

EXPLANATORY STATEMENT

Issued by Assistant Minister Customs, Community Safety and Multicultural Affairs
Parliamentary Secretary to the Minister for Home Affairs

Customs Act 1901

Customs (International Obligations) Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Regulations 2021

The *Customs Act 1901* (the Customs Act) concerns customs-related functions and is the legislative authority that sets out the customs requirement for the importation of goods into, and the exportation of goods from, Australia.

Subsection 270(1) of the Customs Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Customs Act, prescribing all matters which by the Customs Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Customs Act.

Subsection 163(1) of the Customs Act provides that refunds, rebates and remissions of duty may be made:

- (a) in respect of goods generally or in respect of the goods included in a class of goods; and
- (b) in such circumstances as are prescribed, being circumstances that relate to goods generally or to the goods included in the class of goods.

On 15 November 2020, the Hon. Simon Birmingham, former Minister for Trade, Tourism and Investment, and his counterparts from Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam, China, Japan, New Zealand and Republic of Korea signed the Regional Comprehensive Economic Partnership Agreement (the Agreement).

The Agreement sets out, amongst other things, comprehensive provisions for trade in goods and related customs procedures and rules of origin for claiming preferential rates of customs duty. These rules determine whether goods imported into Australia from another Party to the Agreement are originating goods (referred to as 'RCEP originating goods') and are thereby eligible for preferential rates of customs duty.

The *Customs Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Act 2021* (the Customs Implementation Act) inserts new Division 1N into Part VIII of the Customs Act to implement the part of the Agreement dealing with rules of origin.

The purpose of the *Customs (International Obligations) Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Regulations 2021* (the Regulations) is to amend the *Customs (International Obligations) Regulation 2015* (the International Obligations

Regulation) to enable a refund of any excess duties paid on RCEP originating goods, or on goods that would have been RCEP originating goods, in specified circumstances.

Details of the Regulations are set out in Attachment A. A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at Attachment B.

The Department of Foreign Affairs and Trade (DFAT) led Australia's negotiations for the Agreement in consultation with other government agencies. Australia's negotiating positions for the Agreement were informed by the views and information provided by stakeholders through both formal and informal mechanisms.

DFAT undertook regular stakeholder engagement on the Agreement once negotiations commenced in 2012. DFAT, in conjunction with other government agencies, consulted widely with industry and other stakeholders in formulating their positions. In addition to a call for public submissions, negotiators regularly engage with representatives of the business sector, academia and civil society organisations to provide an opportunity to share their views and expectations of the negotiations. At each of the negotiating rounds Australia hosted, DFAT held dedicated stakeholder consultation events in the margins of the meeting on the following dates:

- Melbourne – 30 June 2019
- Perth – 27 April 2017
- Brisbane – 24 September 2013

After the commencement of negotiations, DFAT held biannual International Trade Negotiations Update Meetings which provided an avenue to update peak organisations (including civil society) on the status of the DFAT-led international trade negotiations and for peak organisations to ask questions about the government's trade agenda.

Details of these consultations were set out in the consultation attachment to the National Interest Analysis for the Agreement.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the later of the day after the Regulations are registered, and the day on which Schedule 1 to the Customs Implementation Act commences. Schedule 1 to the Customs Implementation Act commences on the later of the day after that Act receives the Royal Assent, and the day the Agreement enters into force for Australia.

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Details of the *Customs (International Obligations) Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Regulations 2021*

Section 1 Name

This section provides that the title of the instrument is the *Customs (International Obligations) Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Regulations 2021* (the Regulations).

Section 2 Commencement

This section sets out, in a table, the date on which each of the provisions contained in the Regulations commence.

Table item 1 provides for the Regulations to commence on the later of the day after the Regulations are registered, and the day on which Schedule 1 to the *Customs Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Act 2021* (the Customs Implementation Act) commences. Schedule 1 to the Customs Implementation Act commences on the later of the day after that Act receives the Royal Assent, and the day the Regional Comprehensive Economic Partnership Agreement (the Agreement) enters into force for Australia.

Section 3 Authority

This section sets out the authority under which the Regulations are to be made, which is the *Customs Act 1901* (the Customs Act).

Section 4 Schedules

This section is the formal enabling provision for the Schedule to the Regulations, and provides that, each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to this instrument has effect according to its terms.

The *Customs (International Obligations) Regulation 2015* (the International Obligations Regulation) is amended by the Regulations.

