



# THE LAW OF INTERNATIONAL BUSINESS IN AUSTRALIA

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NEW ZEALAND BUTTERWORTHS OF NEW ZEALAND LIMITED

T & W Young Building  
77-85 Customhouse Quay, Wellington

ENGLAND BUTTERWORTH & CO (PUBLISHERS) LIMITED

88 Kingsway, London WC2B 6AB

CANADA BUTTERWORTH & CO (CANADA) LIMITED

2265 Midland Avenue, Scarborough, Ontario M1P-4S1

SOUTH AFRICA BUTTERWORTH & CO (SA) (PTY) LIMITED

National Library of Australia  
Cataloguing-in-Publication entry

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O'Keefe, P.J.

The law of international business in Australia.

Index

ISBN 0 409 43710 7

1. Commercial law—Australia. I. Tedeschi, Mark A.G.,  
joint author. II. Title.

346'.94'07

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Typeset by Queensland Type Service Pty Limited, Brisbane  
Printed by Macarthur Press (Books) Pty Limited  
For the publishers Butterworths Pty Limited

## *Preface*

The purpose of this book is to present an analysis of those laws, either Australian or international, which affect a person engaged in international business either in Australia or from Australia. We have examined those laws which peculiarly affect an Australian doing business overseas or an overseas person doing business in Australia. This book is therefore primarily one on Australian law or international law, particularly as the latter finds expression in the legal systems of selected countries of major trading significance to Australia.

The term "business" is used as an all-encompassing term to include those transactions of a commercial nature which are incidents of trade and investment. The term therefore includes the sale of goods, services and know-how, and the investment of capital. We have tried to concentrate on those areas of the law which affect international business in particular. This book does not include a discussion of those areas of the law, like general contract law, which affect domestic transactions as much as international ones. For those areas, the reader can refer to a book on general commercial law.

Authorship of individual chapters is as follows: Mark Tedeschi has written Chapters 1, 4, 5, 6, and that part of Chapter 9 on litigation; P J O'Keefe has written Chapters 2, 3, 7, 8, and that part of Chapter 9 on arbitration.

The law is stated as at 31 March 1979.

M A G T  
P J O'K

## *Abbreviations*

AALCC	Asian-African Legal Consultative Committee
ABAJ	American Bar Association Journal (USA)
ABLR	Australian Business Law Review
AC	Appeal Cases (UK)
AITR	Australian Income Tax Reports
AJCL	American Journal of Comparative Law (USA)
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
All ER	All England Law Reports (UK)
Anglo-American LR	Anglo-American Law Review (USA)
ATD	Australasian Tax Decisions
ATR	Australasian Tax Reports
AYIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law (UK)
Ch	Law Reports: Chancery Division (UK)
CILSA	Comparative and International Law Journal of Southern Africa (South Africa)
CLR	Commonwealth Law Reports (Australia)
CMLR	Common Market Law Reports (UK)
Cornell ILJ	Cornell International Law Journal (USA)
CTBR	Commonwealth Taxation Board of Review Decisions
DLR	Dominion Law Reports (Canada)
EEC	European Economic Community
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
F Supp	Federal Supplement (USA)
F 2d	Federal Reporter Second Series (USA)
IATA	International Air Transport Association
IBLM	International Business Law Materials (Japan)
ICAO	International Civil Aviation Organization
ILM	International Legal Materials (USA)
ILR	International Law Reports (UK)
IMCO	Intergovernmental Maritime Consultative Organization
JAIL	Japanese Annual of International Law
JBL	Journal of Business Law (UK)
JDI	Journal du droit international (France)
JWTL	Journal of World Trade Law (UK)
KB	Law Reports: King's Bench Division (UK)
Law Americas	Lawyer of the Americas (USA)
Lloyd LR	Lloyd's List Law Reports, 1919-1950 (UK)
Lloyd's Rep	Lloyd's Law Reports (UK)
Melbourne ULR	Melbourne University Law Review (Australia)
NE 2d	North Eastern Reporter Second Series (USA)

