



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI



Regulatory Impact Statement

Geographical Indications (Wine and Spirits) Regulations

Regulatory Impact Statement

Geographical Indications (Wine and Spirits) Regulations

Agency Disclosure Statement

1. This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment (**MBIE**). It provides an analysis of proposals for the regulations and fees required to implement the Geographical Indications (Wine and Spirits) Registration Act 2006 (**'the GI Act'**).
2. The RIS has been prepared on the assumption that 30 – 35 applications to register a geographical indication will be filed in the first year after entry into force of the GI Act, five in the second year, five in the third year, and 0-2 applications per year thereafter, and that most applications will involve New Zealand geographical indications. This assumption is based on information provided by NZ Winegrowers¹ regarding the number of likely applications they will file to protect New Zealand wine geographical indications. If the number of applications is significantly less than expected, the fees collected may not be sufficient to cover the costs of establishing and maintaining the register of geographical indications.
3. No formal cost-benefit analysis has been carried out for any of the options. Instead, qualitative judgements of the impacts (positive and negative) of the options considered have been used to determine the preferred options.
4. An exposure draft of the proposed regulations, together with a proposed fee schedule was released for public consultation in July 2016.

Gus Charteris
Manager, Business Law
Building, Resources and Markets
Ministry of Business, Innovation and Employment

¹ NZ Winegrowers is the umbrella organisation representing New Zealand wine producers.

Executive summary

5. The GI Act was passed in 2006, but has not yet been brought into force. This Act, when in force, will establish a registration procedure for geographical indications ('GIs'). The GI Act will be administered by the Intellectual Property of New Zealand (**IPONZ**). In 2014, the government decided to bring the GI Act into force. Although regulations are required to implement the GI Act, no regulations were drafted at the time it was enacted.
6. In developing regulations for the GI Act there is effectively only one realistic option: base the regulations, as far as possible, on relevant provisions of regulations developed for legislation dealing with similar matters.
7. The registration system established by the GI Act is very similar to the trade mark registration system established by the Trade Marks Act 2002, which is also administered by IPONZ. Modelling the GI Act Regulations on the relevant provisions of the Trade Marks Regulations 2003 minimises the cost to IPONZ of administering the GI Act, as IPONZ can simply adapt existing procedures rather than develop new ones.
8. In addition, many of those who may interact with the registration system will have dealt with the trade mark registration system and so will be familiar with the procedures. Basing the GI Act regulations on the Trade Mark Regulations will minimise the costs involved in becoming familiar with the regulations.
9. In relation to fees, all of the costs of administering the GI registration system will be recovered from the fees paid by applicants for registration and by third parties who interact with the Registrar of Geographical Indications (**'the Registrar'**). One challenge involved with setting the fees is that the number of applications to register geographical indications is likely to be low.
10. It is estimated that 30 – 35 applications to register a GI will be filed in the first year after entry into force, five in the second year, five in the third year and two each year within the first two years after the GI Act enters into force, with 0-2 applications per year thereafter. By comparison, IPONZ receives around 20,000 trade mark applications per year.
11. This means that the costs of establishing and maintaining the registration process for GIs will have to be spread over a very small number of applications. The fees charged by IPONZ will be higher than those that are charged in connection with other registered intellectual property rights, such as trade marks.
12. One option is to set the fees for the procedures prescribed by the GI Act and regulations on the basis of the actual costs to IPONZ of carrying out each procedure ('the cost to serve per unit' approach). This approach would mean that users of ancillary procedures such as oppositions, removal, alteration and restoration relating to registered GIs would meet the entire costs incurred by IPONZ in administering these procedures.

13. These ancillary procedures contribute towards maintaining the integrity of the Register of Geographical Indications (**'the Register'**). If the fees charged are too high, this may discourage the use of these procedures. Applicants for registration also derive some benefit from maintenance of the integrity of the Register, so it seems reasonable that they make some contribution to the costs. As the 'cost to serve per unit' approach does not provide for this, the first option is not preferred.
14. A second option is to set fees on the basis that the total amount collected in fees must cover the total costs of administering the registrations ('the cost to serve entire register' approach). This is the preferred option. Under this approach some fees will be set at less than the 'cost to serve per unit', while others may be set above the this cost. This is the basis for setting fees for the other intellectual property rights registration systems administered by IPONZ (patents, trade marks, designs).
15. Using this approach, the application fee and initial renewal fee would be higher than under the 'cost to serve per unit' approach. This allows fees for ancillary services to be set at a lower level than for the first option. Effectively, some of the costs of the ancillary procedures are being met by fees paid by the applicant.
16. An exposure draft of the proposed regulations, together with a proposed fee schedule was released for public consultation in July 2016. Submitters generally agreed with the proposed approach to the regulations and fees. Some submitters identified areas of the regulations where clarification would be useful. These were mainly in areas specific to geographical indications, that were not catered for in the Trade Mark Regulations.

