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AUSTRALIAN SENATE

ECONOMICS LEGISLATION COMMITTEE

CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE

Provisions of the Trade Practices Amendment

(Country of Origin Representations) Bill 1998

June 1998

Parliament of the Commonwealth of Australia

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BACKGROUND TO THE INQUIRY

The Trade Practices Amendment (Country of Origin Representations) Bill 1998 (the Bill) was introduced into the House of Representatives on 8 April 1998 and passed by that chamber on 28 May 1998. At the date of this report, the Bill is expected to be introduced into the Senate Chamber in a matter of days. The Bill was referred to the Senate Economics Legislation Committee by the Selection of Bills Committee on 27 May 1998[1] for examination and report by 23 June 1998. Subsequently, on 22 June 1998 the Committee's reporting date was extended to 24 June 1998.

In referring the Bill for inquiry, the Selection of Bills Committee noted that the legislation:

> …sets up a framework for establishing country of origin labelling claims and consideration needs to be given as to whether this legislation will meet the requirements called for by various industry bodies and whether it will adequately meet public and industry expectations.[2]

The Economics Legislation Committee secretariat contacted a range of possible interested parties in relation to the referral of the Bill, and received 12 submissions to the inquiry (as listed in appendix 1). A public hearing to examine the Bill was conducted in Canberra on 22 June 1998. A list of witnesses who gave evidence at the hearing appears in appendix 2, and the full transcript of the hearing is available at the internet address of http://www.aph.gov.au/hansard.

BACKGROUND TO THE BILL

Section 52 of the *Trade Practices Act 1974* prohibits misleading and deceptive conduct in trade or commerce. Section 53(eb) of the Act makes it unlawful to make a false or misleading representation about the origin of goods offered for sale in Australia. The Section provides that:

> 53. A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services in connection with the promotion by any means of the supply or use of goods or services -
>
> (eb) make a false or misleading representation concerning the place of origin of goods.

All State and Territory Fair Trading Legislation contain equivalent provisions. However, establishing the test in relation to what is meant by a 'false or misleading representation' concerning the origin of goods has been a matter of considerable difficulty which the Trade Practices Amendment (Country of Origin Representations) Bill 1998 seeks to address.[3]

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1 Selection of Bills Committee report No. 7 of 1998, dated 27 May 1998, published in the Senate *Hansard* of 27 May 1998, pp3020-3022.

2 Selection of Bills Committee report No.7 of 1998, dated 27 May 1998, published in the Senate *Hansard* of 27 May 1998, pp3020-3022.

3 Parliamentary Library Bills Digest No. 213 1997-98, Trade Practices Amendment (Country of Origin Representations) Bill 1998, pp1-2.

OVERVIEW OF THE TRADE PRACTICES AMENDMENT (COUNTRY OF ORIGIN REPRESENTATIONS) BILL 1998

The Explanatory Memorandum to the Bill provides the following outline and description of the draft legislation's regulatory objective.

The Trade Practices Amendment (Country of Origin Representations) Bill 1998 will amend the *Trade Practices Act 1974* (TPA) to establish a defence from potential breach of s52 or 53(eb) for country of origin representations that meet certain criteria.

The amendments will provide a clear regime for country of origin representations which, hitherto, have been subject to the general misleading and deceptive conduct prohibition of the TPA. As such, the provision establishes minimum criteria for unqualified country of origin representations which, if met, will protect manufacturers and importers from litigation under either s52 or s53(eb).

In addition to the general threshold for unqualified country of origin claims, the provisions limit the use of 'product of' descriptions to goods that can demonstrate all or virtually all content and processing in the country from which they are claiming origin.

The provisions will also allow for the prescribing of voluntary industry logos, with criteria stricter than that for the general threshold test, which will facilitate the promotion of goods from industry sectors with very high levels of local content.

The provisions include miscellaneous amendments unrelated to the primary purpose of the Bill which will:

- Include consideration of small business experience in the appointment of Commissioners to the Australian Competition and Consumer Commission (ACCC);

- Expand the ability of the ACCC to take representative actions to include matters arising under Part IV of the TPA relating to restrictive trade practices; and

- Make technical amendments to the TPA, without significant legal effect, to reflect other legislation enacted by the Parliament or changes in administrative arrangements.

Regulatory objective

The regulatory objective of the Bill is to address the uncertainty surrounding origin labelling and to provide realistic thresholds for the use of such claims. The Government is seeking to provide certainty and confidence for consumers and industry by restoring clarity to the regulatory regime governing origin labelling.

The regulatory measures employed by the Government will establish a voluntary regime that is relevant and accessible for local manufacturers who undertake substantial value-adding activities and generate employment in Australia. The regime will provide equal national treatment thereby not imposing a technical barrier to trade incompatible with Australia's commitments under the WTO.

The measures act to confirm that 'product of' descriptors are only used to denote very high levels of local content. Such labels are of particular value to primary producers. Under the proposed regime, the use of 'product/produce of' claims will be governed by a self-standing provision. The provision will effect a prohibition along the lines that a corporation cannot

make a claim that a good is 'produced in' or a 'product of' a particular country, unless that good is created in that country from 'all or virtually all' domestic inputs or ingredients and has 'all or virtually all' of the manufacturing process undertaken there.[4]

ISSUES RAISED IN EVIDENCE

General support for the principle of tighter labelling regulation

Support for the principle of tighter labelling regulation was common to all submissions, yet clearly there is disagreement as to the optimal extent of that regulation. While key stakeholders such as the Australian Chamber of Commerce and Industry; National Farmers' Federation; and the Pork Council of Australia favour the Bill as drafted, other inquiry participants argue for stricter regulation of labelling practices.

