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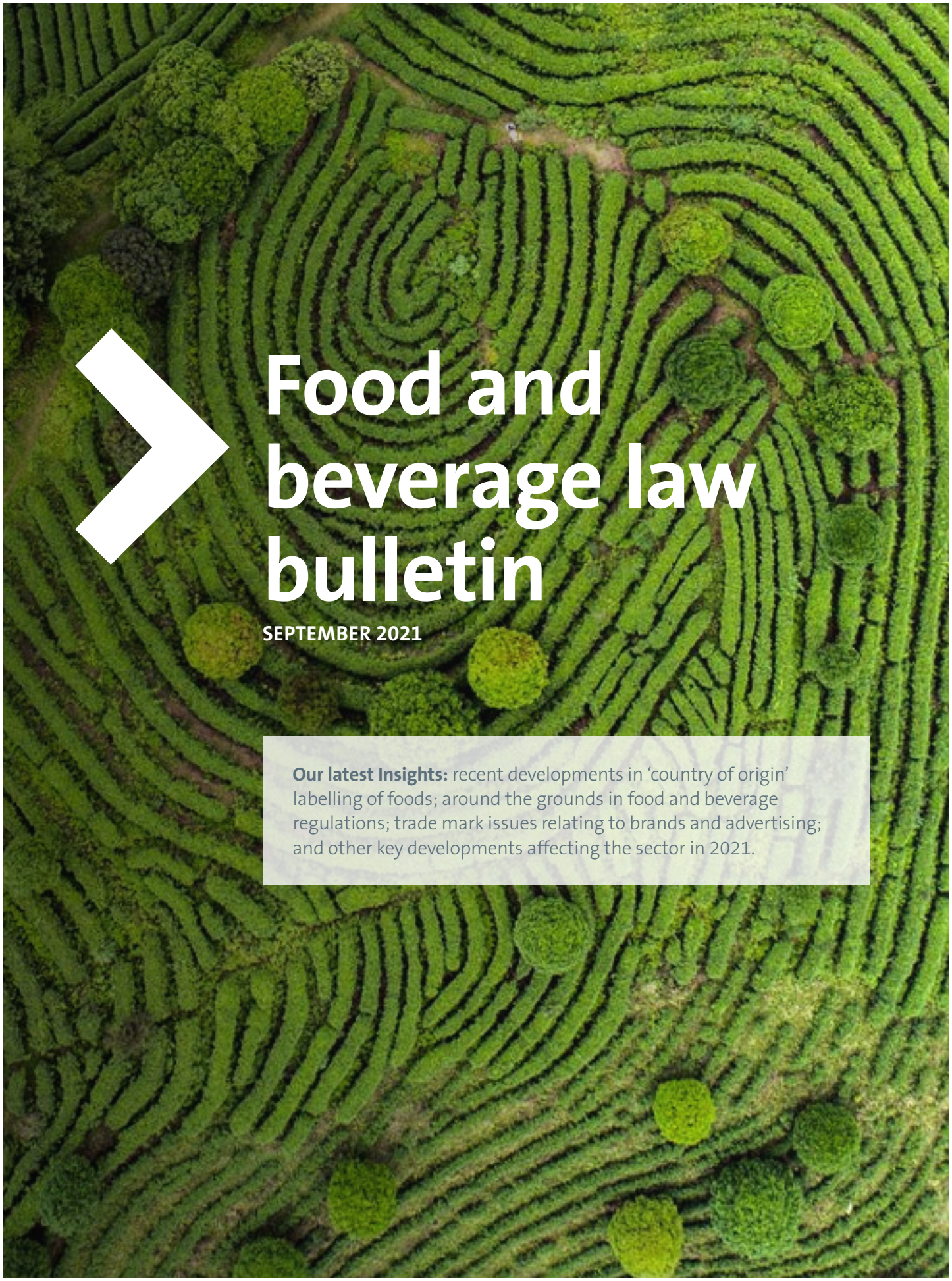

Food and beverage law bulletin

SEPTEMBER 2021

Our latest Insights: recent developments in 'country of origin' labelling of foods; around the grounds in food and beverage regulations; trade mark issues relating to brands and advertising; and other key developments affecting the sector in 2021.

