

The current regulatory framework

- 2.1 In order to frame this report and recommendations contained within, this chapter explains the current framework that regulates country of origin food labelling in Australia and addresses some of the myths which have caused so much reported confusion and consternation for consumers and industry. Comments from industry and consumer organisations and individuals are considered and explored in chapters four and seven.
- 2.2 The regulatory framework for country of origin food labelling is established by two regulatory systems working in tandem. The *Australia New Zealand Food Standards Code* specifies which foods must state their country of origin, while the Australian Consumer Law regulates what descriptors can be put on the label by the producer, manufacturer or retailer.
- 2.3 The *Australia New Zealand Food Standards Code* and the Australian Consumer Law are explained below. The chapter will then address the use of pictorial representations and registered trademarks that can also indicate to consumers the food product's country of origin. Finally, the chapter will discuss the Australian Made Campaign.

Australia New Zealand Food Standards Code

Overview

- 2.4 The *Australia New Zealand Food Standards Code* (the Code)¹ establishes which foods must have a country of origin statement on their labels. The Code is developed and maintained by Food Standards Australia New

1 *Australia New Zealand Food Standards Code* <www.foodstandards.gov.au/code>, accessed 1 September 2014.

Zealand (FSANZ), an independent statutory authority established under the *Food Standards Australia New Zealand Act 1991*.²

- 2.5 FSANZ does not have powers in respect of enforcement of the standards in the Code. Enforcement is the responsibility of State and Territory and New Zealand agencies that adopt the Code in their respective jurisdictions. The compliance and enforcement practices of these regulators are addressed in chapter three.

Categories of food

- 2.6 Standard 1.2.11 of the Code (the Standard) sets out the requirements for mandatory country of origin labelling. The Standard separates foods into two categories: packaged foods and unpackaged foods. These two categories have different country of origin labelling requirements and provide some specific exemptions within each category. They are explained below.
- 2.7 The Standard does not apply to food offered for immediate consumption where the food is sold by restaurants, canteens, schools, caterers, self-catering institutions, prisons, hospitals or other similar institutions such as nursing homes.³ Consequently, foods sold or otherwise supplied in these venues do not require a country of origin statement on their labels.

Packaged foods

- 2.8 The Standard requires packaged foods to be labelled with a statement on the packaging that identifies the country where the food was made, produced or grown.⁴ The following foods are exempt from country of origin labelling under the Standard:
- foods made and packaged on the premises from which they are sold;
 - foods delivered packaged, and ready for consumption, at the express order of the purchaser;
 - food sold at a fundraising event; and
 - foods packaged and displayed in an assisted service display cabinet.⁵

2 *Food Standards Australia New Zealand Act 1991* <www.comlaw.gov.au/Details/C2004C00171>, accessed 1 September 2014.

3 *Australia New Zealand Food Standards Code*, clause 1; Food Standards Australia New Zealand, *Submission 12*, p. 2.

4 *Australia New Zealand Food Standards Code*, clause 2; Food Standards Australia New Zealand, *Submission 12*, p. 3.

5 Food Standards Australia New Zealand, *submission 12*, p. 3.

Unpackaged foods

- 2.9 Unpackaged fruit, vegetables, nuts, spices, herbs, fungi, seeds, fish and most types of seafood, pork, beef, veal, lamb, hogget, mutton, and chicken (or a mix of these foods) must be labelled with a statement on, or in connection with, the display of the food.⁶ These statements must either identify the country or countries of origin of the food, or, 'indicate that the food is a mix of local and imported foods or a mix of imported foods'.⁷
- 2.10 Unpackaged foods for retail sale that do not fall into the above list do not require country of origin labelling.

Other relevant labelling requirements under the Code

- 2.11 The Code also requires all statements mandated by the Code to be legible and prominent 'such as to afford a distinct contrast to the background, and must be in the English language'.⁸
- 2.12 Standard 1.2.9 (Legibility Requirements of the Code) establishes that the statement provided for unpackaged foods must be at least nine millimetres in height, or five millimetres in height if the food is in a refrigerated assisted service display cabinet. There are no conditions for the height of a country of origin statement on packaged foods.

