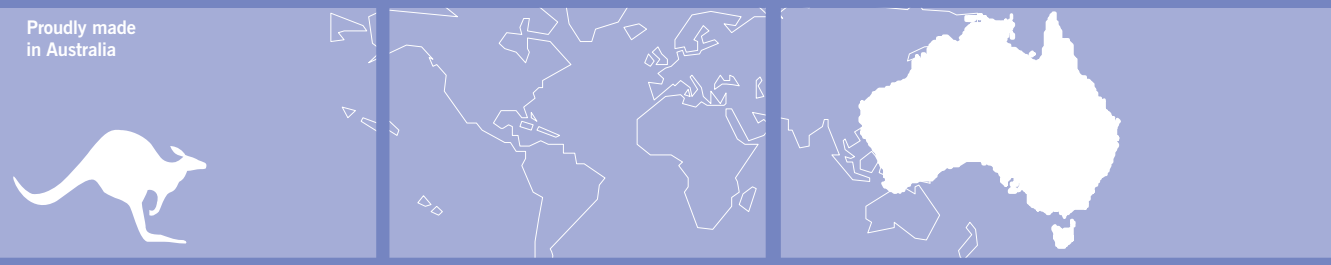
Australian Competition & Consumer Commission

Country of origin claims and the Australian Consumer Law



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Important notice

Please note that this guideline is a summary designed to give you the basic information you need. It does not cover the whole of the *Competition and Consumer Act 2010* and is not a substitute for professional advice.

Because it avoids legal language wherever possible there may be some generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases, the particular circumstances of the conduct need to be taken into account when determining the application of the Act to that conduct.

While it refers to other legislation, such as the *Commerce (Trade Descriptions) Act 1905*, the purpose of this guideline is only to outline the relevant principles to country of origin representations under the Competition and Consumer Act. Issues and queries arising out of other legislation should be raised with either the relevant government body that administers the legislation (in the above example, Customs) or with independent legal advisers.

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Introduction

In November 1997, the Hon. Warren Truss MP, the then Minister for Customs and Consumer Affairs, announced that the Commonwealth Government would move to address industry and consumer uncertainty over origin labelling claims. The minister said:

> Recent court decisions have created considerable confusion in the minds of industry and consumers alike, undermining both the value of origin claims in the marketplace … the government is acting to address this uncertainty, and to set rules that industry can follow and consumers can understand … the government is committed to ensuring that the domestic origin labelling scheme reflects consumer needs, while allowing Australian companies to promote their contribution to the local economy.

The Commonwealth Parliament subsequently enacted legislation to clarify the legal position of corporations that make representations regarding the country of origin of goods they supply. The *Trade Practices Amendment (Country of Origin Representations) Act 1998* which came into effect on 13 August 1998, added Division 1AA of Part V of the Trade Practices Act.

Amendments to this Division were made under the *Industry Tourism and Resources Legislation Amendment Act 2003* (Cth) which came into effect on 11 April 2003.

On 1 January 2011, the *Trade Practices Act 1974* was renamed the *Competition and Consumer Act 2010*. This name change was part of a suite of changes brought about by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* and *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* which included a new country of origin defence for the claim 'Grown in *country*' provision. The new Australian Consumer Law (ACL) commenced on 1 January 2011. The ACL replaces previous Commonwealth, state and territory consumer protection legislation in fair trading acts. It is contained in a schedule to the Competition and Consumer Act. Part 5-3 of the ACL provides defences (also referred to as safe harbours) to proceedings brought under ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) and 151(1)(k) of the ACL against corporations that make representations about the country of origin of their goods. The defences are not available for proceedings brought under ss. 33 or 155 of the ACL.

Briefly, if in making a general country of origin representation, a corporation is accused of engaging in misleading or deceptive conduct under ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL, it is a defence if the goods were substantially transformed in the country that is the subject of the claim **and** 50 per cent or more of the costs of production or manufacture occurred in that country.

The term 'produce of', or variations of that term such as 'product of', are treated more strictly. To qualify for the statutory defence, goods described as 'product of' must have each significant ingredient or component sourced in the country that is the subject of the claim **and** all, or virtually all, processes of production or manufacture must take place in that country.

The term 'grown in' is the new defence introduced with the ACL. Goods are able to meet the 'grown in' a specified country defence test provided that each,significant ingredient or component was 'grown in' the country specified and all, or virtually all processes involved in the production or manufacture happened in that country.

This guide is designed to help industry and consumers to quickly come to terms with the provisions. The main objectives are to provide businesses and industry groups with information that will help them develop strategies to improve compliance with the Act, and to assist consumers in understanding what rules business should apply to their country of origin claims.

While these comments reflect the ACCC's views at the time of printing, it is very likely that these views will be modified in the light of future court consideration of country of origin issues. In any case, interpretation of the law will always ultimately be a matter for the courts. Prudent businesses will take legal advice to ensure they stay abreast of developments in the law.

It should be also kept in mind that private litigants are not bound to consider the ACCC's views.

