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A guide for business

# Country of origin claims and the Australian Consumer Law

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Some Australian consumers are willing to pay a premium for products they believe are made in, grown in or product of a particular country, especially Australia. Any country of origin claim should provide consumers with clear, accurate and truthful information about what they are buying.

This guide is designed to help businesses learn about the ACL provisions relating to country of origin claims and understand how these provisions operate.

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# Country of origin—general principles



Some Australian consumers are willing to pay a premium for products they believe are made in, grown in or product of a particular country, especially Australia. Any country of origin claim should provide consumers with clear, accurate and truthful information about what they are buying.

The Australian Consumer Law (ACL) **does not require** businesses to make country of origin claims, although some other laws may do so for products such as food and imported goods.

This guide is designed to help businesses learn about the ACL provisions relating to country of origin claims and understand how these provisions operate.

## General principles

1. A business may make any origin claim provided that it is not false or misleading.
2. If a business chooses to make a country of origin claim, or is required by law to disclose the country of origin of a good (such as under the Australia New Zealand Food Standards Code or the Commerce (Trade Descriptions) Act 1905), the ACL prohibits the business from making claims that are false or misleading.
3. To provide certainty for businesses, the ACL provides 'safe harbour' defences for country of origin claims in relation to goods that meet certain criteria. If goods satisfy the criteria for a country of origin safe harbour defence, the business is deemed by s. 255 of the ACL not to have engaged in misleading or deceptive conduct or made a false or misleading representation under ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL.
4. The safe harbours are designed to provide businesses with certainty about the types of practices that will allow them to safely make country of origin claims without breaching the ACL. Nevertheless, there will be some country of origin claims made by businesses that do not fall within one of the safe harbour defences. Businesses are still entitled to make such claims, provided they are not false or misleading.
5. Businesses should have a reasonable basis for making country of origin claims and be able to substantiate their claims if need be. In the event that a country of origin claim is challenged in legal proceedings:
  - (a) It is up to the business to establish that the criteria for a 'safe harbour' defence have been met or
  - (b) If a business is unable to establish a 'safe harbour' defence, the business' claim will be assessed against the likelihood it would be regarded as false or misleading or deceptive by ordinary and reasonable consumers.
6. The ACL safe harbour tests are not specific to claims of Australian origin, or to particular products. They apply equally to any *country* of origin (but not *region* or *place* of origin) claims and in relation to all products.

7. Representations that a business may make are not restricted to 'made in', 'produce of' or 'grown in' claims, and may be more detailed or explicit (however, they may not fall within the safe harbour defences).
8. Pictorial representations may also be interpreted as country of origin claims, e.g. use of logos, pictures of iconic animals or iconic symbols.
9. Products that result from processing in different countries require particular care from businesses when making country of origin claims.
10. A 'Made in Australia from local and imported ingredients' claim must not be misleading. The provision of extra information beyond 'Made in Australia' should clarify the origin of the components and not confuse consumers.

# Australian Consumer Law (ACL)



## General principles

- A business may make any origin claim provided that it is not false or misleading.
- If a business chooses to make a country of origin claim, or is required by law to disclose the country of origin of a good (such as under the *Australia New Zealand Food Standards Code* or the *Commerce (Trade Descriptions) Act 1905*), the ACL prohibits the business from making claims that are false or misleading.

The ACL is contained in a schedule to the *Competition and Consumer Act 2010* (the Act).

In general, claims made in relation to goods must be clear, accurate and not misleading. This means that businesses must take care when making claims about the origin of goods. Particular attention should be given to the following areas:

- Each claim or representation in a promotional statement must be correct. This includes not only what is actually said or written, but also what is implied by the use of words or images.
- In deciding whether promotional material or a label is misleading, the court will consider what ordinary members of the target audience would conclude. It will not attribute special knowledge or insight to that audience, unless the target audience is constituted by persons who can reasonably be expected to have such special knowledge or insight.
- In practical terms, this means that careful consideration should be given to how a country of origin claim will be received by ordinary members of the target audience, that is, what impression will be created in their minds. If that could be something different from the truth, then the risk of breaching the law is greater.
- All promotional material (including labels), taking account of both content and context, must be accurate and truthful.
- Claims must accurately reflect the stock that consumers are able to purchase. You will need to consider the implications that changes to labelling or promotional campaigns will have for old stock still likely to be on the shelves. You will also need to ensure that old promotional campaigns and labels keep up with any changes to the contents of products.

## ACL provisions

The following ACL provisions are relevant to country of origin claims. The provisions cover all forms of claims—including labelling, media advertising, signs, brochures, direct mail and oral statements made by employees, chief executives or any other spokesperson of the company.

### Section 18

Section 18, a very general prohibition, states that:

- (1) *A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

### Section 29(1)

Section 29(1) contains a broad prohibition, which states that:

*A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:*

- (a) *make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or a particular previous use.*

Section 29(1) also contains a specific prohibition, which states that:

*A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:*

- (k) *make a false or misleading representation concerning the place of origin of goods.*

### Section 33

Section 33 states that:

*A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.*

## Breaches

Breaches of ss. 18, 29(1)(a), 29(1)(k) and 33 give rise to civil proceedings. Remedies are available in appropriate circumstances.

Sections 151(1)(a), 151(1)(k) and 155, are criminal offence provisions which attach criminal liability to conduct outlined in ss. 29(1)(a), 29(1)(k) and 33 respectively. The conduct outlined in s. 18 does not have an equivalent criminal offence provision.

See Penalties and consequences section for more information.

## Other labelling laws

Some laws other than the ACL impose labelling requirements for particular products or in particular circumstances. These include the following:

- Food products. Each state and territory has its own food legislation. These laws require food sold in each state and territory to comply with the labelling requirements of the *Australia New Zealand Food Standards Code*. Food Standards Australia New Zealand (FSANZ) develops and maintains the Food Standards Code which as at the date of publishing this guide, requires country of origin labelling for most packaged foods and some unpackaged foods sold in Australia. You should contact your local health department, or FSANZ on (02) 6271 2222 or [www.foodstandards.gov.au](http://www.foodstandards.gov.au) for information.
- Imported food products. The *Imported Food Control Act 1992* (Imported Food Control Act) provides for the compliance of food imported into Australia with Australian food standards and the requirements of public health and safety. The Imported Food Control Act is administered by the Australian Department of Agriculture who can be contacted on (02) 6272 5488 or [www.daff.gov.au](http://www.daff.gov.au) for information.
- All imported goods. The Australian Customs and Border Protection Service administer Australian import regulations under the *Commerce (Trade Descriptions) Act 1905* and the *Commerce (Imports) Regulations 1940*. Imported goods that require a trade description must be marked with the name of the country in which the goods were made or produced. Contact the Australian Customs and Border Protection Service on 1300 363 263 or [www.customs.gov.au](http://www.customs.gov.au) for information on the labelling requirements for imported goods.

These are just examples. Other laws may be enacted or amended from time to time imposing country of origin labelling requirements. We recommend that you seek independent legal advice regarding the food labelling requirements that may apply to your products.