Background

What is a 'geographical indication'?

17. A GI is a name, usually a regional name, that is used to identify the origin of goods where some quality, reputation or other characteristic of the goods are related in some essential way to their geographical origin. GIs have been used particularly in the EU for agricultural goods and foodstuffs that have qualities that are claimed to be influenced by unique local characteristics. Examples of GIs include Champagne and Scotch whisky. In the case of New Zealand wine, there could potentially be a number of GIs registered, such as 'Marlborough', 'Nelson', 'Hawke's Bay' or 'Central Otago'.
18. The use of GIs by New Zealand producers is largely confined to the wine industry. Foreign wine producers selling into the New Zealand market also use geographical indications.
19. The World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') requires New Zealand to provide protection for GIs for wines and spirits. Currently GIs in New Zealand are protected by a range of measures, including the tort of passing off, the Fair Trading Act 1986, the Trade Marks Act 2002, the Australia New Zealand Food Standards Code and the Wine (Specifications) Notice 2006.

The Geographical Indications (Wines and Spirits) Registration Act 2006

20. In 2006 the GI Act was passed. This Act, will, when in force, establish a regime for registering GIs in New Zealand. The registration regime will be administered by the Intellectual Property Office of New Zealand (**IPONZ**).
21. In December 2007 Cabinet agreed to delay implementation of the GI Act. At the time it was anticipated that negotiations with the EU for a bilateral wine agreement would soon begin. It was considered that implementing the GI Act and allowing EU wine producers to register their GIs in New Zealand would be premature ahead of concluding these negotiations.
22. Negotiations on the wine agreement were never started, and at the time, the New Zealand wine industry did not support implementation of the GI Act. As a result, the GI Act was never brought into force. Consequently, no regulations were ever drafted.
23. More recently, the New Zealand wine industry has argued that the GI Act should be brought into force so that New Zealand GIs can be registered here. The industry is concerned about the possible misuse of New Zealand geographical indications in overseas markets, and wishes to protect their GIs in those markets. Some other countries will not register foreign GIs unless they are registered in their country of origin. In December 2014 the government decided to bring the GI Act into force.

Status Quo and Problem Definition

Regulations

24. The GI Act establishes a formal register for GIs. Any 'interested person' will be able to apply to register a GI. The application will be subject to an examination process by the Registrar and a GI will only be registered if the criteria for registration set down in the Act are satisfied. The Act also establishes procedures to enable interested third parties to challenge the Registrar's decision to register a GI, and to apply to remove or alter the registration of a GI.
25. The GI Act leaves the procedures associated with the registration process to Regulations. Regulations will therefore be needed to implement the GI Act. As mentioned above, no regulations were drafted at the time the GI Act was passed. The Regulations will deal with such matters as:
 - the information required to be filed with an application to register a GI;
 - the procedures to be followed during examination of the application;
 - procedures to be followed for renewing a registration, and for applications to alter or remove a registered GI;
 - opposition procedures;
 - the conduct of proceedings, such as hearings, before the Registrar of Geographical Indications.

Fees

26. There will be costs to IPONZ in administering the registration regime established by the GI Act. These costs will be recovered entirely from fees charged to persons applying to register GIs and others who interact with the Registrar of Geographical Indications (**'the Registrar'**).

GI Act Regulations: Objectives and criteria for analysing the options

27. MBIE considers that the Regulations should:
- a. Allow IPONZ to implement the GI Act in an efficient and cost-effective manner;
 - b. Be clear and understandable for applicants for registration, registrants, third parties;
 - c. Appropriately balance the interests of applicants for registration, registrants, third parties and the public;
 - d. Be consistent to the extent practical with the other regimes for registered intellectual property rights administered by IPONZ.
28. The first objective is particularly important. It is estimated that there will be about 30-35 applications made to register GIs in the first year after the GI Act enters into force, five in the second year, five in the third year and two each year thereafter.
29. This means that the costs of establishing and maintaining the Register will have to be spread over a relatively small number of applications. If the fees charged to users of the GI registration system are to be kept to a level that does not discourage use of the system, implementation costs must be kept as low as possible.

