# Australian Consumer Law

# Possible Changes to Country of Origin Safe Harbour Defences

## Issues

Submissions to a number of inquiries involving country of origin labelling suggest that aspects of the Australian Consumer Law (ACL) are confusing for consumers and business – despite new guidance material released by the Australian Competition and Consumer Commission in October 2012 and April 2014. The Government is committed to exploring ways in which the ACL can be amended so that businesses can make origin claims that are more meaningful to consumers.

It appears that the ACL safe harbour defence criteria applicable to most country of origin representations – including ‘Made in’ or ‘Manufactured in’ – generate the most concern. These criteria include a ‘substantial transformation’ test and a 50 per cent local production cost test (these criteria do not apply to goods claimed to be ‘Produced in’ or ‘Grown in’ a particular country, which are covered by other safe harbour defences).

It seems that the meaning of ‘substantial transformation’ is still unclear to both consumers and businesses. Some consumers do not trust origin claims because they think the current test is so vague it could cover simple processes that they would not accept as conferring origin. The lack of clarity also means that some businesses are unsure whether the processes they undertake would meet the test – or believe that their products do meet the test when only minor processes have taken place in the country claimed.

Submissions also suggest that consumers find meeting a 50 per cent local production cost test to be irrelevant when determining whether a product originates within a particular country. They are much more focussed on the origin of inputs and/or how much processing has taken place in the country claimed.

In addition to concerns about the relevance of the 50 per cent local production cost test to consumers, many businesses seem to find the test overly burdensome. The methodology used is not necessarily compatible with their production or financial systems, and establishing compliance can require frequent re‑assessment. Production costs may vary due to fluctuations in input prices or exchange rates, or to productivity improvements. Where local production costs fall below the 50 per cent threshold, either temporarily or permanently, businesses can no longer be assured that their origin claim is safe from challenge – even where it is clear the ‘substantial transformation’ test continues to be met.

Given the above, there is some suggestion that, if ‘substantial transformation’ were clarified, the 50 per cent local production cost test would be unnecessary. It appears to be burdensome for business, yet of little relevance to consumers.

Other issues that have been raised in relation to the ACL safe harbour defences include:

1. it can be difficult to distinguish products made of mainly imported inputs from those made of mainly Australian inputs with a small amount of imported, yet key, inputs;
2. the ‘Grown in’ safe harbour defence for components/ingredients *(as opposed to the ‘Grown in’ defence for goods)* is complicated – it may not be needed if this claim is rarely used outside the food sector, and changes are made to food-specific elements of the framework; the safe harbour defence for a logo with a minimum 51 per cent local production cost test has never been used.

The current ACL safe harbour defence provisions are attached.

Possible ACL changes that may affect non-food sectors:

While the final proposals for amending the ACL have yet to be determined, they would attempt to address at least some of the issues raised above, and could include one or more of the suggestions set out below. We would appreciate industry views on the impacts on business of both the current safe harbour defence provisions and the possible changes, including estimated costs and savings. Those views will be considered in developing the Commonwealth’s final proposals for change. The Commonwealth’s proposals will then be put to states and territories for consideration according to established intergovernmental processes.

1. Clarify the general country of origin labelling safe harbour defence *(Item 1 of the Table in subsection 255(1) of the ACL)*, by:
2. making it clearer that its coverage includes ‘Made in’ and ‘Manufactured in’ claims;
3. removing the 50 per cent local production cost test; and
4. making the meaning of ‘substantial transformation’ clearer and better aligned with similar concepts used nationally and internationally, including through lists indicating processes that do or do not constitute substantial transformation (these lists could be in regulation or guidelines).
5. Clarify ‘Product of’ and/or ‘Grown in’ country of origin defences for goods *(Items 2 and 4 of the Table in subsection 255(1) of the ACL)*, by allowing components and/or ingredients that originate in another country to be considered insignificant for the purpose of the defence in certain circumstances, for example, if they:
6. make up less than five or 10 per cent of the product (by weight or value); or
7. do not make a significant contribution to the identity of the product.
8. Remove the safe harbour defence for a logo with a minimum 51 per cent local production cost test *(Item 3 of the Table in subsection 255(1) of the ACL)*.
9. Remove the safe harbour defence for ‘Grown in’ ingredients and components *(Item 5 of the Table in subsection 255(1) of the ACL)*.
10. Make it clearer that it is permissible to voluntarily disclose the relative proportion of local and imported ingredients or components, or the actual origin of particular ingredients, components or processes, either through labels or other means, provided doing so would not result in a representation that is ambiguous, misleading or deceptive.
11. Better align all elements of Australia’s country of origin labelling framework, comprising the ACL, the Australia New Zealand Food Standards Code and the *Commerce Trade Descriptions Act 1905* (including its associated regulations), to ensure their scope is clear, they are compatible and there are no unintended gaps.

