



**Australian Industry Group
- Confectionery Sector -
SUBMISSION**

Parliament of Australia : House of
Representatives
Standing Committee on Agriculture and
Industry
Inquiry into food origin labelling

May 2014

**AUSTRALIAN INDUSTRY GROUP CONFECTIONERY SECTOR
RESPONSE TO THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON AGRICULTURE AND INDUSTRY INQUIRY INTO FOOD
ORIGIN LABELLING**

INTRODUCTION

The Australian Industry Group (Ai Group) Confectionery Sector represents manufacturers of chocolate, sugar and gum confectionery, suppliers of ingredients, machinery, packaging materials and services to the industry, and wholesaler and distributor firms.

Ai Group has approximately 130 confectionery sector members operating in Australia and New Zealand.

The Australasian confectionery industry employs more than 8,000 Australians and New Zealanders.

The Australian confectionery industry's direct market value is in excess of \$3.1bnⁱ billion, with New Zealand's being \$494 million.

Major confectionery manufacturing plants are principally located in New South Wales, Tasmania and Victoria, including in a number of regional locations (eg Ballarat and Lithgow) and to a lesser extent South Australia, Queensland and New Zealand where SME business are based.

The Ai Group Confectionery Sector welcomes the opportunity to provide the following comments on the Australian Parliament House of Representatives Standing Committee on Agriculture and Industry *inquiry into food origin labelling*.

RECOMMENDATIONS

The Ai Group Confectionery Sector recommends that:

- a Country of origin labelling (CoOL) system needs to be maintained
- the safe harbour defences remain appropriate - albeit with some improvement and clarification
- "Product of" should remain as a premium made in claim to describe food where the ingredients have been grown and processed in that country
- the terms significant, component and ingredient be defined in the context of "Product of" claims
- the current meaning of substantial transformation for complex and significant processes be retained and clarified
- substantial transformation be considered the key determinant for "Made in" claims
- the role of packaging in "Product of" and "Made in" be clarified

- qualified claims, if retained, are clarified
- “Packaged in” claims be clarified to denote minimal transformation and/or “Packed in”
- “Packaged in” claims should not be used to obscure the country of origin/place of processing
- a commonsense approach be applied to extended and qualified claims that balances information with the practicalities faced by industry
- Australian CoOL is suitable for export without triggering different local and export labels to jeopardise Australia’s export market potential
- retain country of origin food law in Standard 1.2.11
- any reforms need to be considered in the context of a regulatory impact statement
- country of origin food labelling materials are reviewed to clarify understanding for consumers and business together with an education campaign

INQUIRY TERMS OF REFERENCE

Whether the current country of origin labelling (CoOL for food) system provides enough information for Australian consumers to make informed purchasing decisions

The Ai Group Confectionery Sector understands the importance of country of origin labelling (CoOL) of food as an important consumer product information tool.

We feel consumers believe origin labelling is more important for fresh food and less so for processed foods where place of manufacture and origin of ingredients has greater significance.

Although support for Australian farmers, manufacturing jobs in Australia and for local business influences consumers to buy local; country of origin is not a key purchasing driver, compared to price, quality, habit and brand loyaltyⁱⁱ. Despite this being so, more than 80% of consumers believe it is crucial or very important to identify if a food is grown or manufactured in Australia.ⁱⁱⁱ

Furthermore, it seems that consumers are not especially well versed about the meaning of origin labelling terms – only 12% know the correct meaning of “Made in Australia” and 25% understand the correct meaning of “Product of Australia” according to Choice’s findings^{iv}.

Notwithstanding, business also finds complying with the country of origin food labelling provisions adds complexity and challenge, particularly with regard to determining the cost calculation of “Made in Australia” claims, where a long term business view is required due to forward packaging production schedules. Unforeseen variables such as commodity price fluctuations and supply shortage impacts, for example, lead companies to use qualified claims that provide a degree of flexibility whilst at the same time managing operational certainty.

Although the Australian Competition and Consumer Commission (ACCC) published a new *guide for business on Country of claims and the Australian Consumer Law* in April 2014, apart from the safe harbour provisions, many of the acknowledged areas of complexity are inadequately addressed, from our perspective. For example these areas from a confectionery point of view include, “Made in” qualified claims as alternate claims to the safe harbours; the treatment of product packaging in “Product of” claims; and inclusion of an alternate “Packed in” claim with accompanying definition.