Australian Consumer Law

- 2.13 While the Code specifies which foods must have country of origin labelling, the Australian Consumer Law (ACL), as set out in Schedule 2 of the *Competition and Consumer Act 2010*, establishes some general principles that guide industry about the terms which can be used on a label to indicate the food product's country of origin and under what circumstances they are to be calculated. The ACL is enforced by the Australian Competition and Consumer Commission (ACCC) at the federal level, and by the respective state and territory fair trading commissions. The compliance and enforcement activities of these regulators are addressed in chapter three.
- 2.14 The ACL applies to all goods and products, not just food products. However to reflect the Committee's specific inquiry into food origin

6 Food Standards Australia New Zealand, *submission 12*, p. 3.

7 Food Standards Australia New Zealand, *submission 12*, p. 3.

8 Standard 1.2.9 – Legibility Requirements of the Code; Food Standards Australia New Zealand, *submission 12*, p. 3.

labelling, these provisions will be discussed solely in relation to food products.

- 2.15 Importantly, the ACL does not prescribe explicit rules as to the claims that can be made to satisfy the country of origin requirements as outlined in the preceding section. Rather, the starting point of the ACL is that labels cannot be false, misleading or deceptive.⁹ Businesses are free to employ any terminology to satisfy the Code's origin labelling requirements, so long as it is not false, misleading or deceptive.

'Safe harbour' defences

- 2.16 To reduce complexity, uncertainty and regulatory burden for businesses, the ACL framework provides that country of origin descriptors are considered not to be false, misleading or deceptive where specific 'safe harbour' defences are satisfied.¹⁰
- 2.17 Where a label is able to satisfy one of the country of origin safe harbours in the ACL, it will not be false, misleading or deceptive.¹¹ The following safe harbour criteria are established by the ACL:
- claims that goods are 'produced in' or the 'product of' a certain country;
 - claims that goods or certain ingredients are 'grown in' a particular country; and
 - general country of origin claims where the above claims do not apply, which would permit claims such as 'made in' a particular country.¹²
- 2.18 Most food products will fall into one of these three categories, and most food producers or retailers will use these safe harbour defences.

9 Chapter 5 Part 5-4 of the ACL specifically applies to country of origin claims. The key provisions include:

Section 18 of the ACL, a very general prohibition, states that: (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

Section 29(1) of the ACL contains a broad prohibition which states that: A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services: (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use'; and (k) 'make a false or misleading representation concerning the place of origin of goods'.

Section 33 of the ACL provides that 'a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quality of any goods'.

10 Department of Industry, *submission 20*, p. 2.

11 ACL, s 255.

12 ACL, s 255.

According to the ACCC, 'traders have a strong incentive to make claims with reference to the safe harbours where they know they are in a position to establish the defence'.¹³

- 2.19 However, there will be a limited number of food products that, because of their production processes, will not fall within one of the safe harbour defences. Businesses are entitled to use any terminology to satisfy the legal requirement that food products are labelled with a country of origin statement, providing they are not false or misleading.¹⁴
- 2.20 Further, the safe harbours established under the ACL are not country-specific, and will apply equally to food labels which claim an Australian origin or another country of origin. However, a business cannot rely on a safe harbour for a region or place of origin claim. For example, if a wine is labelled 'product of the Barossa Valley', the producer cannot use the 'produce of' safe harbour defence and will therefore still be required to state its country of origin.¹⁵
- 2.21 The three safe harbour defences ('product of', 'grown in' and 'made in') are discussed further below.

'Product of ...' or 'Produce of ...'

- 2.22 The ACL establishes the following test for the 'product of' safe harbour defence:
- the country was the country of origin of each significant ingredient or component of the good; and
 - all, or virtually all processes involved in the production or manufacture happened in that country.¹⁶
- 2.23 If a manufacturer or retailer can satisfy these two tests, they will not contravene the key provisions under the ACL for false, misleading or deceptive conduct.
- 2.24 The 'product of' descriptor is most often used for processed food, but is also used for fresh produce. For example, if 'Product of Australia' appears on a packet of smoked salmon, this means the salmon was both caught and smoked in Australia.

13 Australian Competition and Consumer Commission, *submission 41*, p. 8.

14 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014. Available at <www.accc.gov.au/system/files/Country%20of%20origin%20and%20the%20Australian%20Consumer%20Law.pdf>, accessed 1 September 2014, p. 7.

