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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT (ORIGIN LABELLING) BILL

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Consumer Affairs,
the Hon. Jeannette McHugh MP)

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OUTLINE

The purpose of this Bill is to introduce a scheme to govern representations about the origin of consumer goods, by inserting a new Division 1B into Part V of the *Trade Practices Act 1974*. The Government's intention in introducing this scheme is to encourage Australian industry to label products which have their origin in Australia and to give consumers a reliable means of identifying Australian products.

2. The scheme therefore focuses on representations about Australian origin carried on consumer goods supplied in Australia. The scheme does not apply to goods intended for export; nor does it make any direct provision about representations on imported goods. Only where imported goods make a representation about Australia does the Bill require that further information be provided. This might involve a statement that the goods or their components had their origin outside Australia.
3. The scheme set out in the Bill applies only where a manufacturer or supplier chooses to make a representation that indicates that the place of origin of the goods is Australia, or if there is an obligation imposed by some other law to label the goods with their place of origin, and that place is Australia.
4. The Bill deals with four different types of representations commonly made on consumer goods: express claims that the goods were made in or are a product of Australia; claims that a step in manufacture happened in Australia, such as 'Assembled in Australia' or 'Packed in Australia'; claims that goods were designed in Australia; and representations in words or pictures that are likely to be regarded as claims that the goods were made in Australia. It also deals with the positioning of labels where goods carry composite or multiple representations.
5. Part VI of the TPA dealing with enforcement, defences and remedies will apply to the new Division. It is also the intention of the Government that sections 52 and 53(eb) of the TPA, dealing with misleading and deceptive conduct and false and misleading representations about the place of origin of goods, will still apply, and that other Commonwealth legislation which is not directly inconsistent with this Bill will continue to have effect.

FINANCIAL IMPACT STATEMENT

6. Costs to Government arise through the need for an education campaign for industry and consumers and for the development of guidelines to assist industry in complying with the scheme set out in the Bill. Enforcement will remain the responsibility of the Trade Practices Commission. State and Territory health authorities will continue to enforce food labelling requirements and the Australian Customs Service will continue to enforce labelling provisions for imported products.

7. It is not possible to make a precise costing of the impact the Bill will have on industry. There will be some re-labelling costs where goods currently labelled do not meet the requirements of the new scheme but this cost will be minimised by a twelve month phase in period from the date of Royal Assent to the date of commencement.

8. The following products would have to be re-labelled:
- goods which are now labelled 'Product' or 'Produce of Australia' which will not qualify for this label under the new rules;
 - goods which now use terms such as 'Assembled' or 'Packed in Australia', but which do not give information about the origin of ingredients or components;
 - goods which are now labelled 'Designed in Australia' but do not carry information on their place of origin;
 - goods which now carry Australian flags or maps or words such as '100% Australian' but do not carry information on their actual place of origin; and
 - goods which are labelled 'Made in' or 'Product of' a town, region or State rather than 'in Australia'.

9. Suppliers will benefit from the scheme by having standard origin terms which will reduce the risk of non-compliance and which will enable them to promote the Australian content of their goods, confident that consumers will understand the messages they are sending. The scheme is also flexible enough to allow suppliers to tell a story about their products if they wish to do so, thus preserving their freedom to communicate with their customers in the way best suited to their products.

10. Informed consumers, acting on reliable information are an important aspect of market efficiency. This scheme provides easily identifiable labels to distinguish all Australian goods and goods made in Australia, so that where consumers want to buy Australian, they can do so with confidence. The provisions which require more detailed information about goods where only some processes have occurred in Australia, or where some implied claim is made about Australian origin, will reduce the possibility of consumers being misled by partial information.

NOTES ON CLAUSES

Clause 1 - Short Title

1. This clause provides for the Act to be cited as the *Trade Practices Amendment (Origin Labelling) Act 1994*. It also provides that the 'Principal Act' referred to in this Act is the *Trade Practices Act 1974* (TPA).

Clause 2 - Commencement

2. The Act commences on the first day of the thirteenth month after Royal Assent. The clause is worded so that, for convenience, the commencement date will be the first of the month rather than the date exactly 12 months after Assent. The period of 12 months is to allow time for an education campaign for industry and consumers and to give industry sufficient time to relabel goods in accordance with the Act.

Clause 3 - Insertion of New Division

3. This clause inserts a new Division 1B into Part V of the TPA to provide rules relating to representations about the Australian origin of goods.

Section 65VA - Definitions

4. All definitions in Part I of the TPA will apply to the new Division 1B so far as they are relevant. Section 65VA provides a number of additional definitions for the purposes of Division 1B. These definitions are self explanatory.

