

CHAPTER EIGHTEEN: CUSTOMS¹

1. Introduction

Customs is an integral part of the process of international lending, borrowing, and acquiring museum collections. The Australian Customs and Border Protection Service (ACBPS), within the Department of Home Affairs, collects the duty and tax on all goods imported into Australia. Fortunately some, or all, of these costs can be waived if the material is being imported for temporary exhibition or being acquired for a public collection.²

Overall the collections sector has a broad range of interactions with the ACBPS. For these to be effective, three things are essential:

- a good understanding of the institution's regulatory obligations under the *Customs Act 1901* and the *Customs Tariff Act 1995*;
- the maintenance of good record keeping systems; and
- regular checks of import activity on order to retain a high degree of Customs compliance.

The ability to import material temporarily, exempt from tax and duty, is an important provision in customs law for collecting institutions. Without it, the substantial amounts of tax and duty applicable on cultural material would inhibit the ability of most, if not all, institutions to borrow from international collections.

When a public collecting institution acquires collection material from an international source, generally, there is no import duty payable (although GST must be paid).³ To achieve this, particular care must be paid to the tariff line stated in the Customs Declaration. "Tariff lines" are the internationally recognised categorisation system that defines every type of product and its applicable duty and tax. This duty exemption is a significant aspect of customs law that enables the purchase of international material by public collections without incurring prohibitively high expenses at the time of import.

It is important to remember that collecting institutions also import material that does attract duty and tax. Many departments import machinery and equipment, published material, retail stock and other goods on which tax and duty must be paid. Again, the tariff class into which the material is entered determines the amount of duty payable.

¹ The author of this chapter is Ms Charlotte Davy, Senior Exhibitions Registrar, Art Gallery of New South Wales. First published on 20 November 2009, updated January 2018 by Shane Simpson and Ian McDonald.

² The discussion in this chapter focuses on goods worth over AU\$1000, items under this amount can be released from Customs by simply completing a Self Assessed Clearance Declaration.

³ *Customs Tariff Act 1995* Schedule 4 contains various provisions exempting certain types of goods intended for public institutions from import duties..

Liability limited by a scheme approved under Professional Standards Legislation. Simpsons Solicitors Pty Ltd (ACN 616 063 266) trading as Simpsons Solicitors. All legal practitioners employed by Simpsons Solicitors are members of the scheme.

2. Key legislation

2.1 The Customs Act 1901

The *Customs Act 1901* is the key legislation that governs the import and export of material to and from Australia. This legislation is substantial, covering every type of import and export scenario, so it is unrealistic for museum staff who occasionally delve into importation to be fully conversant with this legislation in its entirety.

A useful reference is the Australian Customs *Documentary Import Declaration Comprehensive Guide and Information for Exporters*.⁴

2.2 The Customs Tariff Act 1995

The *Customs Tariff Act 1995* defines tariff lines and determines rates of duty. The Schedules to the Act are enormous, listing and categorising every type of product into a tariff line. The tariffs change regularly due to the availability of new products so it is fortunate that the full working tariff is available online.⁵

3. IMPORTING

3.1 Types of Customs entries

The ACBPS treats items differently depending on the purpose that they are brought into Australia. There are two main types of customs entry that collecting institutions usually use:

(a) Home consumption

For Customs purposes, an item that is purchased or gifted from an international source and that will permanently stay in Australia once imported, is entering the country for “home consumption”.⁶ Items that typically fall into this category include acquisitions and gifts for permanent collections, machinery and equipment, and stock for retail outlets.

(b) Event Status

Event Status is a special provision that allows items to be brought into Australia free of duty and tax for a temporary event.⁷ This is used both for the temporary exhibition of material borrowed from an overseas source, and for some collection development loans that are used for short-term research and display.⁸

(c) Customs brokerage

As the owner or borrower of items that are imported from overseas, an institution will need to engage a licensed customs broker to act on its behalf. A customs broker will prepare and lodge a Customs Import Declaration, which involves providing the Australian Customs Service (ACBPS) with the relevant information to determine any applicable tax and duty payable and to make an assessment of border security risks. It is also used to provide information to the Australian Bureau of Statistics on trade activity.

⁴ *Documentary Import Declaration Comprehensive Guide*, the 2013 version of which was published by the ACBPS in 2013 and should now be available from the Department of Home Affairs; see also the document *Information for Exporters*, which should be available from the same source.