The Australian Owned Companies Association argues that labelling regulation should be so strict as to allow only Australian companies the use of 'produce of Australia' labels. In the absence of this restriction, the Association argues that the labels will be degraded in their standing, in that goods which are not intrinsically Australian, such as Coca Cola, could qualify as being labelled 'produce of Australia'.[5]

On the other hand, however, the Australian Chamber of Commerce and Industry (ACCI) welcomes the Bill as drafted, and judges it as likely to give valuable certainty to Australian industry on country of origin representations. ACCI's view is that 'Australian business has endured judicial uncertainty and has already waited too long to have clear labelling laws. The definitions proposed in the Bill are in accord with international standards and ACCI supports all elements of the Bill'.[6]

Base level 'made in Australia' test

Section 65AB of the Bill establishes a defence against action under s52 or s53(eb) of the *Trade Practices Act 1974* in matters relating to country of origin representations. It is a defence under this provision if the goods carrying the representation comply with a:

- substantial transformation test (as discussed below); and
- 50% or more of the cost of producing or manufacturing the good (as determined according to the regime established in Subdivision B of Part 1 of the Bill) occurred in the country of which a representation of origin is being made.

The defence established by this provision permits the use of the label 'made in Australia' but does not provide for the use of the terms 'product of / produce of', or a logo that is prescribed under section 65AD of the Bill.

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4 Parliament of the Commonwealth of Australia, House of Representatives, Trade Practices Amendment (Country of Origin Representations) Bill 1998, Explanatory Memorandum, pp1-3.

5 Submission No.2, Australian Owned Companies Association, p.1.

6 Submission No.7, Australian Chamber of Commerce and Industry, p.7.

Meaning of 'substantial transformation' of goods

Provision 65AE of the Bill provides a definition for 'substantially transformed', the first element of the general test for country of origin representations set out in section 65AB of the TPA. Broadly, the test requires that for a substantial transformation to have occurred, a good must undergo a change in how it looks, operates or to its purpose, within the country indicated in the representation.

The Australian Chamber of Commerce and Industry supports the proposed 'substantially transformed' definition, describing it as 'workable'[7]. On the other hand, however, a number of submissions noted potential problems associated with the qualitative nature of the 'substantial transformation' test. The Law Council of Australia argues that this test is inappropriate and unworkable particularly in respect of products that are made or assembled from a variety of components. The Law Council notes that there is a potential difficulty of interpretation where it is the disparate parts, components or ingredients of the goods that have undergone or formed part of the transformation to create the goods, and not the goods themselves.

The Lovelock Luke case[8] illustrates this difficulty through the example of air conditioners. In the Lovelock Luke case, air conditioners were marketed as 'made in Australia', on the grounds that they had been designed in Australia, and all the parts were made in Australia with the exception of the compressor. Accordingly, Justice Lockhart of the Federal Court determined that the air conditioners had been substantially manufactured in Australia and therefore qualified for the description 'made in Australia'. However, this case is likely to have been decided quite differently, had it been subjected to the proposed provisions of the Trade Practices Amendment (Country of Origin Representations) Bill 1998. As indicated by the Law Council, under the Bill it would have to be established that the air conditioners had been substantially transformed in Australia ie that they had undergone a fundamental change, such that they were new and different goods. The air conditioners were new, but they had not undergone any change nor were they different.[9]

Government response

Government representatives defended the proposed 'substantial transformation' test, arguing that, in practice, it was similar to the 'test of manufacturing' used in the Lovelock Luke air case. Mr Phillip Noonan, Head of the Consumer Affairs Division of the Department of Industry, Science and Tourism stated:

> There is actually a passage in that case (Lovelock Luke) in which Justice Lockhart talks about what is necessary to show that a good was manufactured for the purposes of sales tax. He says 'the essence of making, or of manufacturing, is that what is made shall be a different thing from that out of which it is made.' This seems very similar to the test that has been used to define substantial transformation in the bill.[10]

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7 Submission No. 7, Australian Chamber of Commerce and Industry, p.6.

8 Australian Competition and Consumer Commission v Lovelock Luke Pty Ltd [1977] 1100 FCA (24 October 1977), 39 IPR, 439.

9 Submission No. 1, Law Council of Australia, p.1.

10 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E32.

In making the above statement, however, Mr Noonan agreed to consider possible amendments to the 'substantial transformation' provisions, as suggested by the Law Council of Australia.

In response to concerns that imported ingredients would not be distinguished from local ingredients in respect of a product's qualification for 'substantial transformation', the Committee was advised that legislative mechanisms could be introduced to address this problem.

> The act has a definition of substantial transformation and it allows the minister to make regulations that decide that certain processes are not substantial transformations, to make that clear. In the case of orange juice concentrate, he has already indicated that he would look very closely at proscribing the adding of water to concentrate as a process that would not be allowed to claim that it was a substantial transformation. I do not know enough about the jam example to see whether that is another example that might fit in that category, but we could certainly look at that.[11]

Appropriate threshold for 'cost of production' test

The '50% cost of production' element of the 'made in Australia' test has triggered mixed reactions, with certain industries judging it as too high, others too low. In accordance with this debate, the Australian Chamber of Commerce and Industry consulted extensively with industry representatives and found that:

> Although some manufacturing businesses would prefer a higher threshold, on balance, the consensus is that in recognition of the global nature of manufacturing industries that 50% is a fair recognition of the realities of Australian manufacturing.[12]

Similarly, the Australian Business Chamber's consultation with its members found a generally positive reaction to the proposed new labelling tests, although with some reservations. The Chamber notes that certain industry sectors have particular characteristics which '..may necessitate the preparation of regulations which recognise processes unique to their industries.'[13]

The Victorian Strawberry Growers Association argues it represents one such industry for which the proposed 50% cost test is inadequate. The Association believes that in respect of food products, the 50% threshold may be easy to achieve simply through using '..creative accounting'[14]. Accordingly, the Association recommends splitting the draft legislation into food and non-food sections so that a 75% threshold may be applied for food products while the 50% threshold is retained for other goods.

