Country of Origin Labelling of food — Office of Regulation Review Submission to the National Food Authority

1. Introduction

In March 1994 the Government introduced into Parliament amendments to the Trade Practices Act (TPA) concerning country of origin labelling. This legislation was referred to a Senate Committee for further consideration, and is expected to be debated again by Parliament in early October. In parallel, the National Food Authority (NFA) intends to vary the Food Standards Code (FSC) to require stricter country of origin reporting and to provide legal definitions of terms commonly used. The NFA released a Discussion Paper in June 1994 calling for submissions on its draft proposals (NFA 1994a).

The Office of Regulation Review (ORR) is responsible for administering the Commonwealth Government's regulation review program. Amongst other functions, the ORR provides public advice on regulatory issues.

In this submission the ORR comments on the NFA's Discussion Paper. It examines the rationale for country of origin labelling in general, and assesses the proposal against the Government's regulation review framework.

2. The NFA proposal

At present, for most food products, the country of origin labelling requirement in the food laws are satisfied if:

- the product contains the address of the manufacturer including the country in which the food was made; or
- the label contains a statement of the country in which the food was packed for retail sale. If the food comprises imported ingredients, the label must at least contain a declaration that the ingredients are imported.

The main elements of the NFA's proposed variation are that:

- all packaged and most unpackaged foods must carry a statement indicating the country or countries of origin;
- the terms 'produce' and 'product of' a country are defined to mean that all the major ingredients are from, and the processing of the food has taken place in, that

country (a major ingredient is defined as an ingredient comprising 5 percent or more of the product by weight);

- the term 'made in' a country can only be used if the food has obtained in that country those qualities which are its essential qualities in the minds of consumers.

While the draft variations are broadly consistent with the Government's proposed TPA amendments, they **make country of origin reporting mandatory and also seek to extend the country of origin regime to all imported food and to unpackaged food**.

3. Government policy on regulation

The Commonwealth Government's general policy on regulation is to encourage 'minimum effective regulation'. Under the policy, a particular regulation will be supported only where a well defined social or economic problem exists, where other means of solution such as market mechanisms or self-regulation are inappropriate, and where expected benefits exceed likely costs. The policy does not prescribe what type of regulation should be used in particular circumstances. Rather, it sets out principles and analytical requirements to be followed in the development of regulation. In considering regulation relevant issues include:

- what are the primary objectives of the regulation?
- how do alternative mechanisms for achieving the objective compare?
- do the benefits of regulation exceed its costs?

It is against such a framework that the NFA's proposals have been evaluated by the ORR.

4. Objectives of country of origin labelling

The NFA links its proposed variations primarily with the second objective of the NFA Act — 'the provision of adequate information relating to food to enable consumers to make informed choices and prevent fraud and deception'.

There are two parts to this objective: informing consumers and preventing fraud and deception. The draft variations appear to be primarily aimed at fulfilling the first part — providing information that is useful to consumers. Preventing fraud and deception is an important goal for government policy, but it is already an offence under Section 53 of the TPA which proscribes 'false and misleading claims'. The courts have been involved in specific cases of misleading food labelling, and the

draft variations in themselves would not reduce the number of intentionally misleading claims.

Another aspect of the objective is the underlying rationale for providing information. In the case of nutrient labelling, the information provided allows consumers to make informed choices, but it also fulfils a health function. Some consumers need avoid certain ingredients, even in minute quantities; detailed ingredient labelling allows them to do this. As the Discussion Paper makes explicit, however, a health rationale is not present in the case of country of origin labelling. Country of origin information might be regarded as necessary because some consumers desire such information. The use to which the information is put will vary: consumers may want to seek out, or avoid, products from certain countries; or the most often cited use, they might want to 'buy Australian.'

5. Economic rationale for country of origin regulation

The availability of accurate and relevant information about products is important for the efficient functioning of markets. Regulation of country of origin hinges on the argument that unregulated markets fail to deliver the appropriate amount of information to consumers. Failure would obviously occur if deception were not illegal. Firms could make false claims which consumers would have no way of verifying. However, in Australia, as in nearly all other countries, such practices are illegal.

