The Senate

# Economics
# Legislation Committee

## Competition and Consumer Amendment (Country of Origin) Bill 2016 [Provisions]

October 2016

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# Senate Economics Legislation Committee

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# Chapter 1

# Introduction

1.1 On 1 September 2016, the Competition and Consumer Amendment (Country of Origin) Bill 2016 was introduced by the government into the House of Representatives. On 15 September 2016, the Senate referred the provisions of the bill to the Economics Legislation Committee for inquiry and report by 10 October 2016.[1]

## Conduct of the inquiry

1.2 The committee advertised the inquiry on its website and on Twitter. It also wrote to relevant stakeholders and interested parties inviting submissions by 23 September 2016. The committee received six submissions, which are listed at Appendix 1.

1.3 The committee thanks all of the individuals and organisations that contributed to this inquiry.

## Overview of the bill

1.4 The bill amends the Australian Consumer Law (ACL) (Schedule 2 of the *Competition and Consumer Act 2010*) to alter the definition of substantial transformation as it applies to the safe harbour provisions of the ACL.[2]

1.5 The intention of the bill is to simplify the tests used to justify a country of origin 'made in' claim by clarifying what substantial information means and removing the '50 per cent production cost' test.[3]

1.6 According to the Assistant Minister:

> This bill forms part of the government's country of origin labelling reform package that was agreed by the states and territories in March this year. A key element of this reform package, the Country of Origin Food Labelling Information Standard 2016, actually commenced in July this year…
>
> The reforms aim to provide consumers with clear, more meaningful and easier to find country-of-origin information so they can make informed purchasing decisions in line with their personal preferences.[4]

1.7 Explanatory Memorandum notes that the substantial transformation test in its present form is inadequate. Many consumers are confused or feel they are being

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1 *Journals of the Senate*, 2015-16, no. 7 (15 September 2016), p. 211

2 Explanatory Memorandum, p. 1.

3 Explanatory Memorandum, p. 1.

4 Assistant Minister for Industry, Innovation and Science, The Hon Craig Laundy, *House of Representatives Hansard*, 1 September 2016, p. 20.

misled as it encourages meaningless claims like 'Made in Australia from local and imported ingredients' when food is only minimally processed in Australia.[5]

1.8 Businesses will have more certainty about what activities constitute, or do not constitute, substantial transformation. In addition, the amendments make clear that importing ingredients and undertaking minor processing that merely changes the form or appearance of imported goods, such as dicing or canning, are not sufficient to justify a 'made in' claim.[6]

1.9 According to the Explanatory Memorandum, the '50 per cent production cost' test is an unnecessary burden on business and means little to consumers. The complexities of sourcing components through the global supply chain and variability due to currency fluctuations mean that the test is difficult to administer. The test also becomes redundant for food producers with the introduction of labels showing the percentage of Australian ingredients.[7]

1.10 The Assistant Minister explained the benefits to businesses:

> Businesses will find it easier to make reliable country-of-origin representations through a clarified substantial transformation test and the removal of the burdensome and capricious production cost test.[8]

1.11 The bill complements the Country of Origin Food Labelling Information Standard 2016 (made under the ACL) which came into effect on 1 July 2016. The information standard was separately tabled as a disallowable instrument in Parliament. The information standard provides for mandatory country of origin labelling requirements for food that is sold in Australia, including offered or displayed for sale. No labelling requirements are imposed on food sold outside Australia. The bill includes a new safe harbour defence for a representation in the form a mark specified in the information standard.[9]

1.12 It is anticipated that the removal of the '50 per cent production cost' test will significantly reduce the statutory burden for all businesses, not just food businesses. It is the main regulatory offset against the added costs imposed on food businesses by the information standard. The imposition of the standard was expected to cost businesses $48.2 million per year, while the removal of the production cost test was estimated to result in savings for businesses of $48.5 million per year.[10]

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5 Explanatory Memorandum, p. 1.

6 Explanatory Memorandum, p. 1.

7 Explanatory Memorandum, p. 1.

8 Assistant Minister for Industry, Innovation and Science, The Hon Craig Laundy, *House of Representatives Hansard*, 1 September 2016, p. 20.

9 Explanatory Memorandum, p. 1.

10 Explanatory Memorandum, p. 1.

# 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.
>
> …
>
> 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.
>
> 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.

# Additional comments by Senator Nick Xenophon

## Country of origin labelling—a long and winding road

1.1 These reforms contained in the Competition and Consumer Amendment (Country of Origin) Bill 2016 aim to provide consumers with clear, more meaningful and easier to find country-of-origin information so they can make informed purchasing decisions. I have long advocated for reforms to improve an ineffective and often misleading labelling framework, so it will be easier for consumers to make purchasing decisions that support Australian farmers, Australian manufacturers and Australian jobs.

