



AUSTRALIAN MADE

PRODUCT OF AUSTRALIA

AUSTRALIAN GROWN

SUBMISSION TO SENATE ECONOMICS COMMITTEE

**INQUIRY INTO THE TRADE PRACTICES AMENDMENT
(AUSTRALIAN CONSUMER LAW) BILL (NO. 2) 2010**

AUSTRALIAN MADE, AUSTRALIAN GROWN CAMPAIGN

APRIL 2010

BACKGROUND

The Australian Made, Australian Grown (AMAG) Campaign supports Australian manufacturers and producers by promoting Australian made and grown products in Australia and overseas through use of the Australian Made, Australian Grown 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. It was launched in 1986 by the Hawke Federal Government.

Over 1600 companies, large and small, are currently licensed to use the AMAG logo, with numbers growing strongly in recent years. Over 10,000 products are now licensed to carry the logo.

The logo is the most used country of origin symbol in Australia, recognised by 94% of Australian consumers and trusted by 85% over any other country of origin identifier.

The campaign and the logo are administered by Australian Made Campaign Limited (AMCL), a not-for-profit public company set up in 1999. (Between 1986 and 1996 this function was carried out by the Advance Australia Foundation.)

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 introduction in 1986 the logo has been available for use with two descriptors – 'Australian Made' and 'Product of Australia' – with compliance criteria consistent with the country of origin provisions of the Trade Practices Act.

In early 2007, as a result of an initiative of the Federal Government, the rules governing the use of the AMAG logo were rewritten to accommodate an 'Australian Grown' descriptor for use on fresh produce and processed foods with a high Australian content. 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. DAFF then funded a campaign (delivered by AMAG throughout 2007 and 2008) to establish the Australian Grown descriptor in the marketplace.

This preceded the current government's 2007 pre-election promise to introduce a new "Grown in .." defence to the country of origin provisions of the Trade Practices Act.

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

TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (NO. 2) 2010

AMAG's principal area of interest in the Bill is the country of origin provisions set out in Schedule 1, part 5-3, and our submission will focus on these, in particular issues surrounding:

- Substantial transformation
- The "Grown in" defence
- Qualified claims
- Prescribed logos

SUBSTANTIAL TRANSFORMATION

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 AMAG's criteria for use of the AMAG logo with the claim "Australian Made" or equivalent.

AMAG'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 AMAG 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.

AMAG believes that the adoption of steps 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.

AMAG 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 by buying locally produced products whenever possible.

The Australian Grown descriptor used with the AMAG logo 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 supermarkets including Coles, Woolworths, Aldi and, more recently, Franklins.

However, we acknowledge that some tension arises out of the differing meanings of the representations used with the logo.

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. AMAG 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.

AMAG 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 FTAs.

THE ‘GROWN IN’ DEFENCE

AMAG welcomes the Government’s decision to act on its 2007 election promise to introduce a new “Grown in ..” defence to the country of origin provisions of the Trade Practices Act.

We support the provisions in section 255(1) item 4 for an unqualified claim that goods were grown in a particular country. These provisions are equivalent to the criteria set out in the AMAG Code of Practice, Rule 18(c) for claims that a product is “Australian Grown”.

We do have some concerns however with item 5, relating to representations about the origin of ingredients or components of a good.

The criteria for the claim set out in the Bill are substantially based on the criteria set out in the AMAG Code of Practice, Rule 18(d), however the threshold for total locally grown content is considerably lower in the Bill (50% by weight as compared to 90% in the AMAG rules).

In addition, the Bill does not set a minimum content level for the specified ingredients (AMAG rules specify that at least 50% of the total weight of the product must consist of the specified ingredient/s).

Thus an orange and mango juice drink may claim that it contains “Australian Grown Mangoes”, while consisting of 1% mango juice, 49% water and 50% imported ingredients.

AMAG’s view is that this would be unacceptable to consumers.

The criteria in the AMAG Code of Practice were developed by a Government working party chaired by the then Minister for Agriculture, Fisheries and Forestry. It had significant industry and consumer representation on it as well.

Accordingly, AMAG does not support this proposal, and contends that criteria under section 255(1) item 5 should include a provision that the specified ingredient/s should make up at least 50% of the weight of the product, and that 90% of the total weight of the product should be grown in the specified country.

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.

AMAG recommends that the new Bill include specific provisions on use and wording of qualified claims.

PRESCRIBED LOGOS

Both the TPA and the new Bill provide for regulations to be made to prescribe a logo for use as a representation of country of origin where the level of cost of production is 51% or greater.