15 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 15.

16 ACL, s 255(1), Item 2.

- 2.25 Released in April 2014, the ACCC's *Country of origin claims and the Australian Consumer Law: a guide for business (ACCC's Guide for business)* advises that the question of 'significant ingredient' is not necessarily related to the percentage of that ingredient.¹⁷
- 2.26 The Department of Industry advised that where, for example, the descriptor was used for an Australian food product, it would mean that close to 100 per cent of the product is Australian.¹⁸ It is consequently considered a premium claim on the domestic market.
- 2.27 'Product of Australia' claims are likely to be difficult to sustain for any product with a significant imported ingredient. The ACCC's *Guide for business* advises:

Any food or beverage product that depended on an imported ingredient for its specific nature or identity would not be eligible for the 'produce of Australia' safe harbour defence. The manufacturer may therefore be at risk of action by the ACCC, or any other person, under the ACL, or a state or territory food regulator under the relevant Food Act.

Packaged or processed foodstuffs and beverages are often complex products. They may undergo a series of processes and may contain a range of ingredients, and the ingredients may also come from several sources. If any of these processing locations or sources of ingredients are not within Australia, a 'produce of Australia' claim would be difficult to sustain.¹⁹

- 2.28 The example below shows the 'product of' safe harbour in practice.

Apple and cranberry juice

If a business selling apple and cranberry juice wanted to promote their product as 'product of Australia' and wished to rely on the safe harbour defence both the apple and cranberry juice would have to be sourced from Australia. This is despite the cranberry juice being, on average, about five per cent of the total volume of the product. If, however, a local source can be found for the apple juice and the cranberry juice, then it would be legitimate to rely on the safe harbour defence for 'a product of Australia' label, even if, say, a preservative was added to the juice and the preservative was imported. This is because the preservative does not go to the nature of the good.

Source: *Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill No. 2 2010*, p. 367.

- 17 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 12.
- 18 Mr Paul Trotman, Acting Division Head, Business Competitiveness and Trade, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, p. 5.
- 19 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 12.

'Grown in ...'

- 2.29 The safe harbour defence for 'grown in' states that an individual, manufacturer or retailer will not contravene the key provisions for false, misleading or deceptive conduct where the food can meet the following requirements:
- each significant ingredient of the food was grown in that country; and
 - all, or virtually all, processes involved in the production or manufacture happened in that country.²⁰
- 2.30 The 'grown in' descriptor is mostly used for fresh produce.²¹ For example, if a 'Grown in Australia' label appears on an apple, it was grown in Australia.

How is 'grown in' defined?

- 2.31 According to the ACCC's *Guide for business*, ingredients are grown in a country if they:
- are materially increased in size or materially altered in substance in that country by natural development; or
 - germinated or otherwise arose in, or issued in, that country; or
 - are harvested, extracted or otherwise derived from an organism that has been materially increased in size, or materially altered in substance, in that country by natural development.²²
- 2.32 The example below shows the 'grown in' safe harbour in practice.

Prawns grown in Australia

The claim on black tiger prawns naturally developed in an Australian aquaculture production system from Australian prawn larvae produced in an Australian landed hatchery, but where the wild caught prawn spawners or brood stock may not have come from Australian waters, is likely to satisfy the criteria for the 'grown in' defence.

Source: ACCC, *Country of origin claims and the Australian Consumer Law: a guide for business*, April 2014, p. 14.

'Ingredient grown in' safe harbour defence

- 2.33 The ACL also extends this safe harbour for claims that ingredients of foods were grown in a particular country. An example of this might be a

20 ACL, s 255(1), Item 4.

21 Mr Paul Trotman, Acting Division Head, Business Competitiveness and Trade, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, p. 5.

22 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 14.

bag of mixed nuts which is labelled with a claim, 'made with Australian grown almonds'.

2.34 To establish this safe harbour defence, the following requirements must be met:

- the country claimed could also be represented as the country of origin of the goods, or the country of which the goods are the produce of, in accordance with the safe harbour defence requirements for such claims; and
- each ingredient or component that is claimed to be grown in that country was grown only in that country; and
- each ingredient that is claimed to be grown in that country was processed only in that country; and
- fifty per cent or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country.²³

2.35 The example below shows the 'ingredient grown in' safe harbour in practice.

Minted packaged peas using Australian grown peas and other imported ingredients

A claim on a packet of snap frozen minted peas where the peas were germinated and harvested and packaged in Australia, but where the mint was imported into Australia from China for packaging with the peas, is likely to satisfy the 'ingredient grown in' safe harbour defence. This is because the peas are deemed to be the significant ingredient and 85 per cent or more of the total weight is comprised of peas grown and processed in Australia.

