

FISH OIL CAPSULES FAIL THE SNIFF TEST FOR 'MADE IN AUSTRALIA' CLAIMS

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Legal Briefings - By **Patrick Sands and Steve Wong**

The Federal Court has issued its first decision on the new 'substantial transformation' test since the commencement of Australia's new country of origin labelling laws. The decision clarifies the circumstances where a 'Made in Australia' claim can be made for products manufactured and sold in Australia.

BACKGROUND

The 'substantial transformation' test in the Australian Consumer Law provides a safe harbour against misleading or deceptive conduct for businesses who make 'Made in Australia' claims in relation to goods which 'were last substantially transformed' in Australia.

Following the changes to Australia's country of origin labelling laws in 2017¹, the 'substantial transformation' test was amended to require that, as a result of one or more processes undertaken in Australia, the goods are fundamentally different in identity, nature or essential character from all of their ingredients or components that were imported into Australia.

SUMMARY

Nature's Care is a vitamin manufacturer which sells soft-gel capsules containing fish oil and vitamin D₃. The fish oil and vitamin D₃ are imported from overseas, but the encapsulation process occurs in Australia.

The Federal Court rejected Nature's Care's claim that it was entitled to use the Australian made and owned kangaroo logo, finding that the encapsulation process did not mean that the capsules 'were last substantially transformed' in Australia. In reaching this decision, the Court affirmed that the new 'substantial transformation' test requires a comparison between the manufactured goods and the imported ingredients collectively to determine whether they are fundamentally different in identity, nature, or essential character.

The only differences between the capsules and the fish oil and vitamin D₃ identified by the Court were:

- the mixing of the fish oil and vitamin D₃ in capsules that provide an easy means of delivering miniscule doses of vitamin D₃; and
- the concealment of unpleasant odour and the reduction of degradation and oxidation for the fish oil.

These differences were not sufficient to establish that the capsules were fundamentally different to the fish oil or vitamin D₃ in their identity, nature, or essential character. Indeed, at one point, the Court noted that 'Fish oil is fish oil' and that, while the capsules conceal its unpleasant odour, the fish oil in the capsules is chemically unchanged and retains that odour.

The ACCC intervened to make submissions in this case, and has subsequently issued a media release affirming that the Court's decision reflects the ACCC's position on the correct approach to the new country of origin labelling laws.

WHAT ARE THE CONSEQUENCES FOR BUSINESSES THAT MANUFACTURE AND SELL GOODS IN AUSTRALIA?

1. **Don't rely on the old test:** The Court made clear that, just because businesses were entitled to make a 'Made in Australia' under the old 'substantial transformation' test, this does not provide a safe harbour under the new test.
2. **'Fundamentally different' means what it says:** The new test goes beyond simply excluding minor processes, but requires an overall comparison between the manufactured goods and the imported ingredients. Even where one of the ingredients has been substantially transformed, this may not result in the manufactured goods being fundamentally different when viewed as a whole.

3. **Consider the ‘identity, nature, or essential character’:** These are concepts going to the essential characteristics of the manufactured goods and ingredients. While consideration of qualities such as form and appearance can be relevant to this analysis, they will only be determinative where they go to their essential nature.
4. **Voluntary labels must still comply:** Nature’s Care’s product was not required to bear country of origin labelling because those laws do not apply to complementary medicines. Because it chose to make a country of origin claim, it was required to comply with those laws.

The full decision is available here: [Nature’s Care Manufacture Pty Ltd v Australian Made Campaign Limited \[2018\] FCA 1936](#). The ACCC’s media release affirming the decision can be accessed [here](#).

ENDNOTES

1. See our earlier article on the food country of origin labelling laws [here](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PETER HOLLOWAY

PARTNER,
MELBOURNE

+61 3 9288 1693
Peter.Holloway@hsf.com



PATRICK GAY

PARTNER, SYDNEY

+61 2 9322 4378
Patrick.Gay@hsf.com

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