GI Act Regulations: Options

30. There are no non-regulatory options. The requirements of the GI Act in relation to the registration process for geographical indications mean that regulations are necessary to ensure the smooth running of the registration system.
31. In developing the regulations, there are essentially three possible options:
- i. Draft a new set of regulations from scratch without reference to regulations developed for other legislation, including other legislation administered by IPONZ;
 - ii. Base the regulations, as far as possible, on relevant provisions of regulations developed for legislation dealing with similar matters and administered by IPONZ, in particular, the Trade Mark Regulations 2003 (preferred option).
 - iii. Base the regulations on those developed in foreign jurisdictions with similar geographical indications regimes, in particular, Australia.
32. In considering the options, it quickly became clear that options (i) and (iii) were not viable, and that option (ii) was the only option that was worth pursuing. While all three options would likely meet the last three objectives set out above, options (i) and (iii) would not

meet the first objective of allowing IPONZ to implement the GI Act in an efficient and cost-effective manner.

33. Option (i), drafting a new set of regulations from scratch is likely to impose significant costs on IPONZ if procedures under these regulations are significantly different from the procedures currently implemented by IPONZ. It would not be possible, under these circumstances, for IPONZ to adapt existing processes. As IPONZ operates an all-electronic system, this could lead to significant IT costs. There would also be additional costs in developing and maintaining staff training material.
34. Similar comments also apply to option (iii). Adapting regulations developed elsewhere is likely to result in regulations significantly different from other regulations administered by IPONZ.
35. In any case, as discussed below, the registration regime established by the GI Act has many similarities to the regime for registering trade marks under the Trade Marks Act 2003. In light of this, any regulations drafted from scratch would probably end up looking much like the Trade Marks Regulations.

Preferred Option – Base Regulations on the Trade Marks Regulations 2003

36. GIs are similar to trade marks in that they consist of a word or words, or occasionally a symbol. Like applications to register trade marks, applications to register GIs must be examined to determine eligibility for registration, interested parties will be able to oppose registration or apply to have a registration removed, and registrations will need to be kept in force through the payment of renewal fees.
37. Using the Trade Marks Act and Regulations as a basis for the GI Act Regulations minimises the cost to IPONZ of administering the registration regime. Existing IPONZ processes, including IT processes can be adapted, rather than developing new ones. This will help keep the fees charged to users of the registration system lower than would otherwise be the case.
38. Many users of the geographical indications system are likely to be users of the trade mark registration system, and already be familiar with the provisions of the Trade Marks Act 2002 and the Trade Marks Act 2003. It will be easier and less costly for these users to become familiar with and comply with the GI Act regulations if they are similar to the Trade Mark Regulations.
39. The Trade Marks Regulations 2003 were intended to ensure that an appropriate balance was struck between the interests of trade mark owners, third parties, and the public. Since the regulations entered into force, amendments have been made where deficiencies have been identified. These amendments, where they are consistent with the GI Act registration regime, have been incorporated into the GI Act regulations.
40. In addition to the Trade Marks Act 2002 and the Trade Marks Regulations 2003, IPONZ also administers the Patents Act 2013 and regulations, and the Designs Act 1953 and regulations. Although there are significant differences between the regulations reflecting the different registration regimes involved, there are some procedures common to all of

these regimes. The common procedures mainly relate to proceedings, such as hearings or opposition procedures.

41. The GI Act also provides for proceedings, including hearings and opposition procedures. There are advantages, for both IPONZ, applicants for registration, registrants and third parties if the GI Act adopts the same approach to proceedings as the other registration regimes administered by IPONZ. This avoids the need to establish a separate system for geographical indications, and makes more efficient use of IPONZ resources, as they can be shared with the other registration regimes.
42. Under this option, the GI Act regulations will adopt essentially the same approach as that taken in the Trade Mark Regulations. Procedures for opposition, renewal, and removal or alteration of a registered geographical indication, and proceedings such as hearings will be essentially the same as the corresponding procedures in the Trade Mark Regulations.
43. The only significant departure from the approach taken in the Trade Mark regulations relates to the specific information required to be filed with an application to register a geographical indication. For example, applicants will need to provide evidence of the quality, or reputation, or other characteristic of the wine or spirit that is essentially attributable to the area to which the geographical indication relates. This sort of information is not required for trade mark applications.

GI Act Fees

44. It is intended that the costs of establishing and maintaining the Register will be met entirely from fees paid by applicants for registration and third parties who interact with the **Registrar**. That is, there will be no subsidy from the government, or from the fees collected in respect of the other registered intellectual property rights administered by IPONZ. This approach is in line with that taken for other registered intellectual property rights, such as patents, trade marks and designs.
45. Using this approach does present a challenge in setting fees. It is estimated that there will be about 30 – 35 applications to register a GI will be filed in the first year after entry into force of the GI Act, five in the second year, five in the third year, and 0-2 applications per year thereafter.
46. The projected low number of applications means that the initial fee that must be paid with an application to register a geographical indication will be significantly higher than the initial application fees for other registered intellectual property rights (patents, trade marks and designs) where application numbers are much higher. By comparison, the fee levied by IPONZ to make an application to register a trade mark is \$150.
47. The costs involved in establishing and administering the register have been estimated as approximately \$100,000 in the first year, \$55,000 in the second year, and \$35 – 40,000 in subsequent years.