⁵ See <https://www.homeaffairs.gov.au/busi/cargo-support-trade-and-goods/importing-goods/tariff-classification-of-goods/current-tariff-classification>.

⁶ Customs Act 1901, section 68, and for more information, see <https://www.homeaffairs.gov.au/busi/cargo-support-trade-and-goods/importing-goods/import-declarations>.

⁷ Sections 162 and 162A of the Customs Act 1901 provide that regulations can be made to provide for an exemption from the usual customs processes and tax payments, on an undertaking from the importer to pay any duties that may be payable. Importation for exhibition purposes is included in this category under regulation 99 of the *Customs Regulations 2015*. However, certain types of materials are not covered by this exemption – namely, theatrical costumes, props and scenery and commercial films. If you are importing such materials for exhibition or collection purposes, you will generally need to follow the “usual” customs procedures, as discussed further in this chapter.

⁸ Event status is discussed in greater detail below.

Many collecting institutions may not have a direct relationship with customs brokers as it is usual practice to employ a freight forwarding company that offers a complete freight and customs service. There are two types of freight forwarders offering these services:

- companies, such as Fedex, who have licensed brokers on staff to carry out the Customs reporting for the material that they transport; and
- companies that subcontract the brokering function to a third party, a specialist customs broker.

The institution is ultimately responsible to the ACBPS for the information that is declared to Customs, so it is important that the staff involved in the importation of any goods from overseas have enough knowledge of Customs legislation to provide the correct information to their broker, and so that they can check the accuracy of the information that their broker is declaring to Customs. Such checks are important and must be made regularly.

3.2 Information declared to Customs

The key information required by a customs broker to complete a Customs Import Declaration includes information such as:

- the mode of transport;
- the arrival and departure ports for the material;
- the relevant number for the Airway Bill or Bill of Lading;
- the supplier;
- the country of origin;
- a description of the goods; and
- the tariff category for the goods.

Other specific information such as the owner's contact details, the delivery address, the importer's ABN, and particular technical details relating to specific types of shipments will also be required. A full list of all the fields on an Import Declaration is listed in the Australian Customs *Documentary Import Declaration Comprehensive Guide*.

3.3 Documentation

Museums need to keep clear documentation of their Customs activity in a form that can be easily retrieved for auditing purposes. Customs runs a rigorous compliance program and can audit organisations at least every five years. Key documentation should be retained for a minimum of seven years but it is prudent to keep it longer. This includes:

- copies of Customs Importation Declarations;
- invoices for goods being purchased (or pro forma Invoice for material that is being borrowed);
- Airway Bills and Bills of Lading;
- any contracts or correspondence detailing the terms of the purchases and loans (particularly those relating to who will pay for which aspects of the freight, packing, insurance and any applicable tax and duty);
- proof of payment for the goods, freight, packing and insurance (such as invoices, bank statements and remittance receipts);
- any "Illustrative Descriptive Material" used to determine tariff class, and any written proof of origin of goods (this may include curatorial statements and publications);

In the case of material brought in with special provisions such as Event Status, copies of the applications and approvals.

The ACBPS requires that all documentation must be in English otherwise a translation must be provided.

Museums should regularly check that the information that their broker has declared to Customs correctly matches the documentation relating to the transaction, and ask for amendments to be made if errors are found.

(a) Event status

Section 162A of the *Customs Act* 1901 allows the temporary importation of material for exhibitions, free of import duty and GST. This is known as Event Status.

An application for Event Status is submitted to the ACBPS through a specialist freight agent or directly to the ACBPS. A single application can be made for an exhibition rather than individual applications for each shipment or item. The application form, covering letter and pro forma invoice that form part of the application must include specific information about the material being imported, including details of any material that is subject to Quarantine restriction, the value, any movement within Australia (if it is touring to several venues), and the timeframe for departure. It must be submitted a minimum of seven to ten days before the shipment arrives so that clearance can be secured in advance of the shipment arriving, therefore mitigating any Customs inspection at the airport.