Source: ACCC, *Country of origin claims and the Australian Consumer Law: A guide for business*, April 2014, p. 14.

General claims such as 'Made in...'

2.36 The ACL establishes a 'general country of origin' safe harbour for claims such as 'made in'. If a label is relying on the general country of origin safe harbour defence two separate criteria must be met:

- the food must be substantially transformed in the country of origin being claimed (the substantial transformation test); and
- fifty per cent or more of the total costs to produce or manufacture the food product must have occurred in that country claimed (cost of production/manufacture test).²⁴

2.37 If food products pass both of these criteria for a particular country, the manufacturer (or retailer) may make a claim that the goods are made in

²³ ACL, s 255(1), Item 5.

²⁴ ACL, s 255(1), Item 1.

- that country and that this claim will not attract liability under the key provisions for false, misleading or deceptive conduct under the ACL.
- 2.38 Importantly, such claims go to production or manufacture rather than content. A food product with a 'Made in Australia' label will 'not necessarily contain Australian ingredients'²⁵, though the Department of Industry stated it would be 'surprising' if the requirements of the safe harbour could be met without any Australian contents in the food product.²⁶
- 2.39 For example, if 'Made in Australia' appears on a jar of jam, this means the jam was made in Australia and at least half of the cost of making the jam was incurred in Australia. It does not necessarily mean that the ingredients for the jam were grown or sourced in Australia. Throughout its inquiry, the Committee heard evidence that this is contrary to the majority of consumers' understandings of the 'Made in Australia' descriptor. These issues are discussed further in chapter four.
- 2.40 More information on the two tests (substantial transformation and cost of production or manufacture) is provided below.

Substantial transformation test

- 2.41 The ACL provides that goods will be 'substantially transformed' in a country if they undergo a:
- ... fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.²⁷
- 2.42 However, the ACL does not define 'fundamental change'. The ACCC's *Guide for business* states that the basic idea is that the finished product would be regarded as a new and different product from that imported.²⁸
- 2.43 For example, reconstitution of imported fruit juice concentrate into fruit juice for sale – whether or not Australian water, sugar, preservatives and packaging were used – would not constitute substantial transformation.²⁹

25 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 7.

26 Ms Lyndall Milward-Bason, Manager of Trade Facilitation Section, Trade & International Branch, Portfolio Strategic Policy Division, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, p. 5.

27 ACL s 255(3).

28 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 8.

29 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 10.

- 2.44 Some further examples of the substantial transformation test in practice are below.

Apple pies

A business sells apple pies. The labelling of the pie says, 'Made in Australia'. The packaging, pastry and apple filling are created in Australia and the pie is made (i.e. the pie is constructed and baked) in Australia, but all of the apples are from New Zealand. It is probable that the substantial transformation test of the safe harbour defence could be satisfied in the circumstances. If the threshold of 50 per cent of total costs is also reached so as to satisfy the cost of production/manufacture test, the safe harbour defence should be established. On the other hand, a claim of 'Australian Apple Pie' may be more likely to mislead as it may be taken to apply to the ingredients rather than the product (apple versus pie) and would then be subject to the more onerous 'produce of' or 'grown in' safe harbour defences.

Canned apricots

A business sells preserved 'Australian made diced apricots'. The apricots are sourced from South Africa, diced and canned in syrup in Australia, for sale as a pantry item. The ACCC would have difficulty accepting the goods were substantially transformed by merely dicing the apricots. If however, the diced apricots were combined with jelly in Australia and sold as 'Australian made fruit cups', it is probable that the substantial transformation test of the safe harbour defence could be made. The goods would still need to meet the total cost of production/manufacture test in order to satisfy the safe harbour defence.

Source: ACCC, *Country of origin claims and the Australian Consumer Law: A guide for business*, April 2014, p. 9.

