

AUSTRALIAN HISTORIC VEHICLE INTEREST GROUP

The Hon Josh Frydenberg MP
Treasurer

31 January 2019

The Hon Stuart Robert
Assistant Minister to the Treasurer

Senator the Hon Zed Seselja
Assistant Minister for Treasury and Finance

All c/o The Treasury
Langton Crescent
PARKES ACT 2600
AUSTRALIA

By email to: PreBudgetSubs@treasury.gov.au and to Ministers individually

Dear Minister

2019-20 Federal Budget – AHVIG Pre-Budget Submission No 2 Application of the Luxury Car Tax (“LCT”) to the importation of vehicles over 30 years old (“Historic Cars”) and Australia’s WTO/GATT Obligations

Thank you for the invitation to make pre-Budget submissions. This is AHVIG’s second submission.

1. Executive Summary

Twice in recent years Australia has accepted that the imposition of the LCT on the importation of certain second hand vehicles has breached its international obligations, and been obliged to amend the LCT legislation to exempt them from the LCT.

The first of these was the 1950 Florence Agreement and the 1976 Nairobi Protocol to that agreement (discussed below).

The second was the Australia-USA Free Trade Agreement (also discussed below).

Australia has also committed to imposing zero tariffs on the importation of “collectors pieces and works of art” and “antiques” and where motor cars so qualify, the imposition of the LCT on their importation contravenes Australia’s WTO obligations.

In order to bring Australia into line with its WTO obligations, AHVIG proposes that the importation of second hand motor vehicles which constitute either “antiques” or “works of art or collectors’ pieces” be exempted from the LCT (and where a similar transaction occurring within Australia would not attract the GST, then the GST as well).

As outlined in AHVIG’s primary submission, such an exemption would be revenue positive as the LCT on more valuable Historic Car imports, as rather than raise significant revenue, it acts as an effective block on their importation, and the GST which would otherwise be raised would by far exceed any LCT foregone.

Doing this would also have significant other economic benefits, as also outlined in that submission.

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2. Introduction and background

Australia has had an LCT of sorts since the 1980s, through a higher rate of Wholesale Sales Tax (WST) on the sale of new cars, whether locally made or imported, where the price exceeded a set threshold.

However, when indirect taxes such as the WST were replaced by the 10% flat-rate GST in 2000, to ensure no revenue was lost, a suite of Luxury Car Tax Acts¹ was also passed. These maintained the tax surcharge on the sale of new vehicles worth more than the threshold.

However, both the GST and LCT Acts differed from the predecessor WST legislation in that while of identical effect for the sale of new cars occurring within Australia, their scope was extended to the importation of second hand cars of any age.

As they were only imposed on the importation of second hand vehicles, but not the sale of identical vehicles occurring within Australia, both the GST and LCT constituted customs duties, or, tariffs.

Australia had made no international commitments about limiting the import charges on second hand vehicles as such.

However, Australia had made commitments regarding the importation or reimportation of such vehicles, where they satisfy criteria found in various treaties, agreements and free trade agreements.

Twice now Australia has accepted that the imposition of the LCT on the importation of certain second hand vehicles has breached its international obligations, and been obliged to amend the LCT legislation to exempt them from the LCT.

The first instance involved what are known as the 1950 Florence Agreement and the 1976 Nairobi Protocol (discussed in detail below), which exempted from Customs Duty the importation of “works of art or collectors’ pieces” to be displayed in institutions such as museums and galleries, where they are deductible gift recipients for tax purposes. Australia has long exempted such items from Customs duty, but omitted to address the situation where motor cars are such pieces or works, imposing the LCT on their importation.

As a result, in 2017, the importation of motor cars for display in qualifying institutions which qualified as “works of art or collectors’ pieces” were exempted from the LCT.

The second instance involved free trade agreement obligations, and in particular the AUSFTA. Whereas the LCT was normally payable on the reimportation of second hand vehicles if subjected to renovation or repair overseas, an exemption has been announced (but not yet enacted) where such vehicles are reimported without ownership changing.

Australia is subject to a third set of international obligations regarding the importation of “works of art and collectors’ pieces”, as well as “antiques” being over 100 years old, under the World Trade Organisation.

Briefly, Australia has committed to imposing zero tariffs on the importation of “collectors pieces and works of art” and “antiques” and where motor cars so qualify, the imposition of the LCT on their importation contravenes Australia’s WTO obligations.

