

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 217

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
2010 (No. 1)*

Sections 40FA, 40ZAA and 46 of the *Australian Wine and Brandy Corporation Act 1980* (the Principal Act) provide, in part, that the Governor-General may make regulations consistent with the Principal Act to prescribe all matters permitted and required to give effect to the Principal Act.

The Australian Government signed the Australia – European Community Agreement on Trade in Wine (the Agreement) on 1 December 2008.

Amendments to the Principal Act and the *Australian Wine and Brandy Corporation Regulations 1981* (the Principal Regulations) were required to implement the Agreement.

The purpose of the *Australian Wine and Brandy Corporation Amendment Regulations 2010 (No. 1)* (the Regulations) is to amend the Principal Regulations to implement the Agreement and to reflect amendments to the Act related to the Australian Wine and Brandy Corporation's (AWBC) Label Integrity Program (LIP).

The Regulations provide phase-out periods for registered Geographical Indications (GIs) and registered Traditional Expressions (TEs), rules for the use of pre-existing trade marks and rules for the use of GIs with vine-variety names and blended wines. The Regulations also set out the mechanisms outlined in section 40P of the Principal Act for the Geographical Indications Committee (GIC) to determine and omit foreign country GIs and their translations in Australia.

The LIP ensures truth in labelling, thereby increasing consumer confidence in the reliability of label claims. The LIP was previously limited to wine manufacturers. The Act has been amended to cover other participants in the wine supply chain, such as wineries that do not make wine but merely perform a limited range of grape juice processing procedures, agents, growers, wholesalers and retailers. These people play a fundamental role in the supply chain and the Regulations ensure that these people are captured by the LIP.

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 Regulations commence in two stages – Regulations 1 to 3 on the day after the Regulations are registered on the Federal Register of

Legislative Instruments, and Schedules 1 and 2 of the Regulations on the commencement of the *Australian Wine and Brandy Corporation Amendment Act 2010*.

Authority:

Sections 40FA, 40ZAA and 46 of the *Australian Wine and Brandy Corporation Act 1980*

**AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT
REGULATIONS 2010 (No. 1)**

Regulation 1 Name of Regulations

Regulation 1 provides that the name of the Regulations is the *Australian Wine and Brandy Corporation Amendment Regulations 2010 (No. 1)*.

Regulation 2 Commencement

Regulation 2 provides that regulations 1 to 3 commence on the day after the Regulations are registered in the Federal Register of Legislative Instruments.

The Regulation provides that Schedules 1 and 2 of the Regulations commence on the commencement of Schedule 1 of the *Australian Wine and Brandy Corporation Amendment Act 2010*.

**Regulation 3 Amendment of *Australian Wine and Brandy Corporation
Regulations 1981***

Regulation 3 provides that Schedules 1 and 2 to the Regulations amend the *Australian Wine and Brandy Corporation Regulations 1981* (the Principal Regulations).

Regulation 4 Transitional – Schedule 1

Regulation 4 provides that the Regulations do not apply to applications for the registration of a GI that were made before the amendments commence.

Regulation 5 Transitional – Schedule 2

Regulation 5 provides that any approvals made under previous regulation 6A continue to apply after the regulation is deleted.

Regulation 5 also provides that as the omission provided under item 13 of Schedule 2 applies after the commencement of Schedule 2, applications for an export certificate made prior to this point are required to abide by the time period of at least three days.

Schedule 1 Amendments relating to Agreement **(regulation 3)**

Item [1] Regulation 3, before definition of *approved*

This item defines the term *Act* rather than “*the Act*” as in the previous definition. It also introduces a definition of the term *Agreement* as the *Australia – European Community Agreement on Trade in Wine*, signed on 1 December 2008.

Item [2] Regulation 3, definition of *GIC*

This item removes the definition of *GIC* as this definition is considered to be unnecessary.

Item [3] Regulation 3, after definition of *proposed GI*

This item defines the term *proposed item* as an item that is proposed to be brought before the GIC for determination.

Item [4] Regulation 3, definition of *the Act*

This item is omitted as the term *Act* is defined in Item [1] above.

Item [5] Regulation 13

This item substitutes the existing regulation 13 with a new version that provides for the phase-out periods for the use of listed registered GIs or registered TEs. These phase-out periods provide an exemption from the ‘false’ offence provision outlined in section 40C of the Act; and the ‘misleading’ offence provision in section 40E of the Act for a period of 12 months after the Agreement enters into force. This provides time for the industry to adapt to the obligations of the Agreement.

However, in the case of *Tokay*, the exemption from the ‘false’ and ‘misleading’ offence provision of the Act will apply until 10 years after the Agreement enters into force.

Item [6] Regulations 14 and 15

This item amends the previously open-ended exemption for the use of the GIs *Hermitage* and *Lambrusco* by introducing a phase-out period on their use of 12 months after the Agreement enters into force.

Item [7] After regulation 15

This item introduces a new regulation that provides that wine producers can use the names of varieties of grapes that are also GIs if the name of the variety is listed in Schedule 2 of the Regulations. These variety names were agreed during negotiations of the Agreement and are listed at Annex VII of the Agreement.

