



**Australian Government**  
**Department of Industry,  
Innovation and Science**



## **Country of Origin Labelling Consultation package - Item 6**

### **Draft safe harbour defence amendments Explanatory and discussion paper**

Country of Origin Labelling Taskforce  
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<https://consult.industry.gov.au/cool-taskforce/cool>

# Country of Origin Labelling Consultation Package Item 6

## Draft Safe harbour defence amendments - Explanatory and discussion paper

This document should be read in conjunction with other elements of the Country of Origin Labelling Reform Consultation Package, particularly the Exposure Draft Bill to amend the Australian Consumer Law country of origin safe harbour defences (Consultation Package Item 5). Other elements of the package are the Consultation Regulation Impact Statement (RIS) (Consultation Package Item 1), Consultation Draft Information Standard (Consultation Package Item 2) and its associated explanatory and discussion paper (see Consultation Package Item 3), and the proposed changes to the Australian Made Australian Grown Certification Trade Mark (Consultation Package Item 4).

### 1. Background

#### Operation of existing law

The Australian Consumer Law (ACL – Schedule 2 to the *Competition and Consumer Act 2010*) prohibits false or misleading representations regarding the origin of goods [including food products, most of which must be labelled with their country of origin under the Australia New Zealand Food Standards Code (the Food Standards Code) and/or the Commerce (Import) Regulations 1940].

To provide certainty for businesses, Part 5-3 of the ACL provides ‘safe harbour’ defences for country of origin claims where goods meet certain criteria. If goods satisfy the relevant criteria, the business is deemed by section 255 of the ACL to not have engaged in misleading or deceptive conduct or made a false or misleading representation under the ACL.

Goods that would meet the safe harbour defences if claimed to be Australian would also meet the rules for using the Australian Made Australian Grown (AMAG) logo. Where businesses meet these rules, they may apply to Australian Made Campaign Limited (AMCL) to use the logo. AMCL is a not-for-profit private company that owns and manages the AMAG logo under a deed with the Australian Government.

#### Need for change

The objective of country of origin labelling (CoOL) is to provide consumers with origin information so they can make informed purchasing decisions in line with their personal preferences. Inquiries and research conducted in recent years show that the current framework is largely ineffective in meeting its objectives, particularly for food. Some origin labels and rules are still unclear, confusing or unhelpful to consumers and business, despite the release of improved ACL guidance material on CoOL in October 2012 and April 2014.

#### Proposed reforms

The Commonwealth Government has proposed a package of reforms to address the flaws in the current CoOL framework. A Consultation Regulation Impact Statement (RIS) has been drafted to inform the further development of these proposed reforms (Consultation Package Item 1).

The proposed reforms include changes to the Part 5-3 ACL, which appear in the draft Competition and Consumer (Country of Origin) Bill, and are outlined below. The purpose of these changes is to simplify and clarify the country of origin safe harbour defences so they are better aligned with consumer expectations and impose less regulatory cost on business across all sectors.

The proposed changes will:

- make it clearer that that minor processes such as packaging, slicing or canning would not be sufficient to justify origin claims like ‘made in’;
- remove unnecessarily burdensome or redundant provisions; and
- amend and align remaining provisions with the new Information Standard.

Inclusion of changes to the safe harbour defences in the package of reforms is generally supported by all industry sectors. Consumers are also expected to accept the changes to the safe harbour defences. This is because the proposed new Information Standard on CoOL for food will require the inclusion of the percentage by weight of Australian ingredients on labels for most Australian food. Research shows that this is the most important piece of origin information for consumers when it comes to food.

## Related proposals

The proposed changes to the ACL safe harbour defences form part of a package of proposed country of origin labelling reforms agreed and announced by Government on 21 July 2015, including:

- The introduction of a new Information Standard for CoOL for food, which will require businesses to provide clearer information about the origin of food that consumers can readily understand and trust when making their purchasing decisions (with definitions aligned with those in the ACL safe harbour defences);
- Removal of CoOL provisions in the Food Standards Code;
- Changes to the Commerce (Imports) Regulations 1940 country of origin marking provisions to align them with the new Information Standard and the revised country of origin safe harbour defences (progress on the proposed changes to these regulations can be found on the Department of Immigration and Border Protection website at <http://www.border.gov.au/about/reports-publications/discussion-papers-submissions/review-ci-regulations>); and
- Changes to the AMAG logo arrangements (including alignment of the Code of Practice for the revised Certification Trade Mark to remove food for sale in Australia and reflect the revised ACL safe harbour defences).