# 'Safe harbour' defences



## General principles

- To provide certainty for businesses, the ACL provides 'safe harbour' defences for country of origin claims in relation to goods that meet certain criteria. If goods satisfy the criteria for a country of origin safe harbour defence, the business is deemed by s. 255 of the ACL not to have engaged in misleading or deceptive conduct or made a false or misleading representation under ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL.
- The safe harbours are designed to provide businesses with certainty about the types of practices that will allow them to safely make country of origin claims without breaching the ACL. Nevertheless, there will be some country of origin claims made by businesses that do not fall within one of the safe harbour defences. Businesses are still entitled to make such claims, providing they are not false or misleading.
- The ACL safe harbour tests are not specific to claims of Australian origin, or to particular products. They apply equally to any *country of origin* (but not *region* or *place of origin*) claims and in relation to all products.

The ACL provides defences, referred to as 'safe harbours', to proceedings brought under particular sections of the ACL relating to false or misleading country of origin claims about goods. The particular types of country of origin claims that the safe harbour defences cover include 'made in', 'produce of' and 'grown in'.

Attached at the end of this guide is a flowchart you can use to check if you can rely on a safe harbour defence.

Chapter 5 Part 5-3 of the ACL specifically applies to country of origin claims.<sup>1</sup>

If you make a country of origin claim for a product, and it is alleged to be misleading, deceptive or false, you have an automatic defence to the allegation if you can show that the product meets the safe harbour defence for that claim. These safe harbour defences for country of origin claims provide certainty for businesses in relation to goods that meet certain criteria. If goods satisfy the criteria, the relevant claim will not contravene the key provisions for false, misleading or deceptive conduct under the ACL.<sup>2</sup>

It is important to note that these defences are not available for proceedings brought under ss. 33 or 155 of the ACL, which relate to misleading the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods. Businesses would need to substantiate that any claims impacting on such matters are not misleading without recourse to the country of origin safe harbour defences.

Claims as to country of origin may be made in respect of goods that may not qualify for one of the safe harbour defences provided they are not false, misleading or deceptive.

These safe harbours are not specific to Australian country of origin claims but apply to all country of origin claims in relation to goods. The safe harbours do not apply to place of or region of origin claims.

<sup>1</sup> This Part sets out the safe harbour defences to the prohibitions in ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) and 151(1)(k).

<sup>2</sup> The relevant key provisions are ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL.

Chapter 5 Part 5-3 of the ACL provides defences relating to various kinds of country of origin claims:

- general country of origin claims (such as 'made in')
- 'product of/produce of' a country claims
- claims that goods were 'grown in' a particular country
- claims that ingredients or components of goods were 'grown in' a particular country and
- use of a prescribed logo.

Meeting the threshold for your claim will prove you have not breached the relevant section of the ACL insofar as the claim concerns a country of origin. However, you do not have to fall within the parameters of a safe harbour to make a country of origin claim. Claims that do not meet the safe harbour defences will be assessed against whether the claim is false, misleading or deceptive from the point of view of ordinary and reasonable consumers.

## General country of origin safe harbour defence

This defence is not specific about the terms used to indicate origin. It covers, for example, 'Made in Australia', 'Made in China', 'Australian Made' and 'Manufactured in Australia'. It may also cover many other terms such as 'Built in Australia' etc.<sup>3</sup>

Many general country of origin claims (like 'Made in') go to *production/manufacture* rather than *content*. A product with a 'Made in Australia' label will not necessarily contain Australian ingredients or components.

If businesses are to rely on the general country of origin safe harbour defence, they must 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**).

If goods pass **both** of these criteria for a particular country, the manufacturer (or distributor or retailer) may make a claim that the goods are made in that country and that this claim will not attract liability under the key provisions for false, misleading or deceptive conduct.<sup>4</sup>

Note that you cannot rely on this safe harbour defence if the relevant claim contains a prescribed logo or a more specific claim such as 'produce of' or 'grown in', even if they are made in conjunction with a 'made in' type claim.

## Substantial transformation test

The ACL takes a common sense approach to what amounts to 'substantial transformation'.

The ACL provides that:

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.<sup>5</sup>

The ACL does not define 'fundamental change'. At the core is the basic idea that substantial transformation is a fundamental change in the form, appearance or nature of an imported product such that the finished product would be regarded as a new and different product from that imported.

<sup>3</sup> The safe harbour defence for general country of origin claims is set out in s. 255(1) item 1.

<sup>4</sup> The relevant key provisions are ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL.

<sup>5</sup> See s. 255(3) of the ACL.



While processes that may amount to substantial transformation are too many to mention, they might include:

- the processing of imported and Australian ingredients into a finished food product, for example, the production of a cake from imported spices and fruit and Australian sugar, eggs and flour
- the production of a newspaper from imported newsprint
- the production of plastic or foam from imported polymer stock, such as powder or beads.

## Examples

### Food

#### Apple pies

A business sells apple pies. The labelling of the pie says 'Made in Australia'. The packaging, pastry and apple filling are created in Australia and the pie is made (i.e. the pie is constructed and baked) in Australia but all of the apples are from New Zealand. It is probable that the substantial transformation test of the safe harbour defence could be satisfied in the circumstances. If the threshold of 50 per cent of total costs is also reached so as to satisfy the cost of production/manufacture test (see further below), the safe harbour defence should be established. On the other hand, a claim of 'Australian Apple Pie' may be more likely to mislead as it may be taken to apply to the ingredients rather than the product (apple versus pie) and would then be subject to the more onerous 'produce of' or 'grown in' safe harbour defences.

#### Canned apricots

A business sells preserved 'Australian made diced apricots' in a can. The apricots are sourced from South Africa, diced and canned in syrup in Australia, for sale as a pantry item. The ACCC would have difficulty accepting the goods were substantially transformed by merely dicing the apricots. If, however, the diced apricots were combined with jelly in Australia and sold as 'Australian made fruit cups', it is probable that the substantial transformation test of the safe harbour defence could be made out. The goods would still need to meet the total cost of production/manufacture test in order to satisfy the safe harbour defence.

### Wool products

The packaging of an Alpaca blanket advertises 'Australian Made'. Inside the packaging it states that the wool in the blanket is 80 per cent Australian and the rest is sourced from international Alpaca. The fibre is transformed into a blanket in Australia. The substantial transformation test of the safe harbour defence could be made out. (Note: the goods would still need to meet the cost of production/manufacture test in order to satisfy the safe harbour defence).

Conversely if Merino brand wool blankets had packaging and labelling claims of 'Australian Made' where the spinning and weaving of the wool blankets was done overseas with only the cutting and sewing of the blankets performed in Australia, the ACCC would not consider the substantial transformation test of the safe harbour defence to have been met.

### Apparel

A souvenir store sells a T-shirt with a picture of the Sydney Opera House and labels it 'Australian Made'. If the material is cut, sewn and finished into a T-shirt in Australia, then the substantial transformation test has been met. Provided that the cost of production/manufacture test is also met, the marketer would be able to rely on the defence to a general country of origin claim.

Where manufacturers import partly processed components and then undertake the final processes in Australia there can be problems. The ACCC's view is that if material is cut and sewn overseas then imported into Australia, where they are finished into the final product such as by screen printing a motif or attaching a collar to a T-shirt, the substantial transformation is likely to have occurred overseas rather than in Australia.

### Furniture

A wooden or metal framed upholstered sofa is labelled 'Australian Made'. If the wood or metal, fixings, springs and fabric are imported from China, but the entire construction of the frame, the cutting and sewing of the fabric and all finishing work is done in Australia, the substantial transformation test has been met. Provided that the cost of production/manufacture test is also met, then the claim would be able to rely on the safe harbour defence.

However, if the frame is imported fully or partially assembled, or the fabric is cut and sewn overseas, then the mere assembly or finishing of the sofa in Australia may not amount to a substantial transformation. As such, the manufacturer may not be able to rely on the safe harbour defence for 'Australian Made'.

