

Submission template.

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

This is the submission template for responding to the discussion paper on reforms of geographical indications laws that need to be made before New Zealand can sign and ratify its free trade agreement with the EU. The Ministry of Business, Innovation and Employment (**MBIE**) seeks your comments by **5pm on Tuesday, 28 February 2023**.

Please make your submission as follows:

1. Fill out your details under the “Your name and organisation” heading and, if applicable, check the boxes underneath on privacy and confidentiality.
2. Fill out your responses to the discussion document questions in the table: “Responses to consultation document questions”. Your submission may respond to any or all of the questions. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. If you would like to make other comments not covered by the questions, please provide these in the “Other comments” section.
3. Before sending your submission:
 - a. delete this first page of instructions; and
 - b. if your submission contains any confidential information, please:
 - State this in the cover page or in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (**OIA**) that you believe apply. MBIE will take such objections into account when responding to requests under the OIA.
 - Indicate this on the front of your submission (eg the first page header may state “In Confidence”). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
4. Submit your submission by sending it as a Microsoft Word document to ip.policy@mbie.govt.nz.

Please direct any questions that you have in relation to the submissions process to ip.policy@mbie.govt.nz.

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

Your name and organisation

Name	Kristen Kohere-Soutar (or nominated trustee)
Organisation (if applicable)	Mānuka Charitable Trust
Contact details	Attn: Kristen Kohere-Soutar Executive Chair, Te Pitau Limited Email: lesley.lousich@manukacharitabletrust.org

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

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Please check if you would prefer to give your response in person or would like to meet to discuss your written submission:

I would like to give my submissions in person or would like to meet to discuss my written submission.

If so, please provide contact details so that we can organise to meet in person.

Name	Kristen Kohere-Soutar (or nominated trustee)
Organisation (if applicable)	Mānuka Charitable Trust
Contact details	Attn: Kristen Kohere-Soutar Email: lesley.lousich@manukacharitabletrust.org>

Please choose any of the following you are associated with:

Iwi / Hapū

Māori organisation

Māori business

Other

Please give any additional information you feel is relevant:

The Mānuka Charitable Trust was established in 2019, to protect the mana and mauri of Mānuka along with other taonga species. The Trust's strategy is implemented through its operational arm, Te Pitau Ltd ('TPL'), headquartered in Christchurch with a satellite management team operating out of Tūranga-nui-a-Kiwa Gisborne.

In the implementation of strategy, the Trust also supports industry partners to protect the value of mānuka and its derivatives. This focus aligns with industry efforts to protect the term 'Manuka Honey' to genuine mānuka honey exports derived from Aotearoa – New Zealand.

In the absence of a Geographic Indicator framework for mānuka and its derivatives such as mānuka honey, the Trust has registered and defends Certified Trademarks in Aotearoa – NZ, the UK, China, the EU, Singapore and the US. TPL also opposes registrations from non-NZ businesses in market that use the same term.

Recently, the Trust was instrumental in providing guidance to NZ Trade negotiators IP team on the definition of Mānuka honey that was successfully incorporated into the EU FTA. This description refers to mānuka honey as originating from Aotearoa-NZ.

The Trust has also recently begun engagement with MFAT and MBIE to progress its intention to seek a Geographic Indicator for Mānuka honey.

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>Yes, there are 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. Some well-known examples of products that are exported globally include but are not limited to Mānuka Honey™, and other lesser known honey types derived from our native species, such as Rewarewa honey, Pohutakawa honey, and Kamahi honey to name a few.</p> <p>Mānuka is defined primarily by a Māori epistemological framework as defined by whakapapa, tikanga Māori, and Mātauranga Māori. The relationship between Māori and Mānuka is reciprocal and broadly defined kinship relationship that involves both giving and taking within a localised context. Products derived from our taonga species, such as Mānuka, carry this name, which is imbued with whakapapa, tikanga Māori, and Mātauranga Māori, a characteristic that is essentially attributable to their origin from Aotearoa New Zealand.</p> <p>The Crown has an obligation under He Whakaputanga and Te Tiriti o Waitangi to protect these taonga species and the use of these names on products derived from our taonga species in Aotearoa New Zealand and internationally.</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?
		<p>Yes, Mānuka Honey is an example of a product of Aotearoa New Zealand, but to register this name as a trade mark, or a certification trade mark, overseas is difficult to achieve. For example, the trade mark law in Europe states a certification trade mark cannot have any association with the geographical origin of the product. In addition, GI protection in other countries is usually not possible if you do not have a “home GI”.</p> <p>The name Mānuka Honey would benefit from recognition and protection under an extended GI framework in Aotearoa New Zealand to enable protection of the name Mānuka Honey in the trade mark and GI frameworks internationally.</p>
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?