In recognition of the relatively low level of consumer understanding and complexity and desire for clarity for industry, regarding Australian country of origin claims, improved guidance for business and education resources or campaign for consumers would be welcome.

Whether Australia’s CoOL laws are being complied with and what, if any are the practical limitations to compliance

It is the Ai Group Confectionery Sector’s view that the current CoOL requirements seem to be largely being complied with from a confectionery perspective. However, numerous grey areas exist, including with respect to compliance difficulties, import uncertainties and ambiguity with “Packed in” claims.

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. It is unreasonable to expect multiple labels for the one product to cater for variations in ingredient supply and for more accurate country of origin labelling.

Additionally, some further details for business compliance for claims outside the safe harbours would offer useful assistance to assist calculations and compliance with the current provisions, including with respect to “Packed in” claims.

It is our view that Food Standards Code : Standard 1.2.1 – Country of Origin Labelling provides a loophole for imported goods that claim either “Packed in Australia” or “Packed in Australia from local and imported ingredients” being a disguise for product that is otherwise made outside Australia.

Notwithstanding, these claims are subject to assessment under the current Australian Consumer Law’s (ACL) general misleading and deceptive conduct provisions. It is a matter of those provisions being enforced.

There are import breaches identified by the border inspection measures with country of origin, lot codes and ingredient lists, together making up one third of the labelling non-compliance^v. On the other side, confectionery businesses receive a very low level of consumer inquiry about country of origin and even less complaint.

The Ai Group Confectionery Sector is a strong advocate for uniform compliance and enforcement. A notable area of concern for the confectionery industry has been the

perennial issue of non-compliant parallel imports that may enter the country without correct country of origin labelling information.

Confectionery, typically a low risk food, is inspected at the border at the rate of five percent. Despite the onus for compliance by all suppliers, non-compliant product may escape border inspection protocols and end up on retail shelves. In the case of non-compliant parallel imports (because they often also omit importer details) the local company is typically, and unreasonably, the authorities immediate go to. For example Cadbury, Nestlé and Mars/Wrigley product that is parallel imported is not the responsibility of the local Australian company, but understandably the consumer thinks of the local company, as do the authorities. These non-compliant parallel imports that slip through are the responsibility of third party importers. However, they potentially penalise the brand reputation and commercially disadvantage the local company.

The Ai Group Confectionery Sector understands that the border inspection protocol is commensurate with risk and once in the marketplace authorities' enforcement is limited by priorities (health and safety) and resources. However, more attention needs to be given, particularly where non-compliance cases are alerted to authorities.

Whether improvements could be made, including to simplify the current system and/or reduce the compliance burden

The current CoOL system has scope for improvement in a number of areas, including the tools and guidance documents for industry, resources and education for consumers, in particular. Clarification of the safe harbours and importantly commonly used terms outside the safe harbours would offer simplification and reduce the compliance burden.

“Produce/Product of” safe harbour defence

The “Produce/Product of” safe harbour defence requires ‘each significant component or ingredient’ of the goods to have originated in the specified country, and ‘all, or virtually all, of the production process to have taken place in that claimed country’.

A definition for **significant**, **component** and **ingredient** would enhance the guidance for business.

In relation to significant food ingredients the dimension of the significance is ambiguous. Does it relate to cost, weight, volume or characterising attributes?

For example, an additive, such as a preservative, is used to illustrate compliance with the “Product of” defence in the ACCC guidance for business – the guide explains that the preservative ‘does not go to the nature of the food’.

It is debatable that another additive, such as colour or flavour, in a jelly confectionery, although also used in a small quantity potentially characterises the confectionery considered in its full context, such as where marketing claims are involved.

However, at the same time 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. It isn’t necessarily the quantity (volume, weight) that creates the significance.

A jelly confectionery can claim “Product of Australia” when all of its ingredients are Australian and it is processed in Australia. An ambiguity is illustrated when that jelly is coated in Australian made chocolate, for example chocolate coated snakes. The final product has approximately three to six percent imported cocoa products. It may be argued both ways that the chocolate is/isn’t providing the significant ingredient/component, however the cocoa content certainly imparts significant character in the manufacture of the chocolate that coats the jelly snake.