### Manufacturing or processing in multiple countries

A business supplies abrasive products (sanding discs for metal) with a claim they are 'Australian Made'. The products are manufactured in Indonesia, imported into Australia as a jumbo roll and cut to size and packaged in Australia. The process of cutting and packaging the abrasive discs is unlikely to amount to a 'substantial transformation' for the purposes of the safe harbour because the abrasive disks have not undergone a fundamental change in form, appearance or nature as to make the abrasive disks new and different goods from those existing before the change.

### Manufacturing or processing in multiple countries

A business represents itself as a manufacturer and retailer who produces Australian ugg boots. The ugg boots are being manufactured in China, from unprocessed Australian wool and sheepskins which among other things are tanned, combed and ironed in China. In Australia, an inexpensive rubber sole and a label are added to the ugg boots. The ACCC would not consider that substantial transformation had occurred in Australia.

In the ACCC's view, examples of processes that may **not** constitute substantial transformation are:

- the reconstitution of imported fruit juice concentrate into fruit juice for sale—whether or not Australian water, sugar, preservatives and packaging were used
- the mere assembly of imported components into household or other items (e.g. furniture or electronic equipment).

It is also worth noting that the ACL provides for regulations to prescribe particular processes that would or would not constitute fundamental changes for the purpose of the substantial transformation test. However, no regulations have been prescribed as at the date of publishing this guide.

The process of substantial transformation does not, in itself, enable goods to meet the general country of origin defence. The cost of production/manufacture test must also be met.

### Cost of production/manufacture test

The second requirement to make a general country of origin safe harbour defence is that 50 per cent or more of the total cost of production, or manufacture, is attributable to the country claimed to be the country of origin.

In summary, the cost of producing or manufacturing goods is worked out by adding up the costs of the amounts of expenditure on materials, labour and overheads in respect of the goods. The ACL sets out how these costs are to be calculated.<sup>6</sup>

### Materials

The cost of the materials used in the production or manufacturing of the goods is the sum of costs *incurred by the manufacturer* of the goods (except for any costs prescribed as falling outside of this category of costs—no such regulations are in force as at the date of publishing this guide).

The ACCC considers that this includes:

- purchase price
- overseas freight and insurance
- port and clearance charges
- inward transport to store
- retail packaging for sale (this does not include packaging related to the transportation of the goods such as pallets).

But it may not include:

- customs and excise duty
- sales tax
- goods and services tax.

### Labour

Expenditure on labour, in respect of the goods, is the sum of each labour cost incurred by the manufacturer of the goods that can be reasonably allocated to the production or manufacture of the goods (except for any costs prescribed as falling outside of this category of costs—no such regulations are in force as at the date of publishing this guide).

<sup>6</sup> See ss. 256 and 257.

Australian Customs and Border Protection Service has produced a document to inform exporters and importers on the way they calculate production costs for the purposes of determining duty payable. This information may assist businesses with calculating their production costs however it should be noted that this document is not designed with reference to the ACL and a court may take a different view. The document can be found at [www.customs.gov.au/webdata/resources/files/origin3.pdf](http://www.customs.gov.au/webdata/resources/files/origin3.pdf).

The ACCC considers that this includes labour costs (wages and employee benefits) for workers engaged in:

- the manufacturing process
- management of the manufacturing process
- supervision and training of workers engaged in the manufacturing process
- the quality control process
- packing goods into inner containers
- handling and storage of goods.

## Overheads

Expenditure on overheads in respect of the goods is the sum of each of the overhead costs incurred by the manufacturer relating to the production or manufacture of the goods that can be reasonably allocated to the production or manufacture of the goods (except for any costs prescribed as falling outside of this category of costs—no such regulations are in force as at the date of publishing this guide).

- The ACCC considers that this includes:
- inspection and testing of goods and materials
- insurance and leasing of equipment
- vehicle expenses
- storage of goods at the factory.

## Examples

A product has a total production cost of \$100. This includes material costs of \$45, labour costs of \$30 and overheads of \$25. The labour and overheads costs were incurred in Australia amounting to \$55. The materials were imported. Assuming the materials were also substantially transformed in Australia, from their base form into a new product, the manufacturer of the good could utilise the general country of origin safe harbour defence.

The following is an example of the two criteria—substantial transformation and cost of production/manufacture—in operation:

An Australian company, Motor Pty Ltd, manufactures its multi-purpose motors in Australia, using some imported materials (A, B and C) and an Australian material (D). The labour and overhead costs of transforming materials A, B, C and D into motors are incurred in Australia.

Motor Pty Ltd wishes to claim that its motors are 'Made in Australia'. The company wants to know whether its processes allow it to satisfy the general country of origin safe harbour defence.

First, Motor Pty Ltd considered whether the manufacture of motors from materials A, B, C and D constitutes substantial transformation in Australia. In this case, motors have undergone a fundamental change in form, appearance or nature and are clearly new and different goods from the materials A, B, C and D.

Second, Motor Pty Ltd then collected financial information on the costs of its inputs:

**Materials:** the cost of materials A, B, C and D

**Labour:** the cost of labour that transformed materials A, B, C and D into the finished motors

**Overheads:** the overhead costs of transforming materials A, B, C and D into the finished motors.

The Motor Pty Ltd accountant assessed what parts of the costs could be reasonably allocated to the motors' manufacture.

The accountant noted that, once the motors had been manufactured, no further costs could reasonably be allocated to the manufacturing process. Distribution, advertising and all other costs incurred after the manufacture of the motors could not be considered.

The accountant considered that 40 per cent of the total costs of manufacturing the motors was attributable to the imported materials A, B and C and 60 per cent was attributable to material D together with the labour and overhead costs attributed to the production or manufacturing processes that occurred in Australia. Accordingly, Motor Pty Ltd was confident to claim that its motors were 'Made in Australia'.

Businesses that wish to make a country of origin claim and rely on a safe harbour defence with a new product, should plan ahead in relation to their costs and not rely on calculating these after goods are manufactured.



## 'Produce of' safe harbour defence

This provision applies to claims that goods are the produce of a particular country. It also applies to variations of the term 'produce of', such as 'product of' and 'produced in'.

The term 'produce of' and related terms are generally regarded as premium claims about a good's origin, and imply a stronger meaning than 'made in' or other general country of origin claims. Accordingly, this type of defence is more onerous than the general country of origin, or 'made in' safe harbour defence.

To establish the safe harbour defence for a 'produce of' claim, a business needs to demonstrate that each significant component or ingredient of the goods originated in the specified country, and all, or virtually all, of the production processes took place in that country.

The ACL, sets out the test for establishing the defence.<sup>7</sup> It provides that if a 'produce of' type claim meets the following requirements:

- (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

a person does not contravene the key provisions for false, misleading or deceptive conduct by reason only of making the claim.<sup>8</sup>

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. In the explanatory memorandum to the ACL, an example of apple and cranberry juice was given. If a business selling apple and cranberry juice wanted to promote their product as 'product of Australia' and wished to rely on the safe harbour defence:

...both the apple and the cranberry juice would have to be sourced from Australia. This is despite the cranberry juice being, on average, about 5 per cent of the total volume of the product. If, however, a local source can be found for the apple juice and the cranberry juice then it would be legitimate to [rely on the safe harbour defence for] a 'product of Australia' label, even if, say, a preservative was added to the juice and the preservative was imported. This is because the preservative does not go to the nature of the good.