3. The Museums Exemption

¹ *A New Tax System (Luxury Car Tax) Act 1999* and associated Acts

We go into some detail here because of the relevance to the WTO/GATT position as well.

- 3.1 The United Nations Educational, Scientific and Cultural Organisation (UNESCO) *Agreement on the Importation of Educational, Scientific and Cultural Materials* (the Florence Agreement) (Florence, 1950) and the Protocol to the Agreement (the Protocol) (Nairobi, 1976) were designed to reduce tariff and trade obstacles for educational, scientific and cultural materials. The Parties to the Florence Agreement agreed not to apply customs duties on materials listed in the five annexes to this Agreement. The Protocol further extended the duty free exemption to additional materials.²
- 3.2 Australia acceded to the Florence Agreement in 1990 and the Protocol in 1992. This was implemented in part by removing customs duty on the importation of “works of art or collectors’ pieces” by museums libraries and galleries for display where the institutions were Deductible Gift Recipients for taxation purposes. This is found in Item 7 to Schedule 4 of the *Customs Tariff Act 1995*.
- 3.3 However, it has been long settled that motor cars can constitute “works of art or collectors’ pieces” and therefore the imposition of the LCT on such vehicles for museum etc display saw Australia in breach of its Florence/Nairobi obligations.
- 3.4 In 2011, Treasurer Swan announced that Museums and Galleries would be able to import cars which were “works of art or collectors’ pieces” of any age for exhibitions, free of not only Customs duty, but also GST and LCT³. As he said: “Allowing imports of museum pieces by these entities to be free of all import taxes will bring Australia fully into line with our international treaty obligations.” While this did not proceed at the time, Treasurer Hockey adopted and reintroduced the proposal in 2015, demonstrating the bi-partisan support for this reform, which now allows the importation of significant motor cars, including Historic Cars, into the country, unhindered by tariff barriers⁴.

While it took some time for this to occur, in February 2017, the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* was passed, amending the LCT Act to exempt the importation of such cars from the LCT.

- 3.5 The specific conditions are:
- (a) The importer is a public museum, gallery, library or institution that is registered for GST and endorsed as a DGR (Deductible Gift Recipient) under the *Income Tax Assessment Act 1997*;
 - (b) The car is consigned to the importer;
 - (c) The car is a work of art or collectors’ piece; and
 - (d) The car is imported for the sole purpose of public display.

3.6 Work of Art or Collectors’ Piece

² From the Explanatory Statement to Customs By Law No. 1022040

³ Budget paper no 2 http://www.budget.gov.au/2011-12/content/bp2/html/bp2_revenue-07.htm
http://www.kmbba.com.au/pdf/afb2011_12.pdf

⁴ Although not the subject of a specific exemption for GST, Clayton Utz has confirmed that museums, galleries etc can import such items free of GST, as well as Customs duty and LCT.

There is little guidance as to what would satisfy this criterion, with the Explanatory Memorandum to the above Act stating that:

“Whether a particular car qualifies for this LCT exemption depends on the nature of the car. It is expected that in most cases the reason that a gallery, museum or library will display a car is because of its cultural or historic significance. Given this, there is expected to be a very strong correlation between the types of cars that are imported by such institutions for this purpose, and the status of these cars as a work of art or collectors’ piece under item 7. However, the mere fact of public display is not of itself sufficient to determine that a particular car satisfies the conditions in item 7– it must be able to be objectively determined that the car is a work of art or collectors’ piece .”

- 3.7 However, there is a body of settled law in the EU going back to 1985 where this has been spelt out, at least for vehicles over 30 years of age, which was overlooked by the author of the Explanatory Memorandum. This is relevant because Australia is also a party to the *"The International Convention on the Harmonized Commodity Description and Coding System"*⁵, as are the EU countries, and this mandates the consistent use of classifications for imports and exports (discussed further below under the WTO/GATT section). Put another way, if a car is a “work of art or collectors’ piece” in Europe, it should be here too.
- 3.8 Australia’s import classifications for goods are found in Schedule 3 to the *Customs Tariff Act 1995*. This is the “Combined Australian Customs Tariff Nomenclature and Statistical Classification”, commonly known as the “Working Tariff”⁶.
- 3.9 Imported second hand cars would normally fall into the 8703**** tariff classification, dealing with “Motor cars and other motor vehicles principally designed for the transport of persons (other than those of 8702), including station wagons and racing cars”.
- 3.10 However, where a motor car constitutes a “work of art or collectors’ piece”, the correct tariff classification is found in Chapter 97 “Works of art, collectors' pieces and antiques” with vehicles covered by 9705***** “Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest”.
- 3.11 Cars over 100 years old should be entered under 9706***** “Antiques of an age exceeding one hundred years”. For some reason, according to the Department of Home Affairs⁷, only 2 vehicles had been imported against 97*** codes since 2007⁸
- 3.12 The leading EU case is *JD Classics Holdings Limited v. The Commissioners for Her Majesty’s Revenue and Customs LON-2009-7069*⁹, which followed the 1985 case of *Erika Daiber v Hauptzollamt Reutlingen (Case 200/84)*.