In the face of a general prohibition on misleading claims, and appropriate policing and sanctions, there is no obvious failure in the market to provide consumers with the country of origin information they desire. Firms have a strong incentive to satisfy all consumer requirements with respect to a particular product, including their information requirement. If consumers base purchasing decisions partially or exclusively on a particular feature of a product, such as its origin, firms that possess the desirable feature have a strong incentive to disclose it on the label.[1] Consumers choosing between products are unlikely to buy a brand that contains no information about what they consider to be a desirable attribute. If a consumer wants an 'Australian' product, the absence of such information on one brand will lead them to seek a brand that is 'Australian'. Firms therefore have a commercial incentive to invest in discovering consumers' information requirements and testing their reaction to new products and messages. Similarly, firms that have made a significant investment in establishing a brand-name in a market may be reluctant to risk this investment by making statements that are ambiguous or even potentially misleading.

[1] If firms consider that independent verifications of their claims is useful they can, for a fee, use the logo of the Advance Australia Foundation.

The Discussion Paper provides some evidence, however, that despite the large amount of information provided voluntarily by firms on the country of origin of products, some consumers are confused by origin descriptions, and may be misled. For instance, some consumers may be purchasing products which they believe have been produced in Australia from Australian ingredients whereas in fact there may be some imported content. This confusion arises because terms such as 'Product of Australia', and 'Made in Australia' can be interpreted differently by different consumers, different firms and the courts. There need not be an intention to mislead by any party. A food producer's interpretation as reflected on the label may be fully consistent with that adopted in case law by the courts, but may still convey a different message to some consumers.

If such confusion over meaning was causing widespread problems to consumers there might be a basis for government to clearly and accurately define what country of origin descriptors mean. Whether regulation is warranted depends on three factors:

- the scale of the problem;
- whether government action can eliminate confusion; and
- whether the benefits to the community of doing so outweigh the costs.

The following sections analyse whether the NFA's proposals are desirable given these considerations.

6. The scale of the problem

Estimating the extent to which the current framework for country of origin labelling does not meet consumers' needs has a number of dimensions, but is primarily dependent on:

- the priority consumers place upon such labelling; and
- the level of misinterpretation or dissatisfaction among consumers who use country of origin information.

The Discussion Paper does not demonstrate that the existing country of origin labelling arrangements are of major concern to consumers as a whole, or specifically to consumers who use the information. While consultation has been extensive, the NFA has not produced sufficient evidence to justify changing the food code. As the Paper says:

> there is very little in the way of independent and objective data available to the Authority which can be used to gauge the consumer viewpoint with any confidence. (p. 19)

There is, however, a range of more limited evidence available in the absence of comprehensive data. This evidence comes from three main sources; that of the limited survey carried out for the Federal Bureau of Consumer Affairs (FBCA) (Riley Research 1993), the number of identified cases of misinterpretation or confusion, and the level of concern shown by consumers and governments in other countries.

Survey data

According to the Discussion Paper, the FBCA survey conducted in 1993 found that:

> 'there is a high level of confusion and cynicism amongst consumers about country of origin labelling. The attitudes of consumers were said to be influenced by the (then) recent media coverage of alleged malpractices and suggestions that the present law could easily be bypassed'.(p.19)

The Discussion Paper describes the media coverage that influenced consumers as 'in some cases uninformed or positively misleading' and states that the consumer perception is that goods were being imported and then labelled as originating in Australia. It is difficult to determine how much consumer confusion should be attributed to the media, but even if the consumer perception was correct it does not imply that there should be more prescriptive regulation but, rather, that there should be stricter enforcement of the current laws to prevent obvious examples of fraudulent claims.

Notwithstanding the potential bias caused by inaccurate reporting, the FBCA survey also questioned the extent to which country of origin labelling was a priority for consumers. It stated that:

> 'buying Australian' is of variable (and not especially primary) importance in the consumers' decision processes to purchase most goods - price rules in many cases'. (Riley Research Pty Ltd, 1993)

It also stated that, in addition to being confused and cynical, as was reported in the Discussion Paper, consumers were **'non-caring for the most part**.' Overall the survey results are equivocal at best, and certainly do not demonstrate a necessity for government action in the form of prescriptive regulation.