While the loans are in Australia the material remains under the control of the ACBPS. It is important that the material is identifiable on import and export; that it must be re-exported within a 12-month period from the date of import (and within one month of the end of the relevant exhibition) unless otherwise negotiated; and that the material is not sold or further lent without the permission of the ACBPS. **The key to a successful and straightforward relationship with the ACBPS is keeping it informed of all plans relating to the movement of the material well in advance.**

The ACBPS grants Event Status subject to conditions including the following:

- the number or quantity of articles is reasonable, having regard to why they are imported;
- the relevant forms are lodged with Customs for every shipment;
- all goods are identifiable on import and export and a short form copy of the import declaration is forwarded to the events officer for each item imported under the Event Status;
- goods intended for sale must be entered for home consumption prior to transfer to the exhibition;
- goods included in the "event" list are not loaned, sold, pledged, mortgaged, hired, given away, exchanged or otherwise disposed of or altered in any way without prior permission of Customs;⁹
- where permission has been given and goods are sold during the exhibition, duty and GST must be paid and then the goods are released (but only at the conclusion of the "event"); and
- goods stolen during temporary import become subject to payment of duty and GST.

(b) Amending Event Status entries

Customs Import Declarations for material brought into Australia temporarily under Event Status cannot be amended once the Event Status has expired. Any amendments must be made while the material is in Australia.

(c) Extending Event Status

As a standard rule, the ACBPS allows material to enter Australia for 12 months under Event Status after which time the material must be exported or an extension to the Event Status must be sought. The ACBPS will usually allow extensions to the Event Status as long as the request for an extension is made in advance of the Event Status expiring.

⁹ See regulation 100 of the Customs Regulations 2015.

(d) Acquitting Event Status

Collecting institutions must ensure that their Customs broker and/or freight agent acquits the Event Status once all the material has been exported.

(e) Acquiring material that has been imported under Event Status

If material brought in under Event Status is acquired during the duration of the loan or the Event Status period, the GST and any other applicable duties must be paid to the ACBPS. It is important to note that the GST payable is based on the amount declared on the original temporary import permit.

For example, if an item is brought into Australia using Event Status with a declared value of \$10,000, and is subsequently purchased for \$8,000, the GST will be based on the \$10,000 declared at the time of import. It is also worth noting that if an item is gifted it still attracts GST (again based on the declared value at the time of import).

(f) Issues to avoid with Event Status

Customs is a strictly administered process with clear guidelines that work as long as communication with Customs officials is kept open. Usually, issues are only encountered when the exit of the material from the country is not properly considered before the material is imported. Many scenarios may affect the planned exit of the material – a tour venue may be added to an exhibition, or the museum may decide to acquire the work through gift or purchase.

All too often, museum staff or lenders bring loan items into the country in their luggage without notifying Customs and gaining pre-clearance. This is not good practice. Not only are there obvious issues as the physical care of the material and possible inspection on arrival in the airport. It also has financial implications when the material is shipped back to the country of origin: Customs authorities in the country of origin will require tax and duty (as a percentage of the value) to be paid on re-entry of the material as they will have no record of the initial export.

Some material that may be imported for temporary exhibition may be retained on a long-term loan after an exhibition is complete. However, it is important to avoid setting up expectations with the lender that the loan is 'permanent' or 'indefinite' as Event Status usually requires that the item be returned within the 12-month period. The ACBPS may extend the Event Status on a year-by-year basis, but this is discretionary and will not be extended indefinitely.

(g) Destruction or loss of material under Event Status

There are no specific provisions in the *Customs Act 1901* that deal with the total destruction or theft of goods brought into Australia under Event Status. As a result, the ACBPS deals with these situations on a case-by-case basis. In theory, an item that is stolen or destroyed is no longer in control of the ACBPS and thus, the tax and any applicable duty is payable. In practice, the ACBPS has discretionary powers and is unlikely to demand payment if the institution can prove that it carried out due diligence in protecting and caring for the Event Status goods.

(h) Event status and touring exhibitions

With the increasing number of touring exhibitions that are all, or partially, borrowed from international sources, customs legislation affects the contractual arrangements between the organisation that originally applies for the Event Status and the venue that disperses the exhibition/item back to its country of origin.

Event Status can only be taken out by one institution. It cannot be jointly held by touring venues or transferred between touring venues. If the holder of the Event Status is not directly in control of the re-export under its contract with the venue responsible for administering the re-export, it must pass on the obligation to properly acquit the Event Status obligations.

