



Law Council
OF AUSTRALIA

Business Law Section

Committee Secretary
House of Representatives Standing Committee on
Agriculture and Industry
P O Box 6021
Parliament House
Canberra ACT 2600
Via email: agind.reps@aph.gov.au

9 May 2014

Dear Sir or Madam,

Submission to the House of Representatives Agriculture and Industry Committee Inquiry into Country of Origin Food Labelling (CoOL)

Introduction and Executive Summary

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) appreciates the opportunity to respond to the terms of reference released on 27 March 2014 (**Terms of Reference**).
2. The Committee's comments are, however, restricted to the third of the Terms of Reference namely whether improvements could be made, including to simplify the current system and/or reduce the compliance burden. The Committee's comments in summary are set out below. The full comments are outlined in this submission.
3. The Committee believes that:
 - (i) food should be treated no differently to other products in terms of claims such as "Made in ..." or "Product of...". The ACL provides guidance regarding these different country of origin claims through its "safe harbour" defences in Part 5-3 of the Australian Consumer Law (in Schedule 2 of the Competition and Consumer Act) (**ACL**). The ACL is a law of broad application that was intended by Parliament to apply equally to all products and industries in Australia and the Committee is not aware of any case having been made out that would justify treating CoOL issues for food products any differently.
 - (ii) there should be no change to the safe harbour defences in Part 5-3 of the ACL and that they should continue to apply to food products in the same way as all other products.

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- (iii) a separate safe harbour defence should not be established in relation to claims of “Made in from local and imported product” of “Made in ... from imported and local product”. The Committee believes that such claims can be adequately dealt with under sections 18 and 29 of the ACL.

Response to Terms of Reference

4. Under the Food Standards Code (as adopted through State and Territory health or food legislation) (**Code**) pre-packaged foods as well as some fresh foods are required to be labelled with a statement which identifies:
 - (i) the country where the food was made, produced or grown; or
 - (ii) the country where the food was manufactured or packaged and that the food is a mix of ingredients imported into that country or a mix of local and imported ingredients.
5. The positive labelling requirement under the Code runs contrary to the general position under the ACL. Under the ACL there is no obligation to make any representation regarding country of origin, but if any representation is made it must not be false, or mislead or deceive or be likely to mislead or deceive.
6. Notwithstanding the positive requirement for CoOL for food, the Committee believes that food should be treated no differently to other products in terms of claims such as “Made in ...” or “Product of...”.
7. From a consumer standpoint, the terms “Made in Australia”, “Product of Australia” and “Grown in Australia” sound similar, but their technical meanings are considerably different. The ACL provides guidance regarding these different country of origin claims through its “safe harbour” defences in Part 5-3 of the ACL. The safe harbour provisions also impose stricter requirements for “Product of...” and “Grown in...” claims compared to “Made in...” claims.
8. For claims of “Made in...” the safe harbour defence under the ACL requires the goods to satisfy two separate criteria:
 - (i) the goods must be substantially transformed in the country of origin being claimed (**substantial transformation test**) and
 - (ii) 50 per cent or more of the total costs to produce or manufacture the goods must have occurred in that country (**cost of production/manufacture test**).

The concept of ‘substantial transformation’ is not defined in the ACL, but is generally seen as involving a fundamental change in the form, appearance or nature so that the finished good would be regarded as a new and different good. The ACL provides for regulations to prescribe particular processes that would or would not constitute substantial transformation, although none have been promulgated to date.

9. For the higher level claim of “Product of” a particular country, the safe harbour defence under the ACL requires the goods to meet the following requirements:
 - (i) the country, was the country of origin of each significant ingredient or significant component of the goods and

- (ii) all, or virtually all, processes involved in the production or manufacture happened in that country.

The question of 'significant ingredient' or 'significant component' is not necessarily related to the percentage that the ingredient or component makes up of the goods in question.

10. The Committee believes there should be no change to the safe harbour defences in Part 5-3 of the ACL and that they should continue to apply to food products in the same way as all other products.
11. Where the Committee believes there is most potential for conflict between the current CoOL requirements of the Code and the ACL, is in circumstances where the food product does not clearly meet the requirements of the safe harbor defences for with "Product of ..." or "Made In...". In these circumstances, the Committee understands that expressions such as "**Made in... from local and imported ingredients**" or "**Made in ... from imported and local ingredients**" are often used by businesses to ensure that there is a CoOL statement for the food. These statements do not have the protection of the safe harbour defences in Part 5-3 of the ACL. As the Committee sees it, there are some products that are not able to be accurately described as made in any one country, yet under the Code they must have such a description applied to them.
12. The Committee is concerned that through the use of such claims as "Made in... from local and imported ingredients" or "Made in ... from imported and local ingredients" consumers may be misled. For example:
 - where the business mixes a number of imported ingredients in Australia to formulate the food product, but where there is no substantial transformation or where the local costs are less than 50% of the total cost of the food. Under the safe harbour defences this would not qualify for a "Made in Australia" claim, so to say that it was "Made in Australia from local and imported ingredients" would be misleading
 - where the proportion of local versus imported product changes during the course of the year (for example due to seasonality) and the business uses a "Made in ... from local and imported ingredients in order to avoid the cost of having to change the CoOI statement on the packaging.
13. The Committee does not believe that a separate safe harbour defence should be established under the ACL in relation to such claims as it would undermine the now well established requirements for use of any "made in" claim under the ACL. The Committee believes that from the perspective of protecting consumers and competitors from false or misleading claims, the existing protections under sections 18 and 29 of the ACL are sufficient – as with any product other than food.
14. For products that do not meet the definitions of "Made in..." or "Product of...", if CoOL is required under the Code, then one option to look at would be to require the country of origin of each major/significant ingredient should be disclosed. The Committee is not able to comment on the compliance costs that this would entail, although the cost may encourage business to look more closely at how they would be able to meet a "Made in..." or "Product of..." claim and so avoid the need for such "fall back" CoOL.

15. If you have any questions regarding this submission, in the first instance, please contact the Committee Chair, Michael Corrigan, on 02-9353 4000 or via email: mcorrigan@claytonutz.com.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Teresa Dyson". The signature is fluid and cursive, with the first name "Teresa" and last name "Dyson" clearly distinguishable.

Teresa Dyson
Deputy Chairman, Business Law Section