The Discussion Paper also cited a survey conducted by the CSIRO that found that 'a majority of consumers want country of origin information'. That is not to say, however, that consumers are unhappy with the information they already receive, or that they desire a change to the current regime.

Evidence of consumer confusion

If there were many cases where consumers were 'deceived' by labels, that may illustrate general dissatisfaction with the current regime. However, the Discussion Paper notes that:

> Few instances of specific alleged malpractice have been identified to the Authority, although the media coverage of the subject has at times given the impression that false and misleading country of origin labelling is endemic. (p.20)

Again this is not supportive of the contention that there is widespread consumer dissatisfaction, especially since consumer reaction is partly a result of inaccurate media reporting at the time. Even if prosecutions proved difficult, it would be expected that allegations against products would be reported if consumers or rival firms suspected labels were misleading or confusing. Rival firms have both the detailed market knowledge and the commercial incentive to take action where they suspect a competitor is making misleading claims.

Overseas experience

Finally, in considering the extent of the demand for country of origin labelling, overseas experience provides a useful source of information. While on some issues Australia may have unique concerns, it is rare in the area of consumer protection that similar problems are not encountered in other industrialised countries. However, as the *Report of the Working Groups on Country of Origin Labelling of Consumer Products* (Commonwealth Working Group 1993) and the Discussion Paper make clear, the NFA proposals and TPA amendments go far beyond that of other industrial countries. As the Discussion Paper states:

> no other countries are known to regulate country of origin labelling to the extent that Australia does. (p.22)

Most other developed countries either do not consider country of origin labelling to be a consumer protection issue, or require the label to state in which country the 'last substantial production operation was performed'. The much more demanding regulations proposed for Australia have not been justified on the basis that a large scale problem exists, by either evidence or argument, in the Discussion Paper.

The ORR draws attention to the fact that the NFA is proposing such a fundamental change to country of origin labelling without providing substantial evidence that such a change is sought by consumers. If, in fact, any modification to current arrangements is required, the available information suggests that stricter enforcement of existing arrangements, possibly coupled with additional penalties, would overcome much of the perception in the community of widespread use of misleading labelling.

7. The benefits of specific regulation — can it overcome potential confusion?

Another aspect of the country of origin labelling issue is the scope for Government regulation to yield net benefits to the community, assuming there are well substantiated concerns. Identifying a problem is not a sufficient condition for regulation. It must be a problem that regulation can effectively overcome. **The ORR does not consider that attempts to remove supposed confusion associated with country of origin labelling will be successful if this is done by mandating a particular meaning to particular terms.**

One issue is an attempt to give particular meanings to phrases that do not necessarily have a strict meaning currently in the community. The NFA's and FBCA's research has identified a large number of descriptions that convey information about a product's origin. These include 'Manufactured in Australia', 'Made in Australia', 'Product of Australia', 'Designed in Australia', and 'Processed in Australia'. There are many facets as to what constitutes an 'Australian Product'. The diversity in current depictions of origin suggests the narrow range of mandated descriptions will have no generally accepted meaning. Even in the case of simple essences, such as wine made in Australia, it may well be marketed in an imported bottle — is it an Australian product?

Defining the origin of food is particularly problematic. This is best illustrated by the definition of 'Made In Australia' in the NFA's proposals. The term can only be used where a product obtains its 'essential character' in Australia. The *Working Group on Country of Origin Labelling of Consumer Products* doubted whether this test could be applied satisfactorily to food. Using bacon and peanut butter as examples, the Working Group asked (p.15):

> Is the essential characteristic of bacon the pigmeat or the smoking? Is the essential characteristic of peanut butter the peanuts or its spreadable form? Views can differ dramatically on these questions, illustrating the difficulty of applying the test to food with any consistency.
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> If the essential characteristic is in the ingredient, then the manufacturers of these products using imported ingredients cannot label their goods 'Made in Australia'. If the essential characteristic is always in the final product, in the form in which it is bought by consumers, then the test is meaningless because all food items, except for those imported in final form, can be labelled 'Made in Australia.'