Around the grounds in food and beverage regulation

Nick Li, Alexandra Moloney

IN BRIEF

We review the most significant regulatory developments in the food and beverage sector over the past 12 months, and consider what is just over the horizon, including changes to allergen labelling, health star rating system, industry codes and the regulation of irradiation of foods.

KEY DATES AND TAKEAWAYS

- Food manufacturers must be aware of new allergen labelling requirements for food labels. All labels must comply with the new requirements by 24 February 2024.
- Changes to the Health Star Rating System (***HSR System***) penalise foods high in sugar and salt.
- New amendments to the Australian Food and Grocery Code (***AFG Code***) have come into effect that target agreements between retailers, wholesalers and supermarkets. Amended grocery supply agreements (***GSAs***) must be agreed between retailers and suppliers by 3 October 2021, after which time the new code provisions apply automatically to the GSA.
- The new Food & Beverage Advertising Code (***F&B Advertising Code***) comes into effect on 1 November 2021, targeting the promotion of occasional foods to children.
- The FSANZ Food Standards Code (***Food Standards Code***) has been amended to permit the irradiation of all fruits and vegetables as a phytosanitary measure.

WHO IN YOUR ORGANISATION NEEDS TO KNOW ABOUT THIS?

Legal and marketing teams

NEW ALLERGEN LABELLING REQUIREMENTS

- New allergen labelling requirements were introduced under the Food Standards Code on 25 February 2021. Manufacturers of food will have until 24 February 2024 to comply with the new requirements. Presently, manufacturers may choose to comply with either the new or pre-existing rules.

THE NEW RULES

The new rules require that allergens in food must be declared in the statement of ingredients and a summary statement. The disclosure in each case must use the required name of the allergen.

In relation to the disclosure in the statement of ingredients, the disclosure of the allergen must be:

- in bold font and in distinct contrast with other text in the statement of ingredients;
- in font no smaller than other text in the statement of ingredients;
- listed separately for each ingredient (eg kamut (**wheat**), maltodextrin (**wheat**));
- disclosed as a separate word (eg **milk** powder); and
- separate from, and next to, the name of the relevant ingredient if the ingredient's name is not identical to the allergen name (eg sodium caseinate (**milk**)).

The summary statement must:

- state 'contains' followed by each allergen's required name, separated by commas with no other words; and
- be directly next to (but separate from) the statement of ingredients, in the same field of view and must be printed in bold in the same font size as the statement of ingredients.

Notably, the new requirements neither prohibit nor prescribe additional requirements in relation to voluntary precautionary allergen statements, which may continue to be used. The Allergen Bureau has published its updated guidance on Allergen Management and Labelling for the new requirements.

The new requirements are, in many respects, similar to the voluntary best practice recommendations under the AFGC's Food Labelling and Allergen Guide for the previous allergen labelling rules. Many manufacturers may only need to make small tweaks to comply with the new rules, some may already be complying with the new rules.

PRE-EXISTING RULES

The now former rules for allergen labelling in the Food Standards Code were not as prescriptive as the new rules. The Food Standards Code merely required a declaration of the presence of the allergens with sufficient prominence and in English.

Many manufacturers adopted the voluntary recommended labelling practices in the AFGC's Food Labelling and Allergen Guide.

CHANGES TO THE HEALTH STAR RATING SYSTEM

Changes to the HSR System commenced implementation on 15 November 2020 and are subject to a two-year transition period. A further 12-month stock-in-trade permission will apply to products labelled under the former HSR system prior to 15 November 2020, which have a shelf life of 12 months or longer.

The changes are the result of reforms to the five-year review of the HSR System, about which we previously reported. The HSR System will remain voluntary under the reforms.

The key changes to the HSR system include:

- the energy icon, predominantly used for beverages, is removed from the HSR system;
- fruits and vegetables receive an automatic five-star rating; and
- foods high in sugar and salt are likely to see their ratings reduced.

The reforms unfortunately do not address some of the main weaknesses of the HSR system, including that:

- it does not account for the difference between added sugars and natural sugars; and
- adjustment points for protein and fibre can be used in a way that can undermine the objectives of the HSR system.

CHANGES TO AUSTRALIAN FOOD AND GROCERY CODE

On 3 October 2020, changes to the AFG Code came into effect. The AFG Code is a voluntary, legally enforceable code that regulates trading between retailers (and now wholesalers) and their suppliers. Retailers and wholesalers who are signatories to the AFG Code must ensure they comply with the new changes to the Code.