## 2. Who is affected?

The proposed changes to the ACL are aimed at simplifying and clarifying the safe harbour defences for country of origin claims on all goods sold in Australia, including both food and non-food products, whether imported or locally produced. The proposed changes should make it easier to work out when country or origin claims for goods would not be false or misleading to Australian consumers. The proposed changes could affect anyone who offers goods for sale in Australia, includes primary producers, manufacturers, importers, wholesalers, distributors and retailers.

## 3. Discussion points

At the end of this document, there are a few questions about what should or should not be considered to be substantial transformation for the purposes of making country of origin claims like ‘made in’, as set out in **Attachment A**. Please do not restrict your comments to these questions. You may comment on any of the proposed changes in the draft Bill.

Also, additional questions on the proposed reforms can be found in the Consultation RIS (Consultation Package Item 1), the explanatory and discussion paper accompanying the Consultation Draft Information Standard (Consultation Package Item 3), and the Proposed Changes to the Australian Made Australian Grown Certification Trade Mark (Consultation Package Item 4).

We would appreciate it if you could respond to as many questions as you can so that your views can be taken into account in finalising the package of reforms.

## 4. Next steps

Once this round of consultations is completed, the proposed reforms will be finalised, and will be put to relevant Commonwealth, state and territory Ministerial forums for agreement. Should the final proposal be agreed, legislation will be introduced to give effect to the reforms. At this stage, the legislation is expected to commence in mid-2016.

## 5. Draft ACL changes

To simplify and clarify the ACL country of origin safe harbour defences, and align them with a new Information Standard for food, the draft Bill includes the following changes:

- A. Item 4 of the origin table in subsection 255(1), which applies to goods claimed to be grown in a particular country, has been moved to Item 1, to reflect the specific nature of this claim.
  - This item has also been modified to remove confusing provisions that require the requirements of other defences to be met, provided claims covered by those defences are not made in addition to the 'grown in' claim (see **Change F**).
  - Requirements that virtually all the ingredients/components and processes are from the country claimed will be retained
- B. Item 2 of the origin table in subsection 255(1), which applies to goods claimed to be 'produced in' a particular country, will remain essentially unchanged.
- C. Item 1 of the origin table in subsection 255(1), which applies to all other origin claims (including 'Made in'), has been moved to Item 3 as a fall back defence, and has been clarified and simplified.
  - It has been made clearer that this item applies to claims that goods are made or manufactured in a particular country (as well as to any other claims, except 'grown in' and 'produced in').
  - Requirement (a) for this item, which requires the goods to be substantially transformed in the country claimed, has been amended so that the goods must undergo their last substantial transformation in the country claimed. The meaning of 'substantial transformation' will also be clarified (see **Change G**).
  - Requirement (b) for this item, which requires goods to meet a 50% production cost test, has been removed. This requirement is arbitrary, burdensome for business to assess compliance with, and does not address consumer expectations very well. This means that it has been costly for business to try to meet this requirement, and that meeting the requirement has made little difference to whether a consumer finds a claim misleading.
  - Consumers are more concerned about the extent to which goods have been processed in the country claimed and, in the case of Australian food, the proportion of local ingredients. Once 'substantial transformation for the purposes of requirement (a) is clarified (see

**Change G**) and the Information Standard is introduced, an additional requirement for a 50 per cent production cost test will not be needed.