Schedule 1—Amendments

Customs (International Obligations) Regulation 2015

Article 3.23 of Chapter 3 of the Agreement contains the obligation to allow importers of goods to apply for a refund of any excess duties paid as a result of the goods not having been granted

preferential tariff treatment, on presentation of the following to the customs authority of the Party to which the goods are imported:

- a Proof of Origin and other evidence that the good qualifies as an originating good; and
- such other documentation in relation to the importation as the customs authority may require to satisfactorily evidence the preferential tariff treatment claimed.

The purpose of the Regulations is to specify the circumstances under which an importer of goods may apply for any excess duty paid on RCEP originating goods and goods that would have been RCEP originating goods. The amendments made by items 1 to 6 of the Regulations implement the obligation under Article 3.23.

Item 1 Section 4

This item amends section 4 of the International Obligations Regulation to insert a new definition of *RCEP originating goods*, which has the same meaning as given by subsection 153ZQB(1) of new Division 1N of Part VIII of the Customs Act.

Under subsection 153ZQB(1) of the Customs Act, *RCEP originating goods* means goods that, under Division 1N, are RCEP originating goods. These are goods that are:

- wholly obtained or produced in a Party to the Agreement;
- produced entirely in a Party from originating materials only; or
- produced entirely in a Party from non-originating materials only or from non-originating materials and originating materials, and that satisfy the requirements in section 153ZQE of Division 1N.

Item 2 Section 23 (at the end of the table)

This item amends the table in section 23 of the International Obligations Regulation to insert two new table items to enable a refund of duty for the following goods in the following circumstances:

- (table item 17) RCEP originating goods, where duty has been paid on the goods;
- (table item 18) goods that would have been RCEP originating goods if, at the time the goods were imported, the importer held a Proof of Origin or a copy of a Proof of Origin for the goods where both of the following apply:
 - (i) duty has been paid on the goods;
 - (ii) the importer holds a Proof of Origin or a copy of a Proof of Origin for the goods at the time of making the application for the refund.

A *Proof of Origin* is a document that has the same meaning given by subsection 153ZQB(1) of the Customs Act. That is, a document that is in force and that complies with the requirements under Article 3.16 of Chapter 3 of the Agreement.

Under paragraph 1 of Article 3.16 of Chapter 3, any of the following shall be considered as a Proof of Origin:

- (a) a Certificate of Origin issued by an issuing body in accordance with Article 3.17 (Certificate of Origin);
- (b) a Declaration of Origin by an approved exporter in accordance with subparagraph 1(a) of Article 3.18 (Declaration of Origin); or
- (c) a Declaration of Origin by an exporter or producer in accordance with subparagraph 1(b) of Article 3.18 (Declaration of Origin), and subject to implementation in accordance with that Article, based on information available that the good is originating.

Item 3 At the end of section 24

Section 24 of the International Obligations Regulation provides that a refund is not payable under table item 6 of the table in clause 1 of Schedule 6 to the *Customs Regulation 2015* (the Customs Regulation) to the extent that an application for a refund relates to one or more of the factors mentioned in this section.

This item amends section 24 of the International Obligations Regulation to include a reference to new table items 17 and 18 of the table in section 23 of that Regulation.

Table item 6 of the table in clause 1 of Schedule 6 to the Customs Regulation provides that refunds of duty are payable where duty has been paid because of manifest error of fact or patent misconception of the law. A refund of duty could be paid under item 6 in respect of goods mentioned in table items 17 and 18 of the table in section 23 if it does not relate to the factors that determine whether the goods are RCEP originating goods.

The purpose of paragraph 24(i) is to restrict refunds of duty in relation to RCEP originating goods to the extent that the application for a refund relates to any of the factors that determine whether goods mentioned in items 17 and 18 of the table in section 23 are RCEP originating goods.

Items 4 to 6

These items amend the definitions of *duty payable* and *relevant originating goods* in subsection 31(2) of the International Obligations Regulation.

Items 4 and 5 of the Regulations insert a reference to the new table items 17 and 18 respectively into the definition of ‘duty payable’ under subsection 31(2).

Item 6 of the Regulations insert new subparagraph 31(2)(i), for RCEP originating goods, into the definition of *relevant originating goods*.

The purpose of these amendments is to enable the refund of duty paid on RCEP originating goods to be calculated in accordance with section 31 of the International Obligations Regulation, and subsequently made by a Collector.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Customs (International Obligations) Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Regulations 2021

The Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The Regional Comprehensive Economic Partnership Agreement (the Agreement) is a regional free trade agreement that will complement and build upon Australia's existing free trade agreements with 14 other Indo-Pacific countries. It is a modern and comprehensive free trade agreement delivering outcomes for Australian businesses in trade in goods, trade in services, investment, economic and technical cooperation, and new rules for electronic commerce, intellectual property, government procurement, competition, and small and medium sized enterprises.