The Victorian Strawberry Growers Associations contends that a higher percentage threshold for Australian ingredients would provide a greater level of credibility to the 'made in Australia' label. In addition, it would provide a boost to local producers by encouraging food manufacturers, such as yoghurt manufacturers to use Australian produce in their food

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11 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E34.

12 Submission No.7, Australian Chamber of Commerce and Industry, p.6.

13 Submission No.10, Australian Business Chamber, p.2.

14 Submission No. 3, Victorian Strawberry Growers Association, p.7.

products. The secondary market, in which Australian produce is used in the manufacture of other food items, is particularly important for the soft fruit industry, providing a valuable outlet for seconds and crop surpluses during the peak of the season. Yet the Victorian Strawberry Growers Association notes that many Australian food manufacturers use imported soft fruit in their products, to the extent that there are no Australian strawberries in any of the strawberry jams sold in Australian

In addition to arguing for a stricter 'cost test' to qualify for the 'made in Australia' label, the Victorian Strawberry Growers Association believes that application of the new labelling rules should be broadened to include loose food stuffs. The Association sees a significant weakness in the draft legislation's apparent failure to cover the display of foodstuffs sold in delicatessens and fruit and vegetable shops.[15]

A further possible improvement to the draft legislation noted by the Victorian Strawberry Growers Association involves identification of the country of origin of non-Australian ingredients of food products. The Association suggests that this requirement could be simplified such that country of origin identification be required only for those ingredients constituting greater than 5% of a given product's ingredients. Furthermore, in order to minimise the space required for labelling descriptions, the Association recommends an abbreviation system eg UK, USA, Fr (France), HK (Hong Kong) etc.[16]

The accuracy and credibility of product labelling is a broad concern that the Australian Consumers Association (ACA) shares with the Victorian Strawberry Growers Association. Indeed, the ACA judges the proposed 50% cost test as likely to amount to a breach of consumers' rights to truthful product labelling.

> In simple terms, consumers think they are buying a wholly Australian product, yet may only get half Australian. Consumers identify not only with the processing or manufacturing as an important element in a 'made in Australia' claim, but also the origin of the ingredients or components of a product.[17]

In addition to potentially misleading consumers, the ACA argues that inaccurate labelling practices penalise Australian manufacturers. For example, the ACA highlights the inequity of the proposed legislation whereby, to a large extent, manufacturers who do not use Australian components can make the same labelling claims as those who do.

In the interests of truthful labelling, therefore, the ACA offers an alternative labelling model based on a three tiered system, conveyed in simple language. The proposed system would involve:

> 1. Reserving the pristine term 'product of Australia' for products which are wholly derived from Australian components or ingredients and are also manufactured or processed in Australia;
>
> 2. Providing a set of terms to indicate that Australian manufacturing has occurred with components/ingredients derived from a variety of sources. For example 'made in Australia from Australian and imported components/ingredients' (for a product that is manufactured or processed locally using more than 50% Australian

15 Submission No.3a, Victorian Strawberry Growers Association, p.8.

16 Submission No. 3, Victorian Strawberry Growers Association, p.6.

17 Submission No.11, Australian Consumers Association, p.1.

> components/ingredients.); or 'made in Australia from imported and Australian components/ingredients' (where the latter is less than 50% Australian).
>
> 3. Allowing a range of terms to be used to truthfully describe products of *some* Australian character. For example 'Packed in Australia', 'Cured in Australia from Imported Pork', 'Ground in Australia from Chinese peanuts.'[18]

The ACA argues that in ensuring a truthful system of labelling, the three tiered system would resolve the definitional problems associated with the proposed country of origin test. In particular, the subjectivity of the 'substantial transformation' component of the test (as discussed above) could be avoided.

Government response

As a general Government policy position, Department of Industry, Science and Tourism representatives indicated an unwillingness to consider more highly qualified labelling regulations, such as those proposed by the Australian Consumers Association. Mr Noonan, Head of the Consumer Affairs Division of DIST explained the underlying principles of the Government's proposed new labelling regulation, as hinging on:

> ….the need to keep the labelling regime simple. There have been various schemes looked at over the years that have tried to look at the question of qualification, and the Australian Consumers Association has brought one forward today. However, they all tend to lead to undue complexity and, indeed, to some inflexibility.[19]

In defence of the 50% 'cost of production' test proposed by the new system, Mr Noonan indicated that the National Farmers' Federation and the Food Council of Australia supported this designated threshold. Furthermore, as useful background to the Government's policy position, Mr Noonan informed the Committee that by international standards, the proposed test was relatively demanding.