- 2.45 Satisfying the substantial transformation test does not itself enable food products to meet the general country of origin defence. The cost of production/manufacture test must also be met.

Cost of production/manufacture test

- 2.46 The second part of the general country of origin defence is that 50 per cent or more of the total cost of production, or manufacture, is attributable to the country claimed to be the country of origin. This test is 50 per cent content by value, not volume of the food product.³⁰
- 2.47 These costs are calculated by adding up the costs of the amounts of expenditure on materials, labour and overheads in respect of the goods.³¹ The ACCC's *Guide for business* advises that the cost of materials used in the

30 Ms Lyndall Milward-Bason, Manager of Trade Facilitation Section, Trade & International Branch, Portfolio Strategic Policy Division, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, p. 7.

31 ACL, ss 256 and 257.

production or manufacturing of the goods is the sum of costs incurred by the manufacturer of the goods, and that this will include:

- purchase price;
- overseas freight and insurance;
- port and clearance charges;
- inward transport to store; and
- retail packaging for sale (this does not include packaging related to the transportation of the goods such as pallets).³²

2.48 The ACCC is of the view that the following are unlikely to be included in calculating the costs of materials:

- customs and excise duty;
- sales tax; and
- goods and services tax.³³

2.49 Expenditure on labour is the 'sum of each labour cost incurred by the manufacturer of the goods that can be reasonably allocated to the production or manufacture of the goods'.³⁴ The following labour costs (wages as well as employee benefits) will be included for workers engaged in:

- the manufacturing process;
- management of the manufacturing process;
- supervision and training of workers engaged in the manufacturing process;
- the quality control process;
- packaging goods into inner containers; and
- handling and storage of goods.

2.50 Expenditure on overheads in respect of the goods is the sum of each overhead cost incurred by the manufacturer that can be reasonably allocated to the production or manufacture of the goods. According to the ACCC, this will include:

- inspection and tests of goods;
- insurance and leasing of equipment;
- vehicle expenses; and
- storage of goods at the factory.³⁵

32 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 10.

33 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 10.

34 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 10.

35 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 11.

'Made in ... from local and imported ingredients'

- 2.51 There is no specific safe harbour defence under the ACL for labels that state 'made in ... from local and imported ingredients'. The descriptor is most commonly employed to allow for changes in the availability of ingredients, particularly due to seasonality of fruit and vegetables.
- 2.52 However, this descriptor does not explain what proportion of the ingredients are local or imported. For example, If 'Made in Australia from local and imported ingredients' appears on a can of vegetable soup, some of the tomatoes, carrots, celery, potatoes, as well as a range of other ingredients, could be vegetables grown in Australia or any other country.
- 2.53 Contrary to the understanding of some industry representatives,³⁶ the soup will still need to satisfy the general safe harbour, 'made in', as explained by the Department of Industry:
- So if you have 'made in Australia from local and imported ingredients', which is the concern that many consumers have and that you have raised here, it does not matter whether you make that full statement or just 'made in'. The only way you are covered by the safe harbour is if you meet the 50 per cent content and the substantial transformation requirement. If you do not meet that requirement you must be able to demonstrate that you are not being false, misleading or deceptive to the ordinary consumer by making that statement.³⁷
- 2.54 Further, the provision of additional information ('local and imported ingredients' for example) must be relevant and useful and must not be false, misleading or deceptive.³⁸
- 2.55 The ACCC's *Guide for business* echoes this general principle:
- A 'Made in Australia from local and imported ingredients' claim must not be misleading. The provision of extra information beyond 'Made in Australia' should clarify the origin of the components and not confuse consumers.³⁹

36 Australian National Retailers Association, *submission 21*, p. 2;
Citrus Australia - SA Region, *submission 28*, p. 3;
Australia Industry Group, *submission 48*, p. 4.

37 Ms Lyndall Milward-Bason, Manager of Trade Facilitation Section, Trade & International Branch, Portfolio Strategic Policy Division, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, p. 5.

38 Department of Industry, *submission 20.1*, p. 4.

39 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law - A guide for business*. April 2014, p. 17.