Section 1

What the Australian Consumer Law says

The Australian Consumer Law contains provisions of relevance to country of origin claims made by businesses.

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.

Only civil proceedings may be bought for a breach of s. 18.

Section 29(1) is 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), a specific prohibition, 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 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 of ss. 18, 29(1)(a), 29(1)(k) and 33 give rise to civil causes of action. Remedies are available in appropriate circumstances

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

Sections 29(1)(a) and 151(1)(a) are relevant because a representation as to the country of origin of goods is a representation of the history of those particular goods.

Sections 33 and 155 are relevant because a representation about the country of origin may be a representation about the nature, manufacturing process or the characteristics of particular goods.

Chapter 5 Part 5-3 the ACL specifically applies to country of origin representations. This Part sets out defences (also referred to as safe harbours) to the prohibitions in ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) and 151(1)(k). This means that where certain tests are met, claims about the origin of the goods do not breach these sections of the Australian Consumer Law. These defences are explained below. It is important to note that they are not available to proceedings brought under ss. 33 or 155 of the ACL.

The provisions cover all forms of representation—including labelling, media advertising, signs, brochures, direct mail and oral statements—made by employees or chief executives.

Consumers may be uncertain about country of origin representations.

This means that businesses must take care when making representations 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.
- In deciding whether promotional material or a label statement 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.
- In practical terms, this means that careful consideration should be given to how an origin statement will be received by ordinary members of the target audience. If that is likely to be something that differs from the true state of affairs, then the risk of breaching the Act may be greater.
- All promotional material (including labels), taking account of both content and context, must be honest and truthful.
- Representations must accurately reflect the stock that consumers will see. Consider what changes to labelling or promotional campaigns will imply for old stock still likely to be on the shelves. Conversely, old promotional campaigns and labels need to keep up with changes to the contents of products.

It is a breach of ss. 18, 29(1)(a), 29(1)(k), 33, 151(1)(a), 151(1)(k) and 155 for a corporation to make a misleading, deceptive or false representation about the **place** of origin of goods. Usually 'origin claims' are about the **country** of origin, for example 'Made in Australia'. However, they can also include other claims such as 'Made in Tasmania' or 'Hunter Valley Wine'.

The defences in Chapter 5 Part 5-3 apply only to claims regarding the goods' country of origin. (See page 15 for a further explanation of the differences between 'place' of origin and 'country' of origin).

There are four general classes of country of origin representation recognised in Part 5-3 of the ACL.

General country of origin claims

This provision 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 'Assembled in Australia', 'Built in Australia' etc.

The requirements for the defence to general claims are set out below under **the general country of origin test**.

Product of/produce of claims

This provision applies to representations 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 requirements for the defence to 'product of' claims are much stricter than for general claims and are set out below under the 'product of *Country of origin*' test.

Use of a prescribed logo

This provides for the use of a logo or logos to indicate the country of origin of goods. It allows industry sectors, consumers or other interested parties to develop distinctive marketing schemes that give consumers additional information about the source of contents.

The requirements for the defence to the use of a prescribed logo are set out below under **the use of a prescribed logo**.

No logos have yet been prescribed under the ACL.

Grown in claims

This provision applies to representations that goods, or the ingredients or components of goods, are grown in a particular country.

The requirements for the defence to 'grown in' claims are set out below under the 'product of *Country of origin*' test.

The general country of origin test

The general country of origin test is set out in the new s. 255(1) item 1, which states that if a representation as to the country of origin of goods meets the following requirements:

(a) the goods have been substantially transformed in that country; and

(b) 50 per cent or more of the total cost of producing or manufacturing the goods as worked out under section 256 is attributable to production or manufacturing processes that occurred in that country; and

(c) the representation is not a representation to which product of/ produce of representations or prescribed logo representations applies

a person does not contravene ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or (1)(k) by reason only of making the representation.

What does this mean in ordinary language?

Goods must pass two tests to qualify for the general country of origin defence. They must be substantially transformed in the country that is the subject of the representation **and** 50 per cent or more of the cost of production or manufacture of the goods must be incurred in relation to processes that occurred in that country.

If goods pass **both** of these tests for a particular country, the manufacturer (or distributor or retailer) may make a claim that the goods are made in that country with the full confidence that this claim will

not attract liability for action under ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the Australian Consumer Law.

Substantial transformation

Substantial transformation in a country is defined under s. 255(3) as goods undergoing:

> 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.

Parliament has said that some particular processes may be prescribed as not constituting fundamental changes. However, no regulations have been made at this stage.

The ACCC's view is that the following are examples of processes that may not constitute substantial transformation:

- the reconstitution of imported concentrated fruit juice 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. white goods, furniture or electronic goods).

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, fruit and flour and Australian sugar
- the production of a newspaper from imported newsprint
- the production of plastic or foam forms from imported polymer stock, such as powder or beads.

It should be noted that the process of substantial transformation does not, in itself, enable goods to meet the general country of origin defence. The test of 50 per cent or more of the costs of production occurring in that country must also be met.