> Firstly, I think there is a need to consider what is done in other countries in relation to the level. Most other countries clearly set the level at 50 per cent. In fact, we did a survey of our major trading partners to the maximum extent that we could, through e-mails and correspondence to our counsellor network, and so forth. With the exception of the United States, which was well discussed this morning, we were unable to identify another country that had a higher test that 50 per cent. In fact, most of our major trading partners have one or the other. They have either the substantial transformation test or a value added test. Australia would, in fact, be setting a test on the high side of the general group in going for substantial transformation and 50 per cent value added.[20]

However, when questioned regarding the difficulties posed by the 50% 'cost of production' test for certain sectors within the food and textile, footwear and clothing industries, Mr Noonan conceded that some special concessions may be required, and would be possible.

> The approach in the Bill is to set out general rules that apply to all products, but then to recognise that there are some specific issues in the food area that consumers may wish to address. For instance, whether there should be a listing of all

18 Submission No.11, Australian Consumers Association, p.2.

19 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E30.

20 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E32.

> ingredients on food products. There are probably arguments for and against that, and the body that is best placed to make judgements about that is the Australian and New Zealand Food Authority. So the approach the Government has taken with the legislation is to set down general rules, but to allow ANZFA to develop further rules for the food sector if that seems appropriate. So I think that is probably achieving the objective of having the capacity to treat food separately without holding up addressing the main issue, which is: what are the base rules for industry generally?[21]

In respect of loose food, however, Mr Noonan informed the Committee that it had always been considered separately from packaged foods for the purposes of labelling regulation. Responding to the suggestion that provisions for the mandatory labelling of loose food be incorporated into the Bill Mr Noonan stated:

> It would be a big change from current practice, the bill follows current practice about the circumstances under which labels can be put on. It sets a safe harbour for what you have to show in order to get that, but it does not increase compliance burdens on business.[22]

TCF industry concern surrounding true intent of the Bill

The true legislative intent of the Bill was raised as an issue by representatives of the textile, clothing and footwear (TCF) industry. The concern of this industry is whether the proposed legislation purely represents a defence to challenge of labelling practices through the Trade Practices Act, or actually prescribes labelling practice, effectively restricting any use of the term 'made in Australia' or its derivatives. The latter possibility particularly concerns the Council of Textile and Fashion Industries of Australia Ltd (TFIA), in that the 50% (Australian) cost component of the proposed new test for 'made in Australia' claims, is difficult to satisfy in the case of many textile products.

The TFIA submits that currently where fabric is cut and sewn into a finished item in Australia, industry practice allows for it to be labelled 'made in Australia'. However, under the proposed new labelling tests, where garments are made from imported fabrics comprising greater than 50% of the total cost of the item's manufacture, potentially the finished product would not qualify as 'made in Australia', regardless of the actual manufacturing processes being conducted locally. Indeed, according to the Australian Retailers Association, rigid enforcement of the 50% cost component of the 'made in Australia' test could create situations where:

> …some sizes and colours of a particular style of garment qualify for a "made in Australia' label whilst other larger sizes (more fabric) and colours (more expensive colours) would be ineligible.[23]

As a possible solution to potential labelling problems within the TCF industry, the TFIA suggests that the proposed new 'made in Australia' test be amended to require only one of the proposed two components of the test to be satisfied. That is, either 50% of the cost of

21 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E31.

22 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E35.

23 Submission No.8, Australian Retailers Association, p.2.

producing an item is outlaid in Australia or 'substantial transformation' of the item occurs in Australia.[24]

Government response

On behalf of the Government, Mr Phillip Noonan, Head of the Consumer Affairs Division of the Department of Industry, Science and Tourism, indicated that the textile, clothing and footwear industry was correct to see the Bill as a defence to the existing prohibition on misleading and deceptive conduct. In accordance with this, Mr Noonan stated that it conceivably would be possible to follow a labelling practice different from that set out in the legislation, as long as it could not be proven to be misleading or deceptive. In making this point, however, Mr Noonan emphasised that in circumstances where manufacturers diverge from the labelling practices proposed by the Bill, they would be relying for protection upon potentially difficult legal precedents. Mr Noonan explained that:

> ….all the cases upon which they would have to rely, if they were not to use the safe harbour in the bill, do examine the production processes in great detail. Where they find that a simple assembly was involved, judges are very quick to say that this is not a substantial transformation, that it is not a central character, that it is not whatever test they chose to apply.[25]

Higher level, 'product of…/produce of…' test

Section 65AC provides that a corporation does not breach section 52 and paragraph 53(eb) of the Trade Practices Act in making a representation that goods are the produce of a country, provided that:

- The country was the origin of each significant ingredient or significant component of the goods; and

- All, or virtually all, processes involved in the production or manufacture occurred in that country.

The Australian Chamber of Commerce and Industry welcomes these special provisions in respect of produce, and notes that they will be particularly valuable for those Australian manufactured goods and food products which can satisfy this higher level of Australian content.[26]

A concern is raised by the Law Council of Australia, however, regarding the likely difficulty of determining what is a 'significant' ingredient or component. To illustrate this point, the Law Council refers to an example given in the Bill's Explanatory Memorandum regarding a drink made from apple and cranberry juice. Both juices would have to come from Australia to qualify for a description of 'product of Australia' although the juices would constitute only a small percentage of the total drink. The Explanatory Memorandum states that the preservative used in the drink could be imported on the basis that it is not a significant ingredient or component. Yet as noted by the Law Council, it could be argued that without

24 Submission No.6, Council of Textile & Fashion Industries of Australia Ltd., p.3.

25 Proof Committee Hansard, Senate Economics Legislation Committee, Monday 22 June 1998, p.E30.

26 Submission No.7, Australian Chamber of Commerce and Industry, p.6.

the preservative, the shelf life of the juice could be so limited as to restrict marketing of the product, thus making the preservative a significant ingredient or component.[27]

