

EXPLANATORY STATEMENT

STATUTORY RULES 2004 NO. 365

Issued by the Authority of the Minister for Justice and Customs
Customs Act 1901

Customs Amendment Regulations 2004 (No. 7)

Subsection 270(1) of the *Customs Act 1901* (the Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Act or for the conduct of any business relating to the Customs.

Subsection 163(1) of the Act provides in part 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.

The purpose of the Regulations is to prescribe record keeping obligations on producers and exporters of goods to Thailand and prescribe new refund circumstances in respect of goods imported into Australia from Thailand, in order to fulfil Australia's obligations under the Thailand-Australia Free Trade Agreement (the Agreement).

The *Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004* (the FTA Act) amends the Act to fulfil Australia's obligations under Chapter 4 of the Agreement, which deals with rules of origin. These rules determine whether goods imported into Australia are Thai originating goods and are thereby eligible for preferential rates of customs duty. These rules are contained in new Division 1D of Part VIII of the Act (new Division 1D).

New Division 4C of Part VI of the Act, which was also inserted by the FTA Act, contains provisions that apply to the producers and exporters of goods exported to Thailand for which a preferential tariff is to be claimed in Thailand. New section 126AG of the Act provides that the regulations may prescribe record keeping obligations that apply in relation to goods that are exported to Thailand and are claimed to be Australian originating goods for the purpose of obtaining a preferential tariff in Thailand. These obligations may be imposed on the producer or exporter of such goods.

The record keeping obligations are prescribed in new regulations 105D and 105E of the *Customs Regulations* (the Principal Regulations), and specify the types of records that must be kept, the time for which the records must be kept and the manner in which the records must be kept. These obligations are consistent with record keeping obligations under the Principal Regulations that apply to the owner of goods exported from Australia to Singapore.

The Agreement also allows for refunds of customs duty to be paid in respect of Thai originating goods that are imported into Australia. It is possible that an importer may pay customs duty on such goods where no duty, or a lesser amount of duty, should have been paid. It is also possible that goods imported from Thailand would be Thai originating goods except that an importer did not hold a valid Certificate of Origin, or a copy thereof, at the time the goods were imported. An importer will be able to obtain a refund of duty in relation to such goods if the Certificate of Origin, or a copy thereof, is held at the time the refund is sought. A new refund circumstances that applies in the above circumstances has been prescribed in new regulation 126B and amendments to existing regulation 128B.

Relevant provisions of the FTA Act which amend the Act are expressed to commence on the later of 1 January 2005 or the entry into force of the Agreement for Australia. Details of the commencement provisions are set out in Attachment A.

Details of the Regulations are set out in Attachment B.

The Act does not specify conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations commence on the commencement of Parts 1 and 2 of Schedule 1 to the FTA Act. Parts 1 and 2 of Schedule 1 to the FTA Act will commence on the later of 1 January 2005 or the entry into force of the Agreement for Australia.

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DETAILS OF THE COMMENCEMENT PROVISIONS FOR THE *CUSTOMS AMENDMENT (THAILAND-AUSTRALIA FREE TRADE AGREEMENT IMPLEMENTATION) ACT 2004*

The *Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004* (the FTA Act) contains amendments to the *Customs Act 1901* (the Act) to implement the rules of origin contained in Chapter 4 of the Thailand-Australia Free Trade Agreement (the Agreement). These rules determine whether goods imported into Australia originate in Thailand and are thereby eligible for preferential rates of customs duty. These rules are contained in new Division 1D of Part VIII of the Act, which will be inserted by Part 1 of Schedule 1 to the FTA Act.

New Division 1D will commence when Parts 1 and 2 of the Schedule 1 to the FTA Act commence, pursuant to item 2 of the table in subsection 2(1) of the FTA Act. Under this item, Parts 1 and 2 of Schedule 1 will commence on the later of 1 January 2005 or the day on which the Agreement comes into force for Australia. The item further provides that Parts 1 and 2 of Schedule 1 will not commence at all if the Agreement does not come into force for Australia, and that the Minister for Trade must announce by notice in the *Gazette* the day the Agreement comes into force for Australia.

DETAILS OF THE *CUSTOMS AMENDMENT REGULATIONS 2004 (No. 7)***Regulation 1 - Name of Regulations**

Regulation 1 provides that the Regulations are the *Customs Amendment Regulations 2004 (No. 7)*.

Regulation 2 - Commencement

Regulation 2 provides that the Regulations commence on the commencement of Parts 1 and 2 of Schedule 1 to the *Customs Amendment (Thailand-Australia Free Trade Agreement Implementation) Act 2004* (the FTA Act). Parts 1 and 2 of Schedule 1 to the FTA Act will commence on the later of 1 January 2005 or the entry into force of the Thailand-Australia Free Trade Agreement (the Agreement).

