to impose its laws on defendants and transactions with the requisite close link to the jurisdiction, and with the discretionary assistance of the enforcing court.

(b) Judicial Resources

Another concern of the Court — and indeed one of the reasons that the majority refused to enforce the orders in question in *Pro Swing* — was the use of judicial resources.¹²² The enforcement of non-monetary judgments can require more resources than the enforcement of monetary judgments. When a court enforces a monetary judgment, it declares the existence of the debt, triggering steps for the collection of the debt.¹²³ By contrast, the enforcement of non-money judgments often requires further use of judicial resources.

First, non-monetary judgments often require re-litigation in relation to whether the judgment has been satisfied. The more complex or extended the performance, the more likely that further litigation will be necessary to determine whether the defendant has complied with the order.¹²⁴ Second, further judicial resources may be necessary to understand the original proceedings. Unlike monetary remedies, a local court may need to understand the original proceedings and their factual matrix to enforce an order effectively.¹²⁵ For example, to decide whether an injunction prohibiting the infringement of a copyright has been complied with, a local court may need to understand the findings of the original proceedings about the scope of that copyright.

The use of judicial resources in enforcing non-monetary judgments is particularly significant because of the lack of reciprocity. Michael Whincop argues that the enforcement of foreign judgments amounts to ‘subsidising litigation by out-of-state plaintiffs’ against Australian citizens.¹²⁶ Where a plaintiff seeks enforcement of a foreign judgment in Australia, he suggests, the defendant is more likely than the plaintiff to be a citizen of, or run a business in, Australia. If the plaintiff had been a citizen of Australia, then he or she would have selected Australia as the forum for the litigation.¹²⁷ As few other jurisdictions enforce non-monetary judgments,¹²⁸ the enforcement of non-monetary judgments would

121 Tilbury, Davis & Opeskin, above n17 at 200-201, citing *Cape* [1990] Ch 433.

122 *Pro Swing* [2006] 2 SCR 612 at 629.

123 Black, above n111 at 89.

124 *Pro Swing* [2006] 2 SCR 612 at 629.

125 Pitel, above n120 at 246.

126 Whincop, above n44 at 421.

127 Ibid.

128 Although note that law reform institutions in Singapore, South Africa and the US are considering legislative changes: Oppong, ‘Canadian Courts Enforce Foreign Non-Money Judgments’, above n50 at 674.

amount to using the Australian judicial system to help foreign plaintiffs, without reciprocal treatment for Australian citizens in other jurisdictions.

However, in the words of the *Pro Swing* minority, the concerns about the use of judicial resources 'should not be overemphasised'.¹²⁹ As Pitel observes, not all proceedings will require further litigation in the courts or understanding of the original proceedings. While ongoing orders such as specific performance may need continued supervision, many non-monetary orders impose only a single obligation,¹³⁰ such as the restitution of property, or the publication of a correction to a defamatory statement. Even ongoing orders will require additional supervision only if a defendant resists the order.¹³¹

Concerns about the lack of reciprocity are allayed by the fact that a plaintiff seeking to enforce a foreign judgment in Australia will not always be a foreigner. Cases in modern international litigation are often linked to more than one jurisdiction, and there are several jurisdictions in which a plaintiff could choose to commence an action.¹³² Reasons why a local (Australian) plaintiff might choose to litigate in a foreign forum include: limitation periods, availability of witnesses and other evidence, costs of litigation, and availability of contingency fee lawyers.¹³³

Finally, the costs of enforcement, even for a complicated order, are likely to be less than the costs involved in re-litigating the dispute. Where a plaintiff seeks to enforce a foreign judgment against a defendant, he or she usually has a cause of action against the defendant in that forum. If the local court refuses to enforce the foreign judgment, the plaintiff can bring new proceedings on that cause of action. Hearing the dispute anew would require even more of the local forum's judicial resources than enforcement of the foreign judgment.¹³⁴ The costs of the new proceeding would also be wasted in the sense that they would duplicate issues already resolved by the foreign court.¹³⁵

(c) Adapting to Modern Times

Despite its concerns about sovereignty and judicial resources, the Court in *Pro Swing* considered that it should extend enforcement of foreign judgments to non-monetary judgments in light of changes in technology, including modern means of travel and communications. *Pro Swing* was the latest in a line of Canadian cases in which the Court emphasised the need to broaden private international law rules to adapt to modern technology.¹³⁶

129 *Pro Swing* [2006] 2 SCR 612 at 656–657 (McLachlin CJ, Bastarache & Charron JJ concurring).