Some goods can be quite complex—involving a variety of input materials and several production processes at different locations (possibly in different countries) which can make assessment of the goods' origin quite difficult.

Cost of production/manufacture

The method of calculating the cost of production or manufacture of goods is set out in sections 256 and 257. These sections consider three broad categories of costs: expenditure on materials, labour and overheads. Costs that are eligible to be included for a representation of country of origin are:

- expenditure on materials incurred by the producer/manufacturer in the production or manufacture of the goods
- expenditure on labour incurred by the producer/manufacturer, that relates to the production or manufacture of the goods and can reasonably be allocated to the production or manufacture of the goods
- expenditure on overheads incurred by the producer/manufacturer, that relate to the production or manufacture of the goods and can reasonably be allocated to the production or manufacture of the goods.

Regulations may prescribe (for all three categories) particular costs that are not allowable and may prescribe the manner of working out costs in each category. No such regulations have been made under the ACL.

Exceptions

There are three exceptions to the general country of origin test. These are use of the term 'product of' and similar constructions (for example 'produced in') and use of the term 'grown in'—see on p. 13 under **the 'product of** Country of origin' **test** and p. 16 under the 'grown in Country of origin' test. The other is a provision for parliament to be able to make regulations for prescribed logo representations—see on p. 14 under **the use of a prescribed logo**.

e-x-a-m-p-l-e

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

Widget Pty Ltd wishes to claim that its widgets are 'Made in Australia'. The company is concerned whether its widgets qualify for the general defence.

First, Widget Pty Ltd considered whether the manufacture of widgets from materials A, B, C and D constitutes substantial transformation. In this case, widgets 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, Widget Pty Ltd then collected financial information on costs of its inputs:

materials	the cost of materials A, B, C and D
labour	the costs of labour that transformed materials A, B, C and D into the finished widgets
overheads	the overhead costs of transforming materials A, B, C and D into the finished widgets.

Then the Widget Pty Ltd accountant assessed what parts of the costs could be reasonably allocated to the widgets' manufacture.

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

The accountant considered that 40 per cent of the total costs of manufacturing the widgets was attributable to the imported materials A, B and C and 60 per cent was attributable to production or manufacturing processes that occurred in Australia. Therefore Widgets Pty Ltd felt confident in claiming that its widgets were 'Made in Australia'.

e-x-a-m-p-l-e

A Federal Court case in 1989 (Thorp v C.A. Imports Pty Limited (1990) ATPR 40-996), while it pre-dates the implementation of the country of origin representation defence provisions, illustrates three important points:

- certain simple procedures carried out in a country (in this case, Australia) do not qualify goods for the claim 'Made in [that country]'
- certain costs, even if incurred before the manufacture of the goods is complete, may not be attributable to the production or manufacture of the goods
- the importance of getting correct advice.

In that case, CA Imports' toy koalas were designed and finished in Australia, but the casings (or skins) were made in Korea. In his judgment Justice Sheppard said that the work done in Korea meant that the koalas 'were not correctly described as having been made in Australia'.

- Justice Sheppard found that, while the elements of an offence under s. 53(eb) of the Trade Practices Act were established, the defendant had reasonably relied on erroneous advice that he was entitled to label his product as 'Made in Australia'. Thus, liability for past actions was excluded by the defence previously under s. 85(1)(b).*

In a statement that appears relevant to allowable costs, Justice Sheppard also said 'it is not appropriate to include the designing of the koala bears as a step in their manufacture'. His Honour considered that the three essential steps in the manufacture of the koalas were the cutting and sewing of the material to form the casing, the filling of the casing and the further [final] sewing and checking procedures.

* Section 85(1)(b) has since been repealed. The defence of reasonable reliance is now incorporated into the defence of reasonable mistake of fact set out in s. 207 of the ACL.

The 'product of *Country of origin*' test

'Product of ...' is a premium claim about a good's origin.

The defence for claims that a good is a product of a certain country is more demanding than the general country of origin, or 'Made in … ' defence.

Section 255(1), item 2, sets out the test for representations that goods are the produce of a particular country. It provides that if a representation that goods are the produce of a particular country 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 ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) by reason only of making the representation.

What does this mean in ordinary language?

This provision establishes that, to qualify for the 'product of *Country of origin*' defence, all of the significant ingredients or components of the goods in question must come from the country of the representation and virtually all of the production or manufacturing processes associated with the goods must occur within the country of the representation.

The term 'product of ' and related terms are regarded as being a higher claim than such claims as 'made in'. The legislation also picks up any variation of the term 'product of ' such as 'produce of ', 'produced in'.

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 1998 amending legislation, the following example was given:

> ... for an apple and cranberry juice to be able to carry a 'produce of Australia' label, 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% 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 employ 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.

This seems to make claims of 'product of Australia' 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 would not be eligible for the 'product of Australia' defence. The manufacturer may therefore be at risk of action by the ACCC, or another person who is able to commence private legal action under the Act, or a food regulator under their Food Act. In 2010 the NSW Food Authority prosecuted a manufacturer of smallgoods under the *Food Act 2003* (NSW) for (among other things) labelling pork products such as bacon as 'Product of Australia' when this was not the case.

