1 An Introduction to the Export and Import of Goods and Services

WHILE AUSTRALIA HAS traditionally been an exporter of agricultural and mineral commodities, the past two decades have witnessed a rapid rise in the export of both manufactured goods and services. Accordingly, those wishing to enter the field of international business now need to be aware of the various laws and procedures that apply when exporting commodities, manufactured goods, and services. In 2003–04 exports of primary products, including minerals, comprised approximately 50 per cent of Australia's exports. Manufactured goods and services accounted for approximately 25 per cent each. Coal, iron ore, petroleum, wheat, meat, wine, aluminium and gold dominate Australia's primary product exports. Somewhat surprisingly, motor vehicles play a large role in manufactured exports. While the major destinations for Australia's exports are in the Asia–Pacific region, the Middle East and Europe are growing markets for many small and medium exporters of processed foods and some manufactured goods. The Department of Foreign Affairs and Trade website (<www.dfat.gov.au>) provides annually updated statistics on the composition of Australia's exports and imports.

The terms, conditions and procedures for the sale of commodities have developed over several centuries. In many industries there are now standard form contracts, with the parties often only left to negotiate on price, method of payment, delivery, and the various costs associated with transport, insurance and the like. In addition, the export of agricultural commodities from Australia has had a tradition of being concentrated in the hands of marketing boards that purchased from growers and then exported, while minerals tend to be exported by large-scale mining companies. The knowledge of export procedures and law has therefore not been widely known and understood. However, with the rapid rise in exports of manufactured goods and services, many more businesses now need to become familiar with export procedures. For many, the procedural details involved in exporting manufactured goods and the many issues that have to be negotiated have presented something of a steep learning curve.

Trade in services defies the standardised procedures and forms of agreement that have developed in relation to the longer-established goods trade. This is because of the various ways in which services can be exported, ranging from an in-country presence to deliver the service in the overseas country to the service being delivered in the home country of the exporter. These various modes for the export of services are discussed in more detail later. Exports of services from Australia have been propelled by a greater willingness of countries to allow large-scale involvement in their service sectors by foreign service providers, particularly over the last decade. A moment's reflection on service industries in such fields as telecommunications, finance, tourism, education, construction, distribution, transport and engineering immediately highlights the extent to which major players in those industries are rapidly expanding beyond national boundaries.

This chapter gives an introduction to the practical matters that arise in the export of goods and services. Throughout the chapter, we refer to the various legal issues that arise and to later chapters of the book where such issues are discussed in more detail. The objectives of this chapter are therefore to provide an understanding of:

- the various ways in which a transaction for the sale of goods can be initiated;
- the importance of agreeing at the outset on the fundamental terms and conditions of the transaction;
- the vital role that documentation plays in international sales of goods and therefore the need for careful attention to detail; and
- the difficulties that arise for service exporters because of the various modes by which service exports can occur.

HOW ARE TRANSACTIONS FOR TRADE IN GOODS AND SERVICES INITIATED?

In very simple terms, an export transaction from Australia occurs either as a result of the buyer making an initial approach to the exporter or the exporter actively searching out and approaching a potential buyer. Whether or not an exporter is simply prepared to sit back and wait for potential buyers to approach it, or whether the exporter wishes to actively promote its product in the international marketplace, depends on the nature of the product and the exporter's choice of marketing techniques. If an Australian firm wishes to import goods or services, generally it must seek out possible sources for the required items and then make contact with potential suppliers to negotiate the relevant terms on which the supplier is able to sell it the goods.

The Internet has revolutionised international marketing. It is now much easier for a potential buyer to source products and compare prices and even quality from the details provided on an exporter's website. It is also easier for an exporter to advertise its product much more widely than it could have done little more than a decade ago. Before that time exporters and importers had fewer options available, having to rely to a much greater extent on printed advertising materials and personal knowledge of the industry in order to find potential buyers or suppliers.

While the Internet does not supplant traditional marketing techniques, it has provided some new advantages in negotiation for both exporters and importers. As far as importers are concerned, the abundance of information on the Internet about competing products and services makes it much easier to identify and compare the various global sources of supply. As far as exporters are concerned, those who have mastered the art of designing a user-friendly website and ensuring potential buyers are easily able to find it may well be in a strong position to have the buyer accept the exporter's terms and conditions for the supply of the goods. If, on the other hand, it is the exporter that has to search out and make contact with the buyer, the buyer may initially consider itself to be in the stronger negotiating position concerning the terms and conditions on which the goods are supplied. Having its terms and conditions accepted is not only a matter of giving the exporter greater control over the transaction, but may also have a significant bearing on the profitability of each sale. For example, if the exporter is able to insist on an 'incoterm' favourable to itself, it will reduce transport costs and raise profitability. Likewise, if the exporter is able to have its terms of payment accepted it can reduce the risk of the buyer defaulting.