Item [8] Regulations 17 and 17A

Regulation 17, Marketing periods for the use of geographical indications, registered traditional expressions and registered additional terms

This item ensures that wholesalers and retailers of wines affected by the new arrangements will have sufficient time to sell their pre-existing stock, or will not be unduly penalised in carrying out their normal business activities.

New regulation 17 exempts from the offence provisions the use of a GI, registered translation of a GI (translation) or a TE, or registered additional term, to describe and present a wine if:

- the offence provisions would apply under normal circumstances; and
- the wine was lawfully produced before the day on which the offence provisions first apply to the use of the GI, translation, TE or registered additional term; and
- the GI, translation, TE or registered additional terms is used by (i) a wholesaler; or (ii) a retailer of wine as part of their normal course of business.

The timeframes for the exemption, as they apply to *wholesalers*, are:

- five years after the offence provisions first apply for fortified wines; and
- three years after the offence provisions first apply for all other wines.

The timeframes for the exemption, as they apply to *retailers*, are:

- five years after the offence provisions first apply or, until the retailer has exhausted all stock of fortified wines, for fortified wines; and
- three years after the offence provisions first apply or, until all stock is exhausted, for all other wines.

Regulation 17A, Use of trade mark in description of wine

This item substitutes the existing regulation 17A with a new regulation that relates to the use of a pre-existing trade mark which is identical to, or likely to cause confusion with, a registered GI, or translation, and provides an exemption from the offence provisions under certain conditions and circumstances.

This item also provides an exemption for certain Australian wine companies with pre-existing trade marks from the offence provisions in order to allow them to legally continue to use their registered trade marks in Australia.

The regulation applies if:

- the Registrar of Trade Marks (the Registrar) decides that an objection to a proposed GI is made out, and the GI is then registered in Part 1 of the Register of Protected Geographical Indications and Other Terms (the Register); or
- a trade mark is either registered or is the subject of a pending application and the GI, or a GI that is identical or likely to cause confusion with the trade mark or translation, is proposed and registered; or
- a trade mark listed in Schedule 3 of the Regulations is identical to a registered GI or a region or locality in an agreement country, or a translation; or
- a trade mark listed in Schedule 3 of the Regulations is likely to cause confusion with a registered GI or a region or locality from a foreign country, or a translation.

It provides an exemption for the use of a trade mark to describe and present wine which resembles a registered GI or translation to the extent that the offence provisions relate to the use of:

- a registered GI, translation, or an indication or term that resembles a registered GI or translation; and
- the origin of the wine is shown in the description and presentation of the wine in a way that is not likely to mislead.

For example, ‘Salena Estate’ is a registered trade mark in Australia which is listed in the Regulations and the term ‘Salina’ is an Italian GI which is protected under the Agreement and the Act. Regulation 17A provides that the trade mark ‘Salena Estate’ can continue to be used providing that the origin of the wine is shown in the description and presentation in such a way that is not likely to mislead. Therefore, if a ‘Salena Estate’ Chardonnay were to use the GI ‘South Australia’ in its description and presentation, this would be accepted under the Regulations, as it mitigates against a consumer being misled that the wine was from Salina in Italy.

Item [9] Regulations 19 to 21

This item replaces regulations 19 to 21 to ensure that a wine is described and presented in a manner which is not misleading, in accordance with subsection 40F(6) of the Act.

Regulation 19, Wine originating in more than one country

New regulation 19 was amended to reflect a change to the Act that moved the relevant offence provision from section 40F(5) to 40F(6).

Regulation 20, Grape varieties

New regulation 20 states that the name used to describe and present the grape variety from which a wine originating in Australia is made must be a name of a variety, or a synonym of a name of a variety that is recognised by one of the following organisations:

- (a) The International Organisation of Vine and Wine;
- (b) International Union for the Protection of New Varieties of Plants; or
- (c) International Plant Genetic Resources Institute.

This is in line with Australia's obligations under the Agreement.

Regulation 21, Use of geographical indications registered in relation to Australia

New regulation 21 relates to blended wines which originate in Australia, and are made from grapes grown from different regions which all have registered GIs. The new provisions provide for the use of both Australian registered GIs and foreign place names in a wine blend.

If, in the description and presentation of the wine, both registered GIs and foreign place names are used, the number of these registered GIs and foreign place names must be three or less.

If a wine uses at least one registered Australian GI and one foreign place name, the description and presentation of the wine must ensure that:

- in total, at least 95 per cent of the wine is obtained from;
 - the regions or localities in relation to which those GIs are registered; and
 - the regions or localities identified by those foreign place names; and
- at least five per cent of the wine is obtained from each of those regions or localities; and
- in the description and presentation of the wine, references to the GIs or foreign place names are set out in descending order of their proportions in the wine.
 - For example, this means a wine from which 60 per cent of the grapes were sourced from the Barossa Valley (a registered Australian GI) and 40 per cent was sourced from Marlborough, New Zealand (a place name which is not a registered GI), could be described as a 'Barossa Valley, Marlborough' wine.

Where a word or term such as a place name or country is required to be used on a label by another law, the word or term is not to be treated as a registered GI.

