

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Customs Act 1901

Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022

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 2 April 2022, the Hon Dan Tehan MP, then Minister for Trade, Tourism and Investment, and his counterpart from the Republic of India (India), Minister Piyush Goyal, signed the India-Australia Economic Cooperation and Trade Agreement (the Agreement). The Agreement delivers outcomes for trade in goods and services and sets out related customs procedures and rules of origin for claiming preferential rates of customs duty. These rules determine whether goods imported into Australia from India are originating goods (referred to as ‘Indian originating goods’) and are eligible for these preferential rates.

The *Customs Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Act 2022* (the Customs Implementation Act) amends the Customs Act to, among other things, insert new Division 1JA into Part VIII of the Customs Act to implement the provisions under the Agreement dealing with trade in goods and rules of origin. The purpose of the *Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022* (the Regulations) is to amend the *Customs (International Obligations) Regulation 2015* (the International Obligations Regulation) to prescribe the following two refund circumstances:

- for Indian originating goods, the refund applies when customs duty is paid;
- if at the time of importation and refund, the importer has a certificate, a copy of one, or other documentation to support that the goods are originating, the refund circumstance applies when customs duty is paid.

The effect of the amendments are that an importer of Indian originating goods may apply for a refund if they have paid excess customs duty.

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. The Agreement will be the foundation for the development of a further Comprehensive Economic Cooperation Agreement (CECA).

The public consultation and stakeholder engagement process for the Agreement was informed by that for the earlier CECA negotiations in May 2011. Before negotiations on CECA were suspended, DFAT received 51 formal submissions (including three from the Australian Chamber of Commerce and Industry). Since the re-launch of CECA negotiations on 1 October 2021, DFAT received a further 21 formal submissions from organisations and individuals. Public submissions from these entities are available on the DFAT website.

The Australian negotiating team held numerous direct stakeholder consultations since the re-launch of the CECA negotiations in October 2021, which informed the negotiations when these refocused on concluding the Agreement. The stakeholders consulted included industry and worker representatives, such as peak bodies and trade unions, as well as businesses, individuals, and other entities. Stakeholders were invited to provide written submissions on the commercial, economic, regional, and other impacts that could be expected to arise from the Agreement.

The Australian negotiating team also contacted key industry stakeholders after the December 2021 and February 2022 negotiating round in India, and up to conclusion of the Agreement in March 2022. These direct consultations played an important role in ensuring the right outcomes for Australians to diversify trade and drive an export-led recovery. Once the Agreement's negotiations were launched, DFAT also provided updates through established consultative groups such as the Ministerial Advisory Council on FTA negotiations (on 29 October 2021 and 17 March 2022), and the DFAT Peak Bodies Consultations meetings.

The Regulations are a legislative instrument for the purposes of the *Legislation 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.

Details of the *Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022*

Section 1 Name

This section provides that the title of the instrument is the *Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022* (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 of the *Customs Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Act 2022* (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 *India-Australia Economic Cooperation and Trade 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 4.24 of Chapter 4 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 certificate of origin and other evidence that the good qualifies as a Indian 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 a refund of any excess duty paid on Indian originating goods and goods that would have been Indian originating goods. The amendments made by items 1 to 6 of the Regulations implement the requirements of Article 4.24 of the Agreement.

Item 1 Section 4

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

Under subsection 153ZML(1) of the Customs Act, *Indian originating goods* means goods that, under Division 1JA, are Indian originating goods. These are goods that are:

- wholly obtained or produced in India or in India and Australia; or
- produced in India, or in India and Australia, from non-originating materials, and that satisfy the requirements of section 153ZMN of Division 1JA.

Item 2 Section 23 (after table item 10)

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 10A – Indian originating goods, where duty has been paid on the goods;
- table item 10B – goods that would have been Indian originating goods if, at the time the goods were imported, the importer held a certificate of origin or a copy of a certificate of origin, for the goods where both of the following apply:
 - (a) duty has been paid on the goods;
 - (b) the importer holds a certificate of origin or a copy of a certificate of origin for the goods at the time of making the application for the refund.

A *certificate of origin* is a document that has the same meaning given by subsection 153ZML(1) of the Customs Act. That is, a certificate that is in force and that complies with the requirements of Article 4.15 of Chapter 4 of the Agreement. This definition is inserted into the Customs Act by the Customs Implementation Act.

