

## **“Nay, nay, Captain Birds Eye!” What ARE the rules on claiming “Australian made” on food products?**

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**23 November 2020**

There are a few very important considerations for brands when hoping to rely on an “Australian made” claim. In this case, Simplot Australia Pty Ltd, owner of the famous ‘Birds Eye’ brand pushed the boundaries too far and the ACCC conducted an administrative investigation. In the end, Simplot agreed to amend its country of origin labelling with respect to claiming that their frozen fish products were ‘Made in Australia’. The case itself brings up some really interesting points about the overlapping rules and regulations in this space when it comes to food products particularly, an increasingly important area with so many new grocery retailers poised to enter Australia in the near term. Also with the ‘buy local, shop local’ sentiment growing ever stronger, Australian origin claims have the power to drive buying behaviour and the ACCC is watching these closely.

### **What happened?**

In the Simplot case, products were sold under the brand names ‘Birds Eye’, ‘I&J’, ‘Neptune’ and under a home brand product line, with a “Made in Australia” mark applied to the products. The ACCC was concerned that the labelling ‘Made in Australia’ did not satisfy the legislative requirements outlined in the *Origin Food Labelling Information Standard 2016* (“Standard”) which is provided under the Australian Consumer Law (ACL).

In the Simplot case, given the products are food products, a country of origin statement was mandatory. The Standard states that a food will be *made* in a country if it underwent its ‘last substantial transformation’ in that country.

### **So, what is ‘substantial transformation’?**

Given that so many ingredients for certain products can be sourced from a variety of locations, how a product is finally put together, made, constructed or “transformed” into its final form is vital to consider.

While the Standard does not contain a definitive statement as to what would be deemed a ‘substantial transformation’ in every case (which is not surprising given how varied food manufacturing processes can be), the ACL does provide further guidance on how to determine whether substantial transformation has occurred. There is also a Guide to the Standard released by the ACCC.

The ACL provides that goods are substantially transformed in a country if:

- they were ‘grown in’ or ‘produced’ in that country; or
- as a result of one or more processes in that country, the goods are fundamentally different in *identity, nature* or *essential character* from all of their imported ingredients or components.

The terms 'identity', 'nature' and 'essential character' have not been specifically defined but rather should be interpreted with their ordinary meanings. It is not enough for the final product to be somewhat different from its imported ingredients, to satisfy a 'made in' claim. The product will need to undergo a fundamental change, not merely changing the form or appearance of imported goods. For example, importing a t-shirt and adding a graphic/print, buttons or zippers to the goods would probably not amount to substantial transformation. However, if a business imported materials and cut and sewed those materials to make a t-shirt, this would be deemed a substantial transformation. In a food example, adding chocolate to an imported biscuit, would not be sufficient for a "Made in Australia" claim. However, mixing and baking raw ingredients into biscuits *would* justify the claim.

Other examples of substantial transformation (where a "Made in Australia" claim could be made) include:

- curing and drying imported pork to make bacon;
- juicing imported fresh fruit and vegetables to make a juice;
- moulding of sheet metal into a car panel;
- weaving of fibre/materials into a rug; and
- cutting, assembling and finishing imported wood to make furniture.

Examples of when a substantial transformation has not occurred include:

- blending imported dried herbs to make herbal tea;
- chopping up imported fruit to make a fruit salad;
- crumbing an imported prawn;
- gluing a sole onto an imported shoe upper; and
- cutting blocks of imported soap into individual bars

### **What did Simplot get wrong?**

If a food product, such as fish, is only *packaged in* Australia without being 'substantially transformed' in Australia, it cannot display a 'Made in Australia' mark. The products in question that were sold under Simplot's brands used fish that was imported from various different overseas countries such as New Zealand, United States and South Africa. The fish then underwent the final manufacturing processes in Australia in order to finalise the product for sale, however the ACCC's view was that only *minor manufacturing processes* occurred in Australia and the imported ingredients did not 'fundamentally' differ from the final product.

Simplot was of the view that slicing, crumbing and par-frying the frozen fish satisfied the 'substantial transformation' requirement, which justified use of the 'Made in Australia' mark. However, after the ACCC raised its concerns, Simplot agreed to change its country of origin labelling on products containing the frozen fish ingredients. The ACCC qualified its view noting that processes that only change the 'form' or 'appearance' of imported ingredients or components no longer qualify as substantial transformation.

The ACCC was clear in this case, as is consistent with past pronouncements, that Australian businesses must be diligent in their country of origin claims as they "are designed to inform consumers, some of whom may be willing to pay a premium for products they think are made in a particular country, especially Australia". Again, this is only going to become more important moving forward.

In this case, given the ACCC did not pursue enforcement action after their investigation and Simplot was willing to cooperate, no fines or other penalties were handed down, which is a good outcome and also a strong indicator to the market of the merits in some cases in acting cooperatively with the regulator, especially where the ACCC's position is not totally bulletproof. Moving forward, the relevant Simplot frozen fish products manufactured after 31 October 2020 will bear a '**Packed in** Australia' mark.

## Contact us

If you would like further information on the above and how it impacts on your business or your client's business, please contact one of our experts below.

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