

## RECOVERY OF CHILD MAINTENANCE IN THE INTERNATIONAL ARENA - AN AUSTRALIAN PERSPECTIVE

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In Australia, the Child Support Registrar of the Department of Human Services ('the Registrar') is central authority responsible for overseeing the administration of child support and maintenance obligations. The administration and collection of child support is primarily pursuant to two pieces of legislation – the Child Support (Assessment) Act 1989 (Cth)<sup>2</sup> and the Child Support (Registration and Collection) Act 1988 (Cth)<sup>3</sup> – and their supporting regulations<sup>4</sup>. The Australian framework provides for two parallel structures for child maintenance, being an administrative assessment regime known as child support and child maintenance arrangements through the Family Courts.

The Australian legislative regime uses the terminology of 'payer' being the party with a maintenance liability, and 'payee' being the party who is in receipt of maintenance. This is the terminology that will be used in this paper.

### *Reciprocating Jurisdictions*

The framework for the payment and collection of child support involving an overseas-based party and either Australian- or overseas-based children is based on the concept of reciprocal jurisdictions. A list of the reciprocating jurisdictions is found in Schedule 2 of the CSRC Regulations.

The Registrar has broad administrative powers in relation to child support and child maintenance matters in reciprocating jurisdictions, including:

- accepting applications for child support assessments from overseas payers or payees (provided certain conditions are met) and making or continuing an assessment;
- registering and enforcing overseas maintenance assessments, overseas maintenance orders, and overseas maintenance agreements and arrears that have accumulated pursuant to an overseas maintenance liability;
- communicate requests for enforcement of liabilities to reciprocating jurisdictions
- communicate applications for review or variation of liabilities made in reciprocating jurisdictions.

The powers of the Registrar in respect of reciprocating jurisdictions apply in circumstances where the child lives with a parent in Australia and the payer lives abroad, and where the child lives with a parent

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<sup>2</sup> ('Assessment Act').

<sup>3</sup> ('Registration and Collection Act').

<sup>4</sup> Child Support (Assessment) Regulations 2018 (Cth); Child Support (Registration and Collection) Regulations 2018 (Cth) ('CSRC Regulations'). There is also provision for certain child maintenance arrangements contained within the Family Law Act 1975 (Cth).

in a reciprocating jurisdiction and the other parent, the payer, is located in Australia, although different requirements may apply depending on the circumstances of each matter.

### Applications for Child Support Assessment

#### *Where the Child and Payee Reside in Australia*

Where a payee resides with the child in Australia, that parent may apply to the Registrar for an administrative assessment pursuant to the Assessment Act if the payer resides in a reciprocating jurisdiction on the day of the application.

A payer residing in a reciprocating jurisdiction may apply directly to the Registrar or through their relevant overseas authority.

#### *Where the Child and Payee Reside Overseas*

If a payee lives outside of Australia and the payer resides in Australia, either the payer or the payee may apply for an administrative assessment provided either the payee is a resident of a reciprocating jurisdiction<sup>5</sup> or the child is present in Australia on the day the application is made and/or the child is an Australian citizen or ordinarily resident on the day the application is made.<sup>6</sup>

While both a payee and a payer may apply for an administrative assessment if the payee is living outside Australia, the process of making the application differs whether the payee is in a reciprocating jurisdiction or a non-reciprocating jurisdiction. A payee residing in a non-reciprocating jurisdiction may apply directly to the Australian Registrar. However, if the payee resides in a reciprocating jurisdiction, they *cannot* apply directly to the Registrar for an assessment, and must either provide an application to the relevant authority in their jurisdiction to forward to the Registrar, or seek that the relevant authority make an application directly to the Registrar on their behalf.<sup>7</sup>

### Registrable Overseas Maintenance Liabilities and their Enforcement

The Registrar has the power to register overseas maintenance liabilities for collection by the Registrar, provided that the liabilities arises in a reciprocating jurisdiction.<sup>8</sup> These liabilities include not only child maintenance liabilities, but also spouse maintenance liabilities requiring the payment of periodic payments<sup>9</sup> for the benefit of a child or a former spouse, for example:

- a maintenance order made by a judicial authority;
- a maintenance agreement registered by a judicial authority or administrative authority;
- a maintenance assessment issued by an administrative authority; and
- arrears of periodic amounts arising in respect of the above arrangements.

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<sup>5</sup> Assessment Act s24(2).

<sup>6</sup> Assessment Act s24(1)(b).

<sup>7</sup> Assessment Act s29B.

<sup>8</sup> See Registration and Collection Act s4(1) and s18A.

<sup>9</sup> These are known as 'registrable overseas maintenance liabilities'. See Registration and Collection Act s 18A.