*Law of International Business*

NILR	Netherlands International Law Review
NSWR	New South Wales Reports (Australia)
NSWLR	New South Wales Law Reports (Australia)
NY	New York Reporter (USA)
NYS	New York Supplement (USA)
NZLR	New Zealand Law Reports
Ottawa LR	Ottawa Law Review (Canada)
PCIJ	Permanent Court of International Justice
QB	Law Reports: Queen's Bench Division (UK)
SASR	South Australian State Reports (Australia)
S Ct	Supreme Court Reporter (USA)
Sydney LR	Sydney Law Review (Australia)
TBRD	Taxation Board of Review Decisions (Australia)
TPC	Trade Practices Commission (Australia)
Trade Cas	CCH Trade Cases (USA)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
US	United States Reports (USA)
Va JIL	Virginia Journal of International Law (USA)
VR	Victorian State Reports (Australia)
WLR	Weekly Law Reports (UK)
WN(NSW)	Weekly Notes (New South Wales) (Australia)

## *Index of Government Publications*

### Chapters 4-6

- Foreign Investment in Australia*, statement by the Treasurer the Hon P Lynch to the House of Representatives (11 April 1976) (Australian Government Document no 24251/76)
- Foreign Investment in Australia*, published for the Treasurer the Hon J Howard (September 1978)
- Investment in Australia*, Department of the Treasury (1976) (Australian Government Document no 24248/76)
- Reserve Bank of Australia, *Exchange Rate and Capital Inflow* (23 September 1972)
- Reserve Bank of Australia, *Authority to Implement Transfer of Securities* (27 September 1972)
- Reserve Bank of Australia, *Exchange Control* (2nd ed November 1978)
- Reserve Bank of Australia, *Circular to Exporters—Exchange Control; Abolition of Export Licences* (December 1978)
- Statement by the Prime Minister*, Press Statement no 175 (22 January 1974)
- Statement by the Prime Minister the Rt Hon W McMahon, *Outward Portfolio Investment* (28 September 1972)
- Statement by the Hon F Stewart, Minister Assisting the Treasurer, *Export of Notes and Coins from Australia* (16 February 1975)
- Statement by the Treasurer the Hon F Crean, *Coverage of Restrictions on Overseas Borrowings* (1 February 1973)
- Statement by the Treasurer the Hon F Crean, *Additional Monetary Measures* (10 November 1974) Treasury Press Release no 94
- Statement by the Treasurer the Hon J Howard, *Review of Foreign Investment Policy and Exchange Control Protection Impinging on Capital Inflow* (8 June 1978)
- Statement by the Treasurer the Hon J Howard, *Conditions to Exchange Control Authorities for Direct Investment Overseas* (24 January 1979)

