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Inquiry Secretary
Standing Committee on Agriculture and Industry
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Dear Mr

Thank you for the opportunity to provide additional input into the Standing Committee on Agriculture and Industry inquiry into Country of Origin Labelling for Food. The Department of Industry has prepared the attached supplementary submission addressing outstanding issues that have been raised by the Committee as well as clarification of common misconceptions which have arisen through the submission process.

I trust the enclosed supplementary submission will be of assistance. If the Committee has any further questions, please contact Lyndall Milward-Bason, Manager Trade Facilitation, by telephoning or by email to

Yours sincerely

John Ryan
Acting Secretary
Department of Industry

August 2014

Department of Industry

Supplementary Submission

The House of Representatives Standing Committee on Agriculture and Industry Inquiry into Country of Origin Labelling for Food

The Department of Industry (the department) is providing this supplementary submission to the House of Representatives Standing Committee on Agriculture and Industry to clarify certain issues that have been raised during the Inquiry into County of Origin Labelling for Food (CoOL).

A number of common misconceptions have become apparent through the submission and public hearing processes, which the department has addressed below, along with additional information on the treatment of water under the CoOL safe harbours and a summary of previous proposals to amend the framework.

Common Misconceptions

1. There is a specific safe harbour for 'Made in Australia'

Some of the submissions appear to assume 'Made in Australia' is a safe harbour provision in its own right. For example:

> *The ACCC requirements for 'Made in Australia' are substantial transformation of the ingredients and at least 50% of the costs are incurred.*
>
> – Brewers Association of Australia
>
> *NSW Farmers believes that this position frustrates the intention of CoOL to be a mechanism that provides consumers with the information necessary to exercise purchasing preferences and erodes public confidence in the "Made in Australia" representation which is one of the safe harbour defences within the ACL.*
>
> – NSW Farmers

Clarification

The Australian Consumer Law provides legal defences ('safe harbours') for certain representations that meet defined criteria. These 'safe harbours' apply to all countries (including Australia, China, New Zealand, United States etc). There is no Australian-specific 'safe harbour'.

The general country of origin 'safe harbour' applies to all country of origin claims other than 'product of' or 'grown in' (which have their own specific 'safe harbour' criteria). This means claims that may be covered by the general country of origin 'safe harbour' would include, but would not be limited to, 'Made in (country)', 'Manufactured in (country)' and 'Made in (country) from local and imported ingredients'.

Before a claim can be protected by the general country of origin 'safe harbour', the substantial transformation and 50 per cent content by value tests must be met. If a supplier cannot

demonstrate that these tests are met, it cannot rely on the general country of origin 'safe harbour' as a defence against allegations that its claim is false, misleading or deceptive. Instead, the supplier must be able to demonstrate through some other means that any origin representation it has made is not false, misleading or deceptive, no matter how that representation may have been expressed (for example, in words, pictures and/or symbols).

2. It is too easy to claim 'Made in Australia'

A number of submissions have suggested that it is too easy to make a 'Made in Australia' claim, such as by packaging imported food locally.

> *We are in the situation now where a food product can come into our country and be packaged here and have the legislative power to be called Made in Australia.*
>
> – Citrus Australia
>
> *Existing rules for packaged food allow products (processed or) packaged in Australia ... to be labelled Made in Australia.*
>
> – Australian Pork

Clarification

Imported food that only undergoes simple processing here, such as packaging or reconstitution (for example, in the conversion of fruit juice concentrate to fruit juice), would not meet the substantial transformation test for the general country of origin 'safe harbour'. If a 'Made in Australia' claim were made in relation to such products, current ACCC guidelines suggest that the claim would be considered false, misleading or deceptive under Australian Consumer Law. The same could be said for a 'Made in Australia from local and imported ingredients' claim.

3. If you don't meet a 'safe harbour' you can safely label products 'Made in Australia from local and imported ingredients'

A number of stakeholders believe that it is automatically safe to use 'Made in Australia from local and imported ingredients' as a fall-back claim when a product does not meet the general country of origin 'safe harbour' criteria.