ATTACHMENT

## Australian Consumer Law

## Country of Origin Labelling Safe Harbour Provisions

The Australian Consumer Law (ACL) is uniform law that is incorporated into Schedule 2 of the Commonwealth Competition and Consumer Act 2010, and into state and territory fair trade regulation.

The ACL prohibits origin representations (and associated conduct) that are false, misleading or deceptive. The ACL includes safe harbour defences for country of origin representations. Where these defences are met, representations are not considered to be false, misleading or deceptive. Where the defences are not met, businesses must be able to establish that they are not being false, misleading or deceptive through other means. The ACL is administered by the Australian Competition and Consumer Commission (ACCC) and state and territory fair trade regulators. Further guidance on the country of origin labelling provisions of the ACL, released by the ACCC in April 2014 can be found on the [ACCC’s website](http://www.accc.gov.au/publications/country-of-origin-claims-the-australian-consumer-law).

The country of origin labelling safe harbour defence provisions, as they appear in the Competition and Consumer Act 2010, are set out below:

## Australian Consumer Law

**Part 5‑3—Country of origin representations**

**254 Overview**

This Part provides that certain country of origin representations made about goods do not contravene:

1. section 18 (which deals with misleading or deceptive conduct); or
2. section 29(1)(a) or (k) or 151(1)(a) or (k) (which deal with false or misleading representations).

**255 Country of origin representations do not contravene certain provisions**

(1) A person does not contravene section 18, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation of a kind referred to in an item in the first column of this table, if the requirements of the corresponding item in the second column are met.

Table 1: Country of Origin representation requirements

| **Country of origin representations** |
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| **Item** | **Representation** | **Requirements to be met** |
| 1 | A representation as to the country of origin of goods | (a) the goods have been substantially transformed in that country; and(b) 50% or more of the total cost of producing or manufacturing the goods as worked out under section 256 is attributable to production or manufacturing processes that occurred in that country; and(c) the representation is not a representation to which item 2 or 3 of this table applies. |
| 2 | A representation that goods are the product of a particular country | (a) the country was the country of origin of each significant ingredient or significant component of the goods; and(b) all, or virtually all, processes involved in the production or manufacture happened in that country. |
| 3 | A representation as to the country of origin of goods by means of a logo specified in the regulations | (a) the goods have been substantially transformed in the country represented by the logo as the country of origin of the goods; and(b) the prescribed percentage of the cost of producing or manufacturing the goods as worked out under section 256 is attributable to production or manufacturing processes that happened in that country. |
| 4 | A representation that goods were grown in a particular country | (a) the country is the country that could, but for subsection (2), be represented, in accordance with this Part, as the country of origin of the goods, or the country of which the goods are the produce; and(b) each significant ingredient or significant component of the goods was grown in that country; and(c) all, or virtually all, processes involved in the production or manufacture happened in that country. |
| 5 | A representation that ingredients or components of goods were grown in a particular country | (a) the country is the country that could, but for subsection (2), be represented, in accordance with this Part, as the country of origin of the goods, or the country of which the goods are the produce; and(b) each ingredient or component that is claimed to be grown in that country was grown only in that country; and(c) each ingredient or component that is claimed to be grown in that country was processed only in that country; and(d) 50% or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country. |

Note:  The regulations may prescribe rules for determining the percentage of the total costs of production or manufacture of goods attributable to production or manufacturing processes that occurred in a particular country, see section 257.

(2) Despite subsection (1), this section does not apply to a representation of a kind referred to in item 4 or 5 in the first column of the table in that subsection if the representation is made together with another representation of a kind referred to in item 1 or 2 in that first column.

(3) Goods are 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.