## *Table of Cases*

- Adelaide Steamship Industries Pty Ltd v Commonwealth (1974) 8 SASR 425 . . . 954,  
955
- Albacora SRL v Westcott and Laurance Line Ltd [1966] 2 Lloyd's Rep 53 . . . 335
- Alfred Dunhill of London Inc v Cuba 425 US 682 . . . 822
- American Banana Co v United Fruit Co 213 US 347 (1909) . . . 813
- Ardennes, The [1951] 1 KB 55 . . . 330
- Arthur Andersen & Co v Finesilver 546 F 2d 338 (1976) . . . 834
- Atlantic Shipping and Trading Co v Louis Dreyfus & Co (1922) 10 Lloyd LR 447  
. . . 248
- Australasian Jam Co Pty Ltd v Federal Commissioner of Taxation (1953) 5 AITR  
566 . . . 620
- Banco do Brasil SA v AC Israel Commodity Co 190 NE 2d 235 . . . 723, 724
- Banco Frances e Brasileiro SA v John Doe No 1 (1975) 14 ILM 1440 . . . 724
- Banco Nacional de Cuba v Sabbatino 376 US 398 . . . 821
- Bando Trading Co Ltd v Registrar of Titles [1975] VR 353 . . . 910, 911
- Beguelin Import Co v GL Import Export SA (1972) CMLR 81 . . . 843
- Bonacina, Re [1912] 2 Ch 394 . . . 709
- Bonython v Commonwealth (1948) 75 CLR 589 . . . 245, 247  
—v— (1950) 81 CLR 486 . . . 223  
—v— [1951] AC 201 . . . 908, 909
- Branch v FTC 141 F 2d 31 . . . 812
- British Nylon Spinners Ltd v Imperial Chemical Industries Ltd [1952] 2 All ER 780  
. . . 710, 836
- Brohier v Commissioner of Taxation (1966) 115 CLR 235 . . . 627
- Case 19 (1946) 12 CTBR 321 . . . 620
- Case 56 (1946) 15 CTBR 443 . . . 606
- Case M 75 (1961) 12 TBRD 375 . . . 605
- Case P 51 (1963–1964) 14 TBRD 232 . . . 606
- Case Q 12 (1964) 15 TBRD 51 . . . 606
- Case S 30 (1966) 17 TBRD 174 . . . 605
- Chisholm v British European Airways [1963] 1 Lloyd's Rep 626 . . . 337
- Clearing Dollars Case (1955) ILR 730 . . . 724
- Cofinco Inc v Angola Coffee Co AC (1975) 2 Trade Cas 67, 051 . . . 828
- Commercial Solvents Corp v EC Commission (1974) CMLR 309 . . . 841, 842
- Commissioner of Taxation v Hillsdon Watts Ltd (1937) 1 AITR 42 . . . 613  
—v Miller (1946) 73 CLR 93 . . . 605
- Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA  
[1970] 3 All ER 71 . . . 209, 223
- Continental Ore Co v Union Carbide 370 US 690 . . . 823
- Corocraft Ltd v Pan American Airways Inc [1969] 1 All ER 82 . . . 331
- Cretanor Maritime Co Ltd v Irish Marine Management Ltd [1978] 3 All ER 164 . . .  
918

**References are to paragraph numbers**



- Cropley Ltd v Commissioner of Taxation (1924) 41 WN (NSW) 51...620  
Davies v Commissioner of Taxation (NSW) (1911) 11 SR (NSW) 143...616  
Dawson (deceased); Union Fidelity Trust Co Ltd v Perpetual Trustee Co Ltd, Re [1966] 2 NSW 211...911  
De Beers Consolidated Mines Ltd v Howe [1906] AC 455...607  
Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357...947  
Eastern Railroad Presidents Conference v Noerr Motor Freight Inc 365 US 127...825  
Eisen und Metall AG v Ceres Stevedoring Co Ltd [1977] 1 Lloyd's Rep 665...237, 239  
Eleftheria, The [1969] 2 All ER 641...219, 221  
Elliott v Elliott [1975] 1 NSWLR 148...920  
Emek v Bossers & Mouthaan (1955) ILR 722...723  
Europemballage Corp & Continental Can Co Inc v EC Commission (1973) CMLR 199...842, 845  
Executor Trustee and Agency Co of SA Ltd v Federal Commissioner of Taxation (1932) 48 CLR 26...602  
French and Taiwanese Mushroom Packers, Re the (1975) CMLR D83...843  
Fairclough, Dodd & Jones Ltd v JH Vantol Ltd [1957] 1 WLR 136...230  
Federal Commissioner of Taxation v Angus (1961) 8 AITR 201...626  
— v Austin (1932) 48 CLR 590...631  
— v Brohier (1959) 103 CLR 632...627  
— v Clarke (1927) 40 CLR 246...602, 617  
— v Lewis Berger & Sons (Australia) Ltd (1927) 39 CLR 468...613  
Foster v Driscoll [1929] 1 KB 470...710  
FTC v Cement Institute 68 S Ct 793...809  
Fuld (deceased) (No 3), In the Estate of [1965] 3 All ER 776...605  
Gamlen Chemicals (A'asia) Pty Ltd v Scindia (unreported, 3 October 1978)...335  
Government of India v Taylor [1955] AC 491...705  
Gregory v Deputy Federal Commissioner of Taxation (WA) (1937) 57 CLR 774...605  
Grein v Imperial Airways Ltd [1937] 1 KB 50...327, 337, 343  
Hamlyn & Co v Talisker Distillery [1894] AC 202...928  
Harland & Wolff Ltd v Burns & Laird Lines Ltd (1931) 40 Lloyd LR 286...323  
Henderson v Federal Commissioner of Taxation (1970) 1 ATR 596...602, 617  
Henriksen v Grafton Hotel Ltd (1942) 24 TC 453...631  
Herrick v Leonard and Dingley Ltd [1975] 2 NZLR 566...239  
Hopkins v Difrex Societe Anonyme [1966] 1 NSW 797...221  
Horabin v British Overseas Airways Corporation [1952] 2 All ER 1016...342  
Hughes v Federal Commissioner of Taxation (1957) 98 CLR 345...627  
Hughes (Commissioner for Income Tax for Queensland) v Munro (1909) 9 CLR 289...611  
Hunt v Mobil Oil Corp 550 F 2d 68 (1977)...820, 822  
Huntington v Attrill [1893] AC 150...704  
— v — 146 US 657...704  
Hussler v Swiss Air Transport Co Ltd 388 F Supp 1238 (1975)...328  
ICI Ltd v EC Commission (1972) CMLR 557...842, 843, 844, 845  
I Congreso del Partido [1977] 3 WLR 778...255  
Industrial Investment Development Corp v Mitsui & Co Ltd (1978) 1 Trade Cas 74, 972...820