Need for consumer education regarding proposed new labelling regulations

The importance of an extensive consumer education campaign was widely acknowledged by inquiry participants. The joint submission of the National Farmers' Federation; Pork Council of Australia; and South Australian Farmers' Federation echoed the sentiment of Advantage Australia, that the proposed labelling definitions '…will not restore consumer confidence unless consumers clearly understand what they mean.[28] Indeed, the Victorian Strawberry Growers Association is doubtful that, even with the proposed education campaign, consumers will appreciate the difference between the terms 'made' in Australia and 'produce' of Australia. The Association advocates a clearer distinction between the two terms such as expansion of 'Made in Australia' to 'Made in Australia from Australian and Imported Ingredients'[29]

The Government has allocated approximately $1.35 million (over two years)[30] to consumer education, yet both Advantage Australia and the Australian Owned Companies Association (AOCA) question the adequacy of this funding. The AOCA argued that in the absence of a comprehensive series of Government endorsed logos, the funds allocated to education are likely to be wasted:

> If the Government really wanted to get the labelling message across to the public, it should be creative, like having a competition to design a comprehensive series of logos, and then ask for media, business and community help to promote them.[31]

Need to define 'Australian'

A further weakness of the Bill identified by the Australian Owned Companies Association is its failure to define 'Australian'. According to the AOCA, this omission is likely to leave open the possibility for misrepresentative labelling and therefore warrants further amendment to the Trade Practices Act. The AOCA suggest the Ausbuy definition of 'Australian' as desirable, claiming that it would prevent foreign companies' use of slogans such as 'Proudly Australian', or even the Australian flag as a device for misleading consumers.

Proposed establishment of a Labelling Tribunal

In the interests of assisting both business and consumers in the area of labelling, the Australian Owned Companies Association advocates that a Labelling Tribunal be established within the ambit of the Australian Competition and Consumer Commission. The AOCA notes the following possible benefits of a Labelling Tribunal:

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27 Submission No.1, Law Council of Australia, p.2.

28 Submission 12, Advantage Australia, p2.

29 Submission No.3, Victorian Strawberry Growers Association, p.3.

30 Parliament of the Commonwealth of Australia, House of Representatives, Trade Practices Amendment (Country of Origin Representations) Bill 1998, Explanatory Memorandum, p.1.

31 Submission No.2, Australian Owned Companies Association, p.5.

(a) Small and medium sized businesses could have access to low cost advice and reassurance that the label descriptor chosen for their goods and services would not expose them to problems with the ACCC;

(b) There would be consistency through all industries, and where exemptions are made, they would be consistent;

(c) Approvals and conditional exemptions for exceptional circumstances could be given, and the Tribunal could generally move with technology in a way that is difficult for test Court cases; and

(d) The Tribunal could police proliferation of alternate descriptors the proposed amendments will spawn such as 'Manufactured in', 'Designed in' or "Blended in'.[32]

In further support of a proposed Tribunal, the AOCA argues that the licencing fees associated with a proposed series of Government endorsed logos could be used to offset the cost of the Tribunal.

ACCC representative actions against restrictive trade practices

Item 3 of Schedule 2 to the Bill seeks to empower the ACCC to take representative actions against restrictive trade practices as defined in Part IV of the *Trade Practices Act 1974*.

Item 5 of Schedule 2 provides for this new power of the ACCC to apply retrospectively.

Currently the ACCC can take representative action only where:

- The Commission has brought either a prosecution under s.79 of the Trade Practices Act or proceedings for an injunction under s80; and

- The proceedings are brought in respect of an alleged contravention of Part IVA (unconscionable conduct) or Part V (consumer protection).

In accordance with this, the ACCC considers that its current ability to take representative proceedings is unnecessarily limited, and therefore the proposed extension of these provisions is welcomed. In particular, the ACCC sees the proposed item 3 amendment as likely to increase access to justice for small businesses. The ACCC argues that:

> While the benefits of a competitive market will flow to both consumers and businesses, it is usually businesses (especially small businesses) that suffer direct losses when there are contraventions of Part IV. For example, agreements between businesses to fix prices can keep the price of inputs for small businesses artificially high. Anti-competitive and exclusive dealing arrangements can hinder the ability of small businesses to compete in a particular market.[33]

Yet, while supporting the expansion of its powers under the proposed item 3 amendment, the ACCC is dissatisfied that significant limitations on Part IV representative actions will remain. In practice, the proposed amendment will permit Part IV representative actions only where the Commission institutes proceedings for an injunction. The ACCC notes that it will not be

32 Submission No.2, Australian Owned Companies Association, p.4.

33 Submission No.5, Australian Competition and Consumer Commission, p.2

able to take representative proceedings in circumstances where it institutes proceedings seeking:

- The imposition of a pecuniary penalty under s76;
- An order for damages under s82; or
- Other orders under s87(1).[34]

This limitation on representative actions is seen by the ACCC as unnecessary, given the Commission's view that there are many circumstances in which the most appropriate and relevant orders for a Part IV contravention are pecuniary penalties or s87(1) orders, rather than injunctions. In accordance with this, the ACCC advocates the following further amendment to s87(1B):

> Where, in a proceeding instituted for an offence against section 79 or instituted by the Commission or Minister under section 77 or section 80……[35]

Opposition to retrospective extension of ACCC powers

The proposed extension of ACCC power in respect of representative actions is strongly condemned by the Australian Council of Trade Unions, which, in fact, calls for items 3 and 5 of Schedule 2 to be deleted from the Bill.[36] The ACTU argues that the item 3 and 5 provisions do not relate to the original intention and purpose of the Bill, namely origin labelling. Moreover, the retrospectivity of the proposed provisions, together with the timing of the Bill's introduction to the Parliament, lead the ACTU to allege an inappropriate link between the draft legislation and recent industrial action on the Australian waterfront.