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

The use of a prescribed logo

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

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

Section 255(1) sets out the test for representations made by the use of a prescribed logo.

Item 3 of section 255(1) requires a representation that is specified by regulation in the ACL that:

(a) the goods have been substantially transformed in the country represented by the logo as the country of origin of the goods; and

(b) the prescribed percentage of the cost of producing or manufacturing the goods as worked out under section 256 is attributable to production or manufacturing processes that happened in that country.

What does this mean in ordinary language?

If a corporation makes a representation 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 regulation.

This provision allows industry sectors, consumers or other interested parties to develop distinctive marketing schemes that give consumers additional information about the source of contents. Businesses may be able to use industry-driven information schemes to gain a marketing advantage based on supplying consumers with accurate, relevant and useful information.

No regulations were previously made under the TPA and (at the time of reviewing this publication) no regulations have yet been made under the ACL to prescribe any logos.

The 'Grown in a *Country of origin*' test

'Grown in ...' is the most recent country of origin representation defence introduced as part of the Australian Consumer Law changes of 1 January 2011. A 'Grown in' claim provides growers, processors and retailers with a premium origin claim for foods.

The defence for claims that a good is grown in a certain country is more demanding than the general country of origin or 'Made in … ' defence but less demanding than the 'Produce of …' defence.

Section 255 sets out the test for representations that goods are grown in a particular country.

Item 4 of subsection 255(1) requires a representation that goods were grown in a particular country to meet the following requirements that:

(a) each significant ingredient or significant component of the goods was grown in that country; and

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

Item 5 of subsection 255(1) further requires that a representation that ingredients of components of goods were 'grown in' a particular country must meet the following requirements:

(a) each ingredient or significant component that is claimed to be grown in that country was grown only in that country; and

(b) each ingredient or significant component that is claimed to be grown in that country was processed only in that country; and

(c) 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.

What does 'grown' mean?

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

(a) are materially increased in size or materially altered in substance in that country by natural development; or

(b) germinated or otherwise arose in, or issued in, that country; or

(c) 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.

What does this mean in ordinary language?

This provision establishes that to qualify for the 'Grown in *country of origin*' defence all of the significant ingredients or components of the goods in question must come from the country of the representation and virtually all of the production or manufacturing processes associated with the goods must occur within the country of the representation.

For example: **Prawns Grown in Australia—**the representation 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.

To qualify for the 'ingredient/component grown in *country of origin*' defence the ingredients/component of the goods in question must come from the country of the representation, the processing of that ingredient/component must have happened in that country of the representation and 50 per cent or more of the total weight of the goods is made up of the ingredient/component.

For example: **Peas Grown in Australia**—the representation 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.

Place of origin claims

Sections 29(1)(k) and 151(1)(k) refer to 'place' of origin claims. 'Country' of origin claims are a subset, and are distinct from 'place' of origin claims.

A place of origin claim can be that a good originates from a narrower or more localised region than a country. For instance, 'Made in Melbourne' or 'Product of Tasmania'.

All false and misleading claims about the place of origin are prohibited by ss29(1)(k) and 151(1)(k). If the claim is 'place' of origin only, and not also a country of origin claim, defences in Part 5-3 of the Australian Consumer Law—the defences—do not apply. 'Place' of origin claims will be assessed on their merits.

Section 2

Advice for manufacturers, importers and retailers

Labelling requirements

The Competition and Consumer Act does not require goods to be labelled with their country of origin. However, any claim, representation, implication or impression that is made by any labelling or promotional material must be accurate and not misleading or deceptive or likely to mislead or deceive.

It might be misleading **not** to state the origin of goods if aspects of the labelling or packaging—for example, logos or pictures—carry misleading implications. In such circumstances the safest course may be to make the origin of the goods clear.

Some laws other than the Competition and Consumer Act do 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 acts require food sold in each state and territory to comply with the labelling requirements of the Australia New Zealand Food Standards Code. The Food Standards Australia New Zealand (FSANZ) develops and maintains the Food Standards Code which currently requires country of origin labelling for all packaged foods and some unpackaged foods sold in Australia. You should contact your local health department or agricultural department, or FSANZ on (02) 6271 2222 for information.

- Imported food products. The Imported Food Control Act 1992 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 Quarantine and Inspection Service who can be contact on (02) 6272 5488 for information for information.

- All imported goods. The Australian Customs and Border Protection Service administers 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 office for information on the requirements for imported goods on 1300 363 263.

These are just examples. Other laws may be enacted or amended from time to time imposing country of origin labelling requirements.

If you are in any doubt it would be wise to seek independent legal advice.

Can you substantiate your claims?

It is simply good risk management to ensure that representations 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 or misleading. Any difficulty in substantiating a claim will alert you to the risk in making it.

