

Australian Wine and Brandy Corporation Amendment Regulations 2004 (No. 1) 2004 No. 252

EXPLANATORY STATEMENT

Statutory Rules 2004 No. 252

Issued by the Authority of the Minister for Agriculture, Fisheries and Forestry

Australian Wine and Brandy Corporation Act 1980

Australian Wine and Brandy Corporation Amendment Regulations 2004 (No. 1)

Section 46 of the *Australian Wine and Brandy Corporation Act 1980* (the Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act authorises the Australian Wine and Brandy Corporation (AWBC) to amongst other things determine the boundaries of the various regions and localities in Australia in which wine is produced and to give identifying names known as geographical indications (GIs) to those regions and localities. The Act provides for the establishment of a Geographical Indications Committee (GIC) and for the GIC to make determinations of GIs for wine in relation to regions and localities in Australia.

The purpose of the Regulations is to introduce new arrangements in relation to the determination of GIs consequential to the Australia-US Free Trade Agreement.

The *US Free Trade Agreement Implementation Act 2004* (USFTA Act) consists of nine schedules that amend relevant Australian legislation to fulfil Australia's obligations under the Free Trade Agreement between Australia and the United States. Schedule 3 to the USFTA Act amended the Act to provide specific procedures for the owner of a trademark to object to the determination of an Australian geographical indication (GI) on the basis of pre-existing trademark rights and procedures for the cancellation of an Australian GI. Schedule 3 of the USFTA Act will commence on the later of 1 January 2005 or the day in which the Australia-United States Free Trade Agreement comes into force.

In particular Schedule 3 to the USFTA Act has inserted the following provisions into the Act:

- Subsection 40RC(5), which provides that regulations may set out the procedure for the Registrar of Trade Marks to decide if a trade mark owner can successfully object to the determination of a GI; and
- Subsection 40RE(2), which provides regulations may set out the procedure for the Registrar of Trade Marks to decide if a ground for objection no longer exists.

In addition, subsection 40J(5) of the Act provides for regulations to exempt wines from the operation of the offence provisions.

The *Australian Wine and Brandy Corporation Regulations 1981* (the Principal Regulations) prescribe the criteria for determining GIs (Part 5) and provide for certain exemptions from the offence provisions (Part 3). There are currently no regulations that establish a process by which

the Register of Trade Marks may hear objections to the determination of a GI on trade mark grounds.

The Regulations would introduce a new Part 6 to the Principal Regulations that would establish a process by which the Registrar of Trade Marks may hear objections to the determination of a GI and make a recommendation to the GIC.

The Registrar of Trade Marks works on a cost recovery basis. The Regulations impose fees for the services performed to carry out the processes.

The effect of the Regulations would have no financial impact on the Government.

Details of the Regulations are set out in the Attachment.

Sections 4(1) and 4(2A) of the *Acts Interpretation Act 1901* provide that regulations may be approved between the enactment of an Act and its coming into operation provided that the date the regulations take effect is not earlier than the date that the Act comes into operation. The proposed Regulations would commence on the commencement of Schedule 3 to the USFTA Act.

Authority: Sections 46 of the *Australian Wine and Brandy Corporation Act 1980*

ATTACHMENT

DETAILS OF THE PROPOSED *A USTRALIAN WINE AND BRANDY CORPORATION AMENDMENT REGULATIONS 2004 (No. 1)*

Regulation 1 provides for the name of the Regulations to be the *Australian Wine and Brandy Corporation Amendment Regulations 2004 (No. 1)*.

Regulation 2 provides for the Regulations to commence on the commencement of Schedule 3 to the *US Free Trade Agreement Implementation Act 2004*.

Regulation 3 provides that Schedule 1 amends the *Australian Wine and Brandy Corporation Regulations 1981* (the Principal Regulations).

Schedule 1 Amendments

Item [1] Regulation 3, after definition of *Food Standards Code*

This item introduces definitions of "GI" as geographical indication and "GIC" as the Geographical Indications Committee.

Item [2] Regulation 3, after definition of *licensee*

This item introduces a definition of "proposed GI" as a geographical indication that the GIC is considering determining.

Item [3] After regulation 17 insert

Regulation 17A, Use of trade mark in description of Wine (Act, s.40J)

This new regulation provides an exemption to the penalty provisions in the *Australian Wine and Brandy Corporation Act 1980* (the Act) where:

- a. the Registrar of Trade Marks has decided that an objection to a proposed GI was made out under section 40RC(2) of the Act, and the GI is subsequently registered in accordance with subsection 40ZD(2) of the Act; or
- b. a trade mark is registered or is the subject of a pending application under the *Trade Marks Act 1995* and:
 - i) after the registration of, or application for, the trade mark, an Australian GI is proposed by application made under section 40R of the Act;
 - ii) the Australian GI referred to in paragraph (i) is subsequently registered in accordance with subsection 40ZD(2) of the Act; and
 - iii) the trade mark is identical to, or is likely to be confused with, the Australian GI.

The exemption would apply to the use of the trade mark in the description and presentation of wine, provided that the true indication/origin of the wine is also included in description and presentation where the wine does not originate from that Australian GI. A further condition of use should be that the wine must be described and presented in such a way that it is not likely to mislead as to the origin of the wine.

Item [4] After Part 5

This would insert a new Part 6, Objection to determination of GI based on pre-existing trade mark rights, including new regulations 28 to 55.

Division 1 General

Regulation 28, Definitions for Part 6

This item introduces a definition of "Registrar" as the Registrar of Trade Marks.