The foregoing assumes that the exporter and the potential buyer have had no prior dealing with each other. While all trading relationships between unrelated parties have to commence at this point, the vast majority of transactions are simply repeat business arising from a successful business relationship that has developed between the parties over several years. In these cases, the parties will have an already established method of dealing and will more than likely know the terms and conditions that the other expects. It may even be the case that the parties have become so familiar with each other that a buyer need only phone the exporter and the goods will be dispatched on an understanding that the usual terms and conditions as to payment and delivery will apply.

However, as in any relationship, problems and misunderstandings may occur. For example, the buyer may reject the goods either because the exporter has shipped defective goods or because the goods have been damaged during transport. Alternatively, delays outside the control of the parties may have caused deterioration in the goods or may pose problems for the buyer because it has on-sold the goods. If the parties have become haphazard regarding the terms and conditions on which transactions proceed, then it may require significantly more effort and goodwill to resolve problems than if it is clearly established in each transaction just what terms and conditions will apply. As will be seen in later chapters, resorting to formal methods of dispute resolution is both costly and usually fatal to the business relationship. It is as well to be clear in every transaction, regardless of the extent of the relationship, about what terms and conditions apply.

TERMS AND CONDITIONS FOR THE SALE OF GOODS

In most export and import transactions there are a number of fundamental matters that the parties usually agree on before the transaction takes place. These are:

- a detailed description of the goods to be supplied and quality standards that are to apply to those goods;
- the price and method of payment; and
- the means by which the goods will be delivered to the buyer.

The need for a full description is essential so that there can be no misunderstanding about what exactly it is that is being sold. Failure to supply goods in accordance with the contract description will give rise to an action by the buyer. This matter is discussed in more detail in Chapter 2. The description of the goods will usually occur in the communication from the buyer to the exporter (often referred to as the purchase order) if the buyer approaches the seller, or in the exporter's communication to the buyer offering to supply the goods if the exporter is initiating the transaction. The extent to which the agreement should describe the goods depends on the nature of the goods being sold and the degree to which it is necessary to describe quality standards in detail. For many classes of goods there are elaborate sets of standard terms and conditions established by industry bodies relating to quality that parties refer to in their communications.

In these cases, such terms and conditions are said to be incorporated by reference into the agreement between the parties.

When an export transaction is being negotiated, the price is of course uppermost in the minds of the parties; but so too is the way in which the price will be paid. As we shall see in Chapter 4, the parties have a choice here. The buyer might agree to send the money for the goods to the exporter by telegraphic transfer before the goods have even left the exporter's premises. Alternatively, the buyer might make arrangements with its bank to open a letter of credit allowing the exporter to collect payment from a bank in the exporter's country upon presentation of certain documents relating to the goods. Yet another option is for the buyer to make payment to the seller only when the bank in the buyer's country gives the buyer the documents needed to collect the goods; these documents would have been forwarded by the seller's bank. This method of payment is referred to as documentary collection. Finally, if the seller and the buyer have a longstanding relationship the seller might permit the buyer to pay for the goods after the buyer has received them. This is referred to as payment on open account. As can be seen, it is vital that the parties agree to the method of payment at the start of the transaction.

The third fundamental matter is delivery of the goods. This raises issues common to all international trade in goods and it should come as no surprise that there has been some standardisation of delivery terms. This standardisation is referred to as the 'ICC (International Chamber of Commerce) incoterms'. These were first developed in 1936 and are periodically revised to reflect advances in technology and logistics. When a buyer or a seller uses a particular 'incoterm' in its initial communication to refer to the means by which the goods will be delivered, both parties are assumed to know what responsibilities fall on each regarding the transport, insurance, export and import clearance and expenses, and the point at which risk passes. The details of 'incoterms' will be discussed more fully in Chapter 3.

In addition to these fundamental matters, many sellers and buyers like to include provisions in their agreements to safeguard their positions in case something goes wrong during the transaction. These include provisions that:

- enable the seller to retain title to the goods until paid;
- set out the rights and obligations of the parties should an unforeseen event arise beyond the control of the parties to prevent the performance of the contract;
- declare what law applies to the contract;
- determine the method by which any disputes will be resolved;

- determine the place where any disputes will be heard and the relevant dispute resolution body;
- determine the rate of interest for late payment by the buyer;
- determine the amount of damages for late delivery by the seller; and
- set out the currency of payment and rate of exchange that is to apply.