'Produce of Australia' claims are likely to be difficult to sustain for any product with a significant imported component or ingredient. This may be particularly relevant to a number of processed foodstuffs and beverages.

For example, any food or beverage product that depended on an imported ingredient for its specific nature or identity would not be eligible for the 'produce of Australia' safe harbour defence. The manufacturer may therefore be at risk of action by the ACCC, or any another person, under the ACL, or a state or territory food regulator under the relevant Food Act.

Packaged or processed foodstuffs and beverages are often complex products. They may undergo a series of processes and may contain a range of ingredients. The processing may be carried out at different locations, including overseas, and the ingredients may also come from several sources. If any of these processing locations or sources of ingredients are not within Australia, a 'produce of Australia' claim would be difficult to sustain.

<sup>7</sup> See item 2 of s. 255(1) of the ACL.

<sup>8</sup> The relevant key provisions are ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k).



## 'Goods grown in' safe harbour defence

'Grown in ...' is the most recent country of origin safe harbour defence introduced under the ACL and includes variations, such as 'Australian Grown'.<sup>9</sup>

The safe harbour defence for 'grown in' country of origin claims states that if a claim that goods were grown in a particular country meets the following requirements:

- (a) the country referred to as the country in which the goods were grown could also be represented as the country of origin of the goods, or the country of which the goods are the produce, in accordance with the safe harbour defence requirements for such claims
- (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.

A person does not contravene the key provisions for false, misleading or deceptive conduct by reason only of making the claim.<sup>10</sup>

This safe harbour defence is not available if the 'grown in' claim is made in conjunction with a 'made in' or 'produce of' claim.



## 'Ingredient/components grown in' safe harbour defence

A safe harbour defence also exists for claims that ingredients or components of goods were grown in a particular country.<sup>11</sup>

When a business wishes to emphasise the value of a component of their product, they can alert consumers to the fact that a particular ingredient or component of the good was sourced from that particular country. For example, a restaurant could advertise that their hash browns are made from 'Australian grown potatoes'.

The 'ingredient/component grown in' safe harbour defence provides certainty to businesses wishing to make such a claim. That is, in the event of a challenge to the business' claim that ingredients or components of a good were grown in a particular country, the business would not contravene the provisions prohibiting false, misleading or deceptive conduct, if they established the 'ingredient/component grown in' safe harbour defence.

To establish the 'ingredient/component grown in' safe harbour defence, a business would need to demonstrate that:

- (a) the country referred to as the country in which the ingredients or components of goods were grown could also be represented as the country of origin of the goods, or the country of which the goods are the produce, in accordance with the safe harbour defence requirements for such claims
- (b) each ingredient or significant component that is claimed to be grown in that country was grown only in that country
- (c) each ingredient or significant component that is claimed to be grown in that country was processed only in that country and
- (d) 50 per cent or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country.

This safe harbour defence is not available if the 'grown in' claim is made in conjunction with a 'made in' or 'produce of' claim.

<sup>9</sup> This defence is set out in Item 4 of s. 255(1).

<sup>10</sup> The relevant key provisions are ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k).

<sup>11</sup> This defence is set out in Item 5 of s. 255(1) of the ACL.

### What does 'grown' mean?

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

- are materially increased in size or materially altered in substance in that country by natural development or
- germinated or otherwise arose in, or issued in, that country or
- 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.

### Examples

Prawns grown in Australia—the claim on black tiger prawns naturally developed in an Australian aquaculture production system from Australian prawn larvae produced in an Australian landed hatchery, but where the wild caught prawn spawners or broodstock may not have come from Australian waters, is likely to satisfy the criteria for the 'grown in' defence.

If a business wishes to rely on the 'ingredient/component grown in' safe harbour defence, the ingredients/component of the goods in question must come from the country represented, the processing of the ingredient/components must have happened in the country of the claim and 50 per cent or more of the total weight of the goods is made up of the ingredient/components.

Minted peas packaged in Australia using peas grown in Australia and other imported ingredients—the claim on a packet of snap frozen minted peas where the peas were germinated and harvested and packaged in Australia but where the mint was imported into Australia from China for packaging with the peas. The peas are deemed to be the significant ingredient and 85 per cent or more of the total weight is comprised of peas grown and processed in Australia. Accordingly, this scenario is likely to satisfy the 'ingredient/components grown in' safe harbour defence.<sup>12</sup>

## Use of a prescribed logo safe harbour defence

Logos are frequently used to promote goods to build brand recognition, or to associate the goods with desirable characteristics that may include their origin.

Industry sectors, consumers or other interested parties are able to develop distinctive marketing schemes that give consumers additional information about the source of contents.

The ACL allows for a country of origin logo or logos to be prescribed by regulation.<sup>13</sup> A prescribed logo will signify that both substantial transformation and a certain percentage of costs of producing the goods occurred in a given country.<sup>14</sup>

The ACL sets out the requirements for claims as to the country of origin made by the use of a prescribed logo as follows:

- the goods have been substantially transformed in the country represented by the logo as the country of origin of the goods and
- the prescribed percentage of the cost of producing or manufacturing the goods (as worked out under s. 256) is attributable to production or manufacturing processes that happened in that country.

If a corporation makes a claim as to the country of origin of goods by means of a prescribed logo, the goods must pass both the substantial transformation test and meet the prescribed percentage of production or manufacturing costs that apply for that logo, as set out in the regulations.

At the time of issuing this publication, no regulations have been made under the ACL to prescribe any logos.

There are other private logos which you may see used on products, such as the 'Australian Made, Australian Grown' logo which consists of a stylised kangaroo inside a triangle. This particular logo is not a prescribed logo under the law and businesses are not under any obligation to use it. It is a certification trade mark<sup>15</sup> which may only be used under licence.

<sup>12</sup> Remember that there may also be labelling requirements under other legislation that apply to packaged foods.

<sup>13</sup> This defence is set out in Item 3 of s. 255(1) of the ACL.

<sup>14</sup> Section 255(6) of the ACL specifies that the Regulations can prescribe a percentage in the range of 51 per cent to 100 per cent. No regulations have yet to be made as at the date of publishing this guide.

<sup>15</sup> Certification trade marks (CTM) indicate to consumers that a product or service meets a particular standard. For example, a CTM might indicate that a product is of a particular quality or it has been manufactured in a particular location or by using a particular process. ACCC approval is required before CTMs can be registered under the *Trade Marks Act 1995*. For further information see [www.accc.gov.au/business/applying-for-exemptions/certification-trade-marks](http://www.accc.gov.au/business/applying-for-exemptions/certification-trade-marks).

# Labelling issues



In addition to 'made in', 'produce of' and 'grown in' claims, these are some of the other types of country of origin issues businesses need to be aware of:

- place of origin
- providing additional information
- remaining silent
- blatant misleading and deceptive conduct
- ambiguous representations and other ingredient claims
- pictorial representations
- conflicting claims
- global commerce.

## Place of origin claims

A place of origin claim can be that a good originates from a more localised region or plan than a country, for instance, 'Made in Byron Bay' or 'Product of Tasmania'.

All false or misleading claims about the place of origin are specifically prohibited under the ACL.<sup>16</sup> However, the safe harbour defences apply only to country of origin claims. As such, a business cannot rely on a safe harbour for a region or place of origin claim.

For example, if a wine is labelled 'product of the Barossa Valley', the producer cannot utilise the 'produce of' safe harbour defence.