**References are to paragraph numbers**

# *Table of Cases*

Interamerican Refining Corp v Texaco Maracaibo Inc	307 F Supp 1291 (1970)....	822, 823
Iskra; Ex parte Mercantile Transport Co Pty Ltd, Ex parte	(1963) 63 SR (NSW) 538	....906
James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd	[1970] AC 583; [1970] 1 All ER 796....	908, 942, 948
John Churcher Pty Ltd v Mitsui & Co (Australia) Ltd	[1974] 2 NSWLR 179....	324
J A Johnston Co Ltd v The Ship "Tindeffell"	[1973] 2 Lloyd's Rep 253....	338
Jones v Flying Clipper	(1954) 116 F Supp 386....	341
Julius Bendit Ltd v Commissioners of Inland Revenue	(1945) 2 TC 44....	620
J Zeevi and Sons Ltd v Grindlays Bank (Uganda) Ltd	(1975) 14 ILM 1446....	723, 724
Kahan v Pakistan Federation	[1951] 2 KB 1003....	258
Kahler v Midland Bank Ltd	[1950] AC 24....	712, 714
Kum v Wah Tat Bank Ltd	[1971] 1 Lloyd's Rep 439....	330
Leather's Best Inc v The "Mormaclynx"	[1971] 2 Lloyd's Rep 476....	338
Leduc v Ward	(1888) 20 QBD 475....	330
Lessinger v Mirau	(1955) ILR 725....	724
Lewis Construction Co Pty Ltd v M Tichauer Societe Anonyme	[1966] VR 341....	221
Linseman v World Hockey Association	439 F Supp 1315 (1977)....	823
Lord Cable, decd, Re	[1977] 1 WLR 7....	703, 714
Lotus, The PCIJ Ser A No 10	(1927)....	805
Loucks v Standard Oil Company	224 NY 99....	709
Lummus Co Ltd v East African Harbours Corporation	[1978] 1 Lloyd's Rep 317....	239
Madeleine Vionnet et Cie v Wills	[1940] 1 KB 72....	910
Malayan Shipping Co Ltd v Federal Commissioner of Taxation	(1946) 71 CLR 156	....607
Mareva Compania Naviera SA v International Bulkcarriers SA	[1975] 2 Lloyd's Rep 509....	916
Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd	[1959] AC 589....	335
Meyer Heine Pty Ltd v China Navigation Co Ltd	(1965-66) 115 CLR 10....	856
Miliangos v George Frank (Textiles) Ltd	[1975] 3 WLR 758....	911
Missouri Steamship Company, Re	(1889) 42 ChD 321....	712
Michell v Federal Commissioner of Taxation	(1931) 46 CLR 413....	613
Mogul Steamship Co Ltd v McGregor Gow & Co, The	(1889) 23 QBD 598....	304
Moojen v von Reichert	(1962) 89 JDI 718....	724
M/S Bremen v Zapata Off-Shore Company	92 S Ct 1907 (1972)....	219, 221
Mutual Life and Citizens Assurance Co Ltd v Federal Commissioner of Taxation	(1959) 7 AITR 402....	626
Nathan v Federal Commissioner of Taxation	(1918) 25 CLR 183....	608
New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd	[1975] AC 154....	239, 241
Noel v Linea Aeropostal Venezolana	247 F 2d 677....	328
North Australian Pastoral Co Ltd v Federal Commissioner of Taxation	(1946) 71 CLR 623....	607
Occidental Petroleum Corp v Buttes Gas & Oil Co	331 F Supp 92 (1971)....	815, 820, 825
Offshore International SA v Banco Central SA	[1976] 3 All ER 749....	223
Parke Davis & Co v Commissioner of Taxation	(1959) 101 CLR 521....	608