48. The GI Act requires that GIs will be registered for an initial period of 5 years, renewable for further 10 year periods on payment of a renewal fee. The GI Act also provides that renewal fees may be used to recover some or all of the costs incurred by the Registrar in administering the registration system.

Risks

49. As noted above, there is significant uncertainty regarding application volumes. Much of the costs involved in establishing and administering the register are labour costs. If application volumes are less than estimated, costs will also be less than estimated. IPONZ also intends to review fee levels after three years. These factors will assist in mitigating risks if application volumes are lower than estimated.
50. In addition, the costs of establishing and administering the Register are much less than 1% of IPONZ's total revenue. IPONZ considers that any risk that revenue does not fully cover the costs is manageable, given that the absolute level of costs is such a small fraction of total IPONZ revenue, and that IPONZ intends to review fees three years after the GI Act enters into force.

Objectives and criteria for analysing the options

51. In considering the options, the following criteria have been used:
- **efficiency** considers the likely productive and allocative efficiency impacts as well as the cost effectiveness with which the collection processes could be expected to operate;
 - **equity** considers whether the option is equitable across different users and the amount of possible cross-subsidisation across IPONZ services i.e. fair allocation of costs; and
 - **effectiveness** considers how effective the option is in collecting the cost of operating the service and how accurately costs are recovered from users of these services

Options

52. As mentioned earlier, the revenue recovered from fees must fully recover the cost of establishing and maintaining the Register. Taking account of this, there are a number of ways in which the level of fees could be set:
- i. **cost** to serve per unit;
 - ii. **cost** to serve entire Register (preferred option);
 - iii. **consider** the fee regimes charged in similar foreign jurisdictions.

Analysis of Options

Summary Table of Options

53. In the table below, the symbols used have the following meanings:

- ✓ = positive.
- = neutral
- ✗ = negative.

	Efficiency	Equity	Effectiveness	Overall Rating
Cost to Serve per unit	-	✗	✓	-
Cost to Serve entire register	✓	✓	-	✓ ✓
Consider the fees charged by overseas offices	✗	-	✗	✗ ✗

Option 1: Cost to serve per unit

54. This involves setting individual fees to recover the actual cost of the action that the fee is intended to cover. This option offers a high level of transparency and meets the effectiveness objective. However, it does not meet the equity objective.
55. Under this option, users of ancillary procedures such as oppositions, removal, alterations and restorations relating to registered GIs would be required to bear the entire cost incurred by IPONZ in providing these procedures.
56. These ancillary procedures help to maintain the integrity of the Register. If the fees charged for these ancillary procedures are too high, this may discourage their use. Applicants derive some benefit from the maintenance of the integrity of the Register, so it seems reasonable that they should bear some of the costs of the ancillary procedures. Option 1 does not provide for this, so option 1 is not preferred.
57. Estimates of the fees, using a cost to serve per unit model, are set out in the table below:

	Application fee	Renewal fee (every five years)²	Opposition fee	Hearing fee	Application for removal or alteration
Estimated cost to serve per unit	\$4000	\$1450	\$8000	\$5700	\$2800

Option 2: Cost to serve entire register (preferred option)

58. Under this option, fees are set at a level so that the sum total of fees collected covers the cost of establishing and maintaining the register. Some fees, such as the fees for ancillary procedures, will be set at below the 'cost to serve per unit', while others, such as the application fee and renewal fees, are set at a higher level. This meets the effectiveness objective. The cost to serve entire register model is the model used for setting fees for other registered intellectual property rights administered by IPONZ – patents, trade marks and designs.
59. Compared with option 1, option 2 provides for a more equitable distribution of costs between applicants for registration and users of ancillary procedures. Effectively, applicants will bear some of the costs of the ancillary procedures.
60. This enables the fees for these procedures to be set at a level which is less likely to discourage users of ancillary procedures from participating in the registration process and maintain the integrity of the register. As applicants derive some benefit from maintenance of the integrity of the Register, it seems reasonable that they should bear some of the costs of the ancillary procedures. Option two provides for this, so it is preferred over option 1.
61. Estimated fee levels on the basis of cost to serve the entire register are set out below (fees are exclusive of GST)³:

	Application fee	Renewal fee	Opposition fee	Hearing fee	Application for removal or alteration
Estimated cost to serve entire register	\$5000	\$2000 payable after five years, \$500 every 10 years thereafter	\$700	\$1700	\$1000

² The estimates of fees set out in this table were developed before the current legislative provisions regarding the renewal period had been finalised.