There is no one set of terms and conditions that will suit every transaction between every buyer and seller. Sometimes buyers and sellers agree on a set of terms and conditions that will apply for the duration of their trading relationship, with the seller then simply sending shipments as requested. On the other hand, there are many cases where even among longstanding relationships all that the parties ever agree on are the three fundamental matters of description of the goods or services, payment and delivery. Some organisations active in international trade matters have developed simple export contracts that seek to cover not only these three fundamentals but also many of the safeguard provisions. One such body is the International Chamber of Commerce (<www.iccbooks.com>), which has developed a standard sales contract that could be used in most simple sales of goods agreements.

While it may seem prudent to include many of the safeguard provisions, the desire of the buyer to obtain the goods and the desire of the seller to reap its profit on the transaction as soon as possible often preclude detailed negotiations about such matters as which law will apply to the contract or where any disputes will be heard. Many exporters hold the view that as long as careful attention is paid to documentation, quality assurance and securing payment, the risks are not great enough to warrant the possible difficulties and delay involved in negotiating over the finer points of safeguard clauses. In any event, as many also point out, most errors that occur can be sorted out if there is a good relationship between the parties. One of the aims of this book is to give the reader an appreciation of the ramifications of adopting such a minimalist approach, thereby enabling the intending exporter to better assess the risks of such an approach.

DOCUMENTS AND PROCEDURE

When an exporter receives an order for goods, it will often contain a description of the goods, a proposed price, method and time of delivery, and means of transport. After receipt of the order, the exporter has to decide if it will accept the terms and conditions proposed or whether it needs to enter into negotiations to make the terms and conditions more favourable to it. This may be required, for example, if the exporter's warehouse or production department is simply not able to fill the order in the time requested. The exporter may also wish to renegotiate matters such as price, terms of delivery or payment method. If the parties have had prior dealings or if the standard terms and conditions of the exporter are known to the buyer, the exporter may simply send an acknowledgment of the order, which will constitute an acceptance.

Once the parties have agreed to the conditions of sale, the exporter's documentation department must prepare a number of documents to complete the transaction. The following sections trace the basic steps that must be taken in a typical export of goods. Some transactions will require additional documents depending on the requirements of the buyer's bank and import authorities in the buyer's country. It is therefore important for exporters to be aware of the particular documentary requirements that apply to their product in the importer's country. Many of these steps are discussed in much greater detail in the chapters that follow on payment, transport and customs. Only an introduction is given here so that the reader can gain an appreciation of the various steps and the order in which they are usually taken.

STEP 1 ARRANGE TRANSPORTATION OF GOODS

The first step the exporter takes is to book space on a ship to transport the goods. This can be done either directly or through a broker or freight forwarder. If the goods are to be transported by air this is done either directly through the airline, or through an air cargo agent or a freight forwarder. At this point the exporter may also request that a container be made available for collection on a set date so that the goods can be packed into it.

STEP 2 THE PROFORMA INVOICE

The exporter then prepares what is known as a proforma invoice to send to the buyer. This is a draft of the formal commercial invoice that will be prepared after the exporter has obtained an export declaration number and finalised other details of the shipment. It contains basic shipping information and the description of the goods being shipped. The buyer may need the proforma invoice to apply for a letter of credit or to commence arrangements for the clearance of the goods through customs in its own country.

STEP 3 CUSTOMS

After this the exporter has to apply to customs to obtain an export declaration number (EDN). If the goods to be exported do not fall into the categories of goods restricted by the *Export Control Act 1982* (Cth) and the various Orders made under that Act, the exporter will satisfy initial government requirements by simply obtaining the EDN. The Australian Customs Service has an online system for exporters to obtain EDNs. Exporters can apply to become registered with the Service; once registered, the exporter is able to obtain an EDN for any transaction upon the completion of a form online. The system will be discussed in more detail in Chapter 7.

There are quite a number of agricultural exports and other goods that are restricted under the *Export Control Act*. These include the export of meat, dairy produce, fish, grains, horticultural produce, wool, skins, hides, live animals, pet food, some processed foods, and a range of products designated as dangerous goods. If the goods fall into one of these restricted categories it is necessary to obtain an export permit. For most agricultural exports, the relevant government agency that issues the permit is the Australian Quarantine and Inspection Service or AQIS (<www.aqis.gov.au>). AQIS has an online system for issuing permits known as EXDOCS. Again, once an exporter is registered to use the system, all it needs to do to obtain a permit is to fill in a form online and the system will provide it with a permit number and also a sanitary or phytosanitary certificate (if required), which forms part of the export documents. The EXDOCS system also issues the exporter with an EDN as the system is linked to the Australian Customs Service's system. Further details regarding the EXDOCS system and permits that are required but not covered by the system are given in Chapter 7.