**References are to paragraph numbers**

- Permanent Trustee Co of NSW Ltd v Federal Commissioner of Taxation (1940) 6 ATD 5...618
- Philippine Admiral, The [1976] 1 All ER 78...255
- Pivovarov v Chernabaeff (1977) 16 SASR 329...920
- Polites v Commonwealth (1945) 70 CLR 60...856
- Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (1978) 52 ALJR 337...237, 240
- Praznovsky v Sablyack [1977] VR 114...920
- Ralli Brothers v Compania Naviera Sota y Aznar [1920] 2 KB 287...712, 715
- Rasu Maritima SA v Pertamina [1977] 3 WLR 518...917
- Regazzoni v KC Sethia (1944) Ltd [1956] 2 QB 490...706
- v — (1958) AC 301...710, 711
- Rena K, The [1978] 3 WLR 431...953
- GH Renton & Co Ltd v Palmyra Trading Corporation of Panama [1957] AC 149...335
- Rosack v Volvo of America Corp (1977) 1 Trade Cas 71, 446...809
- Rosenbruch v American Export Isbrandtsen Lines Inc [1974] 1 Lloyd's Rep 119...338
- Rotterdamsche Bank NV v British Overseas Airways Corporation [1953] 1 All ER 675...331
- Royal Typewriter Co v MV "Kulmerland" [1973] 2 Lloyd's Rep 428...338
- Salmond & Spraggon (Australia) Pty Ltd v Joint Cargo Services Pty Ltd [1977] 1 Lloyd's Rep 445...237
- Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd [1966] 1 All ER 814...331
- Scherk v Alberto-Culver Company 94 S Ct 2449 (1974)...218
- Schorsch Meier GmbH v Hennin [1974] 3 WLR 823...911
- Scruttons Ltd v Midland Silicones Ltd [1962] AC 446...240
- Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag Svea [1978] 2 WLR 887...911
- Sharif v Azad [1966] 3 All ER 785...725
- Sharkey v Wernher [1956] AC 58...616
- Siskina (Cargo Owners) v Distros SA [1977] 3 WLR 818...917
- Societe Internationale v Rogers 357 US 197...834
- Stag Line Ltd v Foscolo, Mango & Co [1932] AC 328...341
- Stephen v Zivnostenska Banka National Corp 140 NYS 2d 323...728
- "Suleyman Stalskiy", The [1976] 2 Lloyd's Rep 609...239
- Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61...235
- Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat [1943] AC 507...909
- Texas Co (Australia) Ltd v Federal Commissioner of Taxation, The (1939-40) 63 CLR 382...616
- Tindal v Federal Commissioner of Taxation (1946) 72 CLR 608...602
- Timberlane Lumber Co v Bank of America 549 F 2d 597 (1976)...812, 817, 821
- TM Duche & Sons (UK) Ltd v Walworth Industries (Aust) Pty Ltd (1962) 79 WN (NSW) 27...403, 435
- Todhunter-Mitchell & Co Ltd v Anheuser-Busch Inc 383 F Supp 586 (1974)...838
- Tomkinson v First Pennsylvania Banking and Trust Co [1961] AC 1007...910
- Trendtex Trading Corporation v Central Bank of Nigeria [1976] 1 WLR 868...252
- v — [1977] 2 WLR 356...253, 255
- Underhill v Hernandez 168 US 250...820