All place of origin claims will be assessed on their merits against the provisions of the ACL. As such, any business using these claims should assure itself that the claim does not mislead consumers.

<sup>16</sup> See ss. 29(1)(k) and 151(1)(k)

## Providing additional information

### General principle

- Representations that a business may make are not restricted to 'made in', 'produce of' or 'grown in' claims, and may be more detailed or explicit (however, they may not fall within the safe harbour defences).

There may be situations in which a business might want to elaborate on an origin claim, such as 'Made in Australia', to highlight the presence of a key ingredient or component that originates in the country claimed—perhaps to differentiate its product from others that might contain ingredients or components that originate elsewhere. In doing so, the business must take care to ensure its claim remains compliant with the ACL.

The ACCC encourages the provision of additional information where it is accurate, relevant, useful, and does not give a false or misleading impression.

Such additional information could include:

- 'Manufactured in Australia from quality imported components'
- 'Made in Australia from Chinese fabric'
- 'Assembled in Australia from 70 per cent Australian and 30 per cent imported parts'
- 'Proudly made in Australia. 85 per cent of this product was made HERE, providing Australian jobs. We imported the cranberries because nobody grows them in Australia.'

Any additional information should be:

- as bold, precise and compelling as the body of the claim so that it has equal prominence, force and impact
- placed in the advertisement so that the target audience recognises it as easily as the claim itself and
- stated in accurate, clear and precise terms.

The timing of providing any additional information is critical, as promotional material will be judged on a stand-alone basis. Providing additional information that changes the nature of the claim after advertising, such as disclosure at the point-of-sale, will not excuse omissions or misleading impressions in the initial material.

## Remaining silent

In some circumstances failure to disclose important information can be misleading.

It might be misleading not to state the origin of goods, particularly if aspects of the labelling or packaging—for example, logos or pictures—carry misleading implications.

For example, a biscuit packet that does not state the country of origin but contains a picture of a gum tree and a koala. This may lead consumers to believe that the biscuits are made in Australia. In such circumstances, the safest course will be to make the origin of the goods clear, and ensure that any images or other statements do not give a different impression as to the origin of the goods.

It is the overall impression that is key. Accordingly, if the overall impression is potentially misleading, then more information needs to be provided or the claim needs to be made more clear.

The misleading impression must be corrected at the same time and with the same impact as the initial claim. While there is no general duty of disclosure in relation to country of origin claims under the ACL, it is up to a business to make sure that the combination of what is said and what is left unsaid, does not give consumers the wrong overall impression.

Businesses should be careful about broad claims made in advertising, in signs or by staff comments.

### Examples

A general statement that 'We only supply Australian goods' would be misleading if some goods were not Australian in origin and this fact was not clearly made known to potential purchasers.

A packet of macadamia nuts is imported into Australia. The nuts were grown in Hawaii. This is not likely to be a problem in itself. However, in recognition that the macadamia tree is a native of Australia, the manufacturer or importer may have labelled the nuts as 'Australia's nut' or 'Australia's answer to the cashew'.

Either of these claims would give the clear initial impression that the nuts are sourced from Australia. In the ACCC's view, this is likely to be misleading. Even if the statement is countered by an equally prominent claim that the nuts' origin was another country (in this example, the USA), this additional information may not be enough to ensure that the claim does not mislead consumers.



## Blatant misleading and deceptive conduct

In some cases, claims are blatantly misleading and the ACCC takes a dim view of such conduct. In one successful case taken by the ACCC the Judge remarked that promoting goods entirely made in China, as made in Australia, was 'dishonest'. Further:

'Misrepresentations about goods being Australian Made not only harm the buyers of those goods, but also adversely impact on those traders that can properly make that claim and, over time, may adversely impact on the reliability and value of Made in Australia claims more generally.'

Case law: [ACCC v Marksun Australia Pty Ltd - \[2011\] FCA 695](#)

The ACCC is concerned about such conduct because purchasing decisions are often influenced by claims regarding the country of origin of a product and some consumers are willing to pay a premium for products that they believe are genuinely Australian made.

Any person can take an action to court alleging that a country of origin claim is false, misleading or deceptive and that the ACL has been breached. Ultimately, the court will decide whether the claim was false, or likely to mislead or deceive.

### Examples

The following examples of blatantly misleading conduct demonstrate the ways in which businesses can fall foul of the ACL in making country of origin claims:

- A business markets and sells its sheepskin and wool bedding products as being made in Australia and containing 100 per cent sheep wool or 100 per cent alpaca wool as well as using two well-known certification trademarks for which the goods are not registered. The wool goods are made from blends and the untreated sheep hide was substantially transformed and processed into the products overseas (see the case [ACCC v UNJ Millennium](#)).
- An online business promotes Chinese-made ugg boots via a registered trade mark that includes the phrase 'from Australia' as well as using the statement 'Made in Australia from Australian Wool' when this is not the case. The business also uses the silhouette images of wombats and kangaroos, images of the Australian flag and of the Sydney Opera House (see the case [ACCC v Marksun Australia Pty Ltd](#)).
- A wholesaler imports sultanas from Turkey and puts them into packages that state 'Australian sultanas'.



## Ambiguous representations and other ingredient claims

### General principle

- A 'Made in Australia from local and imported ingredients' claim must not be misleading. The provision of extra information beyond 'Made in Australia' should clarify the origin of the components and not confuse consumers.

The most common complaints about country of origin claims are that the claims are unclear.

The fact that a claim is unclear does not necessarily mean that it is misleading. This is particularly the case if the claim is clarified in a sufficiently obvious fashion. Of course, this approach is only valid if the initial claim is not misleading.

Consider phrases like 'Made in Australia from local and imported ingredients' where businesses may wish to provide information to consumers on where their good was manufactured as well as the origin of its ingredients or components. In either circumstance, such a claim must not be false or misleading. On one hand the phrase is truthful, in that it alerts the consumer to the presence of imported content. On the other hand, it also emphasises the presence of local content. It is therefore unclear what the percentage of local content is or what relative roles the imported and local contents play in the final product. This form of claim is the subject of frequent complaints to the ACCC, on the basis that the term itself is potentially misleading.

When businesses create labels for their goods, to cover circumstances such as variable degrees of local and imported contents, they need to consider the overall impression created and exercise care that any claim such as 'Made in Australia from local and imported ingredients' does not potentially mislead consumers.

As an example, it is unlikely that consumers would expect a product advertised as 'Australian mashed peas made from local and imported ingredients', to include imported peas. The additional information, made from local and imported ingredients, could appropriately convey that aside from the Australian peas, a number of other ingredients, local and imported, such as seasoning, had been used in the process of manufacture.

The ACCC generally supports the use of additional information, where this information reduces ambiguity or gives consumers relevant, accurate and useful additional information. The claim used above, 'Made in Australia from local and imported ingredients', is not likely to be regarded as false, misleading or deceptive if it is an accurate description of the goods. Care should be taken, though, if the Australian content is minimal. Small amounts of content from a particular country should not be used to claim its connection with Australia or any other origin. A claim that a product is made in Australia from local and imported ingredients would obviously be misleading if none of the ingredients were from Australia.

The most useful approach is to provide sufficient information to resolve these issues. Two positive aspects of this approach are: less risk of misleading consumers; and better customer relationships by improving customers' knowledge of your products. One approach could be to state the actual country of origin of imported components or ingredients and the approximate proportions of them in the product.