The onus of proving a breach of the country of origin provisions of the Act is on the party alleging the breach. However, the responsibility of proving that the claim meets the defences set out in the Act is on the person claiming the defence.

That is, if a representation of the country of origin of certain goods is claimed not to be misleading because:

(a) it was substantially transformed in the country in question; and

(b) 50 per cent or more of the cost of producing or manufacturing the goods took place in that country

the person claiming that defence must present or point to evidence that suggests a reasonable probability that the defence exists.

These two principles will help reduce your risk of making false or misleading claims.

- Don't make representations 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 country of origin breach is to show that the goods in question meet the requirements of the defence.

Substantiation notices

The ACCC may issue a substantiation notice requiring a person to give information and/or produce documents that could be capable of substantiating or supporting a claim or representation made by the person.

If the claims relate to a supply or possible supply of goods or services, the ACCC can issue a substantiation notice seeking information or documents in relation to the quantities in which, and the period for which, the corporation will be able to make the supply.

Substantiation notices do not require a person to prove that a claim or representation is true or is not misleading; rather, they are a preliminary investigative tool that helps the ACCC determine whether further investigation is warranted.

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. 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 or $660 for an individual. Alternatively, the ACCC may seek an order from the court for payment of a pecuniary penalty of up to $16 500 for a body corporate or $3300 for an individual.

Qualified claims

Businesses unable to make an unequivocal claim for their product, such as 'Made in Australia', may wish to consider making a qualified claim.

A qualified claim gives more information than a general country of origin or unqualified claim. For example, 'Made in Australia' is an unqualified claim, while 'Made in Australia from local and imported ingredients' is a qualified claim.

The ACCC has adopted the view that qualified claims do not have to meet the substantial transformation and 50 per cent content tests. It also encourages the use of qualified claims where the extra information provided is accurate, relevant and useful and does not give a false or misleading impression.

Qualified claims for country of origin could include:

- 'Made in Australia from Australian and imported components'
- '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.'

If a qualification, or reference to the existence of a qualification, is used it must sufficiently change the **overall effect** of the representation to dispel any misrepresentation that might otherwise be drawn. Accordingly, any qualification should be:

- as bold, precise and compelling as the body of the representation so that it has equal prominence, force and impact
- so placed in the advertisement that the target audience recognises it as easily as the representation itself

- stated in accurate, clear and precise terms. The party relying on the qualification must be able to show that it is likely to be understood by all those who might otherwise be misled.

The timing of a qualification is also critical. Because promotional material will be judged on a stand-alone basis a qualification must be introduced at the same time as the representation it qualifies. Post-advertising steps such as disclosure at the point-of-sale will not excuse omissions or misleading impressions in the initial material.

Disclaimers (corrective or explanatory material not directly associated with the initial prominent representation) are less desirable than qualifications. The courts focus on the overall impression conveyed by the representation. Their attitude is that disclaimers will be effective only rarely.

Reference to qualifications or limitations in promotional material should be clearly identifiable and easily read or heard. Consumers should not have to search for the facts of the matter. A generic disclaimer, such as 'some imported ingredients/components', will not help to avoid breaches of the Act if the imported ingredients or components are significant and should have been included in the primary label or the body of the advertisement. Promotional material and labels must clearly direct attention to qualifications significant enough to affect purchasing decisions.

The best approach is to include details of qualifications in the body of promotional material (including labels) where they are more likely to be read, reducing the risk of misleading consumers and breaching the Act. Fine print qualifications, especially in short exposure media such as billboards, radio and television, are unlikely to be effective.

Remaining silent

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

If the overall impression is misleading in any way, then more information needs to be provided or the representation needs to be made clearer.

The misleading impression must be corrected at the same time and with the same impact as the initial representation. While there is no general duty of disclosure in relation to country of origin representations under the CCA, 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 representations made in advertising, in signs or by staff comments. For example, 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.

e-x-a-m-p-l-e

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 and deceptive unless the statement is countered by an equally prominent representation that the nuts' origin was another country (in this example, the USA).

That said, a false assumption by consumers about facts not in evidence is not enough to make a supplier's silence misleading. If the macadamia nuts in the above example were labelled 'Macadamia Nuts' with no comment about their origin, it would not be misleading by silence if a consumer wrongly assumed they were of Australian origin merely because the macadamia tree is an Australian native.

Section 3

Common problems

Unclear/ambiguous representations

The most common complaints about country of origin representations are that the representation is unclear. An example is the use of phrases like 'Made in Australia from local and imported ingredients'. On one hand the phrase is truthful, in that it alerts the consumer to possible imported product. On the other hand, it seems to emphasise the presence of local product when it is unclear what the local percentage is or what relative roles the imported and local products play in the final product.

However, 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 representation qualified or not, is not misleading.

The ACCC generally supports the use of qualified claims where they reduce ambiguity or give consumers relevant, accurate and useful additional information. The representation 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 fallaciously claim 'Australian-ness' or any other origin.

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.

In the example given at the beginning of this section, the 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'.