**References are to paragraph numbers**

# *Table of Cases*

- United International Stables Ltd v Pacific Western Airlines Ltd 5 DLR (3d) 67 . . . 337
- United Nuclear Corporation v General Atomic Company (1978) 17 ILM 376 . . . 834
- United Railways of Havana and Regla Warehouses Ltd, Re [1961] AC 1007 . . . 725,  
908
- United States v Aluminum Co of America 148 F 2d 416 . . . 813, 814
- v American Tobacco Company 221 US 106 (1911) . . . 812, 826
- v General Electric Co 115 F Supp 835 . . . 836
- v Pacific & Arctic Railway & Navigation Co 228 US 87 . . . 813
- v Timken Roller Bearing Co 83 F Supp 284 . . . 814
- v The Watchmakers of Switzerland Information Centre Inc (1963) Trade Cas 77,  
414 . . . 815, 823, 837
- Unterweser Reederei GmbH v Zapata Off-Shore Company [1968] 2 Lloyd's Rep 158  
. . . 221
- Vanity Fair Mills Inc v T Eaton Co 234 F 2d 633 . . . 837
- Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277; [1939] 1 All ER 513  
. . . 225, 324, 908
- Waterloo Pastoral Co Ltd v Federal Commissioner of Taxation (1946) 72 CLR 262 . . .  
607
- Wells v John Lewis Pty Ltd (1975) 1 TPC 226 . . . 854
- Westinghouse Electric Corporation Uranium Contracts Litigation, Re (1978) 17 ILM  
77 . . . 834
- Westinghouse Uranium Contract Litigation, Re [1978] 2 WLR 81 . . . 835
- Westminster Bank Ltd v Imperial Airways Ltd (1936) 55 Lloyd LR 242 . . . 331
- v — [1936] 2 All ER 890 . . . 336
- Wilson v Darling Island Stevedoring and Lighterage Co Ltd (1956) 95 CLR 43 . . . 239
- Wilson, Smithett & Cope Ltd v Terruzzi [1976] 1 All ER 817 . . . 725
- WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127 . . . 244
- Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1971]  
2 QB 23 . . . 243

**References are to paragraph numbers**

## *Table of Legislation*

Air Navigation Act 1920 (Com) . . . .	316
Air Navigation Regulations (Com) . . . .	316
Antitrust Procedures and Penalties Act 1974 (USA) . . . .	810
Arbitration Act 1891 (SA) . . . .	948
Arbitration Act 1891 (Tas) . . . .	948
Arbitration Act 1895 (WA) . . . .	948
Arbitration Act 1902 (NSW) . . . .	944, 948
Arbitration Act 1958 (Vic) . . . .	948, 954, 958
Arbitration Act 1973 (Qld) . . . .	947, 948
Arbitration (Foreign Awards and Agreements) Act 1974 (Com) . . . .	220, 953, 957, 958
Atomic Energy Act 1953 (Com) . . . .	538
Australian National Airlines Act 1945 (Com) . . . .	538, 539
Banking Act 1959 (Com) . . . .	402, 403, 426, 433, 529, 539, 803
Banking (Foreign Exchange) Regulations (Com) . . . .	402, 403, 407, 420, 427-429, 434, 435, 713, 715, 718
Bill of Lading Act 1855 (UK) . . . .	330
Broadcasting and Television Act 1942 (Com) . . . .	539
Business Concerns Records Act 1961 (Quebec) . . . .	833
Business Records Protection Act 1947 (Ontario) . . . .	833
Carriage of Goods by Sea Act 1932 (Newfoundland) . . . .	324
Carriage of Goods by Sea Act 1924 (UK) . . . .	318, 324
Carriage of Goods by Sea Act 1971 (UK) . . . .	318
Carriage of Goods by Sea Act 1936 (USA) . . . .	321
Civil Aviation (Carriers' Liability) Act 1959 (Com) . . . .	320, 337, 339
Clayton Act 1914 (USA) . . . .	809, 810, 828
Companies Act 1961 (NSW) . . . .	906
Companies (Foreign Take-overs) Act 1972 (Com) . . . .	504
Customs Act 1901 (Com) . . . .	420
Electricity Commission Act 1950 (NSW) . . . .	538
Evidence (Proceedings in other Jurisdictions) Act 1975 (UK) . . . .	835
Federal Trade Commission Act 1914 (USA) . . . .	809, 810
Foreign Judgments Act 1962 (Vic) . . . .	912, 958
Foreign Judgments Act 1971 (SA) . . . .	912
Foreign Judgments (Reciprocal Enforcement) Act 1963 (WA) . . . .	912, 958
Foreign Judgments (Reciprocal Enforcement) Act 1973 (NSW) . . . .	912-914, 958
Foreign Judgments (Reciprocal Enforcement) Act 1973 (Tas) . . . .	912, 958
Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 (Com) . . . .	833, 858, 859
Foreign Sovereign Immunities Act 1976 (USA) . . . .	257, 258, 822
Foreign Takeovers Act 1975 (Com) . . . .	426, 427, 429, 504-528
Government Railways Act 1912 (NSW) . . . .	538