- D. Items 3 and 5 of the origin table in subsection 255(1) have been removed.
- Item 3 applies to goods that qualify for a logo requiring goods to meet a minimum 51 per cent production cost, subject to regulations – there is no demand for such a logo and no regulations have ever been made, so item 3 has never been used.
  - Item 5 applies to claims that nominated ingredients or components were ‘grown in’ a particular country – item 5 is rarely used for non-food products, and will not be needed for food products once the new Information Standard is introduced.
- E. The Note to the table in subsection 255(1) has been removed. This note references section 257 and regulations regarding the calculation of production costs. As requirement (b) in item 1 (see **Change C**) and section 257 (see **Change M**) have been removed, the note is no longer needed.
- F. Current subsection 255(2) has been removed. This provision stops ‘grown in’ product and ‘grown in’ ingredient/component claims from being made at the same time as other claims. The ‘grown in’ ingredient defence has been removed (see **Change D**), and there is no need to stop ‘grown in’ product claims from being made at the same time as other claims – because goods that meet the ‘grown in’ product defence would also meet the requirements applicable to other defences.
- G. The definition of ‘substantially transformed’ in current subsection 255(3) has been replaced by a new definition in a new subsection 255(2) for the purposes of new item 3 (see **Change C**).
- The new definition reflects other domestic and international provisions that rely on the concept of substantial transformation as a means of establishing origin, such as World Trade Organization and free trade agreements, tariff concession and anti-dumping legislation, and CoOL provisions used in other countries.
  - The new definition also tries to more clearly reflect the degree of transformation that consumers believe to be sufficient to confer origin, so that businesses are provided with greater clarity about the sorts of country of origin representations that are most likely to be accepted and trusted by consumers.
  - At the heart of the new definition is that, to be considered as substantially transformed in a country, goods would either have to meet the requirements for ‘produced’ or ‘grown’ claims (ie be wholly obtained, or almost wholly obtained, in the country claimed), or to have undergone one or more processes that made them fundamentally different from all of the imported inputs used to manufacture them.
  - The meaning of ‘substantial transformation’ will be adopted across the whole CoOL framework, including for the purposes of ‘made in’ labels under the new Information Standard, the revised Commerce (Imports) Regulations 1940 and the revised code of practice for the Australian Made Australian Grown logo for non-food products.
- H. Current subsection 255(4) allows regulations to be prescribed to ensure compliance with proposed lists of processes that do or do not constitute substantial transformation for the purposes of current subsection 255(3). This provision has been moved to new subsection 255(3) and amended to reflect the new definition of substantial transformation (see **Change G**).
- Lists of processes that do or do not constitute substantial transformation are being considered. As an alternative to regulation, these lists could be in guidance material (see also **Attachment A**).

- I. Current subsection 255(6) allows regulations to be made for the purposes of a logo permissible under current item 3 in the origin table in subsection 255(1). Any regulations made would require a production cost test above 51 per cent to be prescribed. With the removal of item 3 (see **Change D**), a provision allowing regulations to be made for the purposes of that item is no longer needed.
- J. Current subsection 255(7), which effectively defines 'grown in', has been moved to new subsection 255(4), but otherwise remains unchanged.
- K. Current 255(8), which provides for the treatment of packaging for the purposes of 'grown in' claims, has been moved to new subsection 255(5). It has also been amended to remove the reference to current item 5 in the origin table in subsection 255(1) for grown in ingredients/components (which has also been removed – see **Change D**). Paragraph (b) has also been removed, as it deals with how to treat the weight of packaging for the purposes of current item 5.
- L. Current subsection 255(9) provides for the treatment of water used to reconstitute other ingredients/components for the purposes of 'grown in' claims. This subsection has been moved to new subsection 255(6), and has been amended to remove reference to item 5 in the origin table in subsection 255(1) (which has also been removed – see **Change D**) – as well as paragraph (a), which deals with the weight of water for the purposes of item 5.
- M. Sections 256 and 257, dealing with the calculation of production costs are no longer needed with the removal of requirement (b) in current item 1 in the origin table in subsection 255(1) (see **Change C**).

A need for a new safe harbour defence for the Information Standard (to make it clear that foods carrying labels specifically required or permitted by the Standard are not false or misleading) is still under consideration.

## 6. Application, savings and transitionals

At this stage, no application, savings or transitional provisions for the ACL safe harbour defences are proposed. It is envisaged that products currently labelled in accordance with the existing ACL country of origin safe harbour defences (including those also labelled in accordance with the CoOL provisions in the Food Code and the AMAG logo) will still comply with those defences once they are amended.

This position may need to be revisited once stakeholders have the opportunity to comment on the proposed changes (see **Section 7** below).

The new Information Standard will include its own application, savings and transitional provisions for food products labelled in accordance with the CoOL provisions of the Food Code and with the AMAG Code of Practice.