The NFA says these definitional problems will be avoided by further defining what essential character means through yet-to-be released guidelines. There are two main problems with this approach. Firstly, the guidelines are likely to themselves be open to differing interpretations. Secondly, whatever meaning the guidelines do give will be essentially arbitrary, with the NFA forced to pick one of the various different

interpretations of essential character, and therefore may not be widely understood in the community.

The NFA's proposed solution to such difficulties is to provide education to the community as to the meaning that has been given to certain phrases. However, it is unlikely that even an extensive education campaign will be successful given that chosen meanings of the descriptors may not correlate with the meanings different consumers naturally place on them. The complexity of discussion in the Discussion Paper over fine variances in meaning of different descriptors, and the lack of an accepted meanings among those closely involved with the issue, itself indicates that **it may be very difficult to convey a simple message as part of an education campaign without misleading consumers. If experts cannot agree on a meaning, what hope has the consumer!**

The second difficulty is that the assignment of meanings to descriptors (even if they were understood) assumes that the NFA understands exactly what type of information consumers are seeking. The 'Made in Australia' definition again illustrates the problems this could raise. The 'essential character' test is one possible test of 'Australian-ness' and the one favoured by the courts and the Trade Practices Commission (TPC), but it is not the only possible test. The proportion of Australian value added is another test of 'Australian-ness'. The Advance Australia Foundation uses slightly different criteria again[2]. Products could rate differently under different tests. It is not clear whether a consumer would prefer to receive information on the 'essential character' of a product or its value added. If the consumer is 'buying Australian' in an attempt to support Australian industry and Australian jobs it is possible that he/she will want to judge products on their level of Australian value added rather than whether their 'essential character' was obtained in Australia.

Similarly, from the little research undertaken it appears some consumers want to know if a firm is Australian owned; regardless of ingredients they want to know 'where the profits go'. A concentration on the ingredients or processing as the basis of Australian-ness ignores ownership.

Yet another dimension of Australian-ness is whether the capital equipment used is imported, particularly if its application accounts for a substantial part of the cost of processing.

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[2] According to the Working Group Report to qualify to use the Australian Made certification mark, the major component of the good must be of Australian origin and at least 75% of the cost of producing the product must be incurred in Australia. Under special circumstances a product which has local content of between 50% and 75% of the cost of production may be considered for licensing.

The ORR does not wish to suggest that one test is better than another, or that the NFA should consider an additional ownership labelling requirement. Rather, it raises these issues to illustrate the difficulty faced by the NFA in determining what is in the mind of the typical consumer. Indeed, it is true to say that there is no typical consumer: hence the diversity of products demanded and the diverse attributes sought within those products. Ascribing particular meanings to a limited number of country of origin descriptors may satisfy the information needs of some consumers but create confusion for others.

8. Specific regulation versus general regulation

The Discussion Paper argues that specific regulation is preferable to the provisions of the TPA. It says that the TPC has been reluctant to use the general provisions, both because of a lack of resources and the difficulty of obtaining conclusive evidence. Moreover it states that the courts would prefer specific regulation to more general provisions.

Whether particular rules are best handled by the courts or through specific regulation is a complex matter. **It is clear, however, that lack of enforcement of the general provision is not a reason in itself to enact specific regulation**. Without an increase in the resources for enforcement, a specific regulation is unlikely to be more effective than general provisions.

Supplementing common law with specific regulation can have advantages in removing uncertainty over definitions adopted by the courts over time, thereby giving greater certainty to both producer and consumer. This is most likely where it is possible to convert a court definition into a regulation that is clear and unambiguous.