³ IPONZ fees are quoted exclusive of GST, as fees paid by non-New Zealand residents are zero-rated for GST under section 11A(1)(n) of the Goods and Services Tax Act 1985.

Option 3: Consider the fees regimes in similar foreign jurisdictions

62. This option would involve setting fees after considering how fees are set in similar foreign jurisdictions. Currently, the only similar jurisdiction with a register of GIs is Australia, although some other jurisdictions are in the process of establishing a register.
63. The Australian regime for registering geographical indications is significantly different from the regime established by the GI Act. In Australia the initial application fee is AUD27,500, with other fees charged on a cost-recovery basis. There are no renewal fees. Given the difference in registration regimes, this approach provides little guidance in setting fee levels for New Zealand although it does provide a benchmark.

Conclusions and Recommendations

Regulations

64. MBIE's preferred option is to base the regulations on existing regulations, in particular relevant provisions of the Trade Marks Act 2002 and the Trade Marks Regulations 2003.
65. The use of regulations based on the Trade Marks Regulations will make it easier and less complex for IPONZ to implement the regulations as IPONZ can adapt or use existing processes. As the cost of the geographical indication registration system will be met from fees charged to applicants and third parties, this will mean that the fees are lower than might otherwise be the case.
66. This approach will also be easier and less complex for persons dealing with the Registrar.

Fees

67. The option preferred by MBIE is set the fees on a 'cost to serve entire register' basis. That is, fees are set so that the total amount of fees collected covers the cost of establishing and administering the geographical indications registration system. Fees for the other registered intellectual property rights are set on this basis.
68. Setting fees on this basis allows some fees, such as fees for ancillary procedures such as opposition, removal or alteration procedures to be set a level that is less than the actual cost of the procedure, while others, in particular renewal fees, are set at a level that is higher than actual cost. This allows the fees for ancillary procedures to be set at a level which does not discourage the use of these procedures and so assist in maintaining the integrity of the Register. Effectively, some of the cost of the ancillary procedures is borne by applicants. This is considered reasonable, as applicants benefit from maintenance of the integrity of the Register.

Consultation

69. In July 2016, the Ministry of Business, Innovation and Employment released a public discussion document seeking public submissions on the proposed regulations and fees. The consultation document included an exposure draft of the proposed regulations. This was because there was effectively only one viable option for the regulations. It was considered that going straight to an exposure draft was a better use of both MBIE and stakeholder resources than issuing a consultation document on the regulations, and following this up with an exposure draft.
70. Fourteen submissions were received, mostly from wine growers, including NZ Winegrowers, the umbrella organisation representing New Zealand wine producers. Patent attorney firms, the New Zealand Law Society, and Spirits New Zealand also provided submissions.
71. The submissions on the exposure draft of the regulations supported the approach of basing the regulations on the Trade Mark Regulations 2003. Submissions also identified some aspects of the regulations where they considered that amendment was required to simplify or clarify the regulations. These were mostly in the regulations relating to aspects of the geographical indication regime that differ from the trade mark registration regime, such as the specific information that must be filed with an application to register a GI. The exposure draft has been amended to take account of the points raised by submitters.

Fees

72. Submitters were generally supportive of the proposal to set fees on a 'cost to serve entire register basis'. They recognised the difficulties posed by the likely small number of applications, and the fact that most would be received shortly after entry into force of the GI Act.

Implementation plan

73. IPONZ is currently making preparations for the entry into force of the GI Act. This includes:
- i. Making appropriate changes to its IT systems to implement the GI Act;
 - ii. placing information on its website about GIs, and how the registration system will work once the GI Act is in force;
 - iii. developing, in consultation with stakeholders guidelines on how IPONZ will examine and grant applications to register geographical indications, and how IPONZ will deal with proceedings under the GI Act, such as oppositions, and applications to alter or remove a registered geographical indication;
 - iv. publicising the regulations once they are gazetted together with the date that the GI Act and regulations will formally enter into force.

Monitoring, evaluation and review

74. The operation of the GI Act and Regulations will be monitored as part of IPONZ's normal reporting processes. This will include seeking the views of major stakeholders the way that IPONZ is implementing the registration system. IPONZ will also review the GI Act fees three years after the GI Act enters into force.