130 Pitel, above n120 at 247.

131 *Id* at 246.

132 See discussion below at text accompanying footnotes 145–146.

133 Oppong, 'Canadian Courts Enforce Foreign Non-Money Judgments', above n50 at 677.

134 Pitel, above n120 at 247. See also Whincop, above n44 at 422.

135 Ho, above n7 at 460.

136 See generally Black, above n111 at 83–88; Robert Wai, 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law' (2001) 39 *Canadian Yearbook of International Law* 117.

The first, and most significant, of these cases was *Morguard*.¹³⁷ *Morguard* replaced the 'international jurisdiction' test for enforcement with a 'real and substantial connection test', whereby a foreign court would be considered to have had jurisdiction over the defendant as long as there was a real and substantial connection between the foreign forum and the action. La Forest J, delivering the unanimous judgment of the Court, relied strongly on the need to change the law to respond to modern times. The common law on enforcement of judgments was 'firmly anchored in the principle of territoriality as interpreted and applied... in the 19th century.'¹³⁸ However, modern means of travel and communications meant that there was 'no comparison between the... relationships of today and those obtaining between foreign countries in the 19th century.'¹³⁹ Conflict of laws rules needed to adapt to 'accommodating the flow of wealth, skills and people across state lines'.¹⁴⁰

Morguard concerned the enforcement of judgments from other Canadian provinces and hence an important factor in the Court's decision was the Canadian federal system.¹⁴¹ However, in *Beals v Saldanha* ('*Beals*'),¹⁴² the Court held that the reasoning in *Morguard* was 'equally compelling' outside the federal context and that the 'real and substantial connection' test also applied to foreign judgments.¹⁴³

The main impact of the technological developments referred to in *Morguard* and *Beals* is an increase in the number of transnational cases where a plaintiff may seek to enforce a judgment in another jurisdiction. First, the ease of travel, as well as the ease at which assets can be transferred, makes it easier for defendants to abscond from the jurisdiction in which a judgment is delivered. The problem of the absconding debtor is not limited to large commercial cases, but is also likely to affect ordinary litigation. A good hypothetical example is given by the Trans-Tasman Working Group of a married couple residing in New Zealand who decide to separate. The New Zealand Family Court orders one party to return jewellery to another. If the party with the jewellery leaves New Zealand, the other party must attempt to enforce the New Zealand judgment elsewhere.¹⁴⁴

Second, there are simply more cases with connections to numerous jurisdictions. As McLachlan observes, 'modern international litigation offers litigants multiple choices of forum... [reflecting] the simple reality that the fact-patterns presented in transnational cases typically connect the case to more than one country.'¹⁴⁵ Although a plaintiff may begin an action in one forum, he or she may have to enforce it elsewhere. In particular, the wide reach of the internet may

137 *Morguard* [1990] 3 SCR 1077.

138 *Morguard* [1990] 3 SCR 1077 at 1095.

139 *Morguard* [1990] 3 SCR 1077 at 1098.

140 *Morguard* [1990] 3 SCR 1077 at 1098.

141 *Morguard* [1990] 3 SCR 1077 at 1099–1103.

142 *Beals v Saldanha* [2003] 3 SCR 416 ('*Beals*').

143 *Beals* [2003] 3 SCR 416 at 434–438.

144 Trans-Tasman Working Group, above n36 at 14.

145 McLachlan, 'International Litigation and the Reworking of the Conflict of Laws', above n6 at 592.

connect a case to several jurisdictions. *Dow Jones & Co Inc v Gutnick* ('Gutnick'),¹⁴⁶ an internet defamation case decided by the Australian High Court, provides a good example. Dow Jones, a company incorporated in the US, published the journal *Barron's*. An article allegedly defaming Joseph Gutnick was written by a journalist in New York and uploaded onto the *Barron's* website by a server in New Jersey. The article was downloaded and read by subscribers all over the world, including in Victoria, Australia. Gutnick brought a defamation action against Dow Jones in Victoria. This was a logical place for the plaintiff to bring the action as it was where the plaintiff resided and one place where the article had been downloaded and read. Yet due to Dow Jones's lack of substantial presence in Victoria, if Gutnick had been successful in the defamation action, it is likely that any judgment would have required enforcement in another jurisdiction.