	Section	Question
		<p>The advantage of an extended GI protection regime to Mānuka products are that authentic Mānuka Honey, oil, and other products derived from the taonga Mānuka are protected, because the name can only be used on products sourced from Aotearoa New Zealand.</p> <p>The commercial advantages of an extended GI regime are this regime would provide options for producers from Aotearoa New Zealand to consider when protecting their intangible assets internationally. Sometimes the distinctiveness of a product and what it is called arises from its region of production. As Aotearoa New Zealand relies heavily on its primary industries for exports, it is critical to support those industries when those products have characteristics that are essentially attributable to their origin from regions within Aotearoa New Zealand.</p> <p>In the case of Mānuka Honey, other countries are already claiming wrongly that the same product produced in those countries has the same science or botany based characteristics (Eg New Zealand Mānuka vs Australian leptospermum honeys). These products are not imbued with the same whakapapa, tikanga Māori, or Mātauranga Māori as the products that are produced in Aotearoa New Zealand.</p> <p>An extended GI framework would allow producers to protect a term they use to indicate the origin or the source of their goods, and the essential characteristics those goods have, including whakapapa, tikanga Māori, and any Mātauranga Māori associated with those goods.</p> <p>The disadvantages in not expanding the GI protection framework is that the protection and growth of innovation in certain products, particularly products found within regions, may be restricted within Aotearoa New Zealand, because of the lack of suitable protection through the current TM or GI framework.</p> <p>The lack of an extended GI framework is linked to our inability as a country to understand, recognise, and protect innovation and characteristics specific to geographic areas. Extending protection to these areas will allow regional communities to invest in innovation in those regional products.</p> <p>If the opportunity to extend the GI regime is missed, then the opportunity to adopt an extended GI regime that has the ability to protect whakapapa, tikanga Māori, and Mātauranga Māori and be consistent with the obligations under He Whakaputanga and Te Tiriti o Waitangi, will also be lost.</p>
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>We agree with providing provisions for the enforcement of GIs within the GIs Act. It should be clear to those using a GI framework what enforcement provisions apply and how to bring an enforcement action. This is a key aspect of all other New Zealand IP legislation, eg patents (see Part 4 of the Patents Act 2013), trade marks (see Part 4 of the Trade Marks Act 2002), plant variety rights (see Part 3 of the Plant Variety Rights Act 2022), copyright (see Parts 6/7 of the Copyright Act 1994), and designs (see Section 13 of the Designs Act 1953). Furthermore, it is important that a wide range of remedies be available under the GI Act. At present, the remedies available under the Fair Trading Act 1986 are limited.</p> <p>We also remind the Crown of its obligations under He Whakaputanga and Te Tiriti o Waitangi in relation to taonga, and in particular, the Crown’s obligations of active protection in relation to taonga, including Mānuka. Any enforcement and remedy provisions within a GI framework need to be consistent with these obligations, particularly in relation to our taonga Mānuka, and incorporate aspects that protect not only the name Mānuka, but its whakapapa, and the tikanga Māori and Mātauranga Māori associated with the taonga Mānuka.</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?
		<p>Our preference is the High Court be the venue for hearing GI disputes. This is consistent with the venue for other registered IP rights.</p> <p>However, our view is that the Māori Appellate Court be the venue for hearing GI disputes for GIs related to taonga species or any GIs featuring Māori names, in a similar way that disputes in relation to taonga species under the Plant Variety Rights Act are referred to the Māori Appellate Court. The Plant Variety Rights Act already recognises the nuanced expertise needed to deal with taonga species under that framework, and we consider the same should apply when dealing with taonga species under any extended GI framework, including any GIs that feature Māori names. We consider the Māori Appellate Court will be the appropriate venue to hear and respond to the enforcement and remedy requirements for our taonga species, including Mānuka.</p>
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?
		<p>Yes, we agree with “interested persons” being able to initiate civil enforcement action for GIs. This prevents “straw men” or other third parties bringing frivolous actions. However, “interested persons” should include entities including industry bodies, whānau, hapū, and iwi groups, government appointed bodies, including the Commerce Commission, registered trusts, Māori land entities etc.</p> <p>The disadvantage of limiting the parties who can initiate civil action for the enforcement and remedies of GIs means the regime may not acknowledge or recognise the groups who may have interest in protecting taonga such as Mānuka, or sufficiently address any cultural appropriation or misuse of these taonga. Extending the persons able to enforce GIs consistent with whakapapa, tikanga Māori, and Mātauranga Māori, will also be consistent with the Crown’s obligations under He Whakaputanga and Te Tiriti o Waitangi.</p>