Alternatively, some food labelling laws (outside the ACL) require businesses to label goods with a statement of their origin and to identify what the food is constituted from, or that it contains a mix of, local and imported ingredients.

A manufacturer may decide to set out the way in which imported material is incorporated in its product, for example, 'All Australian apples. Imported cranberries used because no one in Australia grows cranberries'; or 'Local ingredients used most of the year, imported ingredients used from October to December', when also including on packaging the date the product was made to allow consumers to discern whether imported or Australian produce is used. If these claims are accurate, and not used in conjunction with another claim, such as 'Product of Australia', then they are not likely to mislead consumers.

If it is known ahead of time when imported components or ingredients are to be used, it would be simplest and safest to plan the content of labels or other promotional material accordingly. This could be done by utilising different packaging for when Australian produce is used, and when it is not.

## Pictorial representations

### General principle

- Pictorial representations may also be interpreted as country of origin claims, e.g. use of logos, pictures of iconic animals or iconic symbols.

Claims or promotions are frequently made by graphic representations—such as logos, symbols and pictures. Country of origin symbols could include kangaroos, koalas, boomerangs, the Southern Cross, maps or outlines of Australia, national flags or other countries' icons such as maple leaves.

These representations can be just as forceful and effective as written representations, if not more so. Special care should be taken when using pictorial representations to ensure that they do not give a misleading impression.

If a reasonable conclusion from such symbols is that the origin of the good is a particular country when that is in fact not the case, there is a risk of breaching the law.

Any text or symbols that attempt to qualify pictorial representations must be sufficiently prominent to ensure that consumers are aware of them and understand their significance.

The amount of information about goods offered for sale and the way it is represented will vary between different media. Obviously, it is usually possible to convey more information on a label or swing tag than in television or radio advertising or on posters. It is critical therefore that the ways in which representations are made is appropriate to the particular media used.

## Conflicting claims

Problems may arise when a business makes one prominent statement in its labelling or promotional material and then adds further information that conflicts with or qualifies the original, prominent statement.

As with other examples given earlier, additional accurate and relevant information may be the answer. The more specific and detailed you are, the less likely your claim will be misleading.

For example, the front labelling on a food product may make the prominent claim that it is 'Produce of Australia'. On the back label, along with the statement of ingredients and manufacturer's details is the qualification 'due to seasonal variations in availability, some of the contents may be imported'.

This additional information raises a number of problems:

- In the first place, it throws the primary claim into doubt. If, at certain times, the contents may be imported, how can it be 'Produce of Australia' or even 'Made in Australia' at those times?
- Secondly, attempts to modify or qualify the phrase 'produce of' (or similar constructions) may be problematic for businesses wishing to rely on the safe harbour defence, given the strict requirements for establishing the defence.
- Thirdly, the primary claim is made less clear by the use of a term that may not be understood by consumers. 'Seasonal variations in availability' may mean something specific to manufacturers, but this does not mean that consumers have the same understanding.

Does it mean that the contents are imported each year during the Australian off-season, or does it mean that in some years there is a shortage of supply and it is topped up by imports? The former means that there is a regular pattern of imports, the latter that imports are used in an ad hoc manner to bolster local shortages.

## Global commerce

### General principle

- Products that result from processing in different countries require particular care from businesses when making country of origin claims.

The Australian economy is becoming more integrated with the global economy. This may make it very difficult to assign a country of origin to some goods.

Where there is no one clear country of origin, consider whether it is necessary to make a country of origin claim and if you choose to do so, provide as much detail as possible to reduce the risk of breaching the ACL.

### Examples

#### Clothing

A pair of trousers is made from Australian wool that received some basic processing in Australia. The wool was exported to China for secondary processing and spinning into yarn. The yarn then went to Italy to be woven into fabric and the fabric was sent to Australia for cutting and shaping. The cut and shaped pieces of fabric were then sent to Fiji for sewing together, attachment of zips and buttons and other final treatment. The finished clothing was then distributed around the Pacific, including Australia.

Where was that clothing 'made'? Customs legislation may indicate that the country of origin could be Fiji, where the last process of manufacture took place. However, these Customs provisions relate specifically to the calculation of import duty. They are not aimed at providing a definition for consumer or marketing purposes.

The clothing in question may not be able to safely claim a specific country of origin. Remember, if a business was to rely on a general country of origin safe harbour defence they would need to be able to establish substantial transformation took place in the represented country and 50 per cent of the total cost of manufacture or production occurred in that country. Since people in at least four countries cooperated to produce the clothing, it may be that substantial transformation did not occur in any one of those countries, or none of those countries could be claimed to be a source of 50 per cent of the total costs of production.

## Food

Another example is imported processed food which includes ingredients such as Australian sugar, Caribbean cocoa mass, Indian peanuts and South African dried fruit that are processed and/or combined in Singapore to make a chocolate bar which is imported into Australia. The various costs of production or manufacture (including the combining of ingredients) in each country will be crucial in deciding where the chocolate bar is 'made' if the business was to rely on the general country of origin safe harbour defence.

The importer of the above chocolate bar may be in a difficult position. Customs regulations may require the statement of a country of origin, yet the ACL provisions may not allow the importer to rely on the safe harbour defences. The best approach would be to use a claim that provides sufficient information to also comply with other labelling laws while avoiding potentially false or misleading claims to consumers.

## Electronic equipment

A firm manufactures electronic equipment in Australia using some Australian components and some imported components. The imported components are from South Korea.

Assessment of the equipment's manufacturing costs and processes indicates that the equipment has been substantially transformed in Australia and more than 50 per cent of the total costs of manufacture are attributable to processes in Australia. However, the electronics firm claims its equipment is 'Made in Australia from Australian and German components'.

It appears that the finished equipment qualifies for the general country of origin safe harbour defence under the ACL. The claim about the **equipment** is not likely to be regarded as breaching the country of origin provisions of the ACL. There is also a claim about the origin of the **components**—that some of them are Australian (true) and some are German (false).

The ACCC is likely to regard this behaviour as a breach of the ACL. There has been a clear attempt to mislead potential buyers about the origin of the equipment's components. Part of the claim is technically accurate, but the overall impression given by the claim—that the equipment is Australian, with some German components—is false.

Businesses should not attempt to 'stretch the truth' in attempting to qualify for the safe harbour defences.

## Flowers

The claim 'flowers grown in Australia' by a flower wholesaler in commercial advertising and on its website when during peak seasonal demand flowers are sourced from overseas to supplement Australian grown stock, is likely to mislead the consumer.

The flower wholesaler is failing to disclose that it cannot meet the high demand one month of the year and it needs to source flowers from origins that cannot be guaranteed by the supplier, or are a mixture of imported and Australian flowers but from imported seedlings.

The flower wholesaler would not be able to rely upon the 'grown in' defence under the ACL because, at least during peak seasonal demand, the requirements of the safe harbour defence would not be met. The business would need to make a more specific claim such as 'flowers grown in Australia, Brazil and Argentina'. Remember the ACL does not require you to make a country of origin claim. If you choose to make a country of origin claim, you need to make sure it is not false or misleading.

## Substantiating your claims



### General principle

- Businesses should have a reasonable basis for making country of origin claims and be able to substantiate their claims if need be. In the event that a country of origin claim is challenged in legal proceedings:
  - (a) it is up to the business to establish that the criteria for a 'safe harbour' defence have been met or
  - (b) if a business is unable to establish a 'safe harbour' defence, the business' claim will be assessed against the likelihood it would be regarded as false or misleading or deceptive by ordinary and reasonable consumers.