Third, technological developments have also made it easier for plaintiffs to pursue the enforcement of judgments in a foreign jurisdiction. Just as it is easier for defendants to abscond, so too is it easier for plaintiffs to travel to another jurisdiction to pursue proceedings and to engage counsel in that jurisdiction. It is also practically easier than in the 19th century for plaintiffs to litigate internationally because of procedural laws that make it easier, for example, to gather evidence¹⁴⁷ or to authenticate foreign judgments.¹⁴⁸

Canadian judges have argued that this increase in cases where a plaintiff will need to seek enforcement of foreign judgments places greater emphasis on the policies underlying a broad approach to enforcement. As businesses increasingly operate across national boundaries,¹⁴⁹ it is more important for international trade that the risk from these transactions is minimised. As defendants increasingly cross state boundaries, again, there is greater need to aid foreign courts and foreign plaintiffs. As La Forest J concluded in *Morguard*, 'I do not think it much matters whether one calls these rules comity or simply relies directly on the reasons of justice, necessity and convenience.'¹⁵⁰

Equally, the traditional contra-enforcement policies are less relevant in the 21st century. As the majority in *Pro Swing* said, 'frontiers remain relevant to national identity and jurisdiction, but... the globalization of commerce and mobility of both people and assets make them less so.'¹⁵¹ The expansion of the internet, where national boundaries are largely irrelevant, has also fuelled calls for the need to disregard traditional sovereignty concerns and for international co-operation in its regulation.¹⁵² Similarly, the level of distrust of other nations is far less than it was when courts developed conflict of law rules in the 19th century. As Oppong writes,

146 *Gutnick* (2002) 210 CLR 575.

147 See, for example, *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature 18 March 1970, 1992 ATS 37 (entered into force 7 October 1972).

148 See, for example, *Evidence Act 1995* (Cth) s 150(1)(e).

149 See ALRC, above n8 at 35, 37, 39, 41 and 43 for examples of companies with operations in various jurisdictions.

150 *Morguard* [1990] 3 SCR 1077 at 1098.

151 *Pro Swing* [2006] 2 SCR 612 at 619 (Deschamps J, LeBel, Fish & Abella JJ concurring).

152 See, for example, *Australian Competition and Consumer Commission v Chen* (2003) 132 FCR 309 at [52]-[53].

'chauvinistic concerns [about the fairness of foreign proceedings] are far less relevant today.'¹⁵³ Substantive laws themselves, particularly in areas of concern to international business such as intellectual property,¹⁵⁴ are also becoming increasingly harmonised.¹⁵⁵

Finally, in addition to the general need to liberalise enforcement rules, the *Pro Swing* majority pointed out the importance of non-monetary remedies themselves. Overturning the traditional rule against non-monetary remedies, the majority argued, would 'open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy'.¹⁵⁶ Non-monetary remedies are an important weapon in the judicial armoury, especially in cases where it is difficult to quantify or compensate for non-economic harm.¹⁵⁷ In *Pro Swing*, the damage done by Elta's infringement of the Trident trademark was more than merely economic loss from lost sales, but included broader damage to Pro Swing through damage to the brand name and loss of goodwill.

Thus, although the enforcement of non-monetary judgments presents some concerns in relation to sovereignty and the use of judicial resources, these are outweighed by the need to give effect to the pro-enforcement policies in the 21st century, particularly in light of modern technology.

B. Australian Developments

Given the Canadian Supreme Court's decisions in *Morguard* and *Beals*, it is not surprising that, in *Pro Swing*, it concluded that there was a 'compelling',¹⁵⁸ case for enforcing non-monetary judgments. While there has been no comparable revolution of conflict of laws in Australia, such a change would not be without basis in Australian case law.

In *Gutnick*, the High Court was asked to change the choice of law rule for defamation occurring over the internet. Kirby J recognised the challenges posed by new technology to traditional ideas of territorial sovereignty, stating:

the Internet... knows no geographic boundaries. Its basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any given jurisdiction.¹⁵⁹

He went on, 'judges have adapted the common law to new technology in the past. The rules of private international law have emerged as a result of, and remain alive to, changes in the means of trans-border communication between people.'¹⁶⁰

153 Oppong, 'Canadian Courts Enforce Foreign Non-Money Judgments', above n50 at 245. See also Harris, above n52 at 482.

154 See, for example, the list of treaties administered by the World Intellectual Property Organisation at <<http://www.wipo.int/treaties/en/>>

155 Garnett, above n5 at 205.

156 *Pro Swing* [2006] 2 SCR 612 at 625 (Deschamps J, LeBel, Fish & Abella JJ concurring).

