

Submission template

EU-NZ Free Trade Agreement: Reform of Geographical Indications Law in New Zealand – Discussion Paper

Your name and organisation

Name	Privacy of natural persons
Organisation (if applicable)	Fonterra Cooperative Group Limited
Contact details	Privacy of natural persons

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Name	
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Responses to questions

	Section	Question
1	<i>Registration of geographical indications</i>	Are there products other than wines and spirits being produced in New Zealand that are labelled with a name that indicates the products have a characteristic that is essentially attributable to its geographical origin? Are any of these products being exported and, if so, to where, and what export revenues do these products generate for New Zealand producers?
		<p>As noted in previous Fonterra submissions on the NZ-EU FTA negotiations, the qualities, reputation, and other characteristics of foodstuffs very often have weak or tenuous ties to a geographic region, relying more on production processes that could be carried out in any location. This is unlike wine and spirits, which can have a clear and strong tie to a single region.</p> <p>On this basis, we consider that New Zealand's current regime for protecting intellectual property rights (including the Fair Trading Act 1986, the common law tort of passing-off, and the Trade Marks Act 2002) provide for sufficient protection for these terms by preventing the use of misleading product names or geographical descriptions. We see little immediate value in the establishment of a Geographical Indications (GIs) regime for New Zealand products beyond the existing wines and spirits system.</p>
2	<i>Registration of geographical indications</i>	Is the inability to register these names under the GIs Act causing any problems and, if so, what?
		No. As noted above, New Zealand's current system for protecting intellectual property rights (including the Trade Marks Act 2002) provides sufficient protection for food producers. We see no benefit to Fonterra of applying TRIPs-plus protections to foodstuff GIs. In the case of dairy, any extended protection system has been sought by the European Union (EU) for the purpose of directly benefitting European foodstuff producers. This is to the detriment of New Zealand producers of these cheese types.
3	<i>Registration of geographical indications</i>	What would be the advantages (or disadvantages) of extending the current registration regime to include GIs for food and beverages other than wine and spirits?
		While we acknowledge that changes to New Zealand's legislative frameworks are required for the purpose of implementing the outcomes agreed under the NZ-EU FTA, Fonterra can see no direct benefit to extending the current registration regime and protections to wider foodstuffs. Any changes to the current New Zealand system should be limited to those necessary to implement New Zealand's obligations agreed under the NZ-EU FTA and to align with the current remedies available under the Trade Marks Act. In making such changes, effort must be made to avoid imposing additional complexity and cost on New Zealand food producers.
4	<i>Location of enforcement provisions</i>	Do you agree with our preferred option (Option iii) of providing provisions for the enforcement of GIs within the GIs Act? If not, where should these provisions be and why?

	Section	Question
		<p>Fonterra supports the inclusion of provisions for the enforcement of GIs to be contained within the GI Act. We consider this to be the most legally simple and effective approach.</p> <p>Any GI enforcement provisions, regardless of where they are set forth, should be simple, clear, and proportionate. Provisions for enforcement should go no further than what is necessary to implement the concessions granted to the EU under the NZ-EU FTA and to align with the Trade Marks Act. This approach will ensure an effective enforcement model, which reflects the fact that there is no evidence of regular or ongoing infringement of GIs in New Zealand or “that infringement of GIs would become common after entry into force of the EU-NZ FTA”.</p>
5	<i>Civil enforcement</i>	Which option do you prefer for the court(s) to hear and determine the infringement of a registered GI, and why?
		Fonterra prefers that the High Court be responsible for hearing these cases and determining any infringements of a registered GI. This approach is consistent with the Trade Marks Act and the High Court is best geared to hearing the nature of the legal arguments (and cost threshold) typically involved in such civil claims.
6	<i>Civil enforcement</i>	Do you agree with our preferred option (Option iii) to limit persons who may initiate civil action for the enforcement of GIs to “interested persons”? If not, who do you think should be able to take legal action and why?
		Fonterra prefers that all civil action be limited to the registrant for the GIs terms, as the key ‘interested person’. The discussion document, however, raises a practical problem with this option i.e., there will be no ‘registrant’ for the 2000+ GI terms agreed under the NZ-EU FTA. To this end, Fonterra supports recourse to civil action being limited to ‘interested persons’ (Option iii). As there is no specific definition of an ‘interested person’ under the EU-NZ FTA text, and it is for New Zealand to determine its own appropriate method of implementing this obligation, we consider that an ‘interested person’ should be tightly limited to those actors with a clear commercial interest in the issue i.e. those actors that are the registrant for the GI terms and, for those terms protected under the NZ-EU FTA, those actors that are the registrant for the GI terms in their own domestic market. Given the high number of GIs protected under the NZ-EU FTA, such a limitation is necessary to minimise (to the extent possible) the risk of spurious claims that place undue pressure on the New Zealand Court system.
7	<i>Civil enforcement</i>	What would be the advantages (or disadvantages) of providing the same remedies to address an infringement of GI as are provided under the Trade Marks Act for the infringement of a trade mark?
		Fonterra supports an alignment of infringement remedies with those set out under the Trade Marks Act and considers that this would be effective and provide for broader system coherence. Other than to align with the remedies already established under the Trade Marks Act, Fonterra considers that the remedies available for enforcement should go no further than those required to meet New Zealand’s minimum obligations under the NZ-EU FTA.
8	<i>Civil enforcement</i>	What other remedies (other than those provided under the Trade Marks Act) should be adopted for addressing the infringement of a GI and why?