AMAG is seeking to have the AMAG logo prescribed as a country of origin representation, on the grounds that it is widely regarded as being an ‘official’ symbol for Australian products:

- the logo was created by the Federal Government in 1986 and partly funded by the Government for 10 years after that.
- it is administered by AMCL in accordance with a Deed of Assignment and Management Deed with the Federal Government which give the Government residual ownership (“Step-in rights”).
- the ‘Australian Grown’ descriptor and criteria were introduced in conjunction with the Government in 2007.

- it is recognised by 94% of Australian consumers and trusted by 85% over any other country of origin identifier.
- businesses and consumers already believe the logo is administered and funded by government.
- it has been promoted as an export tool in overseas markets for the past five years via an export project partly funded by the Federal Government.

As the AMAG Logo Code of Practice reflects the safe harbour provisions of the TPA for a 'Made in Australia' claim, the minimum local cost of production is set at 50%. It would be necessary to either raise this to 51% or reduce the minimum cost provision in the Bill to 50%.

AMAG recommends that the Bill be amended to reduce the minimum prescribed percentage of cost to 50% for a prescribed logo, the use of which is a 'Made in Australia' claim, and that the Government endorse the AMAG logo with the words 'Australian Made' under the triangle as a prescribed logo under the new legislation.

In the area of food products however, research has shown that consumers are principally concerned about the origin of the ingredients of the product. This is why the AMAG logo has a minimum 90% Australian content requirement for use of the logo with the representation 'Australian Grown'.

AMAG's experience of dealing with consumer issues leads us to believe that the safe harbour provisions should be more closely aligned with consumer expectations, particularly in the area of food.

AMAG further recommends that the Bill be amended to prescribe a minimum content requirement (% by weight) of at least 90%, for a prescribed logo, the use of which is a claim that ingredients or components of a good were grown in Australia, and that the Government endorse the AMAG logo with the words 'Australian Grown' under the triangle as a prescribed logo under the new legislation.

Use of maps and flags as de facto country of origin claims

Flags and maps are often used on products with claims such as 'Proudly Australian', 'Australian Owned' or 'Designed in Australia' and may confuse consumers as to the country of origin of the product.

It is our recommendation that the Australian flag and the map of Australia, when used on products, should be declared prescribed logos, the use of which is a 'Made in Australia' claim, to ensure that products carrying such symbols meet the minimum safe harbour requirements for such a claim.

SUMMARY OF RECOMMENDATIONS

AMAG recommends that the following steps be taken:

1. Provision of a simple administrative mechanism whereby a manufacturer who is uncertain as to whether he 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 in a reasonable timeframe.
2. Consideration be given to the adoption of an alternative definition of substantial transformation, such as a set of Rules of Origin (RoO) based on the Change of Tariff

Classification (CTC) approach, in order to provide an objective method for determining in what country a good is substantially transformed.

3. 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.
4. The proposal to introduce a safe harbour provision into the TPA for claims that ingredients or components were grown in a particular country include a provision that at least 90% by weight of the product must be ingredients grown in that country, and at least 50% by weight of the product consist of the specified ingredient/s.
5. Incorporation of specific provisions on use and wording of qualified claims, including that a qualified claim should not include the words 'Made in ...'.
6. Amend the Bill to reduce the minimum prescribed percentage of cost to 50% for a prescribed logo, the use of which is a 'Made in Australia' claim, and that the Government endorse the AMAG logo with the words 'Australian Made' under the triangle as a prescribed logo for this purpose.
7. Amend the Bill to prescribe a minimum content requirement (% by weight) of at least 90%, for a prescribed logo, the use of which is a claim that ingredients or components of a good were grown in Australia, and that the Government endorse the AMAG logo with the words 'Australian Grown' under the triangle as a prescribed logo for this purpose.
8. The Australian flag and the map of Australia, when used on products, should be declared prescribed logos, the use of which is a 'Made in Australia' claim.

CONCLUDING REMARKS

This Bill is an opportunity for significant improvements to the law relating to country of origin labelling in this country – an opportunity which is not likely to come again in the near future.

AMAG believes that, rather than adopt a hasty, cut-and-paste approach to the new legislation, it is important to take the time to consider what has and hasn't worked under the current regime, and take steps to rectify any problem areas identified.

In particular, a new approach to the concept of substantial transformation is essential in order to reduce confusion on the part of both business and consumers.

AMAG looks forward to the opportunity of meeting with the Committee to more fully address these issues.

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 21 April 2010