(i) What to cover in an agreement for acquittal of Event Status

The key aspects of this type of contract should include:

- the timeframe for re-export;

- the dispersing venue's liability in relation to the terms of the temporary import permit, i.e not to sell or further lend the items;
- clearly defined responsibility for liability and costs relating to the acquittal of Event Status; and
- clear jurisdiction and conflict clauses.

In particular, such contracts should include clauses that also:

- clearly identify the objects to which the obligations apply (for example, by clearly specifying and identifying them in a schedule to the agreement – including images if necessary);
- clearly state the date by which the object/s must be re-exported (ie the date on which the Event Status expires);
- contain an acknowledgement from the museum which is taking on the object/s from the importing museum to the effect that, if the object/s are not exported back to their country of origin by the relevant date, then the ACBPS is likely to impose taxes, fines and/or other costs on the institution that imported the object/s and gave the Customs undertaking to the ACBPS; and
- if, for any reason (other than a reason caused by the importing institution) the museum taking on the object/s from the importing institution fails to re-export the object/s by the relevant date, it will accept liability for any taxes, fines and/or costs imposed by the ACBPS.

3.4 Acquisitions

Items of historical or cultural significance and original works of art acquired internationally by Australian institutions are exempt from customs duty – but still attract GST. Occasionally when assessing a duty exemption the ACBPS will ask for evidence of the significance of an item being imported, and the onus is on the importing museum to provide the necessary written documentation.

The most common method of customs entry for Australian institutions purchasing items internationally is to buy a work for “home consumption” in the same way that would purchase anything from an international source and use the Australian Tax Office’s (ATO) deferred GST scheme that many institutions have in place.

To defer GST, the institution must apply to the ATO to use the scheme, and once approved, it provides their ABN to Customs through their specialist freight agent and/or customs broker. Customs then reports to the ATO on the import activity of the museum and the GST is reconciled through the museum’s Business Activity Statement.

4. EXPORTING

4.1 Export Declarations

Exporting goods from Australia is more straightforward than importing into Australia because the onus is on the overseas buyer or borrower to fulfil the requirements of the Customs authority in their own country. That said, the overseas importer will rely on the Australian lender to provide the correct information on which to base their Customs Declaration.

For goods worth over AUD2000¹⁰ an export must be declared to the ACBPS.¹¹ This can be completed manually by the owner/vendor but due to the technicality of much of the information it is preferable that it is completed electronically by a freight forwarder on behalf of the institution. In its most basic form the declaration states (but is not limited to):

- who is lodging the declaration (the owner or an agent);
- the intended date of export;

¹⁰ This is based on the Free on Board value of the goods which is calculated as all costs to the airplane or ship excluding the international freight and insurance costs.

¹¹ *Customs Act* 1901, section 113(2)(b)(ii).

- whether the goods are currently under Customs control (most commonly, for museums, under Event Status);
- export type (one of three different codes);
- goods type (one of six different codes);
- port of loading;
- currency of the invoice;
- total of the Free on Board (FOB) value (that is, the value of the goods including all costs to get them to the port of loading including any export charges);
- currency of the FOB value.

In addition to this overall information about the consignment, further information must be provided about each of the item lines listed in the import which includes the goods description, origin, and value; their tariff classification; and information about their weight per unit and gross.¹²

4.2 Export Documentation

Remember that the tariff classification and terms of trade rules apply internationally. The information you have to provide to the local authorities is the same information that will be required by an overseas buyer or borrower.¹³ This key information needs to be conveyed to the buyer or borrower in a Commercial Invoice (for selling) or a Pro Forma Invoice (for lending). A commercial invoice or pro forma invoice should, at the very least, contain the following information:

- details of both the owner/vendor and buyer/borrower (and consignee if acting on behalf of the buyer);
- name of freight forwarder or agents responsible for the logistical arrangements;
- details of the vessel/aircraft and ports of loading and destination;
- description of the goods;
- quantity of goods, number of packages, weight of packages, gross weight of consignment;
- terms of trade – Incoterm;
- price or value per item, and for the total consignment.

Further information may be required by the overseas importer specific to the type of goods being exported from Australia. This is particularly important for prohibited material such as weapons and material that is subject to the *Protection of Movable Cultural Heritage Act 1986*.

¹² generally, <http://www.homeaffairs.gov.au/busi/cargo-support-trade-and-goods/exporting-goods/export-declarations>. See, .

¹³ See discussion above at *Information declared to customs*.