In the case of country of origin labelling, as stressed above, it is unlikely that mandated descriptors will have unambiguous meaning in the minds of consumers. In addition, a specific regulation would not remove the necessity for interpretation if the regulation employs concepts such as the 'essential character test'. In this situation court definitions as to what is false and misleading may provide a degree of flexibility which descriptors enshrined in regulations could not have. **Under these circumstances, the ORR favours the use of general provisions.**

9. Alternative approaches

The Discussion Paper does not give adequate attention to the advantages and disadvantages of alternative approaches compared to specific regulation. One alternative to prescriptive regulation, which is given little attention, is the NFA

working with industry to develop self regulating codes of practice on origin labelling. While voluntary industry codes will encounter the same definitional problems as government attempts to standardise descriptors, they could achieve greater consistency in country of origin labelling without legally requiring firms to use descriptors that may not be appropriate to their particular product or the information requirement of their consumers. In its *Background Paper on the Review of the Food Standards Code* (NFA 1994b, p.24), the NFA identifies some advantages of industry codes that are particularly relevant to this case:

- codes of practice can be cost effective compared with regulation;
- appropriately designed and administered industry codes of practice can provide the flexibility necessary for product innovation, diversification, and development, and can be more easily and quickly changed to suit changing circumstances; and
- full implementation of codes of practice by industry can more effectively address consumer complaints than can enforcement of regulations via government agencies.

The NFA, nevertheless, rejects this approach because of the 'apparent consumer dissatisfaction' with present labelling of foods. As argued above, such dissatisfaction may be more apparent than real and is related to a perceived lack of enforcement of current arrangements. Voluntary codes of practice are not inconsistent with greater enforcement of general 'false and misleading' provisions.

Another alternative is issuing (or reissuing) of guidelines by the TPC. This would provide more certainty as to what is likely to be interpreted as false or misleading, but still leave room for flexibility depending on the circumstances of a case. Such an approach has been applied by the TPC in the consumer protection area when it released *Guidelines for Environmental Claims in Marketing* in 1992 to provide specific guidance to producers and consumers about interpreting what constituted false and misleading claims in relation to labels which contained environmental claims. The ORR draws attention to the fact that the use of guidelines was acceptable in the case of such a high profile environmental issue, but seems to be given little consideration as an option in the case of country of origin labelling.

10. Costs of the NFA's proposals

The Discussion Paper has not dealt adequately with the potential costs of the NFA's proposed variations to the food standards code. The scheme will increase costs for:

- Australian firms, especially importers;
- consumers; and

- taxpayers, through increased expenditure by the Commonwealth and State Governments.

Australian firms

The Discussion Paper recognises that costs will be imposed on Australian firms and these will be passed onto consumers. While it would be helpful if the affected firms or industry associations provided estimates of the cost of the labelling changes, their failure to do should not absolve the NFA from making its own estimates based on reasonable assumptions.

The costs to Australian firms are not, however, confined to relabelling. For instance, if a product contains an imported ingredient that is 6 per cent by weight, it could not be described as 'Product of Australia'. It may be penalised, somewhat arbitrarily, in comparison with an alternative product using only 4 per cent imported ingredients.

On the proposal to extend the provisions to unpackaged products, the ORR considers that the same arguments used in the Discussion Paper against applying the provisions to meat may apply to unpackaged foods. With meat, the paper concludes that given the low level of imports it is not worth the effort. In the case of unpackaged foods, the amount imported may also be very small. Only 7-8 percent of *all* food is imported, and most of this is packaged or used in manufacture of other food. Well over 90 percent of unpackaged food, therefore, is Australian. **Requiring all retailers of unpackaged food to put up signs saying food is Australian unless otherwise stated, may be a simple case of overkill.**

Importing firms

Extending the country of origin labelling requirements to imported food is the most significant difference between the TPA amendments and NFA proposals. It is also the element of the draft variations that entails the highest costs. Exports of food products to Australia would comprise a very small proportion of most producers' total production. Requiring a different country of origin label for the Australian share, would involve high costs for either the exporter or the Australian importer. Ultimately Australian food consumers will pay these costs, either through higher prices or reduced choice if it becomes uneconomic to export to Australia. **Such a requirement is anti-competitive and would constitute a significant non-tariff barrier to trade.**

Other agencies are better qualified than the ORR to comment on the consistency of the proposals with GATT obligations. The ORR notes, however, that because the requirement would have an anti-competitive effect, it would certainly be seen (and is

already being seen) by our trading partners as contrary to liberal trade principles. The cost of such perceptions is potentially high, either directly through retaliation, or indirectly through damage to Australia's relatively good standing in international trade fora.