The confectionery industry believes that a product such as chocolate coated snakes should be able to be called “Product of Australia” as it is essentially Australian. More definitive guidance for business would assist the food industry to ensure consistent application.

Is packaging considered a component in the context of “Product of” country of origin food labelling claims? Clarification around the role of packaging in the context of “Product of” origin food claims would be helpful.

The ACCC guidance for business is clear with respect to “Made in” claims where inner packaging is a material cost, but guidance is silent with respect to packaging considerations in “Product of” claims.

Packaging can be significant – its innovation, functionality, novelty or uniqueness has the capacity to contribute to a product. Does the consideration change if the food packaging is simple or sophisticated? Does a “Product of Australia” premium quality confectionery using sophisticated or simple type imported packaging alter the Australian origin status?

Encouraging innovation in packaging in Australia is important for the manufacturing industry and jobs.

“Made/manufactured in” safe harbour defence

The Ai Group Confectionery Sector suggests that providing greater clarity around the cost of production/manufacture test would assist the business compliance burden.

We note that the recent ACCC publication included a decision tree. However we were disappointed that it stopped short of claims outside the safe harbour defences. Inclusions of guidance on alternate qualified “Made in” claims and “Packed in” claims in the decision tree would offer further industry certainty.

At the same time, commonsense needs to be applied to qualified “Made in” claims – striking a balance between providing meaningful, accurate and extended claims whilst

accounting for ingredient sourcing variations, allowance for seasonality, as well, as on pack space limitations and recognition of potential import trade barriers are important factors.

There is merit in the development of a web-based calculator tool to assist businesses apply the cost calculation. This would help to reduce the cost of compliance for industry.

Currently to claim “Made in Australia” is about production and place of manufacture rather than content and providing the safe harbour defence is achieved no ingredients needs to be from Australia. By contrast “Product of Australia” takes care of ingredient composition and place of manufacture. Whilst the terminology is adequate better consumer understanding is likely to alleviate current concerns.

Country of origin food labelling means different things in different sectors and therein stems some of the complexities associated with processed goods. However, for the confectionery industry that imports most of its cocoa ingredients for chocolate production (a key/significant ingredient) – as cocoa products are not available locally in sufficient commercial quantities – the processing of chocolate is significantly complex undergoing substantial transformation to warrant the claim “Made in Australia” or “Made in Australia from local and imported ingredients”.

Should the government be interested in removing business compliance burdens the ability for a company to place “Made in Australia” on all of its’ substantially transformed product would be a cost reducing measure. This would require removal of the 50% cost of production test that is currently required to meet the “Made in” safe harbour defence.

In our view, “Made in” and “Manufactured in” are synonymous terms. A change in the CoOL system that removes provision for “Made in” and replaces it with “Manufactured in” will do little to signal to consumers that a substantial transformation has occurred, particularly if the change is not adequately supported with consumer education.

Standard 1.2.11 – Country of Origin Labelling

Clarification around the meaning of “Packaged in” claims would offer industry more clarity and potentially achieve a higher level of compliance. For example Standard 1.2.11 permits “Made in Australia from local and imported ingredients” or “Packaged in Australia from local and imported ingredients” where the ACL safe harbour defences are not met. Are they both equally adequate for a minimally processed food in Australia, ie when they do not comply with the current safe harbour for “Made in”?

There is also a view that “Packaged in Australia” or “Packed in Australia from local and imported ingredients” is currently being used to obscure a non-Australian origin of manufacture. In the case of homogenous processed foods - ingredients have been manufactured. Although the assumption is that the Clause 2 (2) (a) would apply ie “Made in country x” - country x being other than Australia - the “Packaged in” option is being applied by way of a cover for the place of manufacture. As previously noted, despite ACL general misleading and deceptive conduct provisions, breaches are

difficult to prove. Understandably, there is a legitimate role for “Packaged in Australia” claims, but not at the expense of declaring the origin of manufacture.

Another recent non-compliant example identified was a chocolate confectionery labelled “Made in Belgium” when the product was made in China using Belgian made chocolate. Equally “Product of Switzerland” chocolate sold in Australia is anomalous. Although no one expects Switzerland to have a local cocoa supply it is a premium claim that tends to be ignored, technically it breaches Australian country of origin food labelling.