Pictorial representations

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, maple leaves, national flags or other icons.

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 goods' origin 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 way in which representations are made is appropriate to the particular media used.

Conflicting claims

Problems may arise when a supplier makes one prominent statement in its labelling or promotional material and then adds further information that conflicts with the original, prominent statement. 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 qualification 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, qualification of the phrase 'Product of' (or similar constructions) may be risky, given the strict requirements for establishing a defence of the term.

Thirdly, the primary representation 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.

As with other examples given earlier, additional accurate and relevant information may be the answer. It might be clearer to say when those imports due to 'seasonal variations' occur. An example given earlier is 'Local ingredients used most of the year, imported ingredients used from October to December'.

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.

Global commerce—is there a country of origin?

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.

Clothing

A garment (say trousers) is made from Australian wool or cotton that received some basic processing in Australia. However, the wool or cotton 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 to its markets, including Australia.

Where was that clothing 'made'? Customs regulations may indicate that the country of origin would be the last place of processing (in this case Fiji) for Customs purposes. That is a Customs definition for the calculation of duty. It is not a consumer or marketing definition.

The clothing in question may not be able to safely claim a specific country of origin. Remember, the 'safe harbour' requirements include a 50 per cent cost of manufacture or production test. Since people in at least four countries cooperated to produce the clothing, it may be that none of those countries performed 50 per cent of the costs of production. Perhaps the most accurate description would be 'These trousers were finished in Fiji from Australian wool/cotton, with some processing in China and Italy'.

Food

Another example is with imported processed food. Australian sugar, Caribbean cocoa mass, Indian peanuts and South African dried fruit may be 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'.

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 Australian Consumer Law provisions may not allow the importer access to the defence under s. 255. The best approach would probably be to use a qualified claim, giving sufficient information for Customs to assess the bar's origin for its purposes to comply with the Food Standard Code and to avoid misleading consumers.

For example, 'Manufactured in Singapore from imported sugar, nuts, chocolate and dried fruit'. This approach could be adapted to address, at the same time, food regulation requirements for ingredients labelling.

Electronic equipment

A firm manufactures electronic equipment in Australia using some Australian components and some imported components. The imported components, while of good quality, are from a country not yet known as a source of quality high-technology components. In this example, that country is not Germany.

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 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 defence under the new provisions. The claim about the **equipment** is not likely to be regarded as breaching the country of origin provisions of the Australian Consumer Law (ACL). However, 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.

Suppliers should not attempt to 'stretch the truth' when composing their claims—even when their goods appear to qualify for the new defences.

It is difficult to imagine how a product with any significant imported content could qualify for the defence set out for 'Product of Australia'.

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 their grown in Australian supply cannot meet the high demand one month of year and needs to source flowers from origins that cannot be guaranteed by the supplier, or are a mixture of imported and Australian but from imported seedlings.

The flower wholesaler would not be able to rely upon the 'grown in' defence under the ACL because the statement may at times be misleading, deceptive or otherwise false. The trader would need to make a more qualified claim such as 'flowers grown in Australia and other parts of the world'.

Section 4

Frequently asked questions

The answers to these questions are a general guide only. They may not address some specific issues. If in doubt, please contact the nearest ACCC office listed at the end of this guide. It would also be wise to seek independent legal advice. This will give you access to the latest developments in the law, and information about other relevant legislation.

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

To be safe from legal action (either prosecution or a civil action) under ss. 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the Australian Consumer Law, your product must pass these two tests:

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

If it doesn't pass both tests, you should consider either:

- providing more information to clarify the goods' origin
- using another claim.

What if some of my product (components or ingredients) is imported?

The best policy is to say what the product's origin (including components or ingredients) actually is. If you provide sufficient accurate and relevant information to make the country of origin clear, it is unlikely that a complaint against your product will have substance.

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 really shouldn't use an unqualified claim of 'Made in Australia' and particularly not a claim of 'Product of Australia'.

You cannot simply ignore the fact that the imported components/ingredients are just that—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.

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. We are always happy to respond to telephone, written or facsimile inquiries. Just remember that we can't give legal advice, but we can explain your rights and obligations under the Competition and Consumer Act.

Who can take action under the Competition and Consumer Act?

The ACCC is not the only party able to take legal action under the Act. Anyone who has suffered a loss because the law has been broken can take action for compensation and injunctions. This includes business competitors, consumers, the minister and any other relevant party.

I can't source an essential component/ingredient in Australia—so my product is as 'Australian made' as it can be. Does that let me off the hook?

No. Any claim you make for the product as a whole must still pass the substantial transformation and product costs tests. Whether or not an important ingredient/component is available in Australia is not relevant.

So I still have to say that my product has imported components or ingredients?

Under the Competition and Consumer Act you are **not** required to make a country of origin statement **unless not to do so** would be misleading or deceptive. So no, you do not have to state the source of your components or ingredients unless you make a country of origin claim.

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

It is a defence to a criminal prosecution where the defendant establishes 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 case by case.

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.