> *This is a qualified claim that can be used where it is not possible for a standalone 'Made in' claim to be made, either due to uncertainty around the question of substantial transformation and whether 50 per cent costs of production is met or to adjust to seasonal changes in availability of individual ingredients.*
>
> – Australian National Retailers Association
>
> *These vague laws allow juice manufacturers to fill a container with mainly imported product and advertise their product as being made from local and imported ingredients without transgressing current laws.*
>
> – Citrus Australia

> *Current origin 'safe harbours' drive manufacturers to use qualified claims, for example "Made in Australia from local and imported ingredients" because compliance at the time of label design cannot be adequately guaranteed for a sufficiently forward period of time.*
>
> – The Australian Industry Group

Clarification

There is nothing in Australian Consumer Law that prohibits the use of additional information to any 'Made in' claims. However, to be considered 'safe' from allegations of being false, misleading or deceptive, the tests for the general country of origin 'safe harbour' would still need to be met.

Therefore, if a 'Made in Australia from local and imported ingredients' claim is made, and the product did not undergo substantial transformation in Australia or the 50 per cent value content requirement was not met, the supplier must be able to demonstrate through some other means that its claim is not false, misleading or deceptive.

Given that many consumers have expressed dissatisfaction with the clarity of 'Made in Australia from local and imported ingredients' claims, businesses might consider using other language to provide additional origin information to consumers, for example 'Assembled in Australia from quality imported products' or 'Manufactured in Australia from New Zealand vegetables'. Additional information must be relevant and useful and must not be false, misleading or deceptive.

Acknowledgement of the latest guidance from the ACCC with regards to 'Made in Australia from local and imported ingredients'

The latest version of the *Country of Origin Claims and the Australian Consumer Law* from the ACCC has removed reference to 'Made in Australia from local and imported ingredients' as a 'qualified claim'. This was done to reduce confusion in the market about the interpretation of this expression, as some within the industry (indicated above) were using it inappropriately. The removal of the 'qualified claim' has been acknowledged by some stakeholders, who note that it will take time for the broader industry to adjust to new guidance regarding this expression.

> *We note that in a recently released updated version of Country of Origin Claims and the Australian Consumer Law, the ACCC has left out this statement ... While CHOICE welcomes the ACCC's change in interpretation, we are concerned that it will take time for this interpretation to be absorbed by companies and labelling updated accordingly, and in the meantime consumers may be misled by companies relying on the old interpretation.*
>
> – CHOICE
>
> *The situation was not helped by the ACCC's country of origin guidelines of 2006 and 2011 which stated that where a company was unable to make an*

> *unqualified claim for their product, such as 'Made in Australia', they may make a qualified claim and such qualified claims do not have to meet the substantial transformation or 50% content tests.*
>
> ...
>
> *New guidelines released by the ACCC on 15 April this year no longer include such statements, stating instead only that such claims should not be false or misleading. Unfortunately the damage has been done in terms of consumer confidence.*
>
> – Australian Made Campaign Limited

4. It is too hard to distinguish products made predominantly from Australian ingredients and products made predominantly from imported ingredients

Some within the industry believe it is difficult to differentiate between a product made in Australia from a significant ingredient sourced in Australia and a similar product made in Australia from the same ingredient sourced overseas. This is because the expression 'Australian Made' can legitimately cover both products if the imported ingredient has been substantially transformed in Australia and the value of Australian content is at least 50 per cent of the total production cost.

> *The problem we have with Australian made bacon is that we would like to be able to label that 'Product of Australia'. The way the law is written makes it a little ambiguous as to whether that is possible, because of the ingredients—small amounts of brine—which are unavailable in Australia. Some processors have chosen to see that as a significant ingredient. Therefore the 'Product of Australia' is not an option for their labelling, so they call it 'Made in Australia'. It sits beside imported product called 'Made in Australia'. So the consumer has absolutely no ability to differentiate between the two.*
>
> – Australian Pork Limited
>
> *... sugar confectionery is predominately comprised of sugar – often Australian – and its main character should be considered sugar given it contributes the vast majority of the food. This subjectivity means there is potential uncertainty for business applying the "Product of" safe harbour defence.*
>
> – The Australian Industry Group

Clarification

The CoOL framework is sufficiently flexible to enable any country of origin representation to be made, so long as it not false, misleading or deceptive. This means that suppliers can highlight the origin (Australian or otherwise) of any of the ingredients of their food if they believe this is necessary to distinguish them from food made locally from ingredients imported from elsewhere, and they can do so without being false, misleading or deceptive, as demonstrated by compliance with one of the 'safe harbours' (e.g., ingredients 'grown in (country)') or by some other means. For example, there is nothing to stop a supplier from claiming bacon is 'Made in Australia from Australian pork' or an apple pie is 'Made in Australia from Australian apples' if those statements are true and would not mislead or deceive the ordinary consumer.