⁵ <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>

⁶ <https://www.homeaffairs.gov.au/busi/cargo-support-trade-and-goods/importing-goods/tariff-classification-of-goods/current-tariff-classification>

⁷ By email to the author on 15 February 2018.

⁸ On 1 February 2013, a 1937 Velocette motorcycle, and on 1 October 2016, a 1950 Morris Minor.

⁹ The JD case was about imports of Jaguars – XK120s, 140s, and 150s, and 6 cylinder E Types, a Lotus Elite, an Austin Healey 3000, and an AC Cobra, made between 1954 and 1967. .

Since 2009, the European Commission has set out specific guidelines to national customs authorities, which confirm “*that there is a presumption of “historical interest” in favour of vehicles which are in their original state, without substantial changes to the chassis, steering or braking system and engine, at least 30 years old, and of a model or type which is no longer in production.*”¹⁰

Following the JD case, the UK’s HMRC Notes to Tariff Item 9705 have been amended to say that provided a vehicle is in original condition, over 30 years of age and no longer in production, then it is presumed to satisfy the prerequisite conditions for 9705 of rarity, not being used for its original purpose, being the subject of transactions outside the usual trade in similar utility vehicles, and of greater value¹¹.

3.13 The full text of the UK’s Note to Items commencing with 9705**** says:

“*Additional note*

1. Heading 9705 includes collectors’ motor vehicles of historical or ethnographic interest which are:

(a) in their original state, without substantial changes to the chassis, body, steering, braking, transmission or suspension system and engine. Repairing and restoring is allowed, and broken or worn-out parts, accessories and units can/have been replaced, provided that the vehicle is preserved and maintained in the historically correct condition. Modernised or modified vehicles are excluded;

(b) at least thirty years old;

(c) of a model or type which is no longer in production.

The requisite characteristics for inclusion in a collection being relatively rare, not being normally used for its original purpose, being the subject of special transactions outside of the normal trade in similar utility articles, and being of greater value are presumed to be fulfilled for vehicles which comply with the above three criteria.

This heading also includes, as collectors’ vehicles:

- *motor vehicles, irrespective of their date of manufacture, which can be proved to have been used in the course of an historic event.*
- *motor racing vehicles which can be proved to have been designed, built and used solely for competition and which have achieved significant sporting success at prestigious national or international events.*

Parts and accessories for vehicles are classified in this heading, provided that they are original parts or accessories for collectors’ vehicles, that they are at least thirty years old, and that they are no longer in production.

Replicas and reproductions are excluded, unless they fulfil the above three criteria.”

¹⁰ From the summary of the case by the lawyers for JD Classics Goodman Derrick, at https://www.gdlaw.co.uk/site/news/all-news/VAT_ruling.html.

¹¹ The full note is here: <https://www.trade-tariff.service.gov.uk/trade-tariff/chapters/97>

At the very least, this provides additional guidance to that in the Explanatory Memorandum.

4. AUSFTA¹² – removing LCT on cars re-imported following refurbishment overseas

In the 2018 Budget, Treasurer Morrison announced this exemption, explaining that by so doing, it would align with Australia’s trade obligations with its foreign trading partners. While not so expressed, we understand this was under the AUSFTA.

This obviously only relates to second hand cars.

This was to commence on 1 January 2019, but the implementing legislation – Schedule 6 to the *Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018* is still before the Senate.

5. Australia’s WTO and GATT Obligations

5.1 Australia has more than one set of international obligations regarding duty-free importation of both “antiques” and “works of art or collectors’ pieces”. Australia also has World Trade Organisation (WTO) obligations.

5.2 The DFAT¹³ web page dealing with the WTO says:

“The Schedule of Concessions on Goods¹⁴ contains Australia’s commitments under the WTO on tariffs and tariff quotas, as well as Australia’s commitments on export subsidies and domestic support for agricultural products. This is a consolidation of commitments entered into by Australia in past negotiations under the GATT¹⁵ and WTO¹⁶, including the Uruguay Round.

