# SUBMISSION TO THE REVIEW OF FOOD LABELLING LAW & POLICY

**AUSTRALIAN MADE, AUSTRALIAN GROWN CAMPAIGN**

**MAY 2010**

**INTRODUCTION**

Australian Made Campaign Limited (AMCL) welcomes the opportunity to make this submission to the Food Labelling Review.

Our primary area of interest in the review is country of origin labelling of food, and we note that AMCL has made submissions to similar reviews in the past, including ANZFA in 2001 and the FRSC in 2003.

Consumers are increasingly concerned about the origins of the food they eat. Such concerns are driven by a number of factors – economic, health and safety, and environmental. AMCL's position is that:

- all food products should be required to carry a country of origin claim

- the Food Standards Code should continue to rely on the rules for country of origin claims set out in the Trade Practices Act and eventually in the new Australian Consumer Law

- in order to make a claim that a product is 'made in' a country, the product must be 'substantially transformed' in that country. AMCL believes that the definition of 'substantial transformation' needs to be made more exclusive in relation to food products, and that an administrative mechanism is required which will enable a company to obtain a ruling as to whether its product meets the criteria

- also, it should no longer be permitted to use qualified claims such as 'Made in Australia from imported and local ingredients' unless the product meets the tests for a 'Made in ...' claim.

We appreciate that the Review will have many thousands of submissions to consider, and have attempted to make our comments as brief as possible.

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**BACKGROUND – AUSTRALIAN MADE, AUSTRALIAN GROWN CAMPAIGN**

AMCL is the not-for-profit public company set up in 1999 to administer the Australian Made, Australian Grown (AMAG) logo. The logo, consisting of a stylised kangaroo inside a triangle, is a registered certification trade mark governed by a Code of Practice approved by the ACCC.

AMCL administers the logo in accordance with a Deed of Assignment and Management Deed with the federal government and reports annually to the Department of Industry, Innovation, Science and Resources on its operations.

AMCL's core funding is derived from licence fees paid by companies to use the logo. It receives no financial support from government for its core operations. DIISR currently provides some grant funding (matched dollar for dollar by AMCL) for a 3-year project to promote Australian products in export markets using the AMAG logo.

Since its inception in 1986 (by the federal Government), the logo has been available for use with two descriptors – 'Australian Made' and 'Product of Australia' – with compliance criteria consistent with sections 65AA – AN of the Trade Practices Act.

In 2007, the federal Government introduced the 'Australian Grown' descriptor for use on fresh produce and processed foods with a high Australian content. The rules governing the use of the AMAG logo were rewritten to accommodate this new label, and this was done in conjunction with the Department of Agriculture, Fisheries and Forestry, the Department of Innovation, Industry, Science and Research, the ACCC, and IP Australia. The result is that the term 'Australian Grown', whilst not currently defined in legislation, is defined when used in conjunction with the AMAG logo. (AMCL notes the proposed inclusion of a 'Grown in ...' defence in the Trade Practices Amendment (Australian Consumer Law) Bill (no. 2) 2010).

When used with the AMAG logo without qualification, 'Australian Grown' is equivalent to the 'Product of Australia' claim – that is, all the significant ingredients have been grown in Australia and all production or manufacturing processes have taken place in Australia.

When used with qualification, e.g. 'Australian Grown Potatoes', it indicates that at least 90% of the content (net weight) of the product is grown in Australia, and 100% of the named ingredient, in this instance potatoes, is grown here. An example of this would be frozen potato wedges made in Australia from Australian grown potatoes where some minor added ingredients (oils, spices, flavourings) are imported.

A copy of the Australian Made, Australian Grown Logo Code of Practice, including criteria for use of the logo at Rule 18, is attached.

Over 1600 companies are currently licensed to use the AMAG logo, with numbers growing strongly in recent years. 13% of licensees are in the food and beverage sector. The vast majority of AMAG licensees use the logo with the 'Australian Made' claim.

**COUNTRY OF ORIGIN LABELLING FOR FOOD**

As pointed out in the Review's Issues Paper, one of the primary purposes of food labelling is to provide consumers with enough information to enable them to make informed choices.

AMCL has been aware for some time of growing consumer concerns about the country of origin of fresh foods and of ingredients in processed food products. Drivers of these concerns include anxieties about food safety (as in the melamine in milk scandal) and environmental impact issues (food miles). In addition, many consumers wish to support the Australian economy and the country's farmers and fishermen by buying locally produced products whenever possible.