For example, under Australian law, the Food Standards Code requires wine labels to include bottler details, including the address of the bottler. Therefore, if a wine producer at the address 13 Jones Road, Margaret River, Western Australia, produced a wine from winegrapes sourced from the Yarra Valley in Victoria, the inclusion of the Margaret River address on the back label would not infringe the laws related to the use of GIs.

Item [10] Subregulation 22(1)

This item omits the reference to subsection 40F(5A) of the Act from subregulation 22(1) and replaces it with a reference to subsection 40F(6) of the Act reflecting a change in the numbering of the Act.

Item [11] Paragraph 22(1)(a)

This item ensures that this paragraph 22(1)(1) applies to wines originating in Australia only.

Item [12] Subregulation 22(2)

This item amends the language of this subregulation to make it consistent with the formula in regulations 19, 20, 21 and 22.

Item [13] After Part 4

This item inserts a new Part 4A into the Principal Regulations. The new Part 4A deals with applications for the determination of Australian GIs.

Regulation 22A, Payment of application fee

New regulation 22A provides that the AWBC can charge fees relating to applications for the determination of Australian GIs.

Item [14] Part 5, heading

This item amends the heading of Part 5 because it refers to the determination of Australian, rather than foreign, GIs.

Item [15] Regulations 26 and 27

This item omits regulation 26 which is no longer necessary as it duplicates provisions already in the Act.

Item [16] Part 6, heading

This item amends the heading of Part 6 because it refers to the objection to the determination of Australian, rather than foreign, GIs based on pre-existing trade mark rights.

Item [17] Regulation 29, at the foot

This item inserts a note at the foot of regulation 29 that states that there may only be one party in some proceedings.

Item [18] Regulations 34 to 37

This item replaces regulations 34 to 37 with new versions. New regulation 34 defines the term *party* as it applies to this Division. Regulation 35 which provided for notice of objections was deleted. Paragraphs 34(c) and 36(c) were removed to reflect that there is no third party role in the objection process.

New regulation 37 has been changed slightly to reflect that there will be no more than two parties in some proceedings.

Item [19] Subregulation 39(4)

This item substitutes subregulation 39(4) with a new version that reflects that there will be no more than two parties in proceedings.

Item [20] Regulation 42, note

This item amends the note, reflecting that *GIC* is no longer a defined term.

Item [21] Subregulation 43(2)

This item amends subregulation 43(2) to ensure consistency with new regulation 69, the equivalent regulation regarding foreign GIs.

Item [22] Subregulation 43(2), table, item 2

This item omits item 2 in the table of subregulation 43(2), which relates to the fee payable for registering as a party to proceedings, as the omission of regulation 35, at item 18, causes this item to be redundant.

Item [23] Subregulation 43(3), note

This item omits the note from subregulation 43(2) which was made redundant by the omission of regulation 35 and item two in the table of subregulation 43(2).

Item [24] Regulations 45 and 46

This item replaces regulations 45 and 46 with new regulations.

Regulation 45, Definition for Division 3

This item removes a definition of *claimant* for section 40RE(1)(b) of the Act and defines the term *party* as it applies to Division 3 of the Regulations.

Regulation 46, Notice of application

New regulation 46 requires the Registrar to notify the GIC in writing of an application made under section 40RE(1)(b) of the Act and terms of application.

Item [25] Regulation 47

This item removes the previous requirement that there be a general notice inviting interested persons to register as a party to proceedings relating to the registration of a GI by the Registrar.

Item [26] Regulation 48

This item omits regulation 48, as the power of the regulation has been moved to regulation 52 under item 27.

Item [27] After subregulation 52(2)

This item inserts two new subregulations, 52(3) and 52(4) into the Principal Regulations.

New subregulation 52(3) replaces the current regulation 54 of the Principal Regulations. New subregulation 52(3) is placed with the other subregulations concerning decisions of the Registrar.

New subregulation 52(4) is derived from the current regulation 48. It makes minor changes to the Principal Regulations based on readability.

Item [28] Regulations 53 and 54

This item substitutes regulations 53 and 54 with new subregulations.

Regulation 53, Withdrawal of application

New regulation 53 provides for the action that the Registrar must take if the applicant in question withdraws their application before the Registrar makes a decision.

Where an applicant withdraws their application, the Registrar must continue proceedings if requested to do so by another party.

If no party makes a request for the continuation of the proceedings, then the Registrar must decide that the ground for objection continues to exist.

Regulation 54, Notice of decision

New regulation 54 requires the Registrar to notify the GIC and each party of the Registrar's decision, including the terms of the decision, and ensure that the decision is published in a manner that the GIC considers to be appropriate.

Item [29] Subregulation 55(2)

This item amends the wording of subregulation 55(2) to clarify the intention of the subregulation, which is to require the Registrar not to act until a payment is received.

Item [30] Subregulation 55(2), table, item 2

This item omits table item 2 of subregulation 55(2). This amendment has been made as the requirement to register as a party in response to a notice under subregulation 46(1) has been removed.

Item [31] After Part 6

Australia has an international obligation to treat foreign GIs in the same manner that Australia treats its own GIs.

This item introduces a new part to the Regulations – Part 6A – which sets out a process for the determination of foreign GIs and translations of foreign GIs.