2.56 The *Guide for business* released in April 2014 represents a change in position within the ACCC.⁴⁰ It provides a detailed discussion of the complexity of providing consumers with extra information ('from local and imported ingredients') but also how that extra information can then subsequently confuse consumers. The ACCC's *Guide for business* states:

On one hand the phrase is truthful, in that it alerts the consumer to the presence of imported content. On the other hand, it also emphasises the presence of local content. It is therefore unclear what the percentage of local content is or what relative roles the imported and local contents play in the final product. This form of claim is the subject of frequent complaints to the ACCC, on the basis that the term itself is potentially misleading ... Care should be taken, though, if the Australian content is minimal. Small amounts of content from a particular country should not be used to claim its connection with Australia or any other origin ... The most useful approach is to provide sufficient information to resolve these issues. Two positive aspects of this approach are: less risk of misleading consumers; and better customer relationships by improving customers' knowledge of your products. One approach could be to state the actual country of origin of imported components or ingredients and the approximate proportions of them in the product.⁴¹

40 Department of Industry, *submission 20.1*, p. 4;
CHOICE, *submission 47*, p. 7;
Ms Angela Cartwright, Campaigns Manager, CHOICE, *Committee Hansard*, Sydney, 9 May 2014;
Australian Made Campaign Limited, *submission 18*, p. 8.

41 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 18.

2.57 Two different examples of this advice in practice are provided below.

Australian mashed peas made from local and imported ingredients

It is unlikely that consumers would expect a product advertised as 'Australian mashed peas made from local and imported ingredients' to include imported peas. The additional information, made from local and imported ingredients, could appropriately convey that aside from the Australian peas, a number of other ingredients, local and imported, such as seasoning, had been used in the process of manufacture.

Apple and cranberry juice

It is not likely that consumers would be misled if a label on a juice product, where the producer is accounting for seasonality of produce, stated 'Local ingredients used most of the year, imported ingredients used from October to December', when also including on packaging the date the produce was made to allow consumers to discern whether imported or Australian produce is used.

Source: ACCC, *Country of origin claims and the Australian Consumer Law: A guide for business*, April 2014, p. 18.

A contentious issue: 'water neutrality' and the ACL

- 2.58 The water content of a food product may be included as part of its 'Australian' content for the purposes of a 'Made in Australia' claim or 'Product of Australia' claim. However, the ACCC has issued guidance which indicates that the mere reconstitution of a product, such as imported apple juice concentrate, would not constitute substantial transformation for the purposes of the general country of origin safe harbour, and would be insufficient to make an 'Australian made' claim.
- 2.59 For 'Grown in' claims, the ACL provides that water used to reconstitute the food product will be treated as having the same origin as the ingredient, regardless of whether Australian water is used.
- 2.60 Evidence to the inquiry suggests that water neutrality is a significant issue for industry and is explored further in chapter four of the report.

Pictorial representations

- 2.61 Apart from the text or logo representations about a food's country of origin, food manufacturers and retailers often use iconic imagery or other pictorial representations which might indicate to a consumer a product's country of origin. An example might be using a kangaroo, koala, Australian flag, boomerang, and other iconic images on the packaging of products.

- 2.62 The Department of Industry advised that the prohibition against a false, misleading or deceptive representation on a label would extend to the use of pictures and iconography:
- Any representation as to the country of origin is conceivably caught by the consumer law as being false, misleading or deceptive representation. That would include pictorial representations as much as it would include words.⁴²
- 2.63 The ACCC similarly stated that:
- ... it is illegal to make false or misleading claims about the country of origin of goods [which] includes displaying symbols usually associated with a particularly country (for example, the Australian flag or a kangaroo) on goods or their packaging.⁴³
- 2.64 There are further limitations on the use of the Australian flag on imported goods. Under the *Customs (Prohibited Imports) Regulations 1956*, prior to any importation, importers require approval from the Department of the Prime Minister and Cabinet for 'the design of the representation of the Australian National Flag on the relevant items'.⁴⁴ As these requirements apply to imports only, domestic producers who use the Australian flag for commercial purposes can do so without formal permission. However, the general prohibition of misleading and deceptive conduct under the ACL still applies to domestic producers and importers alike.
- 2.65 Pictorial representation is a significant issue for both consumers and industry and is discussed in detail in chapter four of the report.