	Section	Question
		Other remedies available for enforcement should go no further than those required to meet New Zealand's minimum obligations under the NZ-EU FTA.
9	<i>Border protection measures</i>	Do you agree on basing the border protection measures for GIs on the Trade Marks Act? If not, what other measures should be adopted instead?
		Yes, Fonterra agrees that border protection measures for GIs should be based on the Trade Marks Act. This appears to be the approach that is the most simple, effective, and easy to implement.
10	<i>Border protection measures</i>	If the border protection measures based on the Trade Marks Act were to be adopted for GIs, what changes (if any) should be made to those measures and why?
		The only changes to be made should be those required to meet the obligations set out under the NZ-EU FTA. The current Customs Notice process is very straight forward and efficient. The GI owner should be responsible for the bond that has to be paid to Customs as per the current rules.
11	<i>Border protection measures</i>	Do you agree with the preferred option of limiting persons who may lodge a notice with Customs to those persons who have an interest in the GI concerned? If not, who should be able to and why?
		Yes, we agree with this approach and that those persons allowed to lodge a notice should be limited only to "rights holders". This is consistent with the approach to enforcement (question 6).
12	<i>Administrative enforcement</i>	What would be the advantages (or disadvantages) of providing the same investigative powers currently available to the Commerce Commission under the Fair Trading Act to the agency responsible for providing administrative enforcement of GIs? Are there any other investigative powers that should be provided instead?
		Fonterra supports the stated position in the paper to grant an existing agency with administrative enforcement capability i.e., rather than establish a new agency. This is the most efficient and cost-effective approach. We do not consider it necessary to provide for any further investigative powers.
13	<i>Administrative enforcement</i>	What remedies should the courts be able to grant arising from administrative enforcement of GIs and why?
		For simplicity and effectiveness, we consider that the same remedies should be made available to the judicial system under either a civil or administrative enforcement action. This will also provide clarity and consistency for business. In both cases, the remedies available for enforcement should go no further than those required to meet New Zealand's minimum obligations under the NZ-EU FTA and to align with the Trade Marks Act.
14	<i>Other issues</i> Official GI logo	What would be the advantages (or disadvantages) for the GIs Act to provide for producers to use an official logo on their labels and packaging that verifies the GI has been registered?

	Section	Question
		Product promotion, branding and logos (particularly for overseas markets) – such as the Made with Care (NZ) campaign – requires significant investment and a long-term strategy. In establishing any logo for GI products, it's important to ensure alignment and coherence with existing Government campaigns.
15	<i>Other issues</i> Enduring GIs	Are any of the enduring GIs (ie 'New Zealand', 'North Island' and 'South Island') being used by New Zealand spirits producers? If so, who is using them? Please provide examples of use.
		No comment.
16	<i>Other issues</i> Enduring GIs	If the enduring GIs are not being used for spirits, what would be the advantages (or disadvantages) of repealing their protection under the GIs Act?
		No comment.
17	<i>Other issues</i> Costs	How might the costs to administer the GIs Act be recovered and from whom?
		<p>As per our earlier submissions on GIs, our view has been that any regime should be administered on a cost-recovery basis. The costs for maintaining IPONZ's functions and services related to protecting those GIs should be recovered by the beneficiaries of registrations, which is consistent with the current practice in New Zealand. If not operated on such a basis, the annual cost to New Zealand of registering, investigating, and enforcing protection for the EU's 2,000 plus GIs would be significant.</p> <p>Unfortunately, as this discussion paper sets out, the NZ-EU FTA requires over 2,000 EU GIs to be registered and protected in New Zealand with no fees payable. This concession creates a system that is significantly out of step with the user pays and cost recovery approach adopted widely across New Zealand's broader cost recovery mechanisms. In this context, the only fair, efficient and justifiable option is for the Crown to accept the costs of this FTA concession. It would be unfair for any costs associated with establishing, implementing, and enforcing a broader regime to be borne by existing GI holders. It would also be unacceptable for any costs to be borne by any New Zealand foodstuff producers that do not hold GI rights.</p>
18	<i>Other issues</i>	Are there any other problems with the current GIs Act or proposed new GIs registration regime? What changes, if any, should be considered?

Section	Question
	<p>We note that this consultation paper does not seek views around how the EU-NZ FTA obligations on opposition procedures will be implemented. More clarity and certainty on this issue is necessary for business to understand how future GI applications might be considered.</p> <p>We support the inclusion of provisions in the GI Act on future registration and opposition processes, as provided for in Article 18.33 of the FTA. Administering these processes through a New Zealand legislative framework will ensure a clear and well-understood framework for considering these issues and provide business (both in New Zealand and offshore) with a clear pathway for opposing any future GI terms that might be proposed for inclusion by the EU. Legal certainty has been granted to EU GI rights holders, through the EU-NZ FTA and changes to the NZ GI legal frameworks. The same principles of protection should be similarly granted to those seeking to oppose the registration of further GI terms, given the protection of such terms often results in a negative commercial impact for New Zealand food producers. Opposition processes in the GI Act should also be made with due regard to New Zealand’s obligations under the CPTPP FTA.</p> <p>For further detail, please see the attached cover note.</p>