157 I CF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (7th ed, 2007) at 383.

158 *Pro Swing* [2006] 2 SCR 612 at 619 (Deschamps J, LeBel, Fish & Abella JJ concurring).

159 *Gutnick* (2002) 210 CLR 575 at 625.

In that case, Kirby J agreed with the majority that the choice of law rule for internet defamation should not be changed.¹⁶¹ One of his reasons was that rules should be technologically neutral — a rule expressed in terms of the internet may quickly be out of date as the internet or entirely new technologies developed.¹⁶² However, the imperative to expand enforcement to non-monetary judgments is more than merely the effect of a single technology such as the internet, but rather a response to the changes in the *policies* underpinning enforcement.

The approach of Australian courts to Mareva orders also shows that Australian courts may be willing to expand the enforcement of foreign judgments. A Mareva order, also known as a freezing or asset preservation order, prohibits a defendant from disposing of assets that might be called upon to satisfy a judgment. Broadly, the purpose of Mareva orders is to prevent abuse of process.¹⁶³ At first, Mareva orders were aimed at stopping a defendant from moving assets outside the jurisdiction so that the plaintiff would not have to enforce the judgment in a foreign court. However, in response to the ease at which defendants can move and dispose of funds, courts are now willing to grant orders over assets *outside* the jurisdiction, preventing a plaintiff from dissipating assets which may be used to satisfy judgment.¹⁶⁴

In particular, the approach to foreign Mareva orders in *Davis v Turning Properties Pty Ltd* ('Davis')¹⁶⁵ supports the enforcement of foreign non-monetary judgments in Australia. In *Davis*, Campbell J of the NSWSC granted a Mareva order in support of a Mareva order from a Bahamas court made over the defendant's assets worldwide, including its assets in Australia. It was the first time that such an application had been made.¹⁶⁶ In making the order, Campbell J gave precedence to many of the same policies that support the enforcement of foreign non-monetary judgments.

One ground arguably influencing the decision was efficiency. The plaintiff also had the option of bringing new proceedings against the defendant in New South Wales ('NSW') and applying for a Mareva order in support of the local proceedings. However, by granting the plaintiff's application for a Mareva order in support of the foreign order, Campbell J saved the plaintiff the expense of having to bring fresh proceedings in NSW.¹⁶⁷

Importantly, the decision in *Davis* was based on the need to adapt the law in light of modern technology. Campbell J found that, in light of the ubiquity of

160 *Gutnick* (2002) 210 CLR 575 at 629.

161 The joint judgment of Gleeson CJ, McHugh, Gummow & Hayne JJ focused on substantive defamation law rather than private international law.

162 *Gutnick* (2002) 210 CLR 575 at 631.

163 See, for example, *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J).

164 See generally Biscoe, *Mareva and Anton Piller Orders*, above n10 at 15–62, 120–152. A court can make Mareva orders in relation to assets outside the jurisdiction because the order acts *in personam*, restraining the defendant from dealing with the property: at 7.

165 *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676 ('Davis').

166 *Davis* (2005) 222 ALR 676 at 682.

167 Kent Anderson & Jim Davis, 'Annual Survey of Recent Developments in Australian Private International Law 2005' (2007) 26 *Australian Yearbook of International Law* 425 at 443.

international commerce and the ease of international money transfers, the administration of justice in NSW included the enforcement of rights established elsewhere.¹⁶⁸ The broader concept of abuse of process adopted by Campbell J, which treated an abuse of process of a foreign court as an abuse of process of the local court, recognised the interests of the foreign court and the need for increased judicial co-operation in an increasingly globalised world. This same reasoning underlies the decision in *Pro Swing*.