Either party may apply for the registration of a registrable overseas maintenance liability,<sup>10</sup> although as with applications for assessment, different procedures apply whether it is the payee or payer applying, and whether they are applying from Australia or from a reciprocating jurisdiction. In limited circumstances an overseas authority may also apply for registration on behalf of a payee residing in a reciprocating jurisdiction.<sup>11</sup> Once an application for Registration has been properly made, the Registrar must attend to the registration within 90 days<sup>12</sup> however the liability is enforceable from the day on which the application is received.<sup>13</sup>

When an overseas registrable maintenance liability is entered on the Register, the amounts payable under the liability become a debt due to the Commonwealth of Australia, payable by the payer and administered by the Registrar.<sup>14</sup> This gives the Registrar the power to collect the liability on behalf of the payee (and transmit such amounts to the payee) by way of administrative enforcement and, if necessary, court enforcement.

Administrative enforcement options where the payer resides in Australia include garnisheeing of wages (known as employer withholding)<sup>15</sup>, collection from social security payments<sup>16</sup> and family tax benefits<sup>17</sup>, deductions from tax refunds<sup>18</sup> and deductions from government parental leave payments.<sup>19</sup> The Registrar is also able to make a departure prohibition order that prevents a debtor from leaving Australia.<sup>20</sup>

Where an overseas maintenance liability includes provision for non-periodic payments, these payments will be registered, however they will be a debt due to the payee rather than the Commonwealth and therefore recoverable only on application by the payee to a court exercising the appropriate jurisdiction.<sup>21</sup>

A payee may also apply to the Registrar to have a maintenance order or agreement, or a child support assessment enforced in a reciprocating jurisdiction.<sup>22</sup> If this application is made, the Registrar must request the relevant authority in the reciprocating jurisdiction enforce the liability and provide such documentation required for enforcement proceedings in that jurisdiction.

#### *Other Arrangements with Reciprocating Jurisdictions*

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<sup>10</sup> Registration and Collection Act s25.

<sup>11</sup> This is a 'agency reimbursement liability'. See Registration and Collection Act s4(1) and s18A.

<sup>12</sup> Registration and Collection Act s25(2A).

<sup>13</sup> Registration and Collection Act s28.

<sup>14</sup> Registration and Collection Act s30(1).

<sup>15</sup> Registration and Collection Act Part IV.

<sup>16</sup> Registration and Collection Act s72AA.

<sup>17</sup> Registration and Collection Act s72AB.

<sup>18</sup> Registration and Collection Act s72.

<sup>19</sup> Registration and Collection Act s72AD.

<sup>20</sup> Registration and Collection Act Part VA.

<sup>21</sup> Registration and Collection Act s25B(1).

<sup>22</sup> Registration and Collection Act s30A.

In addition to the direct powers of the Registrar to make assessments, and register and collect liabilities, the Registrar can also seek assistance from and provide assistance to the relevant authority in reciprocating jurisdictions. The Registrar can request that notices or communications to residence of reciprocating jurisdictions be provided to an overseas authority<sup>23</sup> and assist payers in communicating with overseas authorities.<sup>24</sup> The Registrar may also serve documents upon a person who is in Australia on behalf of an overseas authority for the purpose of an international maintenance agreement with the reciprocating jurisdiction.<sup>25</sup>

### ***Non-Reciprocating Jurisdictions***

Where one party resides in a non-reciprocating jurisdiction, the powers of the Registrar are much more restricted than with respect to reciprocating jurisdictions.

If the payee resides in a non-reciprocating jurisdiction and the payer resides in Australia, the payee may make an application for administrative assessment directly to the Registrar, and that liability can be registered and enforced as a registrable maintenance liability.

If a payer resides in a non-reciprocating jurisdiction the parties will not meet the eligibility requirements of the administrative assessment regime and the parties, or either of them, may apply for a child maintenance order pursuant to the Family Law Act.<sup>26</sup> The making of a child maintenance order will create an enforceable liability, however the Registrar is not able to provide the Orders to the non-reciprocating jurisdiction for registration or enforcement. The payee may be able to seek to register and enforce the order in the non-reciprocating jurisdiction, but the extent to which this option is available will depend on the domestic laws of that country.

### ***Conclusion***

From a practical perspective, the administration of child support and maintenance matters within Australia can be arduous, time consuming, and at times costly. The Department of Human Services generally advise that parties attempt to organise maintenance arrangements by way of private agreement, however this may not always be possible where there is ongoing hostility and a refusal to cooperate.

These difficulties are often exacerbated when there is a need to coordinate with the relevant authorities in overseas jurisdictions. Effective enforcement is difficult to achieve within Australia, and despite the legislative provisions for the enforcement of overseas maintenance liabilities, the practical likelihood of enforcement would need to be considered before any action is taken.

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<sup>23</sup> CSRC Regulations reg 33.

<sup>24</sup> CSRC Regulations reg 36.

<sup>25</sup> CSRC Regulations reg 32.

<sup>26</sup> Family Law Act 1975 (Cth) s 66F, s66E.