While the issue of retrospectivity also is noted by the Senate Standing Committee on Scrutiny of Bills, that Committee judges the basis of the retrospectivity to be legitimate. In its *Alert Digest* No.6 of 1998, dated 13 May 1998, the Scrutiny Committee determined that empowering the ACCC to act against restrictive trade practices, '…arguably….may be regarded as beneficial to the forces of competition'.[37] In accordance with this position, the Scrutiny of Bills Committee chose to make no further comment in respect of the Bill.

34 Submission No.5, Australian Competition and Consumer Commission, p.4.

35 Submission No.5, Australian Competition and Consumer Commission, p.5.

36 Submission No.4, Australian Council of Trade Unions, p.3.

37 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No.6 of 1998, 13 May 1998, p.26.

Recommendation

The Committee recommends that the Trade Practices Amendment (Country of Origin Representations) Bill 1998 proceed as printed. In making this recommendation, however, the Committee notes the Minister's referral to the Australia and New Zealand Food Authority the possible need for additional regulations in respect of food products. The Committee recommends urgent consideration by the Authority of this matter, especially whether more stringent labelling requirements should apply to food.

Senator H.G.P Chapman

(Acting) Chairman

MINORITY REPORT – AUSTRALIAN LABOR PARTY

Trade Practices Amendment (Country of Origin Representations) Bill 1998

The Labor members of the Senate Economics Legislation Committee examining the *Trade Practices Amendment (Country of Origin Representations) Bill 1998* dissent from the majority report.

Introduction

There are currently no rules prescribing how a producer or manufacturer can label a good as to its country of origin. There are also no compulsory requirements for labelling.

The validity of a producer's claim to country of origin has been covered by the Trade Practices Act, section 52 (misleading and deceptive conduct) and section 53 (misleading as to origin of goods). The Trade Practices Act is enforceable by the Australian Competition and Consumer Commission (ACCC). It was hoped that individual cases would build up a body of case law that would define how producers and manufacturers should label products with their country of origin.

There have been two notable legal cases. The ruling in the *Bush Friends* case (the Trade Practices Commission v QDSV Holdings Pty Ltd trading as Bush Friends Australia) has been seen by manufacturers as being too prescriptive.

In the *Bush Friends* case Davies J. (and in the appeal, Nicholson J., viewed that the term 'Made in Australia' attached to the toy koala assembled in Australia almost wholly from imported materials was misleading and deceptive. Even though it had been substantially transformed in Australia, and that it had gained its essential characteristic (being shaped as a koala) in Australia, the term 'Made in Australia' was still considered deceptive and misleading.

In the *Email* case (ACCC v Lovelock Luke), the Court ruled that airconditioners could be labelled 'Made in Australia' despite being constructed significantly from imported components. The Court held that such cases should be decided on a case by case basis. Industry views this as unacceptable as manufacturers could never be certain about accuracy of labelling.

This dissatisfaction with the case-by-case approach to defining country of origin labelling requirements led to the previous-Labor Government and the current Coalition Government introducing legislation on country of origin.

A balance needs to be struck between the right of the consumer to have access to truthful information on labels and manufacturers and producers desire to use country of origin labelling as a marketing tool.

While acknowledging that any attempt to legislate labelling for country of origin will be complex, Labor does not believe that this legislation will adequately achieve the aims of manufacturers, producers or consumers.

The *Trade Practices Amendment (Country of Origin Representations) Bill 1998* is also flawed because of the Government's attempt to use it as a vehicle to allow the ACCC to use

restrictive trade practices provisions in part 5 of the *Trade Practices Act 1974* to pursue third parties. This is designed to allow the ACCC to retrospectively take action against the MUA arising from the recent waterfront dispute. This addition is completely incompatible with the stated objectives of the Bill.

Consumer views on 'Made in Australia'

Jenkinson J. in *Korczynski v Wes Lofts*, said about the term 'Made in Australia' in a case involving toy koalas that:

> "It is no doubt natural that a judge construing the verb 'to make' in a taxing statute, or a lexicographer bent on defining the verb, should emphasise the transition from non-existence to existence of the verb's object. But the phrase 'made in' a particular place, in ordinary speech and in application to objects of commerce, is understood as a statement primarily about the activities which precede and resulted in the transition."

In other words, no ordinary Australian would say that a toy koala, stuffed and partially assembled in Australia from imported parts, had been 'Made in Australia', even though by definition it had been 'made' (prepared, assembled, substantially transformed) in Australia.

The Australian Consumers' Association's (ACA) submission to the Committee's inquiry into the Bill included statistics showing consumers believe a product labelled 'Made in Australia' contains virtually all Australian ingredients and is manufactured in Australia. The submission quotes the CSIRO's 1993 *Australian Food Survey* which found that "98% of those asked agreed that food should not be labelled 'Australia Made' unless it is both grown and processed entirely in this country." The submission also quotes the 1995 ANZFA commissioned origin labelling survey, which says: "The term 'Made in Australia' is widely believe to be a product which is totally Australian, in terms of ingredients, processing and packaging. The majority (58%) also consider this to be the best description of the term."

The Government believes that any problems with consumers differentiating between the two terms, 'Made in Australia' and 'Product of Australia', will be addressed with its $1.2 million advertising campaign. In hearings, the Australian Consumers' Association expressed doubt that this in fact would eliminate confusion.