Section 5

Avoiding problems

Safeguards

Four basic safeguards will help reduce the risk of representations breaching the Act.

- Each person in the organisation with responsibility for labelling, advertising, sales and marketing should be aware of the obligations imposed by the Competition and Consumer Act. Tailored compliance training will help equip officers and employees to meet their obligations under the Act.
- All promotional material (labelling, advertising, etc.) should be checked against the requirements of the Act and signed off at the corporate lawyer level.
- 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 representation of country of origin is made, now that the law has been amended.

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
- 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
- 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.

Section 6

Breaches of the Act

Overview

The civil and criminal consequences of contraventions of the consumer protection provisions are set out in the Australian Consumer Law (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(1k) and 33(1)) and Chapter 4 sets out the criminal offence regime relating to unfair practices (such as 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 Competition and Consumer Act, 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:

- infringement notice penalties for alleged breaches of the specific consumer protection provisions, unconscionable conduct, pyramid selling and some product safety provisions of $66000 for ASX listed corporations, $6600 for bodies corporate and $1320 for individuals.
- 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 misleading promotion)
- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken
- specific performance (ordering an individual or business to do something like making good a contract)
- 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

- probation orders, community service orders and corrective advertising orders (only available for the ACCC to seek from the court).

Criminal proceedings

Prosecutions for offences under Chapter 4 of the Australian Consumer Law may only be instituted by the consumer protector regulator, except in limited circumstances.

The penalties and remedies that are available for a breach of Chapter 4 are:

- monetary penalties of up to 10 000 penalty units ($1.1 million) for companies and up to 2000 penalty units ($220 000) for individuals (fines are specified in each section)*
- 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

Defences

A defendant can be excused liability in a criminal prosecution (for fines) for breaching Part 4 only if it can be shown that:

- the contravention was due to a reasonable mistake of fact (s207(1))
- the defendant reasonably relied on information supplied by another person (but not an employee or an agent of the defendant) (s207(2))
- the reason for the conduct was:
  - the action or failure of another person (but not a director, employee or agent of the defendant) (s208(1))
  - an accident (s208(1)(a))
  - some other matter beyond the defendant's control (s208(1)(a))
- the defendant took reasonable care and precautions to avoid the contravention (s208(1)(b)).

Enforceable undertakings

Sometimes, rather than instituting proceedings, the ACCC chooses to settle the matter administratively. This can be done by accepting formal, court enforceable undertakings from a business or person who allegedly breached the Competition and Consumer Act. 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
- 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
- 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 Act are the legal costs, lost executive time and the loss of hard won business reputation.

Attachment

Edited extract from the Australian Customs and Border Protection Service page on ANZCERTA at http://www.customs.gov.au/site/page6011.asp.

Joint Australia/New Zealand Customs information booklet, *Rules governing entitlement to preferential rate of duty for trans-Tasman trade*.

The 50 per cent rule—criteria

What is the setting for the 50 per cent and who must incur it?

The scheme of current Australian legislation is built around 'the factory' which is defined as the place where the last process in the manufacture of the goods was performed. It is important to understand that the manufacturer is defined as the person undertaking the last process in the manufacture of the goods. Manufacture of the goods must take place in Australia. When put together, the significance of these concepts is that:

- all inputs into the manufacturing process (other than those materials treated as overheads) are to be treated as materials entering that process
- all expenditure forming part of the 50 per cent requirement must be incurred by the manufacturer of the goods.

Another important aspect of the 50 per cent calculation is that no cost may be taken into account more than once.

How is the 50 per cent calculated?

The 50 per cent rule is a value added test and is based on the formula:

$$\frac{\text{qualifying expenditure (Q/E) \%}}{\text{factory cost (F/C)}}$$

Q/E = Qualifying expenditure on materials + qualifying labour and overhead (includes inner containers)

F/C = Total expenditure on materials + qualifying labour and overhead (includes inner containers)

The elements of factory cost i.e. material, labour and overhead and inner containers are dealt with below.

Elements of the 50 per cent

Materials

Total expenditure on materials includes all directly attributable costs of acquisition into the manufacturer's store.

This will **include**:

- the purchase price
- overseas freight and insurance
- port and clearance charges
- inward transport to store

but **excludes**:

- customs duty
- anti-dumping or countervailing duty
- excise duty
- sales tax
- goods and services tax

incurred by the manufacturer in Australia.

When materials:

- are provided free of charge or at a cost which is found to be more or less than normal market value or
- are added or attached to goods in order to artificially raise qualifying expenditure

the ACCC may determine a value which will apply.

Qualifying expenditure on materials

Qualifying expenditure on materials is 100 per cent when:

- the material is an unmanufactured raw product of Australia or
- the material is wholly manufactured in Australia from the unmanufactured raw products of this country.

Materials of mixed origin

These are materials which incorporate both imported and Australian content. Australia treats materials of mixed origin which reach 50 per cent or more local content as 100 per cent qualifying materials. Australia calculates the percentage of local content as the sale price of the material minus the imported content. This applies to Australian goods both exported and sold locally.