It includes seven divisions which relate to:

1. Applications for determinations;
2. Objections based on pre-existing trade mark rights;
3. Consideration of objections;
4. Decision that ground of objection no longer exists;
5. Appeals;
6. Determinations of foreign GIs and translations of foreign GIs by the Geographical Indications Committee; and
7. Omission of foreign GIs and translations of foreign GIs.

Part 6A Determination of foreign GIs and translations of foreign GIs

Division 1 Applications for determinations

Regulation 56, Applications for determinations

New regulation 56 specifies that:

- a person may apply in writing to the GIC for the determination of a GI in relation to a foreign country, or a region or locality in a foreign country; and
- a person may apply in writing to the GIC for the determination of a translation of a GI in relation to a foreign country, or a region or locality in a foreign country; and
- an application for the determination of a translation of a GI may be made either:
 - after the GI is registered; or
 - at the same time as an application for the determination of a foreign country GI.

Division 2 Objections based on pre-existing trade mark rights

Regulation 57, Notice to be given of proposed foreign GI or translation of foreign GI

New regulation 57 sets out the rules governing the notification of a foreign GI or translation of a foreign GI and requirements for the Presiding Member of the GIC (the

Presiding Member) to publish a notice of an application that is made for the determination of a GI or its translation.

The Presiding Member shall publish a notice if:

- an application has been made for the determination of a GI; or
- an application has been made for the determination of a translation of a GI.

This amendment was necessary to ensure consistency with amendments to regulation 85.

If an application for the determination of a foreign country GI and an application for a translation of a foreign country GI are made at the same time, the Presiding Member may publish a single notice in relation to both applications.

Regulation 58, Grounds of objection to the determination of a foreign GI or translation of a foreign GI

New regulation 58 specifies the grounds under which a person may object to the determination of a foreign GI, or a translation of a foreign GI.

A registered owner of a registered trade mark may object to the determination of a proposed item on the grounds that the trade mark:

- consists of a word, expression or other indication that is identical to the item; or
- consists of a word, expression or other indication which is likely to cause confusion with that word, expression or other indication; or
- contains a word, expression or other indication and the proposed item is likely to cause confusion with that word, expression or other indication and the owner has trade mark rights in that word, expression or other indication.

The registered owner of a registered trade mark may still object to the determination of a proposed item even if the mark is subject to conditions or limitations entered on the Register of Trade Marks which suggest no trade mark rights.

A person who has an application pending for the registration of a trade mark under the *Trade Marks Act 1995*, may make an objection providing that the application was made in good faith, on grounds including:

- that:
 - the trade mark consists of a word, expression or other indication that is identical to the proposed item; and
 - it appears that the requirements under the *Trade Marks Act 1995* for accepting an application for the registration of a trade mark would be satisfied in respect of the trade mark applied for; or
- that:
 - the trade mark consists of a word, expression or other indication; and
 - the proposed item is likely to cause confusion with that word, expression or other indication; and

- it appears that the requirements under the *Trade Marks Act 1995* for accepting an application for the registration of a trade mark would be satisfied in respect of the trade mark applied for; or
- that:
 - the trade mark consists of a word, expression or other indication; and
 - the proposed item is likely to cause confusion with that word, expression or other indication; and
 - it appears that the requirements under the *Trade Marks Act 1995* for accepting an application for the registration of a trade mark would be satisfied in respect of the trade mark applied for; and
 - after registration, the applicant would have trade mark rights in the word, expression or other indication.

A person who claims to have trade mark rights in a trade mark that is not registered may object to the determination of a proposed item on the grounds that:

- the trade mark contains a word, expression or other indication that is identical to a proposed item; and
- the person has trade mark rights in that word, expression or other indication; and
- these rights were acquired through use in good faith.

Or:

- the trade mark contains a word, expression or other indication; and
- the proposed item is likely to cause confusion with that word, expression or other indication; and
- the person has trade mark rights in that word, expression or other indication; and
- these rights were acquired through use in good faith.

A person may object to the determination of a proposed item on the ground that the proposed item is used in Australia as the common name of a type or style of wine.

Division 3 Consideration of objections

Regulation 59, Application of Division 3

New regulation 59 sets out the basis for consideration of objections by the Registrar when:

- the Registrar receives an objection to a proposed item on the grounds set out in regulation 58; and
- the objection is received within the period stated in the notice under regulation 57.

Regulation 60, Definition for Division 3

New regulation 60 defines the term *party* using the definition in regulation 34 of the Regulations.

Regulation 61, Notice of objection

New regulation 61 requires the Registrar to notify the GIC in writing of the receipt and terms of any objection.

Regulation 62, Evidence

New regulation 62 sets out the procedures which need to be followed by the Registrar to send each party a notice, after notifying the GIC of an objection.

Regulation 63, Evidence in answer

New regulation 63 sets out the procedures applicable following the receipt, by the Registrar, of evidence from a person in relation to an objection. In this instance, if a person files evidence in response to a notice sent under regulation 62, the Registrar is required to send a notice to the other party inviting the party to file evidence in answer within two months of the date of the invitation.