	Section	Question
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?
		<p>The advantages of providing the same remedies for GIs as per the Trade Marks Act is again consistency between the IP regimes. There is no case law precedent in New Zealand for actions brought under the GI Act so guidance from the Trade Marks Act and Trade Mark case law would allow GI owners, practitioners, and the courts to have some understanding and sense of the possible outcomes. A GI is very similar to a Certification Trade Mark or a Collective Trade Mark. The damage that can be caused to a NZ trader by infringement of its GI registration can be as harmful as that caused to a trade mark owner's rights when infringement of a Registered Trade Mark occurs.</p> <p>The disadvantage of providing the same enforcement and remedies provisions as the current TM regime is the TM regime does not acknowledge or recognise taonga such as Mānuka, or sufficiently address any cultural appropriation or misuse of these taonga. Extending the enforcement regime and remedies to incorporate enforcement and remedies consistent with whakapapa, tikanga Māori, and Mātauranga Māori, will help to address these shortcomings in the current TM regime and also be consistent with the Crown's obligations under He Whakaputanga and Te Tiriti o Waitangi.</p>
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?
		<p>We consider that if the offending was serious enough, then criminal sanctions may be appropriate. The key issue is the regime, including any remedies provided under the regime, must acknowledge and recognise taonga such as Mānuka, in a manner that is consistent with whakapapa, tikanga Māori, and Mātauranga Māori. Until that is achieved, then the regime will continue to be inconsistent with the Crown's obligations under He Whakaputanga and Te Tiriti o Waitangi.</p>
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?
		<p>Yes, we agree with basing the border protection mechanisms for GIs on the Trade Marks Act, subject to our comments in response to question 10. The border protection mechanisms are easy to use and only require some indemnity protection from the party putting the notice in place. We would suggest that Customs be able to detain suspected infringing goods for a longer period of time. Given that GIs are collectively held rights, rather than the more traditional privately held trade mark rights, detaining the goods for longer would be beneficial to ensure the "interested person" best placed to bring an enforcement action is notified and has time to take action.</p>
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?