The following example illustrates the Australian outcome where the 50 per cent local content is not reached:

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		$
(a)	Cost of imported materials	150
(b)	Cost of materials manufactured in Australia	20
(c)	Labour and factory overhead for manufacture of materials	30
(d)	Total factory cost of materials	= 200
(e)	Other overhead and profit	50
(f)	Selling price of material to factory	= 250

Qualifying expenditure (b+c) = $50

Qualifying expenditure ÷ total factory cost (d) = $50 ÷ $200 = 25%

Qualifying expenditure on materials = 25% of f ($250) = $62.50

Materials recovered from waste and scrap

Australia has agreed to the following interpretation of this provision. Thus, expenditure:

- on waste and scrap resulting from manufacturing or processing operations in Australia and
- on used articles collected in Australia, which are fit only for the recovery of raw materials

shall be treated as qualifying expenditure on materials used in manufacture of goods.

Inner containers

Inner containers includes any container or containers into which any finished goods are packed other than pallets, containers or similar articles which are used by carriers for cargo conveyance.

Australia treats materials for inner containers in the same manner as any other materials. The effect of this is that where there is less than 50 per cent Australian content, Australia may allow some qualifying expenditure.

Labour

Labour costs associated with the following functions may form part of qualifying expenditure:

- manufacturing wages and employee benefits
- supervision and training
- management of the process of manufacture
- receipt and storage of materials
- quality control
- packing goods into inner containers
- handling and storage of goods within the factory.

To the extent that any of the listed costs:

- are incurred by the manufacturer of the goods
- relate directly or indirectly to the production of the goods
- can reasonably be allocated to the production of the goods
- are not specifically excluded (see exclusions under **Overhead** below)
- are not included elsewhere, for example, under **Overhead**

they may be included, in whole or in part, within qualifying expenditure.

Overhead

Subject to later qualifications, the following overhead costs associated with manufacturing functions may form part of **qualifying expenditure**:

- inspection and testing of materials and the goods
- insurance of the following kinds:
  - plant, equipment and materials used in the production of the goods
  - work-in-progress and finished goods
  - liability
  - accident compensation
  - consequential loss from accident to plant and equipment
- dies, moulds, tooling and the depreciation, maintenance and repair of plant and equipment
- interest payments for plant and equipment

- research, development, design and engineering
- the following real property items used in the production of the goods:
  - insurance
  - rent and leasing
  - mortgage interest
  - depreciation on buildings
  - maintenance and repair
  - rates and taxes
- leasing of plant and equipment
- energy, fuel, water, lighting, lubricants, rags and other materials and supplies not directly incorporated in manufactured goods
- storage of goods at the factory
- royalties or licences in respect of patented machines or processes used in the manufacture of the goods or in respect of the right to manufacture the goods
- subscriptions to standards institutions and industry and research associations
- the provision of medical care, cleaning services, cleaning materials and equipment, training materials and safety and protective clothing and equipment
- the disposal of non-recyclable waste
- subsidisation of a factory cafeteria to the extent not covered by returns
- factory security
- computer facilities allocated to the process of manufacture of the goods
- the contracting out of part of the manufacturing process within Australia
- employee transport
- vehicle expenses
- any tax in the nature of a fringe benefits tax.

NOTE: The cost of any depreciation must be worked out in accordance with generally accepted accounting principles applied by the manufacturer.

To the extent that any of the costs included in qualifying expenditure:

- are incurred by the manufacturer of the goods
- relate directly or indirectly to the production of the goods
- can reasonably be allocated to the production of the goods
- are not specifically excluded (see below)
- are not included elsewhere for example, under **Labour**,

they may be included, in whole or in part, within qualifying expenditure.

The following costs are specifically **excluded as qualifying expenditure**:

- any cost or expense relating to the general expense of doing business (including, but not limited to, any cost or expense relating to insurance or to executive, financial, sales, advertising, marketing, accounting or legal services)
- telephone, mail and other means of communication
- international travel expenses including fares and accommodation
- the following items in respect of real property used by persons carrying out administrative functions:
  - insurance
  - rent and leasing
  - mortgage interest
  - depreciation on buildings
  - maintenance and repair
  - rates and taxes
- conveying, insuring or shipping goods after manufacture
- shipping containers or packing the goods into shipping containers
- any royalty payment relating to a licensing agreement to distribute or sell the goods
- the manufacturer's profit and the profit or remuneration of any trader, agent, broker or other person dealing in the goods after manufacture
- any other cost incurred after the completion of manufacture of the goods.

ACCC contacts

ACCC Infocentre:	1300 302 502
ACCC website	www.accc.gov.au
ACCC Indigenous Infoline	1300 303 143

For information in languages other than English, call 131 450 and ask for 1300 302 502.

Callers who are deaf or have a hearing or speech impediment can contact the ACCC through the National Relay Service **www.relayservice.com.au**.

Voice-only (speak and listen) users—phone 1300 555 727 and ask for 1300 302 502.

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