Regulation 64, Request for hearing

New regulation 64 provides that a party may request a hearing and that, providing the party lodges a request for a hearing with the Registrar as required, the Registrar must agree to this request.

Regulation 65, New evidence

New regulation 65 relates to the filing of new evidence with the Registrar.

If at any time before the Registrar makes a decision about an objection to a proposed item, after the end of a period specified by the Registrar for the filing of evidence, a party may apply to the Registrar, in writing, to file new evidence.

For example, this means that if the Registrar requires that evidence must be filed in three months or less, and the Registrar has not made a decision about an objection to a proposed item, a party may provide further evidence if it arises.

However, any new evidence must include a statement which:

- describes the new evidence; and
- provides reasons why the new evidence was not filed within the specified period.

The intent of this is to ensure that a party cannot flout the time period for evidence by simply saying that any evidence is ‘new evidence’. This provides for the Registrar’s timely consideration of evidence and ability to make decisions as quickly as possible.

If the Registrar decides that it is reasonable to allow the filing of new evidence, the Registrar must set a date by which the evidence must be filed.

If new evidence is filed within the required time frame, the Registrar must send a notice to the other party, informing them that the new evidence is filed and setting a reasonable period for the party to file evidence in answer to it.

Regulation 66, Parties to send copies of evidence to each other

New regulation 66A outlines the circumstances in which evidence is validly filed.

Regulation 67, Decision by Registrar of Trade Marks

New regulation 67 sets out the requirements for the Registrar to make a decision with regard to grounds of objection.

In making this decision, the Registrar must consider:

- the notice published under regulation 57 and any related documents; and
- the documents filed by the parties; and
- any other matter that the Registrar thinks is relevant.

The requirements for the Registrar to make a decision are set out in new regulation 67 as:

- if a hearing is held, the Registrar must also invite submissions from the parties and consider these submissions;
- the Registrar must not make a decision if the registered trade mark concerned is the subject of removal or cancellation proceedings.

Circumstances where the Registrar must decide that grounds for objection are not made out are set out as:

- if the person objecting to the proposed item does not file any evidence within three months; or
- if the person objecting to the proposed item withdraws the notice of objection before the Registrar makes a decision about the objection.

Regulation 68, Recommendation by Registrar of Trade Marks to determine foreign GI or translation of foreign GI despite objection being made out

New regulation 68 applies to instances where the Registrar makes a decision to determine a proposed item despite an objection being made out.

If the Registrar decides that the ground of objection is made out and is satisfied that it is reasonable to recommend to the GIC that the proposed item be determined, despite the objection being made out, the Registrar may make that recommendation to determine the proposed item, in writing, to the GIC. In making this determination, it is essential that the Registrar considers Australia's international obligations.

Regulation 69, Notice of decision

New regulation 69 requires the Registrar to inform, in writing, each party and the GIC of its decision in relation to any objection as per the requirements of regulation 67, and any recommendation that has been made to the GIC under regulation 68.

The Presiding Member, upon receiving a notice of a decision, must publish a notice which:

- sets out the *proposed item*; and
- states that a decision has been made by the Registrar in relation to the proposed item; and
- sets out the terms of the Registrar's decision and any recommendations in relation to the proposed item.

Regulation 70, Fees for Division 3 proceedings

New regulation 70 sets out the fees payable for proceedings related to the consideration of an objection.

Regulation 71, Costs

New regulation 71 states that the Registrar cannot make an order for costs for proceedings relating to the proceedings of this Division.

Division 4 Decision that ground of objection no longer exists

Regulation 72, Definition for Division 4

New regulation 72 provides a definition for the term *party* to be used in Division 4.

In Division 4, the term *party* is defined as a person who makes an objection under this Division.

Regulation 73, Application for decision

New regulation 73 states that, following a decision by the Registrar that a ground of objection has been made out, a person may apply to the Registrar to notify the Registrar that circumstances have changed since the decision was made, and that the ground of objection no longer exists.

Regulation 74, Notice of application

New regulation 74 specifies that if the Registrar receives an application under regulation 73, the Registrar must notify the GIC that the application has been received and of any terms of the application.

Regulation 75, Evidence

New regulation 75 defines the terms on which parties may be invited to file evidence in response to a notice of application under regulation 74.

New regulation 75 also specifies that after notifying the GIC, the Registrar must send each party a notice that:

- gives the names and address of each other party; and
- invites the party to file evidence in relation to a decision about the matter; and
- states that any evidence must be filed three months or less after the date of the notice.

Regulation 76, Evidence in answer

New regulation 76 defines the terms in which evidence in answer to evidence filed under regulation 75 must be filed.

New regulation 76 also specifies that if a person files evidence as per the conditions specified in regulation 75, the Registrar must send each party a notice that:

- invites the party to file evidence in answer to another party's evidence; and
- specifies that this evidence must be filed two months or less from the date of the notice sent under this regulation. However, this period may be extended to any longer period that the Registrar thinks is appropriate under the circumstances.

Regulation 77, Request for hearing

New regulation 77 relates to instances where the Registrar is asked to conduct a hearing.

A party may, within one month of the end of the period, ask the Registrar to conduct a hearing.