## 7. Consultation questions

Attachment A to the Consultation RIS (Consultation Package Item 1) includes a number of questions about the potential impact of the proposed reforms. Questions 13 to 16 and 29 to 31 specifically address the impact on both food and non-food businesses of the current safe harbour defences, as well as the impact of the proposed changes to those defences. Other questions are posed in the explanatory and discussion paper that accompanies the Consultation Draft Information Standard. Section 8 of that paper explores the link between the proposed changes to the safe harbour defences

and the statements that can be made under the Information Standard. The questions below are effectively reproduced under that Section.

The following questions relate to the lists of changes and processes that are or are not considered to be substantial transformation, as set out in **Attachment A**.

1. Do you agree with the list of changes and processes that should or should not be considered as substantial transformation? Why?
2. What other changes or processes do you think are or are not sufficiently transformative to warrant a change in the origin of a product that incorporates imported ingredients or components? Why?
3. Should the lists of changes and processes that are or are not substantial transformation be included in regulations, or should they be in guidance material? Why?

We would appreciate it if you could provide us with feedback on as many of the questions in Country of Origin Labelling Consultation Package as you can.

# Attachment A - Australian Consumer Law – Country of Origin Safe Harbour Defences

## Substantial transformation lists

### Background

Submissions to inquiries and research indicate that there are flaws in Australia's country of origin labelling framework. Reforms are being proposed to address those flaws. While the primary focus has to date been on issues associated with food, consideration is being given to simplifying and clarifying provisions of the Australian Consumer Law (ACL) that apply more broadly.

Two main issues with the ACL safe harbour defences were identified in the recent inquiries:

- the substantial transformation test is vague, leading some to believe that food which is only packaged or minimally processed in a country can be labelled as 'Made in' that country;
- the 50 per cent production cost test in the Australian Consumer Law defence for most country of origin claims is an unnecessary burden on business and means little to consumers.

In June 2015, the Department of Industry and Science invited industry views on the impacts on business of proposed changes to the ACL to address these issues. These proposals were aimed at reducing the regulatory burden for all sectors by making it easier to assess compliance with safe harbour defences.

Feedback from industry across a range of sectors showed strong support for removing the 50 per cent production cost test, provided the substantial transformation test was clarified through further consultation with industry.

The proposal to clarify substantial transformation involves minor changes to the definition and to introduce lists of changes/processes that are/are not considered to be substantial transformation.

The proposed changes to the definition of substantial transformation are designed to reflect:

- other domestic and international provisions that rely on the concept of substantial transformation as a means of establishing origin, such as World Trade Organization and free trade agreements, tariff concession and anti-dumping legislation, and CoOL provisions used in other countries; and
- the degree of transformation that consumers believe to be sufficient to confer origin, so that businesses are provided with greater clarity about the sorts of country of origin representations that would not mislead or deceive consumers.

The proposed definition of 'last substantial transformation' aims to more clearly reflect the degree of transformation that consumers believe to be sufficient to confer origin, so that businesses are provided with greater clarity about the sorts of country of origin representations that are most likely to be accepted and trusted by consumers. The new definition also aims to reflect relevant domestic and international approaches to determining origin, such as World Trade Organization and free trade agreements, tariff concession and anti-dumping legislation, and CoOL provisions used in other countries.

At the heart of the new definition is that, to be considered as substantially transformed in a country, goods would either have to meet the requirements for 'produced' or 'grown' claims (ie be wholly obtained, or almost wholly obtained, in the country claimed), or to have undergone one or more processes that made them fundamentally different from all of the imported inputs used to manufacture them.



The meaning of 'substantial transformation' will be adopted across the whole CoOL framework, including for the purposes of 'made in' labels under the proposed new Information Standard for food, the revised Commerce (Imports) Regulations 1940 and the revised code of practice for the Australian Made Australian Grown logo for non-food products.

Tables A and B provide lists of changes/processes that are or are not considered to be substantial transformation based on this concept. These lists are based predominantly on existing guidance material. Consideration is being given to including these lists either in updated guidance material or in regulation.