Retailers and wholesalers must also ensure that their GSAs are AFG Code compliant. A GSA governs the supply of groceries between a supplier, wholesaler or retailer to a supermarket. Retailers and wholesalers who were signatories to the AFG Code prior to 3 October 2020 must undertake certain steps to ensure their GSAs are compliant with the amended AFG Code.

By 3 April 2021 (for retailers) and 3 April 2022 (for wholesalers), retailers and wholesalers must offer their suppliers, in writing, to amend their GSAs to comply with the relevant provisions of the amended Code. Retailers and wholesalers must amend their GSAs within six months of the supplier accepting the retailer's offer. If a retailer or wholesaler fails to amend their GSA by the relevant date, the amended Food and Grocery Code provisions will automatically apply on 3 October 2021 (for retailers) and 3 October 2022 (for wholesalers).

The key changes to the Food and Grocery Code are as follows:

- the dispute resolution process has been modified in a way that is intended to provide suppliers with more confidence in raising their complaints. In particular:
  - retailers and wholesalers are now required to appoint a Code Arbiter for investigating and proposing resolutions to disputes or complaints raised by a supplier; and
  - the Minister may appoint an Independent Reviewer to review whether the supplier was afforded procedural fairness;
- the amended Code provides further guidance on the circumstances in which a retailer or wholesaler has acted in 'good faith';
- most of Part 3 of the Code has been extended to apply to wholesalers' conduct in purchasing groceries from suppliers;
- the amended Code places additional obligations on retailers and wholesalers seeking to delist products;
- the amended Code prohibits retrospective changes to GSAs;
- new provisions require retailers and wholesalers to respond to, and engage with, suppliers that inform them of a price increase; and
- new provisions allow suppliers to renegotiate wastage payments without needing to renegotiate other terms of their GSA.

Further changes relating the price rise processes commenced on 2 January 2021. Relevantly, those changes will prohibit the retailer/wholesaler from requiring commercially sensitive information from suppliers at any stage during the process.

NEW FOOD & BEVERAGE ADVERTISING CODE

The new F&B Advertising Code is effective from 1 November 2021. The new F&B Advertising Code seeks to reduce opportunities for children to view advertisements that promote occasional food or beverage products.

An occasional food or beverage product is defined as one that does not meet the Food Standards Australia Nutrient Profile Scoring Criterion (***NPSC***). The NPSC is used to determine whether a food is suitable to make a health claim based on its nutrient profile, and considers a number of different factors including energy, sugar, fat and sodium content.

The following key changes will apply from 1 November 2021 when advertising occasional food to children:

- the definition of a child will mean a person under the age of 15 (previously 14 years);
- advertisers must not target children in the advertising of occasional food and beverage products;
- sponsorship advertising that promotes an occasional food or beverage product must not be targeted at children;
- advertisers are not permitted to give occasional food or beverage products or associated vouchers to children as an award or prize; and
- occasional food and beverage products are only able to be advertised where children comprise 25% or less of the audience (down from the previous threshold of 35%).

The advertising restrictions do not apply to foods that meet the NPSC, and therefore encourages advertisers to promote healthier foods to children.

IRRADIATION OF FRUITS AND VEGETABLES FOR PEST DISINFESTATION

The Food Standards Code has been amended to permit the irradiation of all fruits and vegetables as a phytosanitary measure (ie pest disinfestation).

Previously, only specified fruits and vegetables were permitted to be irradiated—including blueberries, capsicum, cherries and mangoes (among others). A separate application to vary the Food Standards Code was required to include each new food to the permitted list.

The change means any fruit or vegetable may be irradiated as a phytosanitary measure, without the need for further approvals from FSANZ. However, it is estimated that only a small amount of Australian-grown and imported fruit and vegetables will be irradiated, as the majority of fruit and vegetables in Australia and New Zealand are grown and eaten within the same quarantine jurisdiction (and do not undergo phytosanitary treatment).

Significantly, the change does not amend the permitted level of ionizing radiation that may be used, nor the labelling or record keeping requirements, as per the existing Food Standards Code.