Section 65VB - Place of origin of marine produce

5. It is necessary for the purposes of this Bill to make some provision for when fish and other produce of the sea can be considered Australian. The *Acts Interpretation Act 1901* in section 17 defines 'Australia' as the Commonwealth of Australia and when used in a geographic sense includes the territories of Cocos Keeling and Christmas Islands. In addition, section 15B of that Act provides that unless the contrary intention appears Commonwealth Acts shall be taken to have effect in the coastal sea as if that sea were part of Australia. The coastal sea is defined as the territorial sea of Australia and the sea on the landward side of the territorial sea and not within the limits of a State or internal Territory. The territorial sea extends to the 12 mile limit. The Australian Fishing Zone extends to the 200 mile limit.

6. In certain circumstances, fish and other marine produce caught outside the territorial sea may legitimately be considered Australian fish. This Bill provides that marine produce shall be regarded as Australian if it is first landed in Australia, regardless of where it is caught. It is current Australian Government policy that only Australian ships shall be permitted to land fish in Australia unless specific authority is given under the *Fisheries Act 1952* or the *Fisheries Management Act 1991*. A small number of authorities have been granted to allow some foreign vessels to unload fish for processing at certain Australian facilities so that those facilities can continue in operation when supplies from Australian vessels are not sufficient.

Section 65VC - When goods "carry" a representation

7. This section limits the representations which are caught by the Division to representations 'carried' by goods, meaning representations that are applied to the goods or to their packaging or labelling. 'Applied to' is defined to include representations printed on, woven in, impressed on, worked into or attached to the goods. The Division therefore does not cover other representations made about the goods, for example in advertisements or on shelf labels. The other provisions of the TPA relating to misleading and deceptive conduct and false and misleading representations will continue to apply to these representations.

Section 65VD - Scope of this Division

8. Subsection 65VD(1) sets the boundary within which the Division operates by reference to the acts of supply and goods covered, that is, supply by a corporation, in trade or commerce, of consumer goods. The rest of the Division must be read with the limitations set by this section in mind. The meaning of 'corporation' and of 'trade or commerce' in this Division are the same as in the TPA and in the case law elaborating the meaning of those terms.

9. Section 6 of the TPA deals with the additional operation of the Act under other Constitutional heads of power. By virtue of paragraph 6(2)(a), this Division will have the same extended operation as the rest of Part V, so that as well as covering acts of supply by corporations, the Division will apply to acts of supply by non-corporations engaged in interstate or overseas trade or commerce, or trade or commerce involving a Territory. By consequential amendments to subsections 6(3) and 6(4) of the TPA, as set out in the Schedule to the Bill, the Division is given as wide an application as possible.

10. Consumer goods are defined as

- goods which are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- goods for which the price was the prescribed amount or less.

The prescribed amount is the same amount as prescribed for section 4B of the TPA. The current amount is \$40,000.

11. The Government's chief concern was with goods claiming Australian origin supplied in Australia to Australian consumers. This Bill therefore does not cover acts of supply which happen outside Australia (paragraph 65VD(2)(a)). Subsection 5(1) of the TPA is amended by the Schedule to exclude Division 1B from the extra-territorial application of the TPA.

12. Goods that are intended for export are not covered by the Bill (paragraph 65VD(2)(b)). Under this Bill goods will be presumed to be for export if they carry a representation that they are so intended. This paragraph picks up the provision in section 65VC so that to get the benefit of the presumption the representation that the goods are intended for export must be 'applied to' the goods or to their packaging or labelling in one of the ways set out in section 65VC.

13. The Division does not apply to goods which were manufactured or produced in Australia, or imported into Australia before the commencement date of the

Division (paragraph 65VD(2)(c)). The 12 months from Royal Assent to commencement will give industry time to relabel goods in accordance with the Division.

Section 65VE - Supply of goods that carry an express Australian origin representation in words.

14. The intention of this section is to provide consumers with reliable and easily identifiable representations to identify goods which are 'all Australian' or which have been made in Australia, and to ensure that those representations will always be in the same basic form. It provides that the corporation must not supply goods that carry an express and unambiguous representation that the place of origin of the goods is Australia except as authorised by the section. The only authorised terms are 'Product of Australia' / 'Produce of Australia' and 'Made in Australia'. Examples of the types of representations considered to be express and unambiguous are set out in a Note.