This approach has not been uniformly accepted in Australia. In *Celtic Resources Holdings Plc v Arduina Holding BV* ('*Celtic 2*'),¹⁶⁹ Jenkins J of the Western Australian Supreme Court refused to grant a Mareva order in support of a foreign Mareva order. Jenkins J's decision, however, was not based on an analysis of the relevant principles so much as on an earlier decision in which Celtic had also applied for a Mareva order against Arduina's Australian assets.¹⁷⁰ In the first case, the foreign court had not yet granted a Mareva order and Hasluck J had rejected the application. Jenkins J noted that, given Hasluck J's earlier refusal to grant the order, the normal course for the applicant would be to bring an appeal.¹⁷¹ She considered that the fact that the foreign court had now granted a Mareva order did not present 'a materially different factual situation from that which was before Hasluck J and upon which he made his decision. It would therefore be inappropriate for me to hear and re-determine afresh this application.'¹⁷²

Not only did Jenkins J's decision lack analysis of the substantive legal principles, it was arguably a wrong interpretation of Hasluck J's decision in the first *Celtic* case. Jenkins J found that one of the grounds for Hasluck J's decision was that 'a Mareva order should not be made where... the [foreign] judgment is not currently able to be enforced by this Court'.¹⁷³ In fact, Hasluck J was 'prepared to accept that... Australian superior courts have an inherent jurisdiction to grant Mareva relief in relation to assets in Australia where a foreign judgment has been or is to be obtained.'¹⁷⁴ He distinguished *Davis*, as the foreign court had not yet granted a Mareva order. He considered that comity required him to act consistently with the procedural and substantive requirements of the foreign country. To grant a Mareva order where one had not yet been issued by the foreign court would be inconsistent with the foreign court's procedure.¹⁷⁵ This reasoning suggests that, had there been a foreign Mareva order at the time, Hasluck J would, in fact, have granted Celtic's application.

These developments, which show that Australian courts recognise the need to adapt the law to modern developments, support the expansion of enforcement of foreign judgments in Australia.

168 *Davis* (2005) 222 ALR 676 at 686–687.

169 *Celtic Resources Holdings Plc v Arduina Holding BV* [2006] WASC 103 ('*Celtic 2*').

170 *Celtic Resources Holdings Plc v Arduina Holding BV* (2006) 32 WAR 276 ('*Celtic 1*').

171 *Celtic 2* [2006] WASC 103 at [17].

172 *Celtic 2* [2006] WASC 103 at [40].

173 *Celtic 2* [2006] WASC 103 at [30].

174 *Celtic 1* (2006) 32 WAR 276 at 285 (emphasis added).

175 *Celtic 1* (2006) 32 WAR 276 at 285.

5. *Enforcement of Non-monetary Judgments: Practical Operation*

The previous part argues that the policies underlying enforcement, particularly in light of modern technology, provide compelling reasons to overturn the rule prohibiting the enforcement of non-monetary judgments. However, Vaughan Black has warned that '[a]ny move to enforce foreign non-money orders requires caution and close attention to the unique features of such remedies.'¹⁷⁶ The concerns about the enforcement of non-monetary judgments addressed in the previous part are useful in defining the limits of enforcement, as are practical concerns.¹⁷⁷

It is impossible to predict comprehensively the issues that might arise in the application of the new rule. Courts will have to deal with issues as they arise on a case-by-case basis.¹⁷⁸ This part identifies some issues that are likely to arise and discusses how they might be resolved by a court.

A. *Requirements for Enforcement*

Under a new approach to enforcing foreign non-monetary judgments, no other changes to the requirements for enforcement are required. It may be appropriate, however, to modify the requirement that the judgment be final and conclusive.¹⁷⁹ Although a judgment may be final and conclusive even if it is subject to appeal, it is not final and conclusive if it remains open to modification by the same court that granted the order.¹⁸⁰ Non-monetary orders may not meet this requirement, as they often remain open to modification.¹⁸¹ Black suggests that as long as a judgment is enforceable in the jurisdiction that granted it, it should be sufficiently final and conclusive to meet this requirement.¹⁸²

The Court in *Pro Swing* held that the enforcement of non-monetary judgments should also be subject to additional requirements based of the unique nature of non-monetary judgments. First, the order should be clear and specific — that is, the domestic court must be able to ascertain what rights, duties and obligations the foreign order imposes on the defendant.¹⁸³ Already, courts will not enforce a monetary judgment if it is for an undefined or unascertainable sum. However, there are likely to be more difficulties in relation to a non-monetary judgment not being clear and specific, as it is not merely for an amount, but specifies what the

176 Black, above n111 at 96.

177 See Oppong, 'Canadian Courts Enforce Foreign Non-Money Judgments', above n50 at 671, suggesting that practical difficulties are one reason that courts do not enforce non-monetary judgments.