STEP 4 PREPARATION OF DOCUMENTS BY THE EXPORTER

The exporter then prepares the documents that are necessary to finalise arrangements for the transport of the goods and to enable the buyer to clear the goods at the port of arrival. Depending on the method of payment, the seller or buyer may need to produce the documents to their respective banks before payment can be made. The standard documents include a commercial invoice, a packing list, an insurance certificate, and a certificate of origin, and if payment is to be made by documentary credit or documentary collection, a bank draft also needs to be prepared. In some cases a buyer or its bank may require documents in addition to these, such as a declaration regarding packaging materials, to ensure that the packing materials do not breach quarantine regulations in the importing country. Some discussion is needed at this point about each of the important documents that the exporter has to prepare and their relevant purposes.

The *commercial invoice* is the document that sets out the total price to be paid by the buyer for the goods, including freight and insurance charges, which are shown separately. The commercial invoice includes a description of the goods, the relevant particulars of the parties, details of the shipping of goods, and the EDN or permit if applicable.

The *packing list* refers to the commercial invoice and is the document that shows how many packages are being sent and what is contained in each. A copy of the packing list is usually placed on each package in the consignment. If a container is being sent, a copy of the packing list is also often attached inside the container.

In addition, a *container list* is also prepared stating the number of containers.

Many exporters have a general *policy of insurance* with a marine insurance company that allows the exporter to produce individual insurance documents for each shipment over the course of a year, for example. The insurance arrangement is then renegotiated.

The *certificate of origin* declares the goods to be of Australian origin. The exporter prepares this document but it needs to be authenticated by one of a designated number of bodies. The official Chamber of Commerce in each state of Australia is able to sign a certificate of origin. There is a detailed list of criteria to determine whether the goods qualify as goods of Australian origin, and authenticating bodies might require some evidence to show that these criteria are satisfied before issuing the document.

As noted, other documents may be required by either the customer or its bank to enable the goods to be cleared by importation authorities or for payment purposes.

The exporter is required to prepare a number of documents relating to the transport of the goods. The two most common are the pre-receival advice (PRA) and the interim receipt – forwarding instruction (shippers letter of instruction [SLI] in the case of airfreight).

The *pre-receival advice* is the document the exporter must forward to the port authority. It sets out the necessary details: vessel number; date of shipment; booking number with the shipping line; details of the container and number of the seal placed on the container at the exporter's premises where the container has been loaded onto the truck that takes it to the wharf;

all details of the shipment including the EDN; and details of shipping date and the goods being shipped. This is now done electronically. The port authority confirms to the exporter that the PRA is in order. Without an accepted PRA the goods will not be permitted to enter the wharf area.

The *interim receipt – forwarding instruction* or *shippers letter of instruction* (for airfreight) is the document that the exporter forwards to the shipping company or the airline to allow it to prepare the bill of lading in the case of sea freight or the air waybill in the case of airfreight. The forwarding instruction contains all of the details regarding the shipment including port of loading, place of receipt, the name of the vessel or aircraft, and a description of the goods shipped.

Once all these documents are completed, the container is packed and transported to the place nominated by the shipping or airline company for loading onto the ship or aircraft.

It is essential that all the documentation prepared by the exporter is consistent. Fortunately there are a number of computer programs available to exporters to facilitate the preparation of these documents. These programs enable the exporter to enter all of the necessary information once only and the program generates the necessary documents.

STEP 5 DOCUMENTS ISSUED BY BANKS AND TRANSPORT COMPANIES

The preparation of these documents by the exporter is not the end of the documentation trail. As noted earlier, other parties are also involved, particularly transport companies and banks. The shipping or airline company will prepare a *bill of lading* or *air waybill* based on the exporter's interim receipt – forwarding instruction or SLI.

The *bill of lading* or *air waybill* is the receipt for the goods and is evidence of the contract of carriage between the exporter and the carrying company. The buyer is often required to produce this to enable it to collect the goods. The details of these transport documents will be discussed more fully in Chapter 5. The documents are frequently transmitted to the buyer via the banking system as explained below.

If the method of payment by the buyer is by way of *documentary letter of credit*, the buyer's bank will have issued a letter of credit in favour of the exporter and will have forwarded it to the exporter via the bank with which they deal in the exporter's country. The *letter of credit* contains the various requirements of the buyer's bank relating to documents and other matters that the exporter must satisfy for the exporter to be paid. Letters of credit