The Australian Made, Australian Grown logo

- 2.66 The Australian Made Campaign Limited (AMCL) is a not-for-profit company set up in 1999 to administer the Australian Made, Australian Grown logo (AMAG logo). The AMAG logo consists of a stylised kangaroo inside a triangle and is a registered certification trademark. As a certification trademark, businesses apply to the AMCL to use the AMAG

42 Ms Lyndall Milward-Bason, Manager of Trade Facilitation Section, Trade & International Branch, Portfolio Strategic Policy Division, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, pp. 12-13.

43 Australian Competition and Consumers Commission, *submission 41*, p. 8.

44 Department of Prime Minister and Cabinet, 'It's an Honour: Australian National Flag – Commercial Use', 27 February 2014, <www.itsanhonour.gov.au/symbols/flag.cfm#commercial>, accessed 1 September 2014; see also Australian Customs and Border Protection Service, 'Prohibited and restricted imports', <www.customs.gov.au/site/page4369.asp>, accessed 1 September 2014.

logo in accordance with specific rules which govern its use. Fees are associated with the grant of a licence and are determined on the actual sales of licensed products for the previous 12 months. The minimum fee is \$300 per annum, with a maximum fee of \$25 000.⁴⁵

- 2.67 These rules are provided under the *Australian Made, Australian Grown Logo Code of Practice* (AMAG Code of Practice). The AMAG Code of Practice is approved by the ACCC and administered by AMCL.⁴⁶ The latest edition of the AMAG Code of Practice was as approved by the ACCC in July 2014.⁴⁷
- 2.68 The AMCL administers four relevant descriptors that accompany the AMAG logo: 'Australian Made', 'Product of Australia', 'Australian Grown' and 'Australian Seafood'. The four descriptors – established as four separate licences under the AMAG Code of Practice – are shown in Figure 2.1.

Figure 2.1 Australian Made, Australian Grown registered trademark



Source Australian Made Campaign Limited, 'About the logo', www.australianmade.com.au/why-buy-australian-made/about-the-logo/, accessed 1 September 2014.

- 2.69 Importantly, the AMAG logo and its administration by AMCL sits separately from the requirements under the ACL. Food products displaying the AMAG logo must also provide a country of origin

45 Australian Made Campaign Limited, 'How much does it cost', <www.australianmade.com.au/for-business/how-much-does-it-cost/>, accessed 1 September 2014.

46 Australian Made Campaign Limited, *submission 18*, p. 3.

47 The Code of Practice is available at <www.australianmade.com.au/media/57318/1406_code_of_practice.pdf>, accessed 1 September 2014.

descriptor which complies with the regulations under the Code and the ACL.⁴⁸

- 2.70 Many of the criteria established in the AMAG Code of Practice mirror those in the ACL. However as the AMAG Code of Practice exists independently of the ACL, important differences have arisen between the tests under the ACL for 'Made in' descriptors and that contained in the AMAG Code of Practice for 'Made in Australia'. This has unsurprisingly caused much confusion amongst consumers.

Criteria regulating the use of the logo

- 2.71 The rules governing the use of the AMAG logo roughly mirror the requirements under the corresponding ACL safe harbours. Each of the four descriptors is examined below.

For the logo to be used in conjunction with 'Product of Australia'

- 2.72 Mirroring the requirements under the ACL, the use of the AMAG logo with the words 'Product of Australia' requires:
- all of the product's significant ingredients to come from Australia, and
 - all, or nearly all of the manufacturing or processing has been carried out in Australia.⁴⁹

For the logo to be used in conjunction with 'Australian Grown'

- 2.73 The use of the AMAG logo with the words 'Australian Grown' requires the ACL criteria for the 'Grown in' safe harbour to be met, namely:
- each significant ingredient of the food product must be grown in Australia as defined under the ACL, and not exported and reimported; and
 - all, or virtually all, processes involved in the production or manufacture of the good must have happened in Australia, as defined under the ACL.⁵⁰
- 2.74 Reflecting the regulation in the ACL, the AMAG Code of Practice also allows the AMAG logo with the representation 'Australian Grown' followed by the name of one or more ingredients, for example, 'Australian Grown Almonds' in a packet of mixed nuts. The AMAG Code of Practice requires the following:

48 Ms Lyndall Milward-Bason, Manager of Trade Facilitation Section, Trade & International Branch, Portfolio Strategic Policy Division, Department of Industry, *Committee Hansard*, Canberra, 8 May 2014, p. 13.