Australian Made campaign

The legislation gives the Minister the power to approve logos and descriptors of 'Product/Produce of' and 'Made in Australia'. While the legislation does not explicitly mention the green and gold kangaroo that Australians were once familiar with, Labor is deeply concerned about the Federal Government's failure to prevent the demise of the licensing agent of the logo, the Advance Australia Foundation. The Foundation's 'voluntary liquidation' was as a direct result of the Federal Government's decision to withdraw the approximately $2 million funding for the Foundation's advertising of the logo. The Government's failure to address this issue for almost three years is bad management and bad government. The restoration of community confidence in the logo will take time and effort.

The Australian Chamber of Commerce and Industry in its submission seems to be mostly interested in its administration of any 'Australian Made' campaign and its administration of the green and gold kangaroo than the actual legislation as it applied more generally.

Country of Origin for marketing

Manufacturers and primary producers want to use the logo to market their product and to increase the use of Australian ingredients and manufacturing in Australia. Unfortunately, while consumers may believe an product that is labelled 'Made in Australia' should have virtually all Australian content and be manufactured in Australia, this would preclude very few manufacturers from being able to label their goods 'Made in Australia'. The Australian Chamber of Commerce and Industry says about the 50% production and manufacturing cost test for 'Made in Australia' contained in the legislation in its submission: "…some manufacturing businesses would prefer a higher threshold…[but] the consensus is…that 50 per cent is a fair recognition of the realities of Australian manufacturing."

The ACA says of this industry view in a press release contained in its submission that it "…flies in the face of the consumer's right to truthful product labelling." The ACA also says:

"Although companies are sourcing more product components from overseas, they still want the marketing advantage of the 'Made in Australia' claim without any declaration of the imported content. This new labelling rule amounts to government-sanctioned commercial exploitation of a term that many Australians use for purchasing decisions."

Primary producers including the Victorian Strawberry Growers' Association (VSGA), also expressed concern about the threshold contained in the test for 'Made in Australia'. It believes a higher threshold, one of 75% would make food manufacturers try harder to have Australian content.

Labor does not believe the industry desire to market a product as Australian and consumers' need for accurate labelling are incompatible. However, if consumers do not believe that a label saying 'Made in Australia' or a logo such as the green and gold kangaroo accurately depict whether an item is 'Made in Australia' or contains a substantial element of imported ingredients then country of origin labelling will not be as useful for industry to use as a marketing tool.

At the Minister's discretion, industry will be allowed to develop logos for those sections of the industry that actually have higher Australian content than the legislation specifies. Labor is concerned that this will result in a proliferation of confusing labels that could undermine the integrity of the green and gold kangaroo.

Certainty

The ACCI says in its submission that: "Australian business has endured judicial uncertainty and has already waited too long to have clear labelling laws." While Labor welcomes the legislation as a start in the process of certainty, it does not believe that it will result in certainty for business. The country of origin legislation could result in businesses getting protection from prosecution from section 52 and 53 of the *Trade Practices Act 1974* where they comply with the rules set out in this legislation. Previously, the Courts may have ruled that a manufacturer has engaged in deceptive and misleading conduct where it has followed a similar path set out in this legislation.

The Council of Textile and Fashion Industries of Australia Limited (the TFIA) reports in its submission that the Department of Industry has told them however, that the legislation is not

intended to have application to current practices that are undertaken on the basis of case law to date.

If this is the case, there is a lack of certainty still among certain industries about what will and will not apply that may end up having to be legally resolved.

Restrictive trade practices

Item 3 & 5 in the bill relating to subsection 87(1B) of the *Trade Practices Act 1974*, dealing with restrictive trade practices, will allow the ACCC to legally pursue any union involved in legitimate industrial action once the Bill has passed and retrospectively.

Labor opposes this schedule and its inclusion in this bill. The Federal Government should pursue this amendment separately and not within the context of a debate on country of origin labelling.

Regulations

Labor is also generally concerned about some regulations under the Bill that are not disallowable and consequently do not allow for parliamentary scrutiny. These sections include regulations to:

- approve country of origin logos;
- prescribe which processes can or cannot be considered to have "substantially transformed" goods (for example, the Government can prescribe that curing pig meat to make ham can not be considered substantial transformation);
- prescribe the cost of a particular material, labour, or overhead that can be included in the 50% test for Made in Australia labelling, or how these calculations can be calculated.

Conclusion

Industry believes that the legislation is not ideal but is an improvement on the current situation in regards to country of origin labelling. Labor is concerned that it does not achieve a proper balance between the needs of consumers for accurate labelling and manufacturers legitimate interest in using 'Australian Made' labels as a marketing tool and that is does not provide industry with the certainty it seeks.

Labor is particularly concerned that the Federal Government has chosen to include an amendment to the *Trade Practices Act 1974* that has nothing to do with country of origin labelling and that will allow the ACCC to take legal action against unions who have or who may engage in legitimate industrial action.

Recommendations

1. The Bill should be allowed passage, as it is an improvement on the present situation.
2. The Government should remove 3 & 5 relating to subsection 87(1B) from this piece of legislation.
3. The Government should make the regulations, as follows, disallowable:

- section 65AD, which allow the Government to approve industry run country of origin logos;
- section 65AE, which allows the Government to prescribe which processes can or cannot be considered to have "substantially transformed" goods (for example, the Government can prescribe that curing pig meat to make ham can not be considered substantial transformation);
- sections 65AJ, 65AK & 65AL, allowing the Government to prescribe the cost of a particular material, labour, or overhead that can be included in the 50% test for Made in Australia labelling, or how these calculations can be worked out.