It is good risk management to ensure that claims in promotional material and on labels can be substantiated before you use them. This will put you in a better position to defend any allegations that they are false, misleading or deceptive. Any difficulty in substantiating a claim will alert you to the risk in making it.

The responsibility of proving that the claim meets the safe harbour defences set out in the ACL is on the person claiming the defence.

That is, if it is argued that a general country of origin claim is not misleading because:

- (a) it was substantially transformed in the country in question and
- (b) 50 per cent or more of the total cost of producing or manufacturing the goods took place in that country

the person claiming that defence must present or point to evidence that substantiates each of these criteria.

The following two principles will help reduce your risk of making false or misleading claims:

- don't make claims you can't back up
- rely on facts and figures, not guesses or unsupported opinions.

Retaining documentation relating to the origins and costs of your components or ingredients and the costs and locations of your production or manufacturing processes will help you apply these two principles. The best way to rebut allegations of a breach of the relevant provisions of the ACL is to be able to show that the goods in question meet the requirements of a safe harbour defence.

## Substantiation notices

The ACCC has the power to issue a substantiation notice requiring a person to give information or produce documents that could be capable of substantiating or supporting a claim or representation made by the person promoting the supply or possible supply of goods or services by the person or another person.

A substantiation notice may be used, for example, to respond to concerns about a claim as to the country of origin of a good or the origin of ingredients or components of a good.

Individuals are not required to provide information or documents if the information or documents may incriminate them or expose them to a penalty.

A substantiation notice must be complied with within 21 days of notice. Civil or criminal penalties of \$27 500 for a body corporate and \$5500 for an individual may apply where false or misleading information or documentation is provided to the ACCC in response to a substantiation notice.

If a person does not respond to a substantiation notice, or does not respond within the compliance period, the ACCC may issue an infringement notice resulting in a penalty of \$3300 for a body corporate other than a listed corporation or \$660 for an individual. Alternatively, the court may order payment of a civil or criminal penalty of up to \$16 500 for a body corporate other than a listed corporation or \$3300 for an individual.

# Penalties and consequences



The civil and criminal consequences of contraventions of the consumer protection provisions are set out in the ACL.

Chapters 2 and 3 of the ACL set out the general and specific protections for consumers that give rise to civil actions (such as ss. 18, 29(1)(a), 29(1)(k) and 33(1)) and Chapter 4 sets out the criminal offence regime relating to unfair practices (such as ss. 151(1)(a), 151(1)(k) and 155(1)).

## Civil actions

While the ACCC can commence proceedings against a corporation for alleged breaches of the ACL, in particular circumstances there is also scope for private legal actions to be commenced (for example, by competitors or customers) to enforce the Act.

If the court decides that the law has been breached, it can order any of the following:

- civil pecuniary penalties for contraventions of the specific consumer protection provisions, unconscionable conduct, pyramid selling and some product safety provisions of up to \$1.1million for corporations and up to \$220 000 for individuals
- disqualification orders disqualifying persons from managing a corporation for breaches of the specific consumer protection provisions, unconscionable conduct and certain product safety provisions
- damages (for example, payment of money to compensate competitors for the business they have lost as a result of a misleading promotion)
- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken or to require an individual or business to do something like performing their obligations under a contract
- probation orders, community service orders and corrective advertising orders and
- other orders of various kinds in favour of people who have suffered loss or damage because of the conduct, including:
  - refund of money
  - declaring the whole or any part of a contract void
  - varying a contract or refusing to enforce any or all of the provisions of a contract.

## Criminal proceedings

The ACL contains provisions for prosecution of the criminal offences under Chapter 4 of the ACL. The penalties and remedies that are available are:

- monetary penalties of up to \$1.1 million for companies and up to \$220 000 for individuals
- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken
- adverse publicity orders
- probation orders, community service orders and corrective advertising orders
- other orders of various kinds in favour of people who have suffered loss or damage because of the conduct, including:
  - declaring the whole or any part of the contract void
  - varying a contract or refusing to enforce any or all of the provisions of a contract
  - damages.

If a defendant is unable to pay both a fine and compensation to victims, the court must give preference to making an order for compensation.

## Infringement notices

The ACCC can issue infringement notices where it has reasonable grounds to believe that a person has contravened particular sections of the ACL. This includes the prohibition on false or misleading representations in s. 29 and the prohibition on misleading conduct as to the nature of goods under s. 33 of the ACL. The penalties for most contraventions are: \$102 000 for ASX listed corporations, \$10 200 for bodies corporate and \$2 040 for individuals.

Related publication: [ACCC powers to issue infringement, substantiation and public warning notices](#)

Related publication: [Guidelines on the use of infringement notices](#)

## Enforceable undertakings

Sometimes, rather than instituting proceedings, the ACCC chooses to settle the matter administratively. This can be done by the ACCC accepting formal, court enforceable undertakings under s. 87B of the Act from a business or person who allegedly breached the ACL. The list of undertakings could include one or more of the following:

- compensating consumers who suffered from the conduct
- running corrective advertisements of similar frequency and prominence to those that misled consumers
- paying for a company or industry trade practices compliance program and
- making administrative changes within the business to reduce the risk of future misleading conduct.

Enforceable undertakings are not a painless solution for the businesses concerned because:

- they are not confidential as they are available on a public register and
- if the undertakings are not honoured, the ACCC can apply to the court for an order, requiring the business or individual to comply with the undertaking. A business or individual that ignores a court order will be in contempt of court, which may lead to fines or imprisonment.

In most cases the most significant costs to businesses involved in breaches of the ACL are the legal costs, lost executive time and the loss of hard won business reputation.

## Claims by other businesses

If you believe that other businesses are breaking the law or doing the wrong thing we want to hear from you. You can lodge a complaint with the ACCC about this or any other breach that comes to your attention by using our online complaint form at [www.accc.gov.au](http://www.accc.gov.au) or by contacting the small business helpline on 1300 302 021.



## Tips to assist good business practice



Four basic safeguards will help reduce the risk of claims or representations breaching the ACL.

- Each person in the organisation with responsibility for labelling, advertising, sales and marketing should be aware of the obligations imposed by the ACL. Tailored compliance training will help equip officers and employees to meet their obligations under the ACL.
- All promotional material (labelling, advertising, etc.) should be checked against the requirements of the ACL, primarily, whether the material is false, or likely to mislead or deceive consumers.
- Every business that sells goods with labels or advertises goods should have clear procedures for signing off on representational materials. Assigning responsibility will reduce the risk of running problem advertisements or labels and also provide an audit trail if corrective action is ever needed.
- Effective complaints handling procedures should be implemented at shop front level. There should also be an effective referral mechanism from shop front to head office so that management will have a feel for the manner in which its advertising and labelling is received by consumers.

It is also important to regularly review existing promotional material. This is absolutely essential where any country of origin claim is made.

### Complaints handling

Many problems with country of origin claims are brought to the ACCC's attention by complaints from consumers. Manufacturers should not overlook the benefits that can flow from listening to and reacting to complaints.

Complaints can:

- give you a window into your target audience or customer base with feedback on what they are thinking
- identify problems in your business and
- allow you to correct problems, reducing longer term costs such as losses to competitors, or action by regulators.

In addition, an effective corporate complaints handling system can turn many disgruntled people into satisfied consumers and thereby increase customer retention.

Standards Australia has a Standard titled: *Customer satisfaction—Guidelines for complaints handling in an organization* (AS ISO 10002:2006) which sets out the essential elements of effective complaints handling with a guide to their implementation.