Under paragraph 1 of Article 4.15 of Chapter 4 of the Agreement, a certificate of origin shall be issued by an issuing body or authority, as appropriate, of the exporting Party, upon an application by an exporter or producer.

Under paragraph 3 of Article 4.15 of Chapter 4 of the Agreement a certificate of origin shall:

- be in writing or electronic format;
- be in the English language;
- specify that the good is originating and meets the requirements of this Chapter;
- contain information, as set out in Annex 4A (Minimum Information Requirements) and presented in the same format as provided for in Annex 4A of the Agreement (Minimum Information Requirements);
- remain valid for 12 months from the date on which it is completed or issued;

- apply to single importation of one or multiple goods provided that each good qualifies as an originating good separately in its own right; and
- bear a unique certificate of origin number, affixed by the issuing body or authority, as appropriate, in the exporting Party.

Item 3 After paragraph 24(e)

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 paragraph 24(ea) to reference to new table items 10A and 10B 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 10A and 10B of the table in section 23 if it does not relate to the factors that determine whether the goods are Indian originating goods.

The purpose of paragraph 24(ea) is to restrict refunds of duty in relation to Indian originating goods to the extent that the application for a refund relates to any of the factors that determine whether goods mentioned in items 10A and 10B of the table in section 23 of the International Obligations Regulation are Indian 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 10A and 10B respectively into the definition of *duty payable* under subsection 31(2).

Item 6 of the Regulations inserts new subparagraph 31(2)(ea), for Indian originating goods, into the definition of *relevant originating goods*.

The purpose of these amendments is to enable the refund of duty paid on Indian 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 (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022

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

On 2 April 2022, the Hon Dan Tehan MP, then Minister for Trade, Tourism and Investment, and his counterpart from the Republic of India (India), Minister Piyush Goyal, signed the India-Australia Economic Cooperation and Trade Agreement (the Agreement).

The Agreement delivers outcomes for trade in goods and services and sets out related customs procedures and rules of origin for claiming preferential rates of customs duty.

The *Customs Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Act 2022* (Customs Implementation Act) amends the *Customs Act 1901* (the Customs Act) to, among other things, insert new Division 1JA into Part VIII of the Customs Act to implement the provisions under the Agreement dealing with trade in goods and rules of origin.

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

Under paragraph 1 and 2 of Article 4.24 of Chapter 4 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 paid for a good 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 Certificate 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 (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022* (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 India, in order to fulfil the above-mentioned obligation, as follows:

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

The expression ‘Certificate of Origin’ is inserted into new subsection 153ZML(1) of the Customs Act by the Customs Implementation Act. It means a certificate that is in force and that complies with the requirements of Article 4.15 of Chapter 4 of the Agreement. The information required to be provided as part of a Certificate of Origin includes personal information. The Regulations bring Indian originating goods within the scope of the customs duty refund scheme, where an importer did not make a claim for preferential treatment at the time of importation.

The Regulations commence on the later of the day after the instrument is 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 Regulations involve the disclosure of personal information by requiring an importer to hold a copy of the Certificate 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 4.20 of Chapter 4 of the Agreement, a Certificate of Origin document provided by 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 Certificate of Origin document is detailed in Articles 4.15, 4.16, 4.17 and 4.23, and Annex 4A to Chapter 4 of the Agreement and includes personal information. The measures in the Regulation implement the requirements of the Agreement by bringing Indian originating goods within the customs duty refund scheme, including the requirement that the importer hold a Certificate of Origin document in order to be eligible for a refund. Existing provisions in the Customs Act and the *Customs Regulations 2015* in relation to obtaining a refund may require an importer to provide a copy of the Certificate of Origin with an application for a

refund. To the extent that the Certificate of Origin may need to be provided in support of a claim for a refund, the right to privacy may be engaged.

The verification of the eligibility for preferential treatment is required under the Agreement and the measures in the Regulations to hold a Certificate of Origin are directed at the legitimate purpose of facilitating and supporting Australia's international obligations under the Agreement. To the extent that this measure may involve the disclosure of personal information, it 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, any 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 Clare O'Neil MP, Minister for Home Affairs