178 See *Pro Swing* [2006] 2 SCR 612 at 633, 657. There have not yet been any cases applying *Pro Swing* that shed more light on additional requirements or defences that the courts might impose.

179 *Pro Swing* [2006] 2 SCR 612 at 632, 654; Black, above n111 at 87.

180 Collins, above n17 at 577.

181 Black, above n111 at 87.

182 Ibid. See also Oppong, 'Canadian Courts Enforce Foreign Non-Money Judgments', above n50 at 678.

183 *Pro Swing* [2006] 2 SCR 612 at 629, 653.

defendant is to *do*.¹⁸⁴ An unclear order would potentially require extensive litigation about the meaning of the foreign order, particularly where the orders would be ‘based on rules with which the court is not familiar’.¹⁸⁵ It would require the domestic court to second-guess the intention of the foreign court and could expose the defendant to additional obligations.¹⁸⁶ Such a requirement is therefore consistent with judicial resources concerns and comity.

Second, *Pro Swing* held that the foreign order should be clear about whether it was intended to apply outside the jurisdiction in which it was made.¹⁸⁷ Like *Mareva* orders, which do not always apply to a defendant’s foreign assets, not all non-monetary orders will be intended to regulate a defendant’s behaviour extra-territorially. In *Pro Swing*, the majority considered that the injunction issued by the Ohio court prohibiting Elta from purchasing and selling equipment in breach of the Trident trademark applied only to its behaviour in the US, and not in Canada. This was because the trademark was protected only in the US; the Ohio court could not have intended the order to apply outside the scope of *Pro Swing*’s trademark protection.¹⁸⁸

Enforcing a foreign judgment creates problems in the domestic forum, including the expenditure of judicial resources, the need to interpret the foreign law, and potential conflicts with domestic sovereignty. The *Pro Swing* majority noted that courts ‘tend to find solutions to limit spheres of conflict’; the principle of territoriality provides such a solution.¹⁸⁹ Further, if the foreign court did not intend for the order to operate extraterritorially, then comity does not require its enforcement, nor is there an abuse of process. Accordingly, imposing this requirement would be consistent with the policies underlying enforcement.

Finally, *Pro Swing* held that the proceedings should be sufficiently connected to the local forum. The Court argued that the domestic court should consider whether the harm that the plaintiff is likely to suffer as a result of non-enforcement is enough to warrant the involvement of the domestic court and the expenditure of its judicial resources.¹⁹⁰ On the other hand, Pitel argues that such an approach is too parochial — if the foreign court considered it necessary to make an order with extraterritorial effect, and the plaintiff is seeking to enforce that judgment in the local court, this should be sufficient to warrant enforcement.¹⁹¹

The test proposed in *Pro Swing*, however, has the significant advantage of preventing Australian courts from being used as a global policeman. For example, a foreign judgment may order the performance of a contract in Ruritania. However, the plaintiff may not be able to enforce the judgment in Ruritanian courts, for example, because Ruritanian courts do not enforce non-monetary judgments or because the defendant does not have assets or presence in Ruritania. Without the

184 Pitel, above n120 at 251.

185 *Pro Swing* [2006] 2 SCR 612 at 639 (Deschamps J, LeBel, Fish & Abella JJ concurring).

186 *Pro Swing* [2006] 2 SCR 612 at 639.

187 *Pro Swing* [2006] 2 SCR 612 at 640–642.

188 *Pro Swing* [2006] 2 SCR 612 at 641.

189 *Pro Swing* [2006] 2 SCR 612 at 640 (Deschamps J, LeBel, Fish & Abella JJ concurring).

190 *Pro Swing* [2006] 2 SCR 612 at 638–639.

191 Pitel, above n120 at 246.

need for a link to the local forum, the plaintiff could enforce the foreign judgment against the defendant in an Australian court. If the defendant had presence or assets in Australia, it would be liable in Australia to any failure to comply with the foreign judgment and would therefore be compelled to comply with the foreign judgment.