Example of industry initiatives for product differentiation:

> *The cider industry is also exploring voluntary industry initiatives to better inform consumers about the product, such as adoption of Apple and Pear Australia Limited's "Made with Aussie Apples" logo to signify the use of 100% Australian juice.*
>
> – Cider Australia
>
> *There have been some efforts to actually move to another solution, which is a marketing-based solution. Industry, for example, uses the pink square logo, which says Australian pork—we license that out. People who truly make their bacon and ham from Australian pork are able to use that logo cost free.*
>
> – Australian Pork Limited
>
> *We have had a significant improvement on two counts. Firstly, we have seen it with our branded products where we have been overtly calling out the fact we are Australian grown and made, using symbols like the map of Australia ... We have seen categories that were either in decline or static go into growth, and in some cases—depending on the retailer—significant growth.*
>
> – SPC Ardmona

5. Food can be imported from New Zealand without a country of origin label

The Department notes that repeated misconceptions regarding imported food, particularly from New Zealand being portayed in the media has contributed to misunderstandings of the labelling requirements for food that has been imported into Australia.

A number of submissions have suggested that food may be imported through New Zealand and be sold in Australia with no country of origin claim at all.

> *Food may be imported through New Zealand and sold in Australia without an origin declaration*
>
> – CHOICE

This means that food from third countries can be legally imported into, and sold in, Australia without origin labelling if trans-shipped via New Zealand and if it meets New Zealand requirements for composition and labelling.

– Australian Food and Grocery Council

Under the Trans-Tasman Mutual Recognition Act 1997 a product which can be legally sold in New Zealand may also be sold in Australia without being required to comply with any further labelling requirements imposed by Australian law.

As New Zealand does not currently require a country of origin statement on food products (Food Standard 1.2.11 of the Food Standards Code does not apply in New Zealand), this means that food products imported from New Zealand may be sold in Australia without a country of origin statement. This may include products imported into New Zealand from other countries.

– Australian Made Campaign Limited

Clarification

Goods can be legally sold in New Zealand without a country of origin label as New Zealand has not adopted the Australia New Zealand Food Standards Code for CoOL (Food Code). The *Trans-Tasman Mutual Recognition Act 1997* (TTMRA, see attached extract) allows food to be sold in Australia without meeting the Food Code or the Australian Consumer Law if it can legally be sold in New Zealand[i].

However, the *Commerce (Trade Descriptions) Act 1905* is exempted from the operation of the TTMRA[ii]. The Commerce (Imports) Regulations 1940 made for the purposes of that Act require all articles of food and beverages for human consumption to have affixed to them a trade description that includes the country in which it is made and produced[iii]. Under the Act, the trade description must not be false (or misleading). This means that Australian law still requires all food imported from New Zealand to be labelled with the country in which it is made or produced, and that such a label must not be false or misleading.

6. Food from a third country can be imported into Australia from New Zealand and be falsely labelled as 'Made in New Zealand'

Participants in the hearings of the inquiry have brought up the possibility that food may be imported into New Zealand, repackaged and exported to Australia for sale but labelled 'Made in New Zealand'.

I have heard all of the stories about product being brought in, say, from China into New Zealand and repacked and then being declared.

– Simplot Australia

There were a couple of the other issues in relation to the relationship with New Zealand and the products that come in from China via New Zealand, which are coming into Australia as a product of New Zealand.

– Australian Manufacturing Workers Union

... food from third countries can be legally imported into, and sold in, Australia without origin labelling if trans-shipped via New Zealand and if it meets New Zealand requirements for composition and labelling.