Regulation 29, Parties to send copies of evidence to each other

This item specifies the process for validly filing evidence in a proceeding under Part 6. To validly file evidence each party must give a copy of the evidence to each party and file evidence with the Registrar along with a statement that the evidence was provided to the other parties.

Regulation 30, Costs

This item indicates that all parties to the proceedings shall pay their own costs.

Regulation 31, How fees are to be paid (Act, s 40RC and s 40RE)

This item would require that fees imposed under Part 6 of the Regulations are to be paid to the Registrar.

Division 2 Consideration of objections

Regulation 33, Application of Division 2 (Act, s 40RC)

This item indicates that Division 2 of the Amendment Regulations applies to the Registrar making a decision under subsection 40RC(2) of the Act. It is up to the Registrar to decide how to collect evidence to make a recommendation under subsection 40RC(3) of the Act.

Regulation 34, Definition for Division 2

This item defines "party" as being the applicant for the GI, the person objecting to the GI and a person who registers as an interested party to the proceedings in response to subregulation 35(1).

Regulation 35, Objections

This item provides that if there has been an objection to a proposed GI under paragraph 40RA(2)(b) of the Act the Registrar must publish a notice advising that an objection has been received and inviting interested persons to register as a party to the proceedings within a period of one month from the date of notice.

The Registrar must publish the notice in a manner the Registrar thinks fit.

Regulation 36, Evidence

This item requires that following the one month period the Registrar must send an invitation notice to each of the parties to the proceedings to advise them of the names of addresses of each party and invite them to file evidence in relation to a decision about the matter within three months of the date of the invitation notice.

Regulation 37, Evidence in answer

This item requires that, if evidence is filed, the Registrar must invite each party to file evidence in answer within two months from the date of the notice. The Registrar has the discretion to allow a longer period for filing evidence in answer.

Regulation 38, Request for hearing

This item requires the Registrar to set the matter down for a hearing if any of the parties to the proceedings requests a hearing. Such a request must be received by the Registrar within one month of the end of the period for filing evidence in answer.

Regulation 39, New evidence

This item describes the procedure for applying to the Registrar to file new evidence and the actions of the Registrar if approval to file new evidence is granted. If a party is granted permission to file new evidence the registrar must allow the other parties to the proceedings to opportunity to provide evidence in answer in reply.

Regulation 40, Decision by Registrar

This item provides that the Registrar must decide whether the ground for objection has been made out by considering the material, including submissions at a hearing, provided by the parties.

Regulation 41, No decision if trade mark subject to removal or cancellation proceedings

This item prevents the Registrar from making a decision about the ground of objection where the registered trade mark is the subject of a current removal or cancellation action.

Regulation 42, Withdrawal of objection

This item provides that if the person making the objection does not file evidence in support or withdraws the objection the Registrar must decide that the ground for objection is not made out.

Regulation 43, Fees

This item specifies the fees that the Registrar may charge and that if the fee is not paid the action will be considered not to have occurred.

Division 3 Application for decision that ground of objection no longer exists

Regulation 44, Application of Division 3 (Act s 40RE)

This item indicates that Division 3 applies to the Registrar of making a decision under subsection 40RE(1) of the Act.

Regulation 45, Definition for Division 3

This item provides definitions of "claimant" and "party". A claimant is a person who applies to the Registrar to make a decision that a ground for objection (made under paragraph 40RE(1)(b) of the Act) no longer exists. A party is the claimant or the owner of the trade mark concerned or a person who registers to be heard in the proceedings.

Regulation 46, Claims

This item provides if the Registrar receives a claim that a ground for objection no longer exists the Registrar must publish a notice that a claim has been received and inviting interested persons to register as a party to the proceedings within a period of one month from the date of the notice.

The notice must be published in a manner that the Registrar thinks appropriate. The Registrar must also give a notice in writing to the owner of the trade mark and the person who applied for the GI.

Regulation 47, Evidence

This item requires that the following the one month period the Registrar must send an invitation notice to each of the parties to the proceedings to advise them of the names of addresses of each party and invite them to file evidence in relation to a decision about the matter within three months of the date of the invitation notice.

Regulation 48, Decision if no evidence is filed

This item provides that if no party files evidence the Registrar must decide that the claim is not made out and advise the parties and the GIC.

Regulation 49, Evidence in answer

This item requires the Registrar to invite each party to file evidence in answer within two months of the date of the invitation. The Registrar has the discretion to allow a longer period for filing evidence in answer.

Regulation 50, Request for hearing

This item requires the Registrar to set the matter down for a hearing if any of the parties to the proceedings requests a hearing. Such a request must be received by the Registrar within one month of the end of the period for filing evidence in answer.

Regulation 51, New evidence

This item describes the procedure for applying to the Registrar to file new evidence and the actions of the Registrar if approval to file new evidence is granted. If a party is granted permission to file new evidence the registrar must allow the other parties to the proceedings to opportunity to provide evidence in answer in reply.

Regulation 52, Decision by Registrar

This item provides for the Registrar to decide whether the ground for objection has been made out and to consider the material, including submissions at a hearing, provided by the parties.

Regulation 53, Withdrawal of claims

This item, provides that if the person making the claim withdraws the claim but another party requests the proceedings to continue the Registrar must continue the proceedings.

If no other party requests the proceedings to continue the Registrar must not make a decision about the matter and inform the GIC and parties that no decision is made.

Regulation 54, No decision if trade mark subject to removal or cancellation proceedings

This item prevents the Registrar from making a decision about the claim where the registered trade mark is the subject of a current removal or cancellation action.

Regulation 55, Fees for claim that ground of objection no longer exists (Act s 40RE)

This item specifies the fees that the Registrar may charge and provide that if the fee is not paid the action will be considered not to have occurred.