As well as tying up resources of Australian courts, such a broad approach to enforcement in Australia might place Australian defendants in a disadvantageous position in international litigation. Any Australian defendant would be liable to comply with a foreign judgment, for fear of liability in Australia. The risks of cross-border transactions might actually increase, and this would deter rather than encourage Australians from entering cross-border transactions.¹⁹² Exposing Australian-based defendants to enforcement proceedings from other states may also deter businesses from doing business or establishing a presence in Australia in the first place.¹⁹³

However, while this suggests that Australian courts should require a connection between Australia and the foreign judgment, the weighing test proposed by *Pro Swing* is overly stringent. A requirement that the foreign judgment is to be performed in Australia would deal with the concerns outlined above, while still giving maximum effect to the pro-enforcement policies.

B. Defences to Enforcement

The current defences against enforcement play an important role in ‘guarding against unfairness in its most recognisable forms’ and will play the same role in relation to non-monetary judgments, although their application may be modified.¹⁹⁴ In particular, the public policy defence may expand. As observed above, courts presently apply the public policy defence only to breaches of *ordre publique* rather than domestic public policy. However, enforcement of non-monetary judgments leads to an increased likelihood that enforcing the foreign judgment may cause conflict with domestic public policy. Thus, courts may need to take a more active role in guarding against conflicts of public policy. Michael Tilbury, Gary Davis and Brian Opeskin note that the ‘open-textured nature of the [public policy defence] leaves considerable scope for its application’.¹⁹⁵ The defence could easily be used by courts to include conflicts of domestic public policy.

At present, mere inconsistency between the foreign law and Australian law is not enough to give rise to the public policy defence.¹⁹⁶ However, it should provide a defence against the enforcement of non-monetary judgments — an Australian court should not enforce an order if the order requires a defendant to breach Australian laws or other legal obligations. Even where there is no direct breach of Australian law, a foreign judgment may nevertheless occasion breach of domestic public policy by mandating action in some inconsistent way. The public policy defence should also be enlivened in these circumstances.

192 *Beals* [2003] 3 SCR 416 at 474 (Lebel J, dissenting).

193 Whincop, above n44 at 421.

194 *Pro Swing* [2006] 2 SCR 612 at 653. See also Black, above n111 at 87.

195 Tilbury, Davis & Opeskin, above n17 at 375.

196 Nygh & Davies, above n17 at 345–346.

Further, commentators have argued that the expansion of enforcement to non-monetary orders should be matched with the creation of new defences.¹⁹⁷ In doing so, the ‘trick’ will be

crafting ... defences that address the specific problems posed by non-money orders ... in a way that both responds to those concerns and minimises the relitigation of issues of matters that were, or should have been, dealt with in the original proceedings.¹⁹⁸

If courts create too many new defences, then the advantages of the new rule will be largely nullified.

In creating new defences against enforcement of non-monetary judgments, courts should also be alert to the consequences for the defendant of non-compliance with the foreign order. Non-compliance with a court order generally constitutes contempt of court, the penalty for which may be as harsh as imprisonment. The decision of an Australian court in relation to enforcing a foreign judgment does not affect the operation of the foreign judgment in the foreign jurisdiction; a defendant remains bound, in that jurisdiction, to comply with the order. Accordingly, Australian courts should be wary of defences that alter the foreign order. In light of this concern, a better approach generally would be to stay the Australian enforcement proceedings, allowing the defendant to apply to the foreign court to amend the order. This would ensure that the defendant would not remain liable in the foreign jurisdiction.

New defences might be based on the subject matter of the foreign order. Black gives the example of anti-suit injunctions. If an Australian court enforced an anti-suit injunction from a foreign court, it would be surrendering control of its own processes to a foreign court — effectively ‘divesting itself of jurisdiction on the basis that another court that happened to have a connection to the action told it to.’¹⁹⁹ He suggests that courts should not enforce non-monetary judgments that purport to interfere with local proceedings.²⁰⁰ It may also be appropriate to exclude from enforcement subject matters such as child welfare and administration of estates, as they traditionally require a high level of supervision.²⁰¹

The *Pro Swing* majority suggested that the nature of the order should also provide defences. For example, as the Court in *Pro Swing* was enforcing an equitable remedy, it considered that it should ‘incorporate the very flexibility that infuses equity’.²⁰² Supporting this view, Black has pointed to equitable defences such as hardship or unclean hands, which are relevant up until the time judgment is delivered. A court that is enforcing an equitable foreign judgment, he argues, should consider these defences again at the time of enforcement.²⁰³

197 See, for example, *Beals* [2003] 3 SCR 416 at 442 (Major J), 473–474 (Lebel J, dissenting); Black, above n111 at 95–96.

