Chapter 2

Comments on the bill

2.1 The committee received submissions from various industry groups and one local manufacturer.

General support for the bill

2.2 All of the submissions supported the intent of the bill and the broader Country of Origin Labelling reforms that the bill contributes towards. For example, the Australian Food and Grocery Council (AFGC):

> …supports the urgent passage of the Bill to provide certainty for industry through the transition period to the new Country of Origin labelling requirements.
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> …
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> The passage of the legislation will provide the sectors with the confidence to implement the labelling changes across product ranges in a timely fashion and within the two year transition period which has already begun.[1]

2.3 Similarly, the Tasmanian Farmers and Graziers Association, a longstanding supporter of strong Country of Origin labelling, considered that increased levels of consumer information will only empower consumer choice.[2]

2.4 In the context of the broader reforms, the Australian Industry Group (Ai Group) congratulated:

> …the Government on the responsive role that it has undertaken in bringing revised country of origin food labelling requirements to fruition. This has been a major and comprehensive process and the Government should be recognised for the constructive and collaborative manner in which it has consulted and developed this new system which aims to meet the many and varied objectives of numerous stakeholders.[3]

2.5 Despite the broad support for the bill, some stakeholders raised specific concerns with the provisions of the bill. These concerns are explored below.

Removal of the 50 per cent production cost test

2.6 The bill proposes to remove the 50 per cent cost production cost test for companies to claim that a product was 'Made in' a country. This change will assist manufacturers for which the test was problematic. For example, the Australian Made Campaign Limited (AMCL) highlighted that businesses had difficulty assessing compliance with this criterion for a number of reasons:

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1 *Submission 1*, p. 1.

2 *Submission 3*, [p. 1].

3 *Submission 5*, [p. 1].

- Uncertainty about the origin of ingredients or components, either because suppliers don't know or variability due to availability.
- Detailed production information may not be available from contract manufacturers.
- Taking into account currency fluctuations, calculating overheads and allocating proportions to individual products.[4]

2.7 In addition, the removal of the test may also support more efficient Australian manufacturers that were potentially penalised under the existing regime:

> …a small factory with outdated machinery and a higher level of manual processing may be able to meet the 50% while a more highly automated production process may not, even where they are producing the similar products from identical inputs.[5]

2.8 The removal of the test may also result in manufacturing companies that use high value key ingredients being able to make 'made in' claims. The AMCL submitted that:

> Our understanding is that removal of the 50% test will result in more companies in the pharmaceuticals/complementary medicines and industrial/agricultural chemicals industries being able to make Made in Australia claims. These are industries where the principal active ingredients are relatively high cost and generally not manufactured in Australia.[6]

2.9 While acknowledging the benefits of removing the 50 per cent test, AMCL raised concerns that it may also result in adverse consequences for some Australian manufacturers of inputs:

> This will occur where a manufacturer opts to source cheaper inputs offshore, knowing that it will not affect their capacity to make a Made in Australia claim. An example of this is a manufacturer of soft gel capsules who currently purchases gelatin from an Australian manufacturer because it assists them to meet the 50% threshold. The local packaging industry may also be impacted adversely by this change.[7]

2.10 With the removal of the 50 per cent test, AMCL indicated:

> Greater guidance on what does and does not constitute substantial transformation for different types of products may mitigate the impact on Australian suppliers…[8]

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4 *Submission 2*, p. 3.

5 *Submission 2*, p. 4.

6 *Submission 2*, p. 4.

7 *Submission 2*, p. 4.

8 *Submission 2*, p. 4.

2.11 The importance of guidance material was also highlighted by a number of other stakeholders, particularly in relation to what constitutes substantial transformation.

Definition of 'substantial transformation'

2.12 While there was widespread support for this provision, stakeholders also raised concerns about the changes to the definition of substantial transformation and the development of associated guidance materials.

2.13 The AFGC emphasised the importance of upholding Australia's reputation for quality food products and high safety and quality assurance standards that apply in domestic processing facilities:

> When determining the processes which qualify for substantial transformation, the Government should ensure that equal consideration is given to the consumers' desire to support value-added products that are underpinned by Australia's world-class food safety systems. In particular, the Government should provide labelling guidance for goods that do not qualify as substantially transformed but which may breach Australian consumer law if labelled as 'Packed in Australia' when they have in fact undergone further processes.[9]

2.14 The AMCL contended the that current and proposed definition of 'substantial transformation' are:

> …very far from providing a clear and objective criterion against which to assess claims.
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> The phrase 'fundamentally different in identify, nature or essential character' is highly subjective and open to interpretation.[10]