Regulation 3 - Amendment of the *Customs Regulations 1926*

Regulation 3 provides that Schedule 1 amends the *Customs Regulations 1926* (the Principal Regulations).

Schedule 1 Amendments**Item 1 - After regulation 105C**

Item 1 inserts new regulations 105D and 105E into the Principal Regulations, after regulation 105C.

New regulation 105D - Record keeping - exporter that is not producer

New regulation 105D provides that for subsection 126AG(1) of the *Customs Act 1901* (the Act), an exporter, who is not also the producer, of goods mentioned in that subsection, must keep the following records:

- a) records of the exporter's purchase of the goods;
- b) records of the purchase of the goods by the person to whom the goods are exported;
- c) evidence that payment has been made for the goods;
- d) evidence of the classification of the goods under the Harmonized System;
- e) if the goods include any spare parts, accessories or tools that were purchased by the exporter - records of the purchase of the spare parts, accessories or tools and evidence of their value;
- f) if the goods include any spare parts, accessories or tools that were produced by the exporter - records of the purchase of all materials that were purchased for use or consumption in the production of such goods, evidence of the value of these materials and records of the production of the spare parts, accessories or tools;
- g) if the goods are packaged for retail sale in packaging material or a container that was purchased by the exporter - records of the purchase of the packaging material or container and evidence of their value;

- h) if the goods are packaged for retail sale in packaging material or a container that was produced by the exporter - records of the purchase of all materials that were purchased for use or consumption in the production of such goods, evidence of the value of these materials and records of the production of the packaging material or container; and
- i) a copy of the Certificate of Origin in relation to the goods.

The goods mentioned in subsection 126AG(1) are goods that are exported to Thailand and are claimed to be Australian originating goods for the purpose of obtaining a preferential tariff in Thailand.

New subregulation 105D(2) provides that the records must be kept for a period of at least 5 years starting on the date of issue of the Certificate of Origin in relation to the goods.

New subregulation 105D(3) sets out the manner in which a record is to be kept. A record may be kept in any place, whether or not in Australia, and the exporter must ensure that:

- a) the record is kept in a form that would enable a determination of whether the goods are Australian originating goods in accordance with the Agreement; and
- b) if the record is not in English - the record is kept in a place and form that would enable an English translation to be readily made; and
- c) if the record is kept by mechanical or electronic means - the record is readily convertible into a hard copy in English.

New subregulation 105D(4) provides that in this Regulation, the following words and expressions have the same meaning as in Division 1D of Part VIII of the Act:

- a) Agreement;
- b) Australian originating goods;
- c) Certificate of Origin;
- d) Harmonized System
- e) produce.

New regulation 105E - Record keeping - producer (whether or not the exporter)

New regulation 105E provides that for subsection 126AG(1) of the Act, the producer of goods mentioned in that subsection, whether or not the producer is the exporter of the goods, must keep the following records:

- a) records of the purchase of the goods;
- b) if the producer is the exporter of the goods - evidence of the classification of the goods under the Harmonized System;
- c) evidence that payment has been made for the goods;
- d) evidence of the value of the goods;

- e) records of the purchase of all materials that were purchased for use or consumption in the production of the goods and evidence of the classification of the materials under the Harmonized System;
- f) evidence of the value of those materials;
- g) records of the production of the goods;
- h) if the goods include any spare parts, accessories or tools that were purchased by the producer - records of the purchase of the spare parts, accessories or tools and evidence of their value;
- i) if the goods include any spare parts, accessories or tools that were produced by the producer - records of the purchase of all materials that were purchased for use or consumption in the production of such goods, evidence of the value of these materials and records of the production of the spare parts, accessories or tools;
- j) if the goods are packaged for retail sale in packaging material or a container that was purchased by the producer - records of the purchase of the packaging material or container and evidence of their value;
- k) if the goods are packaged for retail sale in packaging material or a container that was produced by the producer - records of the purchase of all materials that were purchased for use or consumption in the production of such goods, evidence of the value of these materials and records of the production of the packaging material or container; and
- l) a copy of the Certificate of Origin in relation to the goods.

New subregulation 105E(2) provides that the records must be kept for a period of at least 5 years starting on the date of issue of the Certificate of Origin in relation to the goods.

New subregulation 105E(3) sets out the manner in which a record is to be kept. A record may be kept in any place, whether or not in Australia, and the exporter must ensure that:

- a) the record is kept in a form that would enable a determination of whether the goods are Australian originating goods in accordance with the Agreement; and
- b) if the record is not in English - the record is kept in a place and form that would enable an English translation to be readily made; and
- c) if the record is kept by mechanical or electronic means - the record is readily convertible into a hard copy in English.

New subregulation 105E(4) provides that in this Regulation, the following words and expressions have the same meaning as in Division 1D of Part VIII of the Act:

- a) Agreement;
- b) Australian originating goods;
- c) Certificate of Origin;
- d) Harmonized System
- e) produce.