1.2 In 2009, I, alongside my colleagues at the time former Senator Bob Brown and the then Senator Barnaby Joyce, introduced into the Senate the Food Standards Amendment (Truth in Labelling Laws) Bill 2009. The Food Standards Amendment (Truth in Labelling Laws) Bill 2009 was designed to require Food Standards Australia New Zealand in its authority to develop and approve certain food labelling standards regarding the use of the word 'Australian' on packaging and also to require greater detail of the country of origin of ingredients used in food products.

1.3 During committee hearings on the Food Standards Amendment (Truth in Labelling Laws) Bill 2009, it was clear the 50 per cent cost production test for companies to claim that a product was 'made' in a country was inherently problematic. The impact on citrus growers was significant due to the volume of cheap imported fruit juice being sold as 'Made in Australia' because of the flawed 'substantial transformation' test.

1.4 Further, in 2012 I participated in the Senate Select Committee on Australia's Food Processing Sector. As part of that inquiry, I recommended an urgent overhaul of Australia's country of origin food labelling laws to provide truthful and useful information to customers.

1.5 I outlined then, as I did in 2009, that there were serious concerns about our current labelling regime and the extent to which it allows foreign imports to be classified as 'Made in Australia'. I welcome the changes in the Competition and Consumer Amendment (Country of Origin) Bill 2016 and would like to acknowledge the work undertaken by all stakeholders during the consultation process. While it is a step in the right direction, I believe there are more steps the Government can take to strengthen Australia's food labelling framework.

### Room for improvement

1.6 In its submission to the Competition and Consumer Amendment (Country of Origin) Bill 2016, Australian Made Campaign Limited (AMCL) stated that overall it "…supports the removal of the 50% cost test…" however it noted "…some concerns

that it may result in adverse consequences for some Australian suppliers of inputs". It noted:

> 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.[1]

1.7 I note that this issue was recognised in the Committee report, as well as the need for greater guidance on what does and what does not constitute substantial transformation. The Committee also noted the concerns by AMCL that 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.

1.8 While not making a submission on the Competition and Consumer Amendment (Country of Origin) Bill 2016, consumer group CHOICE has stated that "[U]nfortunately, the new system looks less useful for consumers wanting information about any of the 195 countries that are not Australia. For example, claims such as 'Made in Australia from imported ingredients' will still have you wondering where your food comes from."

1.9 The Competition and Consumer Amendment (Country of Origin) Bill 2016 does not require manufacturers to list the origin of specific ingredients on their label. I am concerned that this will leave many consumers left in the dark when it comes to finding out the origin of the ingredients that are not made or grown in Australia. This could be addressed by manufacturers disclosing the country of origin of specific ingredients on product labels. Alternatively, (given seasonal and other variations) the Government could require manufactures to disclose the country of origin of specific ingredients to the Department of Industry for publication on its website. This could work effectively by requiring disclosure on a six monthly basis (with reporting required within one month of each six month period) of the average percentage of the country of origin of the particular ingredient. For instance, this would be particularly informative for orange juice products which may contain a mix of Australian oranges and imported concentrate depending on the season.

1.10 The Government should take steps within the next 12 months so that manufacturers are required to disclose the origin of specific ingredients in their products. In the absence of such a requirement, I urge food manufacturers to be more transparent about the ingredients that are in their products so that consumers can make a more informed decision.

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1 *Submission 2*, p. 4.

1.11 In relation to the issues surrounding the definition of substantial transformation, AMCL has previously argued for a simple administrative mechanism to address this issue, similar to what exists in the US, which will give manufacturers the ability to apply for a ruling on Country of Origin Labelling claims. I welcome the comments by the Committee that there could be benefit in the Government exploring such a mechanism and urge the Government to do so with alacrity, and with any event within the next 12 months.

**Recommendation 1**

**1.12 Within 12 months, the Government take steps which will require manufacturers to regularly disclose the percentage and country of origin of specific ingredients to the Department of Industry for publication on its website.**

**Recommendation 2**

**1.13 As a matter of urgency, the Government undertake an analysis and report on the benefit of an administrative mechanism which will give manufacturers the ability to apply for a ruling on Country of Origin Labelling claims, and to introduce legislation to this effect within 12 months.**

**Senator Nick Xenophon**
**Senator for South Australia**

# Appendix 1

## Submissions received

| Submission Number | Submitter |
|---|---|
| 1 | Australian Food and Grocery Council |
| 2 | Australian Made Campaign Limited |
| 3 | Tasmanian Farmers and Graziers Association |
| 4 | Ocean Oils Pty Ltd |
| 5 | Ai Group |
| 6 | Food and Beverage Association |