– Australian Food and Grocery Council

Clarification

Food cannot be imported from New Zealand bearing false or misleading country of origin representations. Firstly, the TTMRA only waives application of the Australian Consumer Law to a product imported from New Zealand if it can be sold legally in New Zealand. A product cannot be sold legally in New Zealand if it bears a false or misleading origin representation. Therefore, should such a product be imported into Australia, the TTMRA waiver of the application of the Australian Consumer Law would not apply, and action can be taken against the false or misleading representation under the Australian Consumer Law.

In addition, the provisions of the *Commerce (Trade Descriptions) Act 1905* precluding false (including misleading) trade descriptions could also apply.

Acknowledgement that Australia's CoOL framework does not permit goods to be imported from New Zealand bearing false or misleading origin representations

AMCL is also aware of allegations regarding Chinese frozen vegetables being packed in New Zealand and sold in Australia with claims such as 'Made in New Zealand from local and imported products'.

AMCL has no firsthand knowledge or evidence of this practice. However we would point out that, under the mutual recognition principle, any claims made on such products would need to be valid claims under New Zealand law Section 13(j) of New Zealand's Fair Trading Act 1986 prohibits any "false or misleading representation concerning the place of origin of goods".

According to the NZ Commerce Commission, when determining the place of origin of a food product, consideration should be given to where the "essential character" of the food is created. Simply repackaging imported vegetables would certainly not be sufficient to justify a claim that the product is 'Made in New Zealand'.

...

If products imported from New Zealand were sold in Australia carrying false or misleading country of origin claims, they would potentially be liable for action under the ACL for making false or deceptive claims.

– Australian Made Campaign Limited

7. CoOL rules should be changed to support Australian producers

A number of submissions have expressed a desire to change the CoOL framework to support Australian producers and manufacturers.

> *Our proposed approach allows for clear and simple messages for consumers who want to support Australian farmers and manufacturers*
>
> – CHOICE
>
> *... denying access to the competitive advantage provided by the 'Product of' and similar labels by having a confusing and convoluted labelling regime reduces the incentive for companies to produce food locally.*
>
> – Australian Manufacturing Workers Union

Clarification

The primary purpose of Australia's CoOL framework is not to support Australian producers, even though support for such producers might be the reason that some consumers want to know the origin of products offered for sale. Other consumers look for country of origin for other reasons – such as reputed quality of product. For this reason, the primary purpose of Australia's CoOL framework is to provide a means for businesses to inform consumers about the origin of the goods they are supplying, no matter which country those goods come from or why various consumers want to know.

Consistent with Australia's international obligations, Australia's CoOL framework does not seek to prejudice goods from any particular country, or to favour goods produced in Australia. For example, the CoOL provisions of the Food Code and the Australian Consumer Law apply equally to imported and locally produced goods.

Any attempt to change the CoOL framework to restrict trade or to encourage consumers or producers to substitute imported products or ingredients with Australia products or ingredients could be seen as inconsistent with a range of Australia's international trade obligations, with possible penalties applying. In addition, any attempt to impose Australian-specific CoOL requirements on Australian producers could add regulatory costs that would not be incurred by their overseas competitors, putting Australian producers at a competitive disadvantage, potentially forcing them out of business or off-shore. This, in turn, could reduce the range of goods available from Australian production.

Australia currently maintains a flexible CoOL framework that enables the country of origin to be declared on any product, and does not preclude businesses from highlighting the origin of any particular ingredient, as long as the supplier can demonstrate (either through compliance with 'safe harbour' criteria or by any other means) that its origin claim is not false, misleading or deceptive.

Any changes to the CoOL framework in Australia would require the agreement of the Commonwealth, states and territories. The processes required for change would vary dependent on the complexity of the amendments made to the existing country of origin labelling requirements, however, at the very least change would require:

- extensive industry consultation in order to assess impacts on all sectors of industry;
- undertaking a Regulatory Impact Statement analysis to assess likely associated costs as well as impacts;
- transitional planning so as to minimise impact on industry of any change;
- consultation with all states and territories. Any change at the Commonwealth level would have impacts on related state and territory laws. At the very least majority agreement would be required by state and territory governments;
- Commonwealth legislative change and policy approval processes through Cabinet and Parliament, in addition to changes to state and territories' laws;
- an appropriately funded education campaign would be necessary to inform both consumers and industry to ensure good understanding of the changes to the framework.

