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Dear Mr Wolff

Eligibility for origin claims in the Complementary Medicines Sector – ACCC submission

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission in response to the Department of Industry Innovation and Science's (DIIS) Complementary Medicines Consultation Regulatory Impact Statement (CRIS).

The purpose of our submission is to:

- provide additional information to DIIS which may assist to clarify some of the CRIS content, and
- identify any measures that we consider are likely to reduce the information available to consumers and reduce their ability to make informed purchasing decisions.

The ACCC's role

The ACCC is an independent Commonwealth statutory body that administers the *Competition and Consumer Act 2010* (CCA), which contains the Australian Consumer Law (ACL). The ACCC promotes compliance with these laws and, where appropriate, takes action against businesses that contravene the law.

Competition and Consumer Amendment (Country of Origin) Act 2017

The *Competition and Consumer Amendment (Country of Origin) Act 2017* (the Act) revised the safe harbour criteria for making a 'made in' claim, by both removing the fifty per cent production cost test and amending the definition of substantial transformation. This revision means that some businesses may no longer be able to use the 'Australian Made, Australian Grown' logo (AMAG logo), which is linked to the safe harbour criteria.

The Explanatory Memorandum for the Act sets out the reasons why the ACL was amended, including:

- 'to simplify the tests' used to justify a 'made in' claim by removing the cost of production test

- addressing issues with the previous substantial transformation test, which was deemed 'inadequate' and confusing for many consumers, 'as it encourages meaningless claims like 'Made in Australia from local and imported ingredients' when food is only minimally processed in Australia', and
- to provide increased certainty for businesses about what constitutes substantial transformation by "[making it] clear that importing ingredients and undertaking minor processes that merely change the form or appearance of imported goods...are not sufficient to justify a 'made in' claim."¹

The ACCC's observation is that CRIS Option 1 gives effect to the policy considerations which led to the implementation of the Act. The other options create alternative or additional criteria for origin claims which may confuse consumers, and may allow products which have only undergone minimal processing in Australia to be labelled 'Made in Australia'. This would be to the detriment of Australian consumers and Australian manufacturers.

Availability of other origin statements

Neither the ACL nor the *Therapeutic Goods Act 1989* require complementary medicine products to carry country of origin labelling. In general, businesses are free to make any representation they wish to about their goods provided the representation is truthful and accurate.

The ACCC notes from the CRIS that the two largest businesses in the sector do not use the AMAG logo and that by value, the logo is only attached to one in five vitamins, minerals and supplements sold in Australia.² This indicates that a significant proportion of complementary medicine products sold display different types of origin claims or do not make origin claims at all.

The ACCC guide *Country of origin labelling for complementary healthcare products - a guide for business (Guide)* was developed to assist the complementary healthcare industry to understand how the safe harbour defences set out in section 255 of the ACL apply to their products.

The Guide specifically provides examples of origin claims that may be suitable for products that cannot currently claim to be 'Made in Australia', including 'encapsulated in Australia'.³

The CRIS refers to some of the examples identified in the Guide and lists those which the complementary healthcare industry have identified as 'perceived anomalies'.⁴ The Guide was developed by the ACCC in March 2018 following consultation with the industry. It reflects that the ACL and associated regulations do not currently prescribe specific processes which would meet the test and therefore substantial transformation is determined on a case by case basis. Accordingly, there may be some processes which would appropriately constitute a substantial transformation when applied to a given product, but would not meet the test in another context.

Consumer considerations

The ACCC considers that the fundamental goal of any change to country of origin labelling requirements should be to ensure that consumers have access to accurate country of origin

¹ Competition and Consumer Amendment (Country of Origin) Bill 2016 Explanatory Memorandum, p1: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5706_ems_d5df8fc0-98b1-41ce-ad56-1899406d5ffd/upload_pdf/489998-a.pdf

² Eligibility for origin claims in the Complementary Medicines Sector', Consultation Regulation Impact Statement for the Legislative & Governance Forum on Consumer Affairs (CRIS), p10, p24.

³ <https://www.accc.gov.au/publications/country-of-origin-labelling-for-complementary-healthcare-products-a-guide-for-business>, p4, 6.

⁴ CRIS, p35.

information that enables them to make informed choices about the country of origin of products that they buy.

The CRIS states that consumers of complementary medicines have less access to country of origin labels than they did under the previous substantial transformation test.⁵ However, the ACCC also notes findings of the consumer research commissioned by the Complementary Medicines Taskforce (referred to in the CRIS), which indicates the following.