**References are to paragraph numbers**

*Table of Legislation*

Hart-Scott-Rodino Antitrust Improvement Act 1976 (USA) . . . .	831
Income and Corporation Taxes Act 1970 (UK) . . . .	512, 618
Income Tax Assessment Act 1936 (Com) . . . .	604–609, 612, 613, 615, 616, 618–620, 626–628, 630, 634, 637, 641, 647, 659
Income Tax (International Agreements) Act 1953 (Com) . . . .	604, 627–630
International Monetary Agreements Act 1947 (Com) . . . .	716, 717
Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade 1947 (Japan) . . . .	846
Navigation Act 1912 (Com) . . . .	539
Post and Telegraph Act 1901 (Com) . . . .	538
Reciprocal Enforcement of Judgments Act 1959 (Qld) . . . .	912, 958
Sea-Carriage of Goods Act 1924 (Com) . . . .	215, 318, 321, 322, 324, 325, 335, 337, 953
Service and Execution of Process Act 1901 (Com) . . . .	906, 915
Sherman Act 1890 (USA) . . . .	809, 810, 812, 813, 823, 833, 838
Shipping Conferences Exemption Act 1970 (Canada) . . . .	304
Shipping Contracts and Commercial Documents Act 1964 (UK) . . . .	833
State Immunity Act 1978 (UK) . . . .	256, 258
Supreme Court Act (NSW) . . . .	906
Tariff Act 1930 (USA) . . . .	809, 810
Taxation Administration Act 1953 (Com) . . . .	433
Trade Practices Act 1974 (Com) . . . .	306, 851–854, 857
Uranium Information Security Regulations 1976–77 (Canada) . . . .	833
Usury, Bills of Lading, and Written Memoranda Act 1902 (NSW) . . . .	330
Webb-Pomerene Act 1918 (USA) . . . .	809

**References are to paragraph numbers**

## *Contents*

	<i>Page</i>
PREFACE . . . . .	vii
ABBREVIATIONS . . . . .	ix
INDEX OF GOVERNMENT PUBLICATIONS . . . . .	xi
TABLE OF CASES . . . . .	xiii
TABLE OF LEGISLATION . . . . .	xviii
<i>Chapter</i>	
1 The Nature of International Business . . . . . (including checklist of legal considerations in foreign trade and investment)	1
2 International Business Contracts . . . . .	13
3 International Transport of Goods . . . . .	45
4 Exchange Control . . . . .	72
5 Foreign Takeovers and Investment . . . . .	85
6 Taxation . . . . .	103
7 Recognition of Foreign Regulations . . . . .	130
8 Extraterritorial Control of Business . . . . .	144
9 Dispute Settlement . . . . .	181
NOTES (CHAPTERS 5 AND 6) . . . . .	211
INDEX . . . . .	213

## CHAPTER 1

# *The Nature of International Business*

**[101]** International business is a term which has no distinct legal meaning, but rather is a term used to describe commercial transactions involving the flow of money, goods, services or know-how across international borders. The most common forms are the sale of goods by a seller in one country to a buyer in another and the investment of capital by an investor in one country in an enterprise or in property situated in another country.