(4) Without limiting subsection (3), the regulations:

 (a) may prescribe changes (whether in relation to particular classes of goods or otherwise) that are not fundamental changes for the purposes of that subsection; and

 (b) may include examples (in relation to particular classes of goods or otherwise) of changes which are fundamental changes for the purposes of that subsection.

(5) Item 2 of the table in subsection (1) applies to a representation that goods are the produce of a particular country whether the representation uses the words “product of”, “produce of” or any other grammatical variation of the word “produce”.

(6) The regulations made for the purposes of item 3 of the table in subsection (1) may, in relation to a specified logo, prescribe a percentage in the range of 51% to 100% as the percentage applicable to goods for the purposes of paragraph (b) in the second column of that item.

(7) Goods, or ingredients or components of goods, are grown in a country if they:

 (a) are materially increased in size or materially altered in substance in that country by natural development; or

 (b) germinated or otherwise arose in, or issued in, that country; or

 (c) 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.

(8) For the purposes of items 4 and 5 in the table in subsection (1) in relation to particular goods:

 (a) packaging materials are not treated as ingredients or components of the goods; and

 (b) disregard the weight of packaging materials in working out the weight of the goods.

(9) For the purposes of items 4 and 5 in the table in subsection (1) in relation to an ingredient or component that has been dried or concentrated by the evaporation of water, and to which water has been added to return the water content of the ingredient or component to no more than its natural level:

 (a) the weight of the water so added is included in the weight of the ingredient or component; and

 (b) the water so added is treated as having the same origin as the ingredient or component, regardless of its actual origin.

**256 Cost of producing or manufacturing goods**

(1) The cost of producing or manufacturing goods is worked out, for the purposes of section 255, by adding up the following amounts:

 (a) the amount of expenditure on materials in respect of the goods;

 (b) the amount of expenditure on labour in respect of the goods;

 (c) the amount of expenditure on overheads in respect of the goods;

 (d) each worked out in accordance with this table:

Table 2: Cost of producing or manufacturing goods

| **Cost of producing or manufacturing goods** |
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| **Item** | **This amount of expenditure:** | **is worked out as follows:** |
| 1 | Expenditure on materials in respect of the goods | The cost of materials used in the production or manufacture of the goods:(a) that is incurred by the manufacturer of the goods; and(b) that has not been prescribed by regulations made for the purposes of subsection (2)(a). |
| 2 | Expenditure on labour in respect of the goods | The sum of each labour cost:(a) that is incurred by the manufacturer of the goods; and(b) that relates to the production or manufacture of the goods; and(c) that can reasonably be allocated to the production or manufacture of the goods; and(d) that has not been prescribed by regulations made for the purposes of subsection (2)(b). |
| 3 | Expenditure on overheads in respect of the goods | The sum of each overhead cost:(a) that is incurred by the manufacturer of the goods; and(b) that relates to the production or manufacture of the goods; and(c) that can reasonably be allocated to the production or manufacture of the goods; and(d) that has not been prescribed by regulations made for the purposes of subsection (2)(c). |

(2) The regulations may, for the purposes of subsection (1), prescribe that:

(a) the cost of a particular material, or a part of such a cost; or

 (b) a particular labour cost, or a part of a labour cost; or

 (c) a particular overhead cost, or a part of an overhead cost;

 is not allowable in respect of goods, or classes of goods.

(3) The regulations may, for the purposes of subsection (1), prescribe the manner of working out:

 (a) the cost of a material, or part of the cost; or

 (b) a labour cost, or part of the cost; or

 (c) an overhead cost, or part of the cost.

**257 Rules for determining the percentage of costs of production or manufacture attributable to a country**

(1) Subject to subsection (2), the regulations may prescribe rules for determining, for the purposes of section 255, the percentage of the total cost of production or manufacture of goods attributable to production or manufacturing processes that occurred in a particular country.

(2) Rules prescribed under subsection (1) must not discriminate (whether favourably or unfavourably) between countries or classes of countries.

**258 Proceedings relating to false, misleading or deceptive conduct or representations**

If:

(a) proceedings are brought against a person in respect of section 18, 29(1)(a) or (k) or 151(1)(a) or (k); and

(b) the person seeks to rely on a provision of this Part, or of a regulation made for the purposes of a provision of this Part, in the proceedings;

the person bears an evidential burden in relation to the matters set out in the provision on which the person seeks to rely.