The Registrar must agree to such a request for a hearing.

Regulation 78, New evidence

New regulation 78 defines the terms in which new evidence can be filed.

A party may apply, in writing, to the Registrar to file new evidence at any time before the Registrar makes a decision about whether a ground of objection to a proposed item no longer exists, but after the end of a period specified by the Registrar for filing the evidence.

The party must include in their application a statement:

- describing the new evidence; and
- giving the reasons why the new evidence was not filed within the specified period.

If after the Registrar considers the application and decides that it is reasonable to allow the filing of the new evidence, then the Registrar must set a date by which the new evidence must be filed.

If the new evidence is filed by the specified date, the Registrar is required to send a notice to the other parties telling them that the new evidence is filed and setting a reasonable period for the parties to file evidence to answer to it.

Regulation 79, Parties to send copies of evidence to each other

New regulation 79 outlines the circumstances under which evidence can be validly filed.

Regulation 80, Decision by Registrar of Trade Marks

New regulation 80 sets out the requirements for the Registrar to make a decision regarding whether the ground for objection no longer exists.

In making this decision, the Registrar must consider:

- the documents filed by the parties; and
- any other matter that the Registrar thinks is relevant.

The Registrar must not make a decision if the registered trade mark concerned is the subject of removal or cancellation proceedings.

The Registrar must decide that the ground of objection continues to exist if no party files evidence.

Regulation 81, Withdrawal of application

New regulation 81 requires that if the applicant withdraws the application before the Registrar makes a decision under this Division, the Registrar must continue proceedings if requested to do so by another party.

This means that if 'party A', the original applicant was to withdraw their application, a supporter of the original application may request that the Registrar continue with proceedings.

The Registrar must decide that the grounds of objection continue to exist if no party makes a request to continue.

Regulation 82, Notice of decision

New regulation 82 requires the Registrar to inform, in writing, the GIC and each party of the Registrar's decision.

After receiving notice of a decision from the Registrar, the Presiding Member must publish a notice:

- setting out the proposed item; and
- stating that a decision of the Registrar has been made in relation to the proposed item; and
- setting out the terms of the decision.

Regulation 83, Fees for Division 4 proceedings

New regulation 83 sets out the fees payable for proceedings for making an application for a decision that the grounds of objection no longer exist.

Regulation 84, Costs

New regulation 84 states that the Registrar cannot make an order for costs for proceedings in relation to this Division.

Division 5 Appeals

Regulation 85, Decisions appellable to Federal Court (Act s 40ZAR)

New regulation 85 provides that appeals to the Federal Court can be made for the following decisions of the Registrar that:

- a ground of objection is not made out;
- a proposed item be determined or a refusal to make such a recommendation; and
- a ground of objection no longer exists or a refusal to make such a decision.

Division 6 Determinations of foreign GIs and translations of foreign GIs by Committee

Regulation 86, When the Committee may proceed to make a determination

New regulation 86 provides that GIC may make a determination if:

- no objection to the foreign GI or translation was made;
- an objection was made and in the opinion of the Registrar was not made out;
- an objection was made out in the opinion of the Registrar and the objector agrees to a determination being made;
- an objection was made out in the opinion of the Registrar and the Registrar recommends that the GIC make a determination.

Regulation 86 also provides that the GIC must not determine a translation without a corresponding GI if:

- the application for determination of the translation was made at the same time as an application for determination of the GI was made; and
- the GIC is not permitted under this Regulation to proceed to determine the GI.

Regulation 87, Consultation by the Committee

New regulation 87 specifies that the GIC may consult with any organisation or person it thinks is appropriate in its determination of a GI.

Regulation 88, Determining foreign GIs

New regulation 88 sets out the GIC's requirements in determining a foreign GI.

The GIC must identify the boundaries of a GI and these must be the same as in the application.

It can determine any conditions of use that are applicable to the GI.

The GIC must have regard to whether the GI in question is protected by the laws of the country where the area is located.

The GIC must not consider any submission to the extent that the submission asserts a trade mark right in respect of the proposed GI.

Regulation 89, Determining translations

New regulation sets out the GIC's requirements in determining a translation of a GI.

In determining a translation of a GI, the GIC must:

- identify the GI to which the translation relates (for example, the translation 'Burgundy' is related to the GI 'Bourgogne'); and
- determine the translation to be used; and
- determine any conditions of use that are to be applicable to the translation.

The GIC may not determine a translation which is different to that translation proposed in the application.

In determining a translation of a GI, the GIC must consider if the translation conveys or evokes the significance of the GI to which it relates.

The following examples, based on country names and their translations, provide examples of where a translation may be considered to convey or evoke a place name and where it may not.

For example, the ‘Ivory Coast’ is an English translation of ‘Côte d’Ivoire’. Given that the two names are used interchangeably in this case, the translation ‘Ivory Coast’ can be considered to convey and evoke the name ‘Côte d’Ivoire.’

Alternatively, the English translation of ‘Costa Rica’ is ‘Rich Coast’. These two names are not used interchangeably, and as the name ‘Rich Coast’ is not commonly used, the phrase ‘Rich Coast’ does not convey or evoke the name ‘Costa Rica’.