15. The effect of this section is to prohibit the use of representations such as 'Manufactured in Australia' or 'Produced in Tasmania' or 'Processed in Australia' or 'Made in Canberra' or any other unauthorised representation that might be considered an express and unambiguous representation that the place of origin of the goods is Australia or a place in Australia. If manufacturers or suppliers wish to identify the town, city, region or State of origin of goods, this may be done by adding that identification, provided it does not alter the authorised form. A label which now reads 'Made in Bendigo' will therefore have to be amended to read, for example, 'Made in Australia at Bendigo'.

16. Subsection 65VE(2) sets out in table form the three representations that may be used and their meanings. Goods may be labelled 'Product of Australia' or 'Produce of Australia' if Australia was the place of origin of each major ingredient or component of the goods and all operations involved in the manufacture or production of the goods happened in Australia. 'Major' is not defined, as what will be considered major, or minor, will vary depending on the type of product. For example, in food products small amounts of imported seasonings and flavourings may be acceptable in a product labelled 'Product of Australia', but in electronic goods the smallest components may be the most vital to the operation of the product.

17. The condition which must be met to be able to label goods 'Made in Australia' is that the goods acquired their essential character or qualities in Australia. This test is based on the decisions of the Federal Court of Australia in cases brought under paragraph 53(eb) of the TPA. That paragraph prohibits corporations from making false or misleading representations about the place of origin of goods. Examples of circumstances in which goods acquire their essential character or qualities in Australia are included in a Note to the section. These examples are also based on the case law and are not intended to limit in any way the circumstances which might be considered when deciding if particular goods acquired their essential character or qualities in Australia.

18. Guidelines will be developed to assist industry to make decisions about whether particular goods meet the conditions to be labelled either 'Product' or 'Produce of Australia' or 'Made in Australia'. These guidelines will have no statutory force but will assist industry in circumstances where doubt might otherwise arise as to the manner in which the Act will be enforced.

19. Other information about the goods, or about the ownership of the company, may be added to these basic representations, provided that it is not false or misleading and does not alter the basic form of the authorised representation.

Section 65VF - Supply of goods that carry the Australian Made Certification Mark.

20. The Australian Made Certification Mark is the green and gold triangular logo containing a representation of a kangaroo with the words 'Australian made' at the base of the triangle. The Commonwealth owns the logo and has licensed the Advance Australia Foundation to license, in turn, the use of the logo on goods which meet certain criteria, set by the Commonwealth.

21. Subsection 65VF(1) provides that section 65VE does not apply to the representation 'Australian made' when used as part of the logo. This ensures that the words 'Australian made', when used with the logo, are not prohibited by subsection 65VE(1). However, the logo can only be used in conjunction with one of the claims authorised by subsection 65VE(2). So all consumer goods which carry the 'Australian made' logo will also have to carry a representation that the goods are the 'Product' or 'Produce of Australia' or that they were 'Made in Australia'. The criteria set by the Commonwealth may have to be amended to ensure that consumer goods which are licensed to carry the logo meet the conditions to carry those authorised representations.

Section 65VG - Supply of goods that carry a representation in words about an Australian production step.

22. It is the current practice for some goods to carry representations identifying one or more production steps which occurred in Australia, for example, 'Assembled in Australia' or 'Finished and Packed in Australia'. To make it quite plain to consumers that only these limited processes took place in Australia, suppliers will be required to provide information about the source or sources of the ingredients or components of those goods. For some goods the supplier might wish to identify the actual country of origin of particular components or ingredients; however, it will be sufficient to identify that components or ingredients are imported. A Note to the section includes examples of acceptable representations about the origin of ingredients or components.

23. This type of representation is most likely to be used on goods which have a high imported component or for which no country can be identified as the country of origin as critical processes have occurred in a number of places, including Australia. It may be used also on goods which are labelled 'Product' or 'Produce of Australia' or 'Made in Australia' to provide a fuller description of the Australian origin of the goods. Thus a table which is a 'Product of Australia' may additionally be labelled 'Carved and crafted in Australia from fine Australian timbers'.

Section 65VH - Supply of goods that carry a representation in words about an Australian pre-production step

24. It is current practice for some goods to carry the representation that they were 'Designed in Australia' without any further information about the place of origin of the goods. The purpose of this section is to ensure that consumers are not misled or confused by this partial claim, but are given information as well on the place of origin of the goods.

25. Section 65VH provides that where a representation of this type is carried by goods, then there must also be some indication of the place of origin of the goods. If the goods have been made in Australia or are a product of Australia and this claim has not already been put on the goods, then the terms authorised by subsection 65VE(2) may be used. Alternatively, a representation that one or more production steps happened in Australia may be used, in which case the place of origin of the components or ingredients must also be identified in accordance with section 65VG. A further option is that a representation may be made that the goods originated outside Australia.