8. Additional Issue – treatment of water under the safe harbours

The department was asked to provide some information to the Committee about how water is treated under the different country of origin 'safe harbours' in the ACL.

The water content of a food product may be included as part of its 'Australian' content for the purposes of a 'Made in Australia' claim or 'Product of Australia' claim.

However, the ACCC has issued guidance which indicates that the mere reconstitution of a product, such as imported apple juice concentrate, would not constitute substantial transformation for the purposes of the general country of origin 'safe harbour', and would be insufficient to make an 'Australian made' claim.

For 'Grown in' claims, the ACL provides that water used to reconstitute the food product will be treated as having the same origin as the ingredient, regardless of whether Australian water is used.

In practice, this means:

If a carton of tomato juice was made from imported Italian tomato concentrate, which was then reconstituted in Australia, it would not meet any of the 'safe harbours' in the ACL.

In particular, as ACCC guidance suggests that the conversion of tomato concentrate to tomato juice would not constitute substantial transformation, the juice would not meet the 'safe harbour' for general country of origin representations such as 'Made in'.

Therefore, a claim that the juice was 'Made in Australia' or even 'Made in Australia from local and imported ingredients' is likely to be considered misleading.

The supplier would need to consider alternative origin representations, taking care to ensure that it could demonstrate that any claim it decided to make was not false, misleading or deceptive.

For example, consideration could be given to labelling the juice 'processed and packaged in Australia from imported concentrate' or 'reconstituted and packaged in Australia from Italian grown tomatoes'.

If the same tomato concentrate were to be used to make a can of minestrone soup in a factory in Adelaide, the cost of the Australian water used to reconstitute those tomatoes, together with the cost of other Australian ingredients, labour and overheads, could be counted towards the overall value of the Australian content of the soup.

As the tomato concentrate would have undergone substantial transformation in the making of the minestrone soup, should the value of Australian content account for at least 50 per cent of the total production cost of that soup, it would meet the 'safe harbour' requirements for general country of origin representations.

This would allow the soup to be labelled 'Made in Australia', 'Made in Australia from imported tomato concentrate', 'Made in Australia from Italian tomato concentrate', or a wide range of other descriptions, without the claim being considered false, misleading or deceptive.

However, as the soup would contain a significant imported ingredient (the tomato concentrate), a 'Product of Australia' or 'Grown in Australia' label is likely to be considered false, misleading or deceptive, even if a number of the other ingredients were grown here.

9. Additional Issue – previous proposals to amend the CoOL framework

The department was asked to provide some information to the Committee about previous Senate proposals relating to the CoOL framework, particularly in relation to the department's assessment of these proposals.

The provisions of Bills, such as those tabled by the Greens during the last Parliament, which seek to provide separate rules for goods of Australian origin, may invite WTO scrutiny. It is contrary to normal practice and WTO expectations for members to implement country-specific origin labelling laws. Other members may question the consistency of such laws with WTO requirements that promote consistent regulation of imports and domestically produced goods – aimed at preventing protectionism by ensuring trading rules do not favour domestic production over imports.

In common with the first (2012) Greens CoOL Bill, the latest (2013) Bill elicited support from some quarters. However, had either Bill been passed, several unintended consequences would likely have eventuated, and certain problems alleged to exist with the current CoOL framework would not have been resolved.

For example, in a press release on 17 May 2013, AUSVEG indicated its support for the latest Bill, suggesting it would provide a solution to an alleged problem of product from China entering the Australian market via New Zealand. However, the Bill did not address claims of origin on imported foods, so could not be a solution to the alleged problem with imports from New Zealand (which appeared in any case to be unfounded). Further, the latest Bill appeared to make no provision for origin labelling of Australian food materials that were sent to another country for processing or manufacture, and then re-imported into Australia.