The Australian Grown label was created in response to these concerns of consumers and producers to provide a simple and effective method of identifying Australian produce, and has been enthusiastically taken up by major retailers including Coles, Woolworths, Aldi and, more recently, Franklins.

The Food Standards Code currently requires a country of origin claim to be made on packaged foods and unpackaged pork, seafood and fruit and vegetables. Fresh beef and chicken do not require a country of origin label, nor does food in the first group when mixed with food in the second group. This is inconsistent and confusing.

AMCL believes that if country of origin labelling is required, then for the benefit of both businesses and consumers, the rules should be consistent, clear and as simple as possible, with:

- one set of rules for all States and Territories
- one set of rules for all types of products (food and otherwise)
- rules to apply equally to all types of food products.

It is also important that rules for food labelling continue to be consistent with other federal laws in this area.

Currently the FSC relies on the country of origin provisions of the Trade Practices Act (TPA) for definitions of claims such as 'Made in Australia' and 'Product of Australia'. The new Australian Consumer Law (ACL), when finalised, will also include definitions for claims that products or ingredients are 'grown in' a country.

We do not support calls for mandatory country of origin labelling for all <u>ingredients</u> of food products because of the complexity involved and the costs to business of compliance. The new 'Grown in ...' representation to be defined in the ACL will provide a satisfactory framework for claims relating to the major ingredients of a product. The AMAG logo with the words 'Australian Grown' continues to provide a premium claim for products where at least 90% of the content by weight is grown in Australia.

Therefore our recommendation is that:

- the FSC (or equivalent) should require mandatory country of origin labelling of <u>all</u> food products, packaged or unpackaged; and
- the FSC should continue to rely on and be consistent with the TPA/ACL in its rules for country of origin claims.

**COUNTRY OF ORIGIN CLAIMS - TERMINOLOGY**

The Review's Issues Paper also raises the issue of consumer confusion/dissatisfaction with the terminology used to describe food manufactured in Australia, in particular, terms such as 'Made in Australia/Australian Made' and 'Product of Australia'.

As outlined in our submission to the Senate Economics Committee Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (no. 2) 2010, AMCL has serious concerns about the current rules for claims that a product is 'made in' a country.

The *Explanatory Memorandum* to the Bill discusses the background to the introduction of the current country of origin provisions set out in Part V, Division 1AA of the Trade Practices Act 1974 (TPA). *(Explanatory Memorandum, Chapter 16, pp 359-360)*

These provisions were introduced in order to provide "*clear, objective criteria against which to assess claims*" that a product was 'made in' or 'product of' a country. (*Explanatory Memorandum, Chapter 16, p.360)*

In particular, under the TPA a person can safely claim that a good was made in a country where:

- the good had been 'substantially transformed' in that country; and
- 50% or more of the cost of producing or manufacturing the good occurred in that country.

Substantial transformation is defined in the TPA as "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". *(TPA Part V, Division 1AA, Section 65AE(1))*

This definition and the safe harbour provisions are carried over into the new Bill essentially unchanged.

These provisions are also the basis of AMCL's criteria for use of the AMAG logo with the claim "Australian Made" or equivalent.

AMCL's principal concern in this area is that this definition of substantial transformation is very far from providing a clear and objective criterion against which to assess claims. Although the ACCC has published a series of 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*" *(ACCC. Country of origin claims and the Trade Practices Act. 2006.p.2)* and such interpretation occurs on a case by case basis.

There is currently no mechanism by which a manufacturer may obtain a definitive answer as to whether it may safely claim that its product is 'made in Australia'. A company may hesitate to make a country of origin claim for fear that competitors will challenge its validity.

This also places AMCL in the invidious position of administering a code of practice which sets out compliance criteria for goods, but being unable to objectively determine whether a particular good meets the criteria.

There are a number of ways in which this situation might be improved:

1. Provide a simple administrative mechanism whereby a manufacturer who is uncertain as to whether it may make a country of origin claim in respect of a good is able to apply for and receive a ruling on the matter, for an appropriate fee and within a reasonable timeframe.

2. Consider adopting an alternative definition of substantial transformation, along the lines of that used for Rules of Origin (RoO) in Free Trade Agreements. Rules based on the Change of Tariff Classification (CTC) approach, such as those set out in the ANZCERTA and TAFTA agreements, provide a more objective method for determining in what country a good is substantially transformed.