Item 2 - After regulation 126A

Item 2 inserts new regulation 126B into the Principal Regulations, after regulation 126A.

New regulation 126B - Other circumstances under which refunds, rebates and remissions are made - Free Trade Agreements

New subregulation 126B(1) provides that for subsection 163(1) of the Act, the following circumstances are prescribed:

- a) duty has been paid on Thai originating goods (other than goods mentioned in subregulation (2));
- b) duty has been paid on goods (other than goods mentioned in subregulation (2)):
 - (i) that would have been Thai originating goods if, at the time the goods were imported, the importer held a Certificate of Origin for the goods; and
 - (ii) for which the importer holds a Certificate of Origin at the time of making the application for the refund.

It is possible, at the time the goods are imported, that an importer may pay duty on Thai originating goods at a higher rate of duty than is imposed on such goods. It is also possible that goods may satisfy all of the requirements under the Act to be Thai originating goods except for the requirement that the importer holds a Certificate of Origin, or a copy thereof, for the goods at the time of importation. In such circumstances, a refund of duty is payable.

New subregulation 126B(2) provides that subregulation (1) does not apply to:

- a) safeguard goods; or
- b) goods that would have been safeguard goods if, at the time the goods were imported, the importer held a Certificate of Origin or a copy of the Certificate of Origin for the goods.

In new subregulation 126B(4), safeguard goods has the meaning given in subsection 16A(7) of the *Customs Tariff Act 1995* (the Tariff Act). Subsection 16A(7) provides that safeguard goods means goods that are Thai originating goods and that are included in the table in this section. These goods are prepared tuna, prepared pineapple and pineapple juice, including canned products.

Under the Agreement, safeguard goods are sensitive products that have been given special treatment. Under the Tariff Act, once the volume of imports of these goods into Australia exceeds the specified level for a given year, the goods may no longer be eligible for a preferential rate of customs duty and duty may be payable at the general rate for the remainder of the calendar year.

The new refund circumstances in subregulation 126B(1) could encourage importers to avoid paying higher rates of duty on safeguard goods after the specified levels of imports has been reached. Importers could achieve this outcome by paying the general rate of duty at the time of importation, and delaying a refund claim until the following calendar year. Such action could mean that significant volumes of imports would not count toward the special safeguards volume

triggers. The result could delay or circumvent the imposition of duty on safeguard goods which could frustrate the implementation of the Agreement as it applies to safeguard goods. This in turn could expose the Government to criticism from the Australian tuna and pineapple industries.

Therefore, safeguard goods, and goods that would have been safeguard goods if, at the time the goods were imported, the importer held a Certificate of Origin, or a copy thereof for the goods, will not be eligible for a refund of duty under new regulation 126B. However, this will not remove the right of importers to obtain refunds on other grounds currently provided under the Principal Regulations, for example under paragraph 126(1)(b) if the goods are damaged or destroyed while subject to the control of Customs.

New subregulation 126B(3) provides that a person may not apply for duty to be refunded under paragraph 126(1)(e) in respect of:

- a) goods mentioned in subregulation (1); or
- b) goods mentioned in subregulation (2)

to the extent that an application for refund relates to 1 or more of the factors that determine whether the goods are Thai originating goods.

Paragraph 126(1)(e) provides that refunds of duty are payable where duty has been paid through manifest error of fact or patent misconception of the law. A refund of duty could be paid under paragraph 126(1)(e) in respect of goods mentioned in subregulation 126B(1) and (2) if it does not relate to the factors that determine whether the goods are Thai originating goods.

The purpose of subregulation 126B(3) is to allow refunds of duty in relation to Thai originating goods to the extent that the refund does not relate to any of the factors that determine whether goods are Thai originating goods.

New subregulation 126B(4) provides that in this regulation:

Certificate of Origin has the meaning given in subsection 153ZA(1) of the Act.

safeguard goods has the meaning given in subsection 16A(7) of the Tariff Act.

Thai originating goods has the meaning given in subsection 153ZA(1) of the Act.

Item 3 - Subregulation 128B(6) after definition of *deductible administrative costs*

Item 3 inserts the definition of *Thai originating goods* into subregulation 128B(6) and provides that the phrase has the meaning given in subsection 153ZA(1) of the Act.

Item 4 - After subregulation 128B(7)

Item 4 inserts new subregulations 128B(8) and (9), which set out the amount of refund payable under new subregulation 126B(1).

New subregulation 128B(8) provides that the amount of a refund, rebate or remission of duty that may be made in the circumstance prescribed in paragraph 126B(1)(a) is the difference between the amount of duty paid on the goods and the amount of duty payable on the goods as Thai originating goods.

New subregulation 128B(9) provides that the amount of a refund, rebate or remission of duty that may be made in the circumstance prescribed in paragraph 126B(1)(b) is the difference between the amount of duty paid on the goods and the amount of duty payable on the goods if they had been Thai originating goods at the time of their importation.