Inclusion of 'manufactured in Australia' and 'packaged in Australia' representations meant that the latest Bill was an improvement on the earlier Bill, but fundamental problems remained, including:

- the proposed labelling requirements would likely create inconsistency between origin labelling of food and non-food products, which could have led to consumer confusion and further complaint;
- the proposed labelling requirements appeared likely to create inconsistency between origin labelling of Australian and imported food – for example, cheese would have had to be 'Manufactured in Australia' but imported cheese could continue to be 'Made in New Zealand' – potentially a source of more consumer confusion and complaint;
- the proposed CoOL rules made no distinction between food processed and packaged in Australia (which did not meet the requirements of 'Manufactured in Australia') and food that would be only packaged in Australia. For example, a 'Packaged in Australia' label on coffee would have applied equally to imported coffee roasted and packed here, as well as imported coffee roasted elsewhere and packed here.
- by being very prescriptive about the representations that could be made and about the circumstances in which they could be made, the Bill may have forced suppliers to make certain representations that would have been false, misleading or deceptive due to the specific circumstances of their products and production processes. Any reduction in the current flexibility of the framework may result in a diminished ability for Australian businesses to provide consumers with information of Australian input into products outside of the ingredients themselves.

The above list of potential difficulties is not exhaustive, but serves to illustrate the existence of significant deficiencies in the previous Bills.

Attachment A

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[i] *Trans-Tasman Mutual Recognition Act 1997*

...

10 Entitlement to sell goods

The Trans-Tasman mutual recognition principle is that, subject to this Part, goods produced in or imported into New Zealand, that may lawfully be sold in New Zealand, either generally or in particular circumstances, may, by virtue of this Act, be sold in an Australian jurisdiction either generally or in particular circumstances (as the case may be), without the necessity for compliance with further requirements imposed by or under the law of that jurisdiction as described in section 11.

11 Requirements that do not need to be complied with

The further requirements referred to in section 10 are any one or more of the following requirements relating to sale that are imposed by or under the law of the Australian jurisdiction concerned:

...

(b) a requirement that the goods satisfy standards of the jurisdiction relating to the way the goods are presented, including for example requirements relating to their packaging, labelling, date stamping or age;

...

(e) any other requirement relating to sale that would prevent or restrict, or would have the effect of preventing or restricting, the sale of the goods in the jurisdiction.

[ii] *Trans-Tasman Mutual Recognition Act 1997*

...

Schedule 1—Exclusions

Part 1—Introduction

1 Excluded laws

(1) The laws specified or described in this Schedule are excluded from the operation of this Act, so far as they relate to:

(a) customs controls and tariffs—but only to the extent that the laws provide for the imposition of tariffs and related measures (for example, anti dumping and countervailing duties) and the prohibition or restriction of imports; and

...

(2) The laws specified or described in this Schedule are excluded only to the extent that those laws would be affected by the Trans Tasman mutual recognition principle as applying to goods.

...

Part 2—Laws

2 Customs controls and tariffs (including laws relating to international obligations)

Prohibited imports
...
Commerce (Trade Descriptions) Act 1905 of the Commonwealth

[iii] *Commerce (Trade Descriptions Act) 1905*

3 Interpretation

In this Act, unless the contrary intention appears:

Trade description, in relation to any goods, means any description, statement, indication, or suggestion, direct or indirect:

...

(b) as to the country or place in or at which the goods were made or produced; or

...

False trade description means a trade description which, by reason of anything contained therein or omitted therefrom, is false or likely to mislead in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, which makes the description false or likely to mislead in a material respect.

Part III—Imports

7 Prohibition of imports not bearing prescribed trade description

(1) The regulations may prohibit the importation or introduction into Australia of any goods unless there is applied to them a trade description of such character, relating to such matters, and applied in such manner, as is prescribed.

...

Commerce (Imports Regulations) 1940

7 Additional prohibition of certain imports

(1) The importation of the following goods is prohibited unless there is applied to those goods a trade description in accordance with these regulations:

(a) articles used for food or drink by man, or from which food or drink for use by man is manufactured or prepared;

...

8 Trade description — general requirements

The trade description to be applied in accordance with these regulations is a trade description that complies with the following provisions:

(a) subject to these regulations, the trade description, in the case of goods other than goods that are imported as pre-packed articles, shall be in the form of a principal label or brand affixed in a prominent position and in as permanent a manner as practicable to the goods or, if affixture to the goods is impracticable, to the coverings containing the goods;

(b) subject to these regulations, the trade description, in the case of goods imported as pre-packed articles, shall be marked on the packages in which the goods are packed;

(c) the trade description shall contain, in prominent and legible characters:

(i) the name of the country in which the goods were made or produced;

...