ACTIONS YOU CAN TAKE NOW

- Review product labels and update for compliance with new allergen labelling requirements. The transition period ends on 24 February 2024.
- Retailers and wholesalers should review their GSAs to ensure they are compliant with the changes to the AFG Code.
- Review advertising campaigns relating to occasional foods to ensure they are compliant with the new F&B Advertising Code commencing 1 November 2021.

Burger, beer and a side of trade mark dispute?

Tommy Chen, Tom Campbell

IN BRIEF

Food and beverage businesses need to be mindful of trade mark issues when investing in brands and advertising.

Recent disputes, including those among competing beer brewers and rival burger giants, highlight the risks of adopting or promoting new brands that are not enforceable as trade marks or that conflict with other brands.

HOW DOES THIS AFFECT YOU?

- Consider conducting a clearance analysis for any new brands to ensure they are distinctive and do not conflict with other traders' existing rights. Investing in brands that are descriptive, or that conflict with others' rights, can be a costly mistake to correct.
- Food traders that adopt brands that are descriptive of their products run the risk of being unable to enforce these brands as trade marks.
- Use of a brand that is too close to a competitor's brand can lead to costly court proceedings. Although comparative advertising is permitted under Australian law, a 'cheeky' nod to a rival or trader based overseas can stray into actionable trade mark infringement.

WHO IN YOUR ORGANISATION NEEDS TO KNOW ABOUT THIS?

Legal counsel and those involved in product marketing.

ADOPT A DISTINCTIVE BRAND – THE CAUTIONARY TALE OF URBAN ALE

Businesses in the food industry that are considering adopting brands that are descriptive of their food products should take note. Australian beer brewery Urban Alley's attempt to sue competitor La Sirène for infringing its registered trade mark URBAN ALE highlights the risks in attempting to enforce rights in a descriptive trade mark.

La Sirène used the words URBAN PALE in relation to one of its craft beer offerings, as shown below alongside some of their other products:

Urban Alley relied on its registered URBAN ALE mark to sue La Sirène for infringement. In cross-claim, La Sirène sought cancellation of the URBAN ALE registration. A key question considered by the court was whether the URBAN ALE brand was capable of distinguishing Urban Alley's beer from that of other traders, as required for a mark to be registered under the Trade Marks Act. The trial judge decided (and the full Federal Court agreed) that the words URBAN ALE describe craft beer made in an inner city location – a tangible, descriptive meaning which falls short of the distinctiveness requirements. The court ordered cancellation of the trade mark, and Urban Alley was not able to pursue its infringement case. Further, the court found that La Sirène's use of the words 'Urban Pale' on its product packaging did not constitute 'use as a trade mark', and so in any event infringement would not be established.

The case highlights the risks when businesses in the food industry choose to adopt a brand that is inherently descriptive of its products. Unless the mark becomes distinctive through use, it may not be possible to register it. Additionally, even if registered it is at risk of being cancelled, and in any case it would not be enforceable against others who adopt the same or similar branding.

BIG JACK V BIG MAC – COMPARATIVE ADVERTISING, A PLAYFUL NOD OR INFRINGEMENT?

The decision by Australian burger chain Hungry Jacks to promote a new range of BIG JACK and MEGA JACK burgers has resulted in court proceedings with rival burger giant McDonald's.

The case is currently in progress. In pleadings before the Federal Court, McDonald's alleges that use of BIG JACK and MEGA JACK infringes its earlier trade mark registrations for BIG MAC and MEGA MAC on the basis that the marks are deceptively similar. McDonald's also requests cancellation of Hungry Jacks' trade mark registration for BIG JACK on the basis that it was applied for in bad faith and is likely to cause deception and confusion amongst the burger-buying public.

Hungry Jacks appears to have embraced the dispute, publicising it in television advertisements. However, the proceedings remain

on foot, with legal fees on both sides accumulating due to what appears to be a bold (and potentially costly) approach to comparative advertising.

IN-N-OUT OR DOWN-N-OUT – THE LINE BETWEEN INSPIRATION AND APPROPRIATION

In a further example of comparative advertising potentially straying into actionable trade mark infringement, the attempt by local burger restaurant Hashtag Burgers to trade off the reputation of the US-based IN-N-OUT Burger chain proved to be a risky move. Hashtag Burgers adopted (what they termed the 'cheeky') branding of DOWN-N-OUT. The trial judge held the conduct amounted to trade mark infringement, passing off and misleading and deceptive conduct under the Australian Consumer Law. The Full Court of the Federal Court ultimately upheld these findings.