New regulation 89 would require the GIC to also have regard to any other matter it considers relevant to the determination of the translation.

However, the GIC must not consider any submission to the extent that the submission asserts a trade mark right in respect of the proposed translation.

Regulation 90, Interim determination

New regulation 90 declares that any determination by the GIC is to be considered an interim determination, which does not initially have any effect.

Regulation 91, Publication of notice of interim determination

New regulation 91 applies in instances where a notice of interim determination is published.

The Presiding Member will publish a notice of the interim determination, stating that it has been made and setting out its terms.

This notice must invite persons to make written submissions in relation to the determination, within a period no less than one month of the notice being published.

The Presiding Member may publish a single notice if interim determinations have been made of both a GI and its translation.

Regulation 92, Final determination

New regulation 92 provides that the GIC may make a final determination after the consideration of submissions.

Regulation 93, Publication of notice of final determination

New regulation 93 applies to the publication of a final determination by the Presiding Member.

Once a final determination is made, the Presiding Member must publish a notice stating that a determination has been made and setting out its terms.

The notice must advise that on appeal against the determination can be made to the Administrative Appeals Tribunal (the AAT) or the Federal Court. Appeals to the Federal Court are made in respect to decisions of the Registrar.

If final determinations are made of both a GI and translation of the GI, the Presiding Member may publish a single notice in relation to both determinations.

Regulation 94, Review of final determination

New regulation 94 specifies an application may be made to the AAT and that this application must be made within 28 days after notice of the determination is published in accordance with Regulation.

The application may be made to the Tribunal for review of a final determination.

Regulation 95, Date of effect of final determination

New regulation 95 provides that if the Presiding Member decides on a final determination, the Presiding member must provide a copy of a final determination to the Registrar of Protected Geographical Indications and Other Terms, and also provide a copy of the final determination to the Chairperson of the AWBC.

The regulation also provides that if the GIC decides to omit a GI, a translation of a GI or both, the GIC must inform the Registrar of Protected Geographical Indications and Other Terms who must remove the GI from the Register. The removal takes effect on the day on which the GI or translation or both are omitted from the Register.

Division 7 Omission of foreign GIs and translations of foreign GIs

Subdivision 1 Omission for non-use or loss of significance

Regulation 96, Definition for Subdivision 1

New regulation 96 defines the phrase *item proposed to be omitted* as:

- a registered GI in relation to a foreign country or a region or locality in a foreign country; or
- a registered translation of a GI, in relation to a foreign country or a region or locality in a foreign country; or
- both a registered GI in relation to a foreign country or a region or locality in a foreign country and the registered translation of that GI.

Regulation 97, Application for omission of foreign GI or translation of foreign GI

New regulation 97 provides for the application for the omission of a foreign country GI on the ground that it is not in use.

If an application is made to omit a GI from the Register, and a translation of that GI is included in the Register, the application is taken to be for omission of both the GI and the translation. This is due to the fact that a translation can not exist without an associated registered GI.

A person may separately apply to the GIC to omit a translation of a foreign country GI from the Register on the basis that it no longer conveys or evokes the significance of the GI for which it was registered.

Regulation 98, Further information concerning an application

New regulation 98 provides that the GIC may require the applicant to provide further information.

If the applicant does not comply with the request to provide further information, the application is taken to have been withdrawn.

Regulation 99, Notice by Committee

New regulation 99 provides that if the GIC receives an application under regulation 97 it will invite submissions on the application.

Regulation 100, Determination by Committee

New regulation 100 provides that the GIC will determine to omit a GI on the grounds of non-use if it believes that:

- the GI has been registered for more than five years before the date of the notice under Regulation 99;
- the GI has not been used during the three years before the date of the notice under regulation 99;
- no special circumstances exist in relation to the country, region or locality indicated by the GI that would preclude the making of determination to omit the GI from the Register.

A GI has not been used if:

- there has not been a production of wine for commercial use originating in the country, regional or locality indicated by the GI; and
- wine originating in the country, region or locality indicated by the GI has not been described and presented for sale in Australia using the GI or a registered translation of the GI; and
- wine originating in the country, region or locality indicated by the GI has not been described and presented for sale in the country of origin using the GI or a registered translation of the GI.

Special circumstances are if:

- the country, region or locality indicated by the GI has been affected by a natural disaster such as fire, drought or some other disaster; and
- as a result of this disaster, there has not been a production of wine for commercial use originating in the country, region or locality indicated by the GI during the period of three years immediately before the date of the notice under regulation 99.

The GIC may make a determination to omit a translation of a GI if it is satisfied that the translation no longer conveys or evokes the significance of the GI for which it is registered.

The GIC must make a determination to omit a translation of a GI if it makes a determination to omit the GI. This is due to the fact that a translation cannot exist without an associated registered GI.

Regulation 101, Notice of determination

New regulation 101 states the Presiding Member of the GIC must:

- give a notice of its determination to the applicant; and
- if a determination to omit a GI and its translation from the Register is made, publish a notice setting out the terms of the determination.

Regulation 102, AAT review of a determination

New regulation 102 specifies an application may be made to the AAT and that this application must be made within 28 days after notice of the determination is published in accordance with regulation 101.