26. Though in many cases it may be desirable for marketing purposes to identify the actual country of origin, the section does not require this and an indication that the goods were made overseas would be sufficient. Examples are given in the Note to the section. Where the goods are imported and fall within the list of goods which must carry origin labelling under Regulation 7 of the Commerce (Imports) Regulations, then the goods must identify the actual country of origin. It is not intended that this provision, which deals only with additional requirements if goods carry representations that a pre-production step happened in Australia, should in any way affect the requirements of those Regulations.

Section 65VJ - Supply of goods that carry a representation likely to be regarded as an Australian origin representation.

27. The three previous sections dealt with three different types of express representations in words. This section deals with representations in words or pictures or symbols which are likely to be regarded as representations that the place of origin of the goods is Australia. When such representations are made, the goods must also carry information about the actual origin of the goods.

28. This additional information may take the form of one or more of the following representations dealt with in previous sections of the Bill:

- 'Product' or 'Produce of Australia' or 'Made in Australia';
a claim that one or more production steps happened in Australia, accompanied by information on the source of ingredients or components;
a claim that the goods were designed in Australia, accompanied by information on the source of the goods; or
- a representation that the goods had their origin outside Australia.

29. The effect of this section is that where goods do carry implied claims about Australian origin, those claims can remain on the goods but they cannot stand alone, they must be accompanied by further information about the actual origin of the goods. The purpose of this section is to encourage suppliers to label fully and

truthfully. If this is an unacceptable option for some suppliers, they may choose to carry no representations at all about origin and risk consumers making the assumption that the goods therefore have no connection with Australia and are fully imported.

30. An example of how this section operates, and how the different sections of the Bill interlink, is to consider goods carrying an Australian flag. As the design work was done in Australia, the claim 'Designed in Australia' is added. Because this is a pre-production step, further information on the actual place of origin must be supplied. The goods were not made in Australia but they were finished and packed here. The label now reads 'Designed, finished and packed in Australia'. However, because the label now carries a representation about production steps which happened in Australia, it must also carry information on the source of components. The label now tells a story about the product: 'Designed, finished and packed in Australia from imported materials'. This label must be given equal prominence and be as close as possible to the label with the Australian flag (see section 65VK and paragraph 34 below). The intention of these interlinking sections is to encourage suppliers to tell the whole story about their product so that consumers can make a fully informed choice.

31. In considering whether representations are likely to be regarded as claims about Australian origin, the perceptions of the potential audience should be taken into account in the same way as has been done by the Court when considering whether particular conduct is misleading or deceptive or likely to mislead or deceive under section 52 of the TPA, or whether particular representations are misleading under section 53 of the TPA.

32. There are likely to be many examples of representations which may fall within the ambit of this section - a Note to the section gives some of them. The most common pictures or symbols are likely to be the Australian flag, or a map of Australia, or a representation of a kangaroo, used in a way which indicates that the goods originated in Australia. There will be occasions when these symbols are used in trade marks or designs; however the fact they are part of a trade mark or design will not be conclusive that they fall outside this section - that will depend on the circumstances of each case, including the way the symbol is used and other information provided.

33. Examples of representations in words that may fall within this section are 'Wholly Australian', '100% Australian', 'Australian mangoes', 'Made by Australian workers', 'Tasmanian pate', or even, 'Manufactured by J. Smith Pty Ltd, 232 Smith Road, Smithfield, NSW'. As with the pictorial representations, whether these claims fall within the section or not will depend largely on the other information provided.

Section 65VK - Supply of goods that carry composite or multiple representations.

34. This section covers the situation where goods carry a composite representation, for example, 'Assembled in Australia from imported components', or multiple representations, for example, 'Designed in Australia. Made in India'. Where, as in the above examples, there is a representation about Australia and a representation about a place other than Australia (even if only the generic terms 'imported' or

'overseas' are used), then the foreign representation must be as prominent as the Australian representation and the two representations must be as close to each other as possible.

35. This does not mean that the representations have to be in the same size type face, but it does mean that if the Australian connection is given prominence, then the foreign connection has to have equal prominence. The purpose of the provision is to ensure that all information about origin is easily accessible, and to stop such practices as having a large label carrying the flag of Australia obscuring a small label identifying the true place of origin.

Clause 4 - Further amendments to the Principal Act

36. The consequential amendments to sections 5 and 6 of the TPA have already been discussed - see paragraphs 9 and 11. Other amendments will insert reference to Division 1B into sections dealing with the TPA's cross-vesting scheme. These sections are 75AS, 86, 86A and 86B.