**[102]** A distinction must immediately be drawn between doing business *in* and *with* a foreign country. Where a trader does business *with* a foreign country, he has no legal presence in the foreign country, but deals from afar with another trader in that country. Where a trader does business *in* a foreign country he has a presence in that country, which is recognized by the law of that country. His presence gives to the foreign country jurisdiction to attach legal obligations to the trader.

### THE DIFFERENT FORMS OF FOREIGN INVESTMENT

**[103]** A term which is sometimes used to describe doing business *in* a foreign country is "direct investment". This term is most commonly used in the context of corporations which set up a subsidiary in an overseas country. Direct investment is the method by which a new constituent part of the home corporation is established. Direct investment is the form of expansion whereby the investor sets up a new subsidiary or acquires a sufficient degree of ownership over an existing overseas subsidiary that it can control the activities of the subsidiary. This is to be distinguished from "portfolio investment", where the investor acquires an interest in an enterprise with a view to deriving income and possibly capital gain from the ownership of that interest, but without any intention or indeed capability of causing the enterprise to subsume its interests to those of the investor.

If a corporation trades overseas through the medium of an agent located in the host country so that the agent is merely standing in the shoes of the principal, then the overseas entity is itself involved in activities in an overseas country, even though acting through an intermediary. For all intents and purposes the agent will be treated by the host government as the local manifestation of a foreign enterprise. All the disadvantages of exporting from abroad will be encountered, and the principal faces the risk of discrimination by the host country government. The expenses and income of the agent are the expenses and income of the principal, and the agent is at no stage considered as a separate economic entity from his principal.



[104] Another form of investment available to the person wishing to invest overseas is through licensing agreements whereby a licensee in the overseas country is given the technological knowledge and the legal right to engage in a certain activity within specific limitations as to geographical area and duration of the right. Patent or copyright legislation may affect the relationship. The investor most often will have an entitlement to a share of profits or gross receipts. This is not a form of direct investment since the interests of the licensee and the investor have not merged, even though they may often coincide. The investor usually has no control over the manner in which the licensee exploits the licensing agreement, and he relies on the coincidence of interests for the protection of his investment.

#### THE ADVANTAGES OF DIRECT INVESTMENT

[105] Most investors engage in direct investment because of market opportunities in a foreign country which the investor feels he can exploit. The opportunity to exploit may arise from a competitive advantage which the investor has.

The investor may have an economy on a larger scale than purely local firms and have access to markets and capital on a multinational basis. This both gives it an advantage over local firms in each host country and provides the initial incentive to expand into a new area. However, at least initially, a foreign subsidiary will be at a disadvantage to local firms in the host country, in that it is not as knowledgeable about local conditions, including local law, and there is the risk of discrimination by the host government and the placing of restrictions on the foreign owned subsidiary's activities. Other disadvantages of direct investment abroad may include the necessity of setting up a management division to link the subsidiary with the home office, and inevitably there will be costs of overseeing an activity located at a distance from the home office.

On the other hand, the direct investor may be able to supply superior management expertise and research knowledge, access to overseas sources of capital and overseas markets, and an efficiency derived from division of function between the constituent parts of the enterprise situated in different countries.

[106] Michael Z Brooke and H Lee Remmers report that according to their field research the move abroad, rather than being an aggressive strategy aimed at the development of an economy of larger scale, was more commonly a defensive strategy aimed at defending an existing activity which was faced with a threat: *The Strategy of Multinational Enterprise* (Longman 1970). Ronald Z Aliber would argue that the main factors which prompt an investor to engage in direct investment abroad are differences between currency exchange rates, capital markets, and import or export restrictions: "A Theory of Direct Foreign Investment" in C P Kindleberger, *The International Corporation—a Symposium* (MIT Press 1970). A clearer view is obtained if one accepts that the typical manager believes that his enterprise is not healthy unless there is an acceptable rate of growth and that the decision to invest abroad is invariably made in order to ensure that this acceptable rate is maintained: see C P Kindleberger, *American Business Abroad* (Yale University Press 1969) 6–10; J K Galbraith, *The New Industrial State* (Hamish Hamilton 1967). It is also