The Agreement was signed at a virtual signing ceremony on 15 November 2020. Australia signed in Canberra, and the other 14 states signed in their respective territories (China, Japan, New Zealand, the Republic of Korea, and the ten members of the Association of Southeast Asian Nations: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam).

The *Customs Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Act 2021* (Customs Implementation Act) amends the *Customs Act 1901* (the Customs Act) to fulfil Australia's obligation under Chapter 3 of the Agreement, which details the Agreement's rules of origin.

These new rules determine whether goods imported into Australia from a Party to the Agreement are originating goods (referred to as RCEP originating goods) and are thereby eligible for preferential rates of customs duty. RCEP originating goods are goods from a Party to the Agreement that satisfy the rules of origin; the framework of which is contained in new Division 1N of Part VIII of the Customs Act.

Under paragraph 1 of Article 3.23 of Chapter 3 of the Agreement, each Party, subject to its laws and regulations, shall provide that where a good would have qualified as an originating good when it was imported into that Party, the importer of the good may, within a period specified by its laws and regulations, and after the date on which the good was imported, apply for a refund of any excess duties, deposit, or guarantee paid as the result of the good not having been granted

preferential tariff treatment, on presentation of the following to the customs authority of that Party:

- a Proof of Origin and other evidence that the good qualifies as an originating good; and
- such other documentation in relation to the importation as the customs authority may require to satisfactorily evidence the preferential tariff treatment claimed.

The purpose of the *Customs (International Obligations) Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Regulations 2021* (the Regulations) is to amend the *Customs (International Obligations) Regulation 2015* to prescribe two new refund circumstances in respect of goods imported into Australia from a Party to the Agreement, in order to fulfil the above-mentioned obligation, as follows:

- for RCEP originating goods, the refund circumstance applies when customs duty has been paid on such goods; and
- for goods that would have been RCEP originating goods if at the time the goods were imported, the importer held a Proof of Origin or a copy of a that document for the goods, the refund circumstance applies when customs duty has been paid on such goods and the importer holds a Proof of Origin or a copy of document for the goods at the time of making the application for the refund.

The expression ‘Proof of Origin’ is defined in new subsection 153ZQB(1) of the Customs Act, which means a document that is in force and that complies with the requirements of Article 3.16 of Chapter 3 of the Agreement. The information required to be provided as part of a Proof of Origin includes personal information.

The Regulations commence the later of the day after the Regulations are registered, and the day on which Schedule 1 to the Customs Implementation Act commences. Schedule 1 to the Customs Implementation Act commences on the later of the day after that Act receives the Royal Assent, and the day the Agreement enters into force for Australia.

Human rights implications

The Regulations engage the right to not be subjected to arbitrary or unlawful interference with privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

To the extent that the Regulation facilitates the collection and disclosure of personal information by requiring an importer to hold a copy of the Proof of origin when applying for a refund of customs duty paid where the importer did not make a claim for preferential tariff treatment at the time of importation, the Regulations may engage and limit the right to privacy under Article 17 of the ICCPR. Article 17(1) sets out:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Under Article 3.22 of Chapter 3 of the Agreement, a Proof of Origin document completed by the exporter or producer or an authorised representative of the exporter or producer shall support a

claim that goods are eligible for preferential tariff treatment in accordance with the Agreement. The information that must be included in a 'Proof of Origin' document is detailed in Articles 3.16, 3.17, 3.18 and 3.22, and Annex 3B to Chapter 3 of the Agreement and includes personal information.

The verification of the eligibility for preferential treatment is required under the Agreement and the measures in the Regulations are directed at the legitimate purpose of facilitating and supporting Australia's international obligations under the Agreement. This collection and disclosure of personal information will only be permitted for the limited purpose of verifying a claim made by a person for preferential tariff treatment making it a reasonable and proportionate response to a legitimate purpose. As such, the collection and disclosure of personal information in these circumstances will not constitute an unlawful or arbitrary interference with privacy.

Conclusion

The Regulations are compatible with human rights because to the extent that it may limit the right to privacy, the limitation is reasonable, necessary and proportionate in achieving a legitimate objective.

The Hon. Jason Wood MP
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Parliamentary Secretary to the Minister for Home Affairs