Despite not having permanent restaurants in Australia, the US chain has registered numerous trade marks in Australia, including the word mark IN-N-OUT BURGER and the logo:

It has also held annual 'pop-up' events in Australian cities.

The trial judge found that the 'N-OUT' element was an 'essential ingredient' of each party's marks and that DOWN-N-OUT 'sailed too close to the wind' in its close resemblance to IN-N-OUT, such that there was a real tangible danger of consumer confusion.

Interestingly, the court also found that IN-N-OUT had established a strong reputation in Australia – reflected in the demand for its pop-up events. This reputation helped to establish misleading and deceptive conduct under the Australian Consumer Law.

Hashtag Burgers was not helped by the fact that it referenced IN-N-OUT in much of its promotional material, with one of its media releases titled 'SYDNEY'S ANSWER TO IN-N-OUT BURGERS HAS FINALLY ARRIVED!' The addition of false denials, inadequate discovery and a decision to give no evidence during the trial did not support its case. Evidence also showed that the IN-N-OUT logo was used as a starting point for the design of the DOWN-N-OUT trade mark and that DOWN-N-OUT used significant features of the IN-N-OUT marks with the intention of confusing consumers. This intention to confuse was used to infer that confusion is likely to occur.

The evidence indicated a blatant attempt at free-riding by DOWN-N-OUT, and provides a stark reminder that the 'line between inspiration and appropriation' can be a costly one to cross. The case also highlights that free-riding on the local reputation of overseas-based traders can be actionable.

ACTIONS YOU CAN TAKE NOW

- Take caution when adopting branding that is similar to competitors, and ensure that permissible comparative advertising does not stray into actionable free-riding. Even if a food trader considers it a 'cheeky' reference to a rival, it may attract intellectual property infringement claims and lead to costly court proceedings.
- Avoid deliberately creating branding where an intention to confuse customers can be shown, and avoid publicly advertising an intention to cause confusion with another business in the food industry.
- When adopting a new brand for food products, check that it will meet the distinctiveness requirements under trade mark law so that the owner can enjoy enforceable rights in the name.
- Contact a member of the Allens IP team to enquire about our brand and advertising clearance services before investing in new branding or advertising campaigns.

Substantially transformed? Recent developments in country of origin labelling of foods

Nick Li

IN BRIEF

Recent developments in relation to country of origin labelling (***CoOL***) requirements for food and beverages provide some further guidance on the ACCC's approach, and foreshadow the possibility of further regulatory changes.

HOW DOES THIS AFFECT YOU?

- The ACCC has confirmed its view that processing steps such as slicing, battering and par-frying of imported fish do not substantially transform the fish, and therefore are not eligible for a 'made in Australia' claim.
- Country of origin labels for food and beverage products should be regularly reviewed, and together with consideration of the manufacturing steps of the product as a whole, evaluated against the requirements in the country of origin Food Labelling Information Standard 2016 (the ***Standard***).
- The Australian Government is presently undertaking an evaluation of the country of origin food labelling regulatory framework and companies should consider making submissions as opportunities for consultation arise.

WHO IN YOUR ORGANISATION NEEDS TO KNOW ABOUT THIS?

Legal and marketing teams.

WHAT'S NEW IN COUNTRY OF ORIGIN?

The Standard has now been in full force for around three years, and the current form of the safe harbour provisions under the Australian Consumer Law (***ACL***) has been around for even longer.

The Standard provides that foods may make a 'made in' claim in respect of the country of the food's last substantial transformation.

Substantial transformation is defined in the ACL as:

- where the food satisfies the requirements to make a 'grown in' or 'produce of' claim; or
- where the goods are fundamentally different in identity, nature or essential character from all of their ingredients or components that were imported.

Significant ambiguity remains over the meaning of 'substantial transformation' in the second limb and the parameters of what constitutes a change to the identity, nature or essential character of a food.

Developments in the past year have provided further insight into the ACCC's interpretation of 'substantial transformation', as well as highlighted potential avenues for reforms to improve clarity in the future.