If “Packed in” defines minimally transformed foods as well as meaning simply “Packed in” clarification to this point would help.

Other reviews

The Ai Group Confectionery Sector acknowledges that there have been many country of origin food labelling reviews, each with the best intentions to improve regulatory requirements. Any improvements need to be made with a long term view, combined with suitable education to ensure understanding is achieved. Reviews are costly just as potential changes are for industry.

In 2011, the Legislative and Governance Forum on Food Regulation (FoFR) responded to *Labelling Logic : Review of Food Labelling Law and Policy* supporting retention of mandatory country of origin labelling on all food being retained in the *Australia New Zealand Food Standards Code* in preference for specific food requirements being provided for under the *Competition and Consumer Act 2010*.

Labelling Logic also recommended a food-specific country of origin labelling framework, based on ingoing weight of ingredients and components (excluding water) being developed. However, the FoFR did not support this recommendation, continuing to provide its support to the existing framework and definitions for Australian country of origin labelling.

However, at that time FoFR recommended that existing country of origin publications, guidelines and education materials be reviewed through a consultative process and suggested the possibly of developing an education campaign to clarify the requirements. Subsequently, in 2012 the ACCC launched some new education material designed to provide clarity of the country of origin labelling claims used in connection with foods, however, there remains more that can be done in this area to improve understanding.

At that time, ACCC Chair, Mr Sims noted that

“the Australian Competition and Consumer Commission (ACCC) does not believe there is an essential problem with the current classifications. The problem is people’s understanding of what they mean.”

There is support for maintaining a CoOL system, but the one we have requires some improvements. It is onerous and difficult to understand and even the ACCC are reluctant to interpret it.

Other issues

Care needs to be taken that any CoOL labelling improvements resulting from a focussed review on food, does not have unintended consequence for other industry sectors.

That any reforms stemming from this inquiry also need to be considered and conferred by a regulatory impact statement.

Whether Australia's CoOL laws are being circumvented by staging imports through third countries

Under the Trans-Tasman Mutual Recognition Agreement (TTMRA) product imported into New Zealand, that comply with New Zealand laws, can be shipped to, and sold in Australia, even if it does not comply with Australian standards.

This means that food from third countries can be legally imported into, and sold in, Australia (via New Zealand) without origin labelling.

However, it is incorrect to believe that products can be legally sold as “Made in New Zealand”, unless they have been substantially transformed in New Zealand, given it is illegal to sell products with a false or misleading statement of origin. Regardless, there is potential to circumvent country of origin food labelling in this manner and it is difficult to prove. However, we do not have data or a sense of the magnitude of this actually occurring.

The impact on Australia's international trade obligations of any proposed changes to Australia's CoOL laws

The current Australian CoOL in the Food Standards Code, supported by ACL are more onerous than international Codex provisions. Within Australia, CoOL requirements also apply to imports under the *Commerce (Trade Descriptions) Act* and *Commerce (Imports) Regulations* in addition to the general mandatory food labelling approach.

Although, in the main, Australia and New Zealand have a joint Food Standards Code, New Zealand has opted out of the country of origin food requirement.

For the remainder of the world, there is little consistency with regard to CoOL laws. Australia needs to ensure it does not create unnecessary obligations that impact international trade.

A CoOL system that ensures the suitability of the domestic label in our export markets needs to be a high priority.

CONCLUSION

The Ai Group Confectionery Sector supports the need to maintain a CoOL system, albeit with improvements.

Importantly, the Ai Group Confectionery Sector supports a CoOL system that supports local production and manufacturing and provides consumer information. We need a country or origin food labelling system that acknowledges where a product is made or produced.

The suggested consumer confusion associated with CoOL designations could be overcome by clarification in guidance for industry and consumers together with education.

Australian manufacturing and employment are critically important to a strong Australian economy, skilled workforce and competitive food manufacturing sector. For these reasons food producers and manufacturers need to be able to claim Australian production and manufacturing on their food labels and need certainty for the long term.

ⁱ IBIS World Industry Report C2172, May 2012

ⁱⁱ Catalyst survey of Australian grocery buyers

ⁱⁱⁱ Choice survey, February 2014

^{iv} Choice survey, February 2014

^v DAFF Imported Food Inspection Data Report, January to June 2014