**Table A. Processes or changes considered to be substantial transformation**

#	Product	Local ingredient/ component	Imported ingredient/ component	Substantially transformative or material process/change	Primary Reason
<b>Food</b>					
1.	Cake	Sugar, eggs, flour	Spices	Mixing and baking	The imported ingredients (spices) are fundamentally different from and do not have the identity or essential character of the finished product (cake)
2.	Apple pies	Pastry, sugar	Apples, spices	Forming a pie and Baking	The imported ingredients (apples, spices) are fundamentally different from and do not have the identity or essential character of the finished product (apple pie)
3.	Frozen crumbed Prawns	Prawns, egg	Crumb, spices	Cultivating and shelling prawns and raising chickens (from which eggs are, gathered) before crumbing	The imported ingredients (crumb, spices) are fundamentally different from and do not have the identity or essential character of the finished product (frozen crumbed prawns)
4.	Frozen battered seafood snack	Flour, eggs, water (to form batter)	Prawns, squid, seasoning	Mincing, mixing, forming and battering	The imported ingredients (seafood) are fundamentally different from and do not have the identity or essential character of the finished product (frozen battered seafood snack)
<b>Other</b>					
5.	Printed T-shirt	Thread	Fabric, dyes	Cutting fabric to size and shape, sewing and printing	The imported components (fabric, dyes) are fundamentally different from and do not have the identity or essential character of the finished product (T-shirt)
6.	Woollen blanket	Merino wool	Alpaca fibre	Spinning and weaving	The imported components (alpaca fibre) are fundamentally different from and do not have the identity or essential character of the finished product (blanket)

#	Product	Local ingredient/ component	Imported ingredient/ component	Substantially transformative or material process/change	Primary Reason
7.	Couch	Foam, thread	Wood or metal, fixings, springs and fabric	Construction of the frame, cutting fabric to size and shape, sewing, and assembly of foam, upholstery and frame	The imported components (wood/metal, fixings, springs, fabric) are fundamentally different from and do not have the identity or essential character of the finished product (couch)
8.	Plastic bottle		Polymer resin, pigments, other chemical products	Blow moulding	The imported components (polymer resin, etc.) are fundamentally different from and do not have the identity or essential character of the finished product (plastic bottle)
9.	Newspaper		Newsprint	Printing	The imported components (newsprint) are fundamentally different from and do not have the identity or essential character of the finished product (newspaper), which is the intellectual property imparted through the printing process

**Table B. Processes or changes not considered to be substantial transformation**

#	Product	Local ingredient/component	Imported ingredient/component	Insufficiently transformative or immaterial process/change	Reason
<b>Food</b>					
1.	Sultanas from one country packed in another		Sultanas	Packing	The imported ingredients (sultanas) are not fundamentally different from, retain their the identity and have the essential character of the finished product (sultanas)
2.	Canned apricots	Syrup	Apricots	Peeling, cooking and canning	The imported ingredients (fresh apricots) are not fundamentally different from, retains their identity and have the essential character of the finished product (canned apricots)
3.	Orange Juice	Water, sugar, preservatives	Orange juice concentrate	Reconstitution	The imported ingredient (orange juice concentrate) is not fundamentally different from, retains its identity and has the essential character of the finished product (orange juice)
4.	Frozen crumbed prawns	Crumb, egg	Prawns, spices	Crumbing, packing, freezing	The imported ingredients (prawns) are not fundamentally different from, retain their identity and have the essential character of the finished product (frozen crumbed prawns)
5.	Frozen mixed vegetables	Corn	Peas, carrots	Steaming bagging, freezing	The imported ingredients (peas and carrots) are not fundamentally different from and retain their identity in the finished product (frozen mixed vegetables)
6.	Mashed peas		Peas	Mashing and packing	The imported ingredients (peas) are not fundamentally different from, retain their identity and have the essential character of the finished product (mashed peas)

#	Product	Local ingredient/component	Imported ingredient/component	Insufficiently transformative or immaterial process/change	Reason
<b>Other</b>					
7.	Printed T-shirt		T-shirt, dyes	Printing	The imported component (T-shirt) is not fundamentally different from, retains its identity and has the essential character of the finished product (printed T-shirt)
8.	Ugg boots		Ugg boot without sole, rubber sole (generic size)	Cutting rubber sole to size and fixing to ugg boot without sole	The imported component (ugg boot without sole) is not fundamentally different from and has the essential character of the finished product (ugg boot)
9.	Woollen blanket	Thread	Woollen cloth	Cutting fabric to size and sewing	The imported component (woollen cloth) is not fundamentally different from the finished product and has the essential character of the finished product (woollen blanket)
10.	Couch	Foam, thread	Frame, upholstery	Assembly of foam, upholstery and frame	The imported components (frame and upholstery) are not fundamentally different from the finished product and have the essential character of the finished product (couch)