- Country of origin is 'not something Australian consumers immediately look for or notice when purchasing complementary healthcare products' (this was ranked fifth in purchasing drivers).⁶ This may suggest that less country of origin labelling on these products may not be a key concern to most Australian consumers.
- Consumers feel the AMAG logo guarantees them a wholly Australian product; from sourcing of ingredients through to the manufacture and packaging.⁷ Although the ACCC recognises that this is not a reflection of the current or previous substantial transformation tests, nor the current food labelling requirements, it suggests that consumers focus on more than manufacturing processes when considering origin claims.
- 'Consumers, if considering origin claims, would prefer greater clarity regarding the proportion of the ingredients that are from Australia when purchasing complementary medicines'.⁸ This may indicate that additional information is likely to provide greater assurance to those consumers who consider country of origin claims when purchasing complementary healthcare products.

The ACCC is concerned about any regulatory changes that take the criteria for use of the AMAG logo further away from consumer expectations about what that criteria entails. Based on the above findings, the ACCC considers that some consumers will choose a product believing that the AMAG logo denotes that it is wholly Australian, even though only minor processes occur in Australia and no information is provided about the source of the ingredients.

When used on food products, the *Country of Origin Food Labelling Information Standard 2016* mitigates the risk that consumers may be misled by requiring the use of a bar chart and explanatory statement setting out the proportion of Australian ingredients be displayed alongside the AMAG logo.

Of the CRIS options proposing a regulatory change, CRIS Option 3c appears to provide consumers with the most information, including the type of information they are typically seeking. The CRIS states that consumers indicated a preference for the use of a three-part mark (those required for foods 'grown' 'produced' or 'made' in Australia) on complementary healthcare products made from a mix of local and imported ingredients.⁹

Competition considerations

The ACCC has also reviewed the CRIS from a competition perspective. Competitive and informed markets ensure better outcomes for consumers including through greater choice, lower prices and better quality products and services.

The CRIS notes that Option 3a may create 'a possible loss of competitive advantage to firms that already met or have incurred costs to meet the substantial transformation test'.¹⁰ The ACCC agrees and notes that this may require some further investigation and quantification.

⁵ CRIS, p5.

⁶ CRIS, p31-32.

⁷ CRIS p32.

⁸ CRIS p33.

⁹ CRIS p33.

¹⁰ CRIS p42.

The ACCC is aware that a number of manufacturers have invested in removing the AMAG logo from their products in light of the new substantial transformation test and Federal Court decision in *Nature's Care*.¹¹

Consideration should also be given to whether any regulatory change is likely to reduce the incentives and benefits for manufacturers to continue to differentiate their products based on country of origin representations. This includes considering whether manufacturers who use Australian ingredients may be at a competitive disadvantage if they are unable to effectively differentiate their products from manufacturers who use imported ingredients. The ACCC is aware of Australian manufacturers using Australian active ingredients, which are generally more expensive to produce than the comparable imported active ingredients.

Other considerations

The ACCC's role in assessing certification trade marks (CTMs)

Several of the proposed policy options appear to potentially involve the registration or variation of CTM rules. Accordingly, the ACCC would have a role in assessing a CTM application if one were to result from the adoption of Options 2, 3 or similar.

The *Trade Marks Act* requires that the ACCC only approve a CTM application if it is satisfied that:¹²

- the attributes required of approved CTM assessors are sufficient to enable the person to competently assess whether goods and/or services meet the certification requirements, and
- the CTM rules would not be to the detriment of the public and are satisfactory having regard to the principles of competition, unconscionable conduct and consumer protection.

Future regulatory reform

The ACCC notes that the substantial transformation criteria applies to all industries that wish to claim their goods are 'Made in Australia'. The CRIS recognises that Options 3a-3c create 'an alternative test for one industry sector to use the logo'.¹³

Should any of these Options be implemented, the ACCC considers that the reasons for doing so should be clearly articulated. This will ensure transparency and consistency for other industries which may in future seek similar amendments on the basis that they have a competitive disadvantage or higher threshold for accessing the AMAG logo.

Should you wish to discuss this matter further, please contact Mr David Salisbury, General Manager Consumer & Small Business Strategies branch, directly on (03) 9290 1919.

Yours sincerely



Rod Sims
Chair

¹¹ <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca1936>

¹² *Trade Marks Act 1995* s 178 and *Trade Marks Regulations 1995* regs 16.8-16.9.

¹³ CRIS, p46.