FROZEN FISH PROVIDES FURTHER CLARITY ON 'SUBSTANTIAL TRANSFORMATION'

In November 2020, Simplot agreed to amend its country of origin labelling on a number of its frozen fish products sold under brands including Birds Eye, I&J and Neptune from 'made in Australia' to 'packed in Australia'. The change is to address the ACCC's concerns arising from compliance checks that the goods were not substantially transformed in Australia.

The fish was imported from other countries including New Zealand, the US and South Africa. The slicing, crumbing and par-frying of the imported fish took place in Australia. The ACCC was concerned that the steps taken in Australia changed the form and appearance of the imported fish, but that the end products did not differ fundamentally from the imported goods.

This development sheds further light on what the ACCC considers to be the meaning of 'fundamentally different in identity, nature or essential character'. The ACCC's 2019 guide on Country of Origin Food Labelling attempts to clarify its position using a number of examples. The Guide is not an authoritative position on how a court would construe the meaning of substantial transformation, and the examples raise some potential inconsistencies. For example, 'cooking imported dried pasta, rice or legumes' is given as an example of a processing step that the ACCC regards as substantial transformation – and yet it did not appear to consider par-frying fish to meet the requirement.

There has only been one Federal Court decision considering the issue of substantial transformation and the safe harbour provisions in the ACL. In that case[1], the court held that encapsulating imported fish oil in gelatin to make fish oil capsules did not substantially transform the fish oil, and therefore did not justify a 'made in Australia' claim.

1 *Nature's Care Manufacture Pty Ltd v Australian Made Campaign Limited* [2018] FCA 1936

PROCESSES MAY BE DEEMED TO BE SUBSTANTIAL TRANSFORMATION UNDER REGULATIONS

Ambiguity persists in understanding the meaning of substantial transformation and the boundaries for 'made in' claims in relation to food. However, as of 1 October 2020, the Australian Consumer Law was amended[2] to include a new provision permitting that certain processing steps could be prescribed by the regulations as substantial transformations.

The amendment is intended to address country of origin labelling issues arising with complementary medicines (for which a separate information standard is also being developed). However, the consequence of the new provision opens a pathway for manufacturing steps relating to other goods (not just complementary medicines) to be prescribed by regulation as being processes of substantial transformation.

Certainly, the change was driven by the complementary medicines industry from its belief that many complementary medicines would not be capable of being labelled 'made in Australia' despite significant processing steps being performed in Australia.

A similar concern applies to the food sector, and this mechanism may well be useful in curing some of the issues with the current definition of 'substantial transformation'.

FURTHER CHANGES ON THE HORIZON

The Australian Government is undertaking an evaluation of the country of origin food labelling reforms which commenced in 2016 and have been in full effect since July 2018. Public consultation closed in September 2020, and the review is expected to be completed in the middle of this year.

The terms of reference are broad, with the stated purpose being 'to review the CoOL reforms and their effectiveness in meeting their intended objectives, including a consideration of any unintended consequences.'

The evaluation will consider 23 questions addressing all aspects of the current system, including:

- design and implementation;
- effectiveness of outcomes;
- compliance and unintended consequence; and
- impacts on business.

The discussion paper sought submissions on nine questions – including, notably:

- whether the criteria for 'made in' claims reflect consumer perceptions and expectations; and
- whether the distinction between priority and non-priority foods under the Standard continue to meet consumer expectations.

Further rounds of consultation and surveys have been flagged. So far, a number of industry and consumer interest organisations have published their submissions. The Australian Food and Grocery Council highlighted in its submission the need for greater clarity around 'substantial transformation'.

It is too early to predict whether this review will result in any significant changes or improved clarity to the CoOL requirements for foods and beverages.

ACTIONS YOU CAN TAKE NOW

- Review your existing country of origin labels on food and beverage products and whether they comply with the requirements under the Standard, particularly if a 'made in' claim is made, as well as whether the substantial transformation test is satisfied.
- For any given product, consider the steps taken to bring about the final product, including where each ingredient is sourced, and where each processing step occurs. The country in which the last change in the food's identity, nature or essential character occurs is the country the food is 'made in'.
- Monitor the progress of the Government's evaluation of the CoOL requirements for foods, and consider making submissions as further public consultations arise.

2 Competition and Consumer Amendment (Australian Consumer Law—Country of Origin Representations) Bill 2020

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