Senator Mark Bishop **Senator Jacinta Collins**

Senate Economics Legislation Committee

Trade Practices Amendment (Country of Origin Representations) Bill 1998

Minority Report : Senator Andrew Murray Australian Democrats : June 1998

The Australian Democrats commend the Government for its legislation, the Trade Practices Amendment (Country of Origin Representations) Bill 1998. However, the Democrats believe that suggestions made by the Australian Consumers Association and the Victorian Strawberry Grocers Association would improve the Bill substantially. We believe also that proposals by the Australian Owned Companies Association Limited also have great merit.

The Democrats believe the Bill should be amended along lines suggested in a number of submission to the Economics Committee. Specifically :

1. There should be provision for labelling to include a product's list of ingredients which should also indicate the country of origin for those ingredients that are not sourced from Australia. Consumers should be given full information and not be taken for granted.

2. The descriptor "Made in Australia" should be expanded to "Made in Australia from Australian and Imported Ingredients". This will enable consumers to clearly distinguish between this label and the "Product of Australia" label. Further, labelling should allow for a range of terms to be used to describe products of *some* Australia character, as long as the terms are truthful, for example Packed in Australia, Cured in Australia from Imported Pork, Ground in Australia from Chinese Peanuts, Assembled in Thailand and Australia from Imported and Local Components, Processed in Indonesia from Australian Produce, and so on.

3. The Bill applies a 50% cost test for the "Made in Australia" descriptor. We believe that this is too low and that 75% should be used instead. The higher cut off will provide a give a greater level of credibility to the product that has the "Made in Australia" label.

   The higher cut off will provide a boost to the local producers as it will encourage food manufacturers such as yoghurt manufacturers to use Australian soft fruit in their manufacture.

4. The legislation, regulations, or explanatory memorandum should provide examples of what would constitute "Substantial Transformation". This is a qualitative test and would be difficult to interpret and/or enforce. Perhaps up to 50 examples of what would and would not constitute "Substantial Transformation" would help the courts, industry and the enforcers in their deliberations.

5. The Democrats believe that the legislation should be split into food and non-food amendments, as the needs of Australian food producers are different to those who manufacture non-food products. This will enable compromises between the

competing needs of the primary producers and manufacturers of non-food products to occur.

6. The Democrats believe that this legislation should also apply to loose food stuffs such as those sold in delicatessens and fruit and vegetable shops.

Consumers will be able to identify the country of origin of the products sold loosely on the supermarket shelves. This practice is very common overseas and will provide the shopper with valuable information.

Further, the Democrats believe that there has been a tendency on the part of manufacturers of packaged food to be less than transparent in current labelling practice.

There is the possibility that marketers might observe the letter of the law, but by clever graphics and images, give the impression that the product has been grown and/or raised in Australia.

An example would be the use of an Australian setting on a label with eucalypts and a bush setting to advertise a jam, which had been made from imported ingredients. Another instance could be the processor's name that could indicate a genuine Australian product when the opposite is true. Locality names are an instance where the trademark is owned overseas but is used in Australia to denote an Australian product.

The Democrats commend the above very sensible improvements to the Bill to the Senate.

Senator Andrew Murray

Australian Democrats

APPENDIX 1 - SUBMISSIONS

Submission 1	Law Council of Australia
Submission 2	Australian Owned Companies Association Ltd
Submission 3	Victorian Strawberry Growers Association
Submission 4	Australian Council of Trade Unions
Submission 5	Australian Competition & Consumer Association
Submission 6	Council of Textile & Fashion Industries of Australia Ltd
Submission 7	Australian Chamber of Commerce and Industry
Submission 8	Australian Retailers Association
Submission 9	National Farmers' Federation; Pork Council of Australia; and SA Farmers' Federation
Submission 10	Australian Business Chamber
Submission 11	Australian Consumers' Association
Submission 12	Advantage Australia
Submission 13	Australian Electrical and Electronic Manufacturers' Association Ltd

APPENDIX 2 – PUBLIC HEARING WITNESSES

A public hearing of the Committee to consider the Bill was conducted on Monday, 22 June 1998. The following witnesses gave evidence at the hearing:

Australian Chamber of Commerce and Industry

Mr John Martin, Executive Director

Ms Karen Curtis, Senior Adviser Policy

Australian Retailers Association

Council of Textile & Fashion Industries of Australia Ltd

Mr Stan Moore, Manager, Policy Research & Government Affairs, ARA

Mr Tony McDonald, Trade and Customs Adviser, TFIA

Australian Consumers Association

Ms Mara Bun, Manager Policy and Public Affairs

Mr Matt O'Neill, Senior Policy Officer, Food and Nutrition

Law Council of Australia

Mr Brian O'Callaghan, Phillips Fox

Victorian Strawberry Growers Association

Mr Laurie Modaffari, President

Mr Henry Kita, Vice-President

Mr John Stewart, Member

Mr Paul Panebianco, Consultant

Australian Owned Companies Association

Mr Harry Wallace, President

Senator the Hon. Warwick Parer, Minister for Resources and Energy

Mr Phillip Noonan, Head, Consumer Affairs Division, Department of Industry, Science and Tourism

Mr Antony Brugger, Manager, Business Law and Microeconomic Reform Section, Industry Policy Division, Department of Industry, Science and Tourism

Mr Peter Green, Assistant Manager, Business Law and Microeconomic Reform Section, Industry Policy Division, Department of Industry, Science and Tourism