The key points in this particular standard are that:

- there should be a strong commitment from the top down to handling complaints, i.e. a 'your problem is our problem' philosophy throughout the whole company
- the complaints handling process should be visible
- access to the process should be easy and
- there should be systematic recording of complaints so that they can be classified and analysed for the identification and rectification of systemic and recurring problems.

# Frequently asked questions



The answers to these questions are a general guide only. They may not address some specific issues. We recommend that you seek independent legal advice regarding your specific circumstances as this will give you access to the latest developments in the law, and information about other relevant legislation.

## General

### 1. Does the ACL require me to put country of origin details on my product?

No, not unless failing to make a claim would be misleading by silence. However, there may be country of origin labelling requirements under other labelling laws.

### 2. Do I have to say that my product has imported components or ingredients?

Under the ACL you are not required to make a country of origin statement unless not to do so would be misleading or deceptive. You should, however, check other labelling laws.

### 3. When can I claim that my product is 'Made in Australia'?

At any time, provided your claim is not false or misleading.

If you wish to have the certainty that your claim will be safe from legal action under the key provisions regarding false, misleading or deceptive conduct,<sup>17</sup> you must be able to establish the following:

- the goods were substantially transformed in Australia and
- 50 per cent or more of the total cost of production or manufacture of the goods were carried out in Australia.

If you don't think you can justify a 'Made in Australia' claim then you should consider:

- providing more information to clarify the good's origin or
- abstaining from making the claim or using another claim.

### 4. Who can take action under the ACL?

The ACCC is not the only party able to take legal action under the ACL. Any person can take an action to court alleging that a country of origin claim is false, misleading or deceptive and that the ACL has been breached. This includes businesses, competitors and consumers.

<sup>17</sup> The relevant key provisions are ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL.

5. **Can I rely on assurances from others (such as the manufacturer or wholesaler who supplied me the goods) regarding country of origin assertions?**

A defendant in the prosecution of criminal proceedings will have a defence if they can establish that they reasonably relied on information supplied by another person. Whether it is reasonable to rely on assurances from others regarding country of origin assertions will be determined by the courts on a case by case basis.

In relation to civil proceedings, the ACCC may take into account an honest and reasonable reliance on an assurance given by the supplier of goods in deciding what enforcement activity it will take against a business.

If in doubt, you should seek independent legal advice.

## Applying the safe harbour defences

6. **I import complete dining and lounge chair frames and pre-cut fabric from overseas, but all sewing, upholstery and finishing is done in Australia. Am I protected by the safe harbour provisions if I make a 'Made in Australia' claim?**

The ACCC considers that the completion of furniture from imported frames and pre-cut fabric is not likely to constitute 'substantial' transformation. As such, you would not be covered by the general country of origin safe harbour defence.

7. **I have a business making furniture. If I import the materials for the frame, but the building of the frame, cutting and sewing of the fabric and all finishing work is done in Australia, can I claim that a lounge is 'Made in Australia'?**

The 'Made In' claim goes to production rather than the source of the components. In this example, the product has undergone substantial transformation in Australia. Therefore, provided it also meets the cost of production/manufacture test, the manufacturer could rely on the general country of origin safe harbour defence.

8. **What if I use a mixture of ingredients in my product?**

Most foods, especially highly processed foods, use a mixture of ingredients. What matters is the claim being made about the end product and ultimately, whether your claim might mislead or deceive consumers. The safe harbour defences in the ACL can provide you with certainty that if you meet those thresholds, you will not contravene the key provisions regarding false, misleading or deceptive conduct.

9. **What if some of my product (components or ingredients) is imported, but only sometimes? Sometimes I just can't source my raw materials in Australia.**

If you know, or should reasonably have known, ahead of time that a significant component or ingredient will be imported, you shouldn't use a claim of 'Product of Australia'.

You cannot simply ignore the fact that the components/ingredients are imported, regardless of why they were imported.

If the local shortage is related to seasonal availability, the best policy may be to say so, but in a way that makes it clear why. Clarify whether the drop in local availability is due to an irregular crop shortage or a regular replacement by imports in the local off-season, and ensure that it is not used in conjunction with a claim that implies otherwise.

You could utilise different packaging with accurate labelling for when Australian produce is used, and when it is not. You could also use a claim such as 'Australian apples used 11 months of the year, New Zealand apples used in July' when also including on the packaging the date the product was made to allow consumers to discern whether imported or Australian produce is used.

10. **Can I import peas, bag them and sell them in Australia?**

Yes, but if you make an Australian country of origin claim about them you will not meet the general country of origin safe harbour and would have to defend any such claim against allegations that the conduct is false, misleading or deceptive, in breach of the ACL.

The ACCC would not consider bagging, freezing or simple cooking processes such as steaming of vegetables prior to freezing or heat treatment of canned goods, to constitute 'substantial transformation' under the safe harbour defence.

11. **What if I buy peas sent from China and bagged in New Zealand, can I call them Made in New Zealand?**

Under the Trans-Tasman Mutual Recognition Arrangement, goods that may be legally sold in New Zealand may be sold in Australia, and vice versa. Australian and New Zealand laws both prohibit misleading or deceptive conduct, such that the labelling is likely to be illegal in Australia and New Zealand.

12. **I have imported prawns from Vietnam and crumbed them? Are they Australian prawns?**

Unlikely, the prawn still originates from Vietnam and if a business was looking to rely on a safe harbour defence it is unlikely that the mere crumbing of the prawn would constitute 'substantial transformation'.

13. **What if I defrost the prawns, mix them with some frozen Thai squid, season them, process them and call them a sea shanty, made in Australia?**

This is unlikely to be misleading, and the business would be in a position to claim the general country of origin safe harbour defence given the product is likely to constitute 'substantial transformation', provided that the cost of production/manufacture test is also satisfied.

14. **I import premium quality honey. I package and market the honey here, which costs me more than 50 per cent of my costs and I put a picture of a map of Australia on the label and call it 'Naturally Australian'. I do specify on the packaging that the honey itself comes from overseas. Do I meet the general country of origin safe harbour defence?**

No. The honey has not been substantially transformed in Australia. It should also be noted that marketing expenses cannot be included as part of the producing or manufacturing costs. You may also need to consider whether the overall impression created by such claims may be misleading.

15. **Can I make other types of claims, such as 'Australian owned' or 'Packed in Australia'?**

Claims such as 'Australian owned', 'Packed in Australia', 'Manufactured by an Australian company' do not attract the safe harbour defences. The claim will be assessed on its merits against the provisions of the ACL as to whether it is false, misleading or deceptive. Any business using these claims should assure itself that the claim is accurate and truthful and does not mislead or deceive consumers.

## Further information

Who should I contact:

- if I'm worried about my own country of origin claims?
- if I think one of my competitors is breaking the rules?

Contact the ACCC's Infocentre on 1300 302 502 or the ACCC small business helpline on 1300 302 021. We can't give legal advice, but we can explain your rights and obligations under the ACL.

### Small Business Information Network (SBIN)

If you would like to be kept informed about competition and consumer law updates which relate to the small business sector, why don't you subscribe to the ACCC's SBIN which is a free information service. Simply email your name and business details to [smallbusinessinfo@acc.gov.au](mailto:smallbusinessinfo@acc.gov.au)

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory 2601

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The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

# Flowchart

## Does a safe harbour defence apply to your country of origin claim?