3. If relying on the existing definition, use the power set out in the TPA and the new Bill to make regulations which prescribe changes which are considered to be (or not to be) fundamental changes.

4. Again, if relying on the existing definition, make available (for example, on a website) a library of case law detailing previous judicial decisions.

AMCL believes that the adoption of step 1 above, either in conjunction with step 2 or steps 3 and 4, would provide much greater certainty and reduce confusion in this area.

**SUBSTANTIAL TRANSFORMATION AND FOOD PRODUCTS**

AMAG currently has a proposal before the ACCC to amend its Code of Practice in order to, among other things, exclude certain processes from the definition of substantial transformation.

The 'Australian Made' claim, as currently defined in the TPA and consequently the Food Standards Code, relates to manufacturing processes and costs of production, rather than content. A food product which contains a high percentage of imported ingredients can still legally be described as 'Australian Made', provided it meets the twin criteria of 'substantial transformation' in Australia and at least 50% of costs incurred locally.

Our major area of concern is in the interpretation of the term 'substantial transformation' in regard to food products, particularly as set out in the ACCC booklet '*Food and beverage industry: country of origin guidelines to the Trade Practices Act*'. Under these guidelines, mixing, homogenisation, coating and curing are all processes "*likely to be considered as substantial transformation"*.

Thus, homogenised milk, mixed diced vegetables, blended fruit juices, battered fish fillets, crumbed prawns and ham and bacon may all qualify as 'Australian Made' **even though all the major ingredients may be imported**, as long as at least 50% of the cost of production is incurred in Australia.

As noted above, interpretation of the law ultimately rests with the courts and judges often take into consideration whether the average consumer might be deceived by product labelling. AMCL believes that the average consumer, seeing the words 'Australian Made' on such a product, might reasonably believe that the product was made from ingredients of Australian origin, certainly the major or characterising ingredients. For this reason, we have moved to specifically exclude processes such as crumbing, curing and juicing from the definition of substantial transformation for the purposes of the AMAG Code of Practice.

AMCL recommends that, if the current system of determining substantial transformation is retained, the Government use the power set out in the TPA and the new Bill to make regulations which prescribe changes which are considered to be (or not to be) fundamental changes, and that it uses these regulations to tighten up the existing ACCC guidelines on substantial transformation in relation to food products.

In the event that a CTC system is introduced as the foundation of a new approach to determining substantial transformation, then a set of rules should be established to support this system, as has been done with the Free Trade Agreements.

**QUALIFIED CLAIMS**

The ACCC's country of origin guidelines state that where a company is unable to make an unqualified claim for their product, such as 'Made in Australia', they may make a qualified claim. *(ACCC. Country of origin claims and the Trade Practices Act. 2006.p.18)*

Qualified claims do not have to meet the substantial transformation or 50% content tests.

A qualified claim may take the form "Made in Australia from imported and local ingredients".

AMAG takes the view that where an unqualified 'Made in Australia' claim cannot be supported, the qualified claim should not include the words 'Made in Australia'. This practice is illogical and confusing for both consumers and manufacturers. The words 'Made in Australia' or 'Australian Made' should be reserved exclusively for products which can meet the tests set out in the legislation.

AMCL recommends that the TPA/ACL should include specific provisions on use and wording of qualified claims and that these should include a prohibition on the use of the words 'Made in ...' or equivalent where the product does not meet the criteria for an unqualified 'Made in ...' claim.

**SUMMARY OF RECOMMENDATIONS:**

1. The FSC (or equivalent) should require mandatory country of origin labelling of all food products, packaged or unpackaged.

2. The FSC should continue to rely on and be consistent with the TPA/ACL in its rules for country of origin claims.

3. Under the TPA/ACL, Federal Government should provide a simple administrative mechanism whereby a manufacturer who is uncertain as to whether it may make a country of origin claim in respect of a good is able to apply for and receive a ruling on the matter, for an appropriate fee and within a reasonable timeframe.

4. Under the TPA/ACL, Federal Government should make regulations which prescribe changes which are considered to be (or not to be) fundamental changes, and that it uses these regulations to tighten up the existing ACCC guidelines on substantial transformation in relation to food products.

5. The TPA/ACL should include specific provisions on use and wording of qualified claims and that these should include a prohibition on the use of the words 'Made in ...' or equivalent where the product does not meet the criteria for an unqualified 'Made in ...' claim.