198 Black, above n111 at 96.

199 Id at 88. See also Oppong, ‘Canadian Courts Enforce Foreign Non-Money Judgments’, above n50 at 675–676.

200 Black, above n111 at 88.

201 Trans-Tasman Working Group, above n36 at 14–15.

202 *Pro Swing* [2006] 2 SCR 612 at 633.

However, applying defences based on the nature of the order would require an Australian court to be familiar with the facts of the original proceedings. It would also require an Australian court to be familiar with the foreign law. Although Australian courts might be familiar with similar systems of law, such as equity, the same could not be said for other systems of law such as civil law or Sharia law. Even if the Australian court were broadly familiar with the foreign legal system, such doctrines might have developed differently in other jurisdictions. As mooted above, a preferable approach in this situation would be for the Australian court to stay enforcement proceedings, allowing the foreign court, already familiar with the proceedings, to determine if the circumstances warranted amending the order.

C. The Form of the Remedy

One final issue that may arise is the remedy granted by the foreign court. If the judgment satisfies the requirements for enforcement, and there are no applicable defences, the local court will enforce the foreign judgment by issuing a local order. In cases where the remedy granted by the foreign court is one available in the local forum, then that remedy can be granted. Australian courts will be familiar with many foreign non-monetary remedies, especially those from other common law jurisdictions.²⁰⁴ However, in some cases, the remedy granted by the foreign court will not exist in Australia. As the majority in *Pro Swing* explained, 'comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants'.²⁰⁵ The local court should try to grant a local remedy that fulfils the same objectives as the foreign order as far as possible,²⁰⁶ although this is likely to require some further litigation to determine the most analogous remedy. The remedy granted by the foreign court may also be so different that enforcement is not at all possible.²⁰⁷

D. The Role of the Foreign Court

Many of the concerns raised in this part can be addressed by the foreign court. A court that wishes another court to enforce its judgment can do much to aid this by, for example, ensuring that its order is specific, clear about its territorial scope, and makes provision for the protection of third parties.²⁰⁸ The standard provisions developed for worldwide Mareva orders, which include provisions for the protection of the defendant and other third parties, could provide guidance on the formulation of other foreign judgments.²⁰⁹

203 Black, above n111 at 92–94.

204 Pitel, above n120 at 247.

205 *Pro Swing* [2006] 2 SCR 612 at 633 (Deschamps J, LeBel, Fish & Abella JJ concurring).

206 Oppong, 'Enforcing Foreign Non-Money Judgments', above n11 at 268; Pitel, above n120 at 247.

207 ALRC, above n8 at 157.

208 Oppong, 'Canadian Courts Foreign Non-Money Judgments', above n50 at 679.

209 For the text of these provisions, see Peter Biscoe, 'Transnational Freezing Orders' (2006) 27 *Australian Bar Review* 161 at 169.

6. *Conclusion*

The long-settled rule prohibiting the enforcement of foreign non-monetary judgments should be overturned in Australia. The traditional obligation theory rationale provides an inadequate explanation for enforcement of foreign judgments. Rather, conflicting policies underlie enforcement. Policies such as comity and efficiency explain why courts enforce foreign judgments, while sovereignty and distrust explain the reluctance of courts to enforce foreign judgments and provide the basis for defences to enforcement.

The prohibition on enforcement of non-monetary judgments no longer reflects the policies underlying enforcement of foreign judgments. While there are concerns about sovereignty and the use of judicial resources, these are outweighed by changes to technology which underscore the need for enforcement rules to facilitate movement and trade across national boundaries. Australian case law, including the case law on Mareva orders, supports the need to modernise laws as times change. However, some restrictions on enforcement of foreign non-monetary judgments are necessary, including that the foreign judgment be clear about its extraterritorial effect and that the foreign judgment is to be performed in Australia. Some additional defences, most significantly an expansion of the existing public policy defence, may also be necessary.

As day-to-day transactions increasingly cross national boundaries, the role of conflict of law rules in regulating those transactions will become more significant. Conflict of law rules developed in the 19th century must adapt to deal with modern technology. The enforcement of non-monetary judgments would be one important step in the modernisation of conflict of law rules.