It lists obligations Australia has undertaken not to raise tariffs above levels agreed in trade negotiations and upper limits for government expenditure for specified types of subsidies in the agriculture sector. Tariffs actually imposed on goods when they are imported into Australia will normally be less than the WTO commitments set out in the consolidated schedule.

This consolidation, which includes changes to reflect amendments to the Harmonized Commodity Description and Coding System that took effect on 1 January 2002, provides a ready reference to Australia’s commitments but does not have any formal status in the WTO.”

5.3 GATT Article II:1(b) reads:

¹² Australia – USA Free Trade Agreement

¹³ Department of Foreign Affairs and Trade: <https://dfat.gov.au/trade/organisations/wto/Pages/australia-s-wto-tariff-schedule.aspx>

¹⁴ May be downloaded here: <https://dfat.gov.au/trade/organisations/wto/Documents/schedule.pdf>

¹⁵ GATT – General Agreement on Tariffs and Trade. Note that while it ceased to exist in 1995 when the WTO was established, the original GATT text is still in effect under the WTO framework, subject to modifications made in 1994 - https://en.wikipedia.org/wiki/General_Agreement_on_Tariffs_and_Trade

¹⁶ World Trade Organisation - https://en.wikipedia.org/wiki/World_Trade_Organization

“The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.”
(Emphasis added).

Explanatory Note No 4 emphasises the exemption:

“Products covered by concessions in this Schedule shall be exempt from Other Duties and Charges of the kind covered by Article II:1(b) of GATT 1994.”

- 5.4 The explanatory material categories duty rates as “Bound” which indicates an upper limit of duty that might be imposed, and “Unbound” (depicted by “U”) which means Australia has made no commitment to limit the import duty that might be charged. As one would expect (given the GST and LCT payable on imports of second hand vehicles), a “U” appears beside the various second hand car items in the Schedule. This means that the LCT and GST on second hand car imports, even where they constitute Customs duties, have no upper limit.
- 5.5 However, where Chapter 97, Items 9705 and 9706, applies, Australia has agreed that the Bound Rate - ie a maximum rate - of import duty will be zero% – a commitment that has existed since the GATT Uruguay Round in 1994.
- 5.6 Australia has only partially implemented its WTO/GATT obligations and these are reflected in the Working Tariff, which both categorises goods (as outlined above) and indicates only the amount of Customs duty payable (under the *Customs Act 1901*).
- 5.7 For second hand cars (8703****) the rate of duty is 5% (but there is an exemption for Historic Cars¹⁷), and for “Works of art and collectors’ pieces”, which include, at 9705**** Collectors’ pieces, and at 9706, “Antiques of an age exceeding 100 years”, the rate of duty is shown as “Free”.
- 5.8 However, the imposition of the LCT (and in certain circumstances, the GST) on the importation of second hand cars where they constitute either “antiques” or “works of art or collectors’ pieces” constitute “*customs duties*” or “*other duties or charges of any kind imposed on or in connection with the importation*” of those vehicles and Australia is therefore in breach of its WTO/GATT obligations.
6. Proposal
- Most Historic Cars (over 30 years old) will satisfy the criteria adopted in Europe for determining whether they are “works of art or collectors’ pieces” (see 3.13 above) as they will satisfy the 3 criteria for the preemption to arise.
- In order to bring Australia into line with its WTO obligations, AHVIG proposes that the importation of second hand motor vehicles which constitute either “antiques” or “works of art or collectors’ pieces” be exempted from the LCT.

¹⁷ Schedule 4, Item 36

This would be most easily implemented, at least for Historic Cars, by extending the Customs duty exemption which currently applies to the importation of such cars over 30 years of age to the LCT as well.

As outlined in AHVIG's primary submission, such an exemption would be revenue positive as the LCT on more valuable Historic Car imports, rather than raise significant revenue, acts as an effective block on their importation, and the GST which would otherwise be raised would by far exceed any LCT foregone.

Doing this would also have significant other economic benefits, as also outlined in that submission.

Members of AHVIG are available to appear in person before any inquiry into the matters we have raised.

Please contact the Chairman, Doug Young, on 0418 719 430 or doug_young@inet.net.au in the first instance should you require further information or clarification.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Douglas Young', with a horizontal line underneath.

Douglas Young
Chair