49 *Australian Made, Australian Grown Logo Code of Practice*, July 2014, 18(a), pp. 12-13.

50 *AMAG Code of Practice*, July 2014, 18(c), p. 13.

- 50 per cent or more of the cost of manufacturing and producing the good must be attributable to production or manufacturing processes that occurred in Australia (consistent with s 256 and s 257 of the ACL); and
- 90 per cent or more of the total ingoing weight of the good must consist of ingredients or components which have been grown in Australian and/or water harvested in Australia; and
- 100 per cent of each ingredient/s specified in the claim must have been grown in Australia; and
- the ingredients specified must not have been exported from Australia and reimported in a different form; and
- the representation must always be used with the appropriate descriptor to identify the Australian grown ingredients, 'Australian Grown Apples and Pears'.⁵¹

2.75 For the purposes of both of these claims, packaging materials are not treated as ingredients or components of the goods; and the weight of the packaging material is also disregarded when calculating the weight of the goods.⁵²

For the logo to be used in conjunction with 'Australian Seafood'

2.76 AMCL also administers a seafood-specific trademarked logo. The AMAG Code of Practice provides that the 'Australian Seafood' representation used in conjunction with the logo must be made in reference to an 'aquatic vertebrate or invertebrate intended for human consumption, but excluding amphibians, mammals and reptiles', and meet the requirements for 'Australian Grown' as specified above.⁵³

2.77 Any product displaying this logo would also need to satisfy the ACL requirements for the 'Grown in' descriptor.

For the logo to be used in conjunction with 'Australian Made'

2.78 Mirroring the ACL, the AMAG Code of Practice requires the use of the AMAG logo in conjunction with the representation 'Australian Made' to satisfy the following criteria:

- the good must be substantially transformed in Australia; and
- 50 per cent or more of the cost of manufacturing the food product must be attributable to production or manufacturing processes that occurred in Australia.⁵⁴

51 AMAG Code of Practice, July 2014, 18(d), p. 13.

52 AMAG Code of Practice, July 2014, p. 14.

53 AMAG Code of Practice, July 2014, 18(e), p. 13.

54 AMAG Code of Practice, July 2014, p. 8.

2.79 However, the AMAG Code of Practice applies a more restrictive test to ‘substantial transformation’ than provided under the ACL and in the associated ACCC guidelines.⁵⁵ AMCL has developed a list of processes that will not amount to substantial transformation to include:

- packaging or bottling;
- size reduction – cutting, dicing, grating, mincing;
- reconstituting;
- freezing, canning or simple preserving processes associated with packaging;
- mixing or blending of food ingredients, where the resulting product is not substantially different to the separate ingredients;
- juicing
- homogenisation
- pasteurisation;
- seasoning;
- marinating;
- coating or crumbing;
- pickling;
- dehydrating and drying;
- fermentation (e.g. in the production of wine, cider or salami);
- curing (e.g. the treatment of meat with curing salts, as in ham or bacon);
- roasting or toasting (e.g. of coffee beans, nuts or seeds).⁵⁶

Reconstituted products and the AMAG logo

2.80 The AMAG Code of Practice provides additional rules for the reconstituting of ingredients (that is, products ready for consumption that contain ingredients that have been dried or concentrated by the evaporation of water, to which water has been subsequently added).⁵⁷

2.81 The AMAG Code of Practice states that, in the case of reconstituted goods, the water used to reconstitute these ingredients must be included in the calculation of the ingoing weight of these ingredients:

Any water (whether of Australian origin or not) which is added to reconstitute an ingredient that is not of Australian origin is deemed to have the same origin as the foreign ingredient.⁵⁸

55 AMAG Code of Practice, July 2014, p. 8.

56 Australian Made Campaign Limited, *submission 18*, p. 8.

57 AMAG Code of Practice, July 2014, p. 14.

58 AMAG Code of Practice, July 2014, 18(d), pp. 14-15.

- 2.82 This is commonly referred to as ‘water neutrality’ because despite the origin of the water reconstituting that product, it is treated as having the same origin as the ingredient it is reconstituting.
- 2.83 The approach of AMAG’s Code of Practice here demonstrates a departure from the ACL and ACCC’s *Guide for business* as discussed above.