2.15 The Ai Group raised concerns about the interpretation of the new definition as it has been applied to some confectionary industry examples, as provided in the Explanatory Memorandum. In particular, the Ai Group argued that the additional processing in Australia to convert industrial chocolate into a consumer-ready finished product is complex and adds significant product value:

> Where industrial chocolate is imported into Australia, it is likely to be melted and conched in conching equipment, transferred through a series of food safety critical control points to a tempering machine. The process of tempering changes the chemical structure of the chocolate to ultimately give the consumer finished product it shine, snap, mouthfeel and associated organoleptic properties, such as smell, taste and texture.[11]

2.16 The Ai Group contended that the additional processing of industrial chocolate in Australia does represent a substantial transformation and urges the government to

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9 *Submission 1*, p. 4.

10 *Submission 2*, p. 4.

11 *Submission 5*, [p. 2].

consult widely with industry in determining what constitutes a substantial transformation under this legislation.

2.17 Ocean Oils provided details of what it considers to be manipulation of the previous Country of Origin labelling regime by various Australian manufacturers which import bulk raw materials (in this case, a specialty marine lipid known as 'Squalene') and package them into bottles of soft gel capsules for retail sale.

2.18 Ocean Oils contended that the packaging of this product does not constitute a 'substantial transformation' because the material inside the final product is identical to the raw material. However, Ocean Oils noted that:

> Although we are the only Australian manufacturer of Squalene and although we sell not one drop of our Squalene in Australia, there are presently 59 brands of *'Australian Made'* Squalene endorsed by the Australian Made Campaign Limited (AMCL) and all 'regulated' by the Australian Competition and Consumer Commission (ACCC)…In addition, a recently completed Market Research Report undertaken on our behalf by the good people at Austrade China has revealed that there are 23 brands claiming to be 'Australian' or 'Australian Made' endorsed Squalene in the China market. [12] [Emphasis in original]

2.19 Further, Ocean Oils reported that the Country of Origin claims being made by competitors are:

> …severely impacting on our ability to sell genuine Australian Squalene in legitimate competition with incredible amounts of cheap, imported 'Australian' and 'Australian Made' endorsed Squalene… [13]

2.20 Ocean Oils supported the position described in the explanatory memorandum whereby importing goods and undertaking minor process that merely change their form or appearance are not sufficient to justify a 'Made in' claim. Further, Ocean Oils requested that the improved guidance material clearly indicate that the packaging of Squalene and other marine derived health supplements does not constitute a substantial transformation of the product.

2.21 An industry consultation process on the meaning of 'substantial transformation' is being undertaken by the Country of Origin Taskforce (though the Department of Industry, Innovation and Science) which will contribute to the development of guidance material being prepared by the Australian Competition and Consumer Commission (ACCC). This guidance material is intended to provide further information and examples to complement the changes proposed in the bill. [14]

2.22 Noting this, however, the AMCL highlighted the limitations in the usefulness of guidance material:

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12 *Submission 4*, p. 2.

13 *Submission 4*, p. 2.

14 *Do you manufacture goods for sale in Australia?*, https://www.business.gov.au/news/do-you-manufacture-goods-for-sale-in-australia (accessed 4 October 2016).

> Although the ACCC [Australian Competition and Consumer Commission] can and does publish guidelines on country of origin claims in which it expresses its views on what may or may not constitute substantial transformation, it acknowledges that 'interpretation of the law will always ultimately be a matter for the courts' and such interpretation occurs on a case by case basis.[15]

2.23 The AMCL also noted that there was currently no mechanism by which manufacturers could obtain a definitive answer regarding Country of Origin claims and this could result in companies being hesitant to make a claim for fear that competitors would challenge its validity.[16] The AMCL also noted that it had previously proposed a fee for service mechanism whereby manufacturers could apply for a ruling on a country of origin claim within a reasonable timeframe. The US Customs and Border Protection Customs Rulings is an example of such a system.[17]

Committee view

2.24 The committee notes that the submissions received supported the intent of the bill and the broader Country of Origin Labelling reforms.

2.25 While noting the specific concerns of stakeholders, the committee considers that most of the issues raised can be appropriately considered through the development of guidance material and the associated consultation processes.

2.26 That said, the committee appreciates that uncertainty can lead to lost business opportunities and, as such, there could be benefit in the Government exploring the establishment of a mechanism by which manufacturers can apply for a ruling on Country of Origin Labelling claims.

Recommendation 1

2.27 The committee recommends the Senate should pass the bill.

Senator Jane Hume

Chair

15 *Submission 2*, p. 4.

16 *Submission 2*, p. 4.

17 *Submission 2*, p. 4.