Consumers

Increased costs will be passed on to consumers in higher prices or restricted product choice. All consumers will bear these costs, yet if they benefit at all, it will not be equally. The only consumers who will benefit are those who:

- seek country of origin information; and
- are not happy with the information content of the current arrangements (as distinct from the enforcement of the current 'false and misleading' provisions); and
- whose information requirement regarding country of origin aligns with that contained in the proposed standard.

This situation raises the question of whether spreading the additional costs among all consumers is equitable.

Government

The costs to government are the most direct and include costs to the NFA, of state government enforcement and of the education campaign. The Discussion Paper does not quantify any of these amounts, although earlier work provided estimates of the cost of the education campaign at $0.8m. The relevant notion of cost is that of opportunity cost — the services forgone because of expenditure on the chosen activity. The NFA has a limited budget and a range of priorities, including a review of the FSC, which is largely concerned with public health issues. The ORR considers that the opportunity cost of some NFA resources devoted to country of origin labelling could be quite high.

If the NFA's proposals were to be accepted, enforcement costs would have to rise. The proposals are more prescriptive and more onerous than current arrangements, and would require more extensive and detailed monitoring of labelling. These costs are borne by State Governments and, before any proposal is put to the National Food Standards Council, the level of increased enforcement costs should be quantified.

We note from past experience that such regulation is unlikely to be adequately policed. Enforcing regulations is critical to the success of any regime. Lack of

enforcement not only makes a scheme ineffective, but can render consumers worse off. Without adequate policing, producers will not change behaviour, but some consumers may act as if the regulation were obeyed. While the ORR doubts that an education campaign will clarify the meaning of origin descriptors effectively, some consumers will change their perceptions of what various descriptors mean. If, in the absence of adequate policing, labels do not accord with their newly assigned meaning, greater confusion is inevitable.

11. Conclusion

The Government's approach to evaluating new regulations requires that:

- the objectives be clearly defined;
- alternative approaches be identified; and
- a broad indication of the costs and benefits of each approach be given.

The NFA states that the objectives of its draft standard on country of origin labelling are to provide consumers with information to allow informed purchasing decisions, and to prevent fraud and deception. The ORR considers that only the first objective is relevant in this case. Fraud and deception are already prohibited under the TPA and the draft standard will not in itself prevent intentionally misleading claims.

Whether or not a new regulation is warranted, to overcome perceived confusion over country of origin labelling among consumers, depends on the scale of the problem and the likely effectiveness of the proposed regulation. Possible alternative responses include:

- stricter enforcement of the current regime;
- issuing (or reissuing) of guidelines by the TPA to clarify how the courts have interpreted various descriptors;
- greater reliance on, and publicity of, industry codes of practice.

The NFA has not adequately examined the costs and benefits of such alternatives. And it proposes changes to the country of origin requirements that would make the Australian standards the most prescriptive in the world.

The ORR concludes that a case has not been established to support the draft variations. The discussion paper does not demonstrate that there is significant or widespread concern in the community over the issue. In addition, the proposal seeks to define what certain phrases mean, independently of how these phrases are

understood in the community. Attempting to reduce complex concepts of 'Australian-ness' to simple descriptors is likely to result in greater confusion among consumers. The ORR does not consider than an education campaign would be successful in overcoming such confusion.

While the benefits are not apparent, significant costs would be imposed on the government, Australian firms (including importers), and ultimately consumers — in higher prices and reduced product choice.

References

Commonwealth Working Group on Country of Origin Labelling of Consumer Products (1993), *Report of the Working Group on Country of Origin Labelling of Consumer Products*, May.

Keating P.J (1994), *Working Nation*, The White Paper on Employment and Growth, AGPS Canberra, May.

NFA (National Food Authority) 1994a, *Country of origin labelling of foods - A Discussion Paper*, June.

— 1994(b), *Review of the Food Standards Code - Background Paper*, August.

Riley Research Pty Ltd. (1993), *Issues relating to country of origin labelling*, Qualitative market research study conducted for the Federal Bureau of Consumer Affairs, July/August.