	Section	Question
		<p>Customs notices need to be able to be filed by “interested persons” as well. “Interested persons” should include entities including industry bodies, whānau, hapū, and iwi groups, government appointed bodies, including the Commerce Commission, registered trusts, Māori land entities etc.</p> <p>In the case of products that are imported and claim to have an association with a taonga species or claim an association with any aspect of cultural heritage, then these products should be stopped at the border without the need for a customs notice to be in place. The Crown could do this by adopting a similar regime to that being used in Australia to stop the importation of counterfeit indigenous products.</p>
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?
		<p>As mentioned above, we consider a new regime that recognises and protects whakapapa, tikanga Māori, and Mātauranga Māori by stopping the importation of counterfeit indigenous products at the border is preferred. For this reason, we do not 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. Customs notices need to be able to be filed by “interested persons” as well. “Interested persons” should include entities including industry bodies, whānau, hapū, and iwi groups, government appointed bodies, including the Commerce Commission, registered trusts, Māori land entities etc.</p>
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?
		<p>We support the recommendation that a government body be given the powers to assist in the administrative enforcement of GIs. The Commerce Commission is already established to do this type of work and has the appropriate investigative powers.</p> <p>However, in the case of administrative enforcement of GIs related to taonga species or any GIs featuring Māori names, then nuanced expertise is needed, similar to the enforcement of PVRs related to taonga species as discussed above. In that case, the Māori Appellate Court is the relevant body to hear those disputes.</p> <p>We consider the Māori Appellate Court or a specialist Commission needs to be established to carry out these investigative powers when dealing with GIs related to taonga species or GIs featuring Māori names. This approach would be consistent with the recommendations by the Waitangi Tribunal in the Wai 262 Report, Ko Aotearoa Tēnei.</p>
13	<i>Administrative enforcement</i>	What remedies should the courts be able to grant arising from administrative enforcement of GIs and why?

	Section	Question
		<p>We agree the same remedies that are available under civil enforcement of other intellectual property rights should be available when enforcing GI rights. These include:</p> <ul style="list-style-type: none"> • Injunctive relief including interlocutory relief • Account of profits • Damages/compensation, including punitive damages • Delivery up of infringing goods <p>For GIs related to taonga species or any GIs featuring Māori names, then other remedies need to be provided that are consistent with whakapapa, tikanga Māori, and Mātauranga Māori.</p>
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?
		<p>The advantages would be that consumers would be put on notice of the existence of a GI.</p> <p>The disadvantages are that an “official logo” would be required. Who would police the use of the logo? It opens up yet another avenue for counterfeit producers to “endorse” their product with an “official logo”.</p> <p>Should this “official logo” option be adopted, perhaps the GI legislation could include a clause making an invalid claim to GI registered status a breach of the Act with heavy penalties and enforceable by the Commerce Commission, the Māori Appellate Court, or an independent Commission to be established.</p>
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.
		<p>We are not aware of any use of these phrases as GIs.</p>
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?
		<p>It would seem short-sighted to repeal any protection around enduring GIs for spirits. While there may be no use of these enduring GIs for spirits at present, that is not to say that in the next decade or so that there could be the need for GIs for spirits.</p> <p>We also recommend that an enduring GI rights be granted to the name Aotearoa for wines, spirits, and within the extended GI regime.</p>
17	<i>Other issues</i> Costs	How might the costs to administer the GIs Act be recovered and from whom?

	Section	Question
		<p>We consider it is appropriate for the costs to be borne by those that use the GI system, ie application fees, renewal fees etc. Again, this is consistent with the other IP frameworks in place in New Zealand. It surprises us that 2,133 EU GIs must be afforded protection (and up to 30 additional GIs every three years) with no requirement for a registration fee and no requirement for a renewal fee. At a minimum, it is certainly hoped that the EU will offer the same rights in exchange for NZ GIs?</p> <p>However, in the case of the recognition and protection of taonga species, and products derived from taonga species, the Crown should be open to providing some financial relief or other support to empower and enable communities to engage with the GI system.</p>
	<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?
18		<p>The current GI Act makes no reference to Te Tiriti o Waitangi and the Crown's obligations under Te Tiriti. This needs to be rectified. We are also extremely concerned with the Crown's statement that this review will not consider Mātauranga Māori and tikanga principles under the proposed GI registration regime.</p> <p>The Wai 262 claim (filed in 1991) raised many concerns in relation to the intellectual property framework and the Wai 262 report (issued in 2011) made several recommendations for change in the intellectual property framework. We acknowledge the Crown is working through these recommendations under Te Pae Tawhiti and with Te Taumata Whakapūmau, but to progress a significant change in our intellectual property framework without addressing the broader concerns about the intellectual property framework and its lack of protection for whakapapa, tikanga Māori, and Mātauranga Māori is inappropriate, reckless, and ill-advised.</p>