Regulation 103, Date of effect of determination to omit an item

New regulation 103 provides that if the GIC decides to omit a GI, a translation of a GI or both, the GIC must inform the Registrar of Protected Geographical Indications and Other Terms who must remove the GI from the Register. The removal takes effect on the day on which the GI or translation or both are omitted from the Register.

Subdivision 2 Omission because not protected in country of origin and not used in Australia

Regulation 104, Application for omission of foreign GI

New regulation 104 provides for the application to omit a foreign GI from the Register, based on the fact that it is not protected in its country of origin and is not in use in Australia. These requirements ensure Australia meets its international obligations.

Regulation 105, Further information concerning an application

New regulation 105 provides that for the purposes of determining an application, the GIC may require the applicant to provide further information.

If the applicant does not comply with the request to provide the further information, the application will be taken to have been withdrawn.

Regulation 106, Notice by Committee

New regulation 106 provides for the publication of a notice by the GIC in the event that the GIC receives an application under Regulation 104.

Regulation 107, Determination by Committee

New regulation 107 provides that the GIC must make a determination to omit the GI from the Register if it is satisfied that:

- the GI is not protected by the laws of the country where the GI is located; and
- in the 3 years before the date of the notice under regulation 106, wine originating in the country, region or locality indicated by the GI has not been described and presented for sale in Australia using the GI or a registered translation of the GI.

If the GIC makes a determination to omit a GI and this GI has an associated registered translation, then this translation must also be omitted. This is due to the fact that a translation can not exist without an associated registered GI.

Regulation 108, Notice of determination

New regulation 108 outlines the requirement to disseminate a determination by the Presiding Member. In this case, the Presiding Member must:

- give a notice of the GIC's determination to the applicant; and
- publish a notice setting out the determination and its terms in a manner it thinks appropriate.

Regulation 109, Date of effect of determination to omit a foreign GI

New regulation 109 applies to the date of effect for the final determination to omit a foreign GI and related procedural matters.

If the GIC decides to omit a GI from the Register, the Presiding Member must give a copy of the determination to the Registrar of Protected Geographical Indications and Other Terms so that the particulars of the determination can be omitted from the Register as soon as practicable.

When the Presiding Member provides a copy of the determination to the Registrar of Protected Geographical Indications and Other Terms, a copy of the determination must also be given to the Chairperson of the AWBC.

The determination of the GIC takes effect on the day on which particulars of the GI are omitted from the Register.

Item [32] Part 7

This new regulation advises that the listing of a GI on the Register is not intended to give the GI any trade mark rights. This reflects a section 40RG of the Act concerning the protection of Australian GIs.

Items [33] Schedule 1

Items 33 adds terms to Schedules 1, 2 and 3.

The list of GIs and TEs in Schedule 1 are those referred to in regulation 13 to be phased out twelve months after entry into force of the Agreement rather than when listed in the Register of Protected Geographical Indications and Other Terms as is the case for other GIs and TEs.

The list of vine-variety names in Schedule 2 provides for the on-going use of a number of vine variety names that may otherwise be considered to be false or misleading when used to describe or present a wine.

The list of trade marks in Schedule 3 are those to be recognised under regulation 17A.

**SCHEDULE 2 AMENDMENTS RELATING TO EXPORT CONTROL
AND LABEL INTEGRITY
(regulation 3)**

Item [1] Regulation 3

This item adds the number (1) to improve the readability of this regulation.

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

This item inserts a passage to regulation 3, after the definition of *approved*, which says that the term *Australian New Zealand Food Standards Code* has the same meaning as the *Food Standards Australia New Zealand Act 1991*.

Item [3] Regulation 3, definition of *Australian standard*

This item introduces a definition of *Australian Standard* as meaning a standard within the meaning of the *Food Standards Australia New Zealand Act 1991*.

Item [4] Regulation 3, definition of *Food Standards Code*

This item omits the definition of *Food Standards Code*. The *Food Standards Code* is now defined as the *Australian New Zealand Food Standards Code*, a definition introduced by item 2.

Item [5] Regulation 3, after definition of licensee

This item introduces the term *product label*. *Product label* is defined as a label attached to, or writing or other sign appearing on a bottle or other package of a grape product.

Item [6] Regulation 3, definition of relative

This item would introduce the term *de facto partner* to appear after the term *spouse* to remove any discrimination against same-sex couples in the Regulations.

Item [7] Regulation 3, definition of vintage

This item omits the definition of *vintage* which is defined in the Act.

Item [8] Regulation 3

This item defines the term *child* to remove any discrimination against same-sex couples in the Regulations.

Item [9] Paragraphs 6(1)(e) and (ea)

This item provides for the AWBC to ensure the soundness and merchantability of a wine for export by requiring that a licensee provides the AWBC with samples of the product and the product label. The item also requires an exporter to comply with requests for further information.

Item [10] After subregulation 6(5)

This item provides for the AWBC, to request in writing, that an exporter provide a record kept under section 39F of the Act. This element of the Act relates to the obligation to keep records relating to label claims.

Item [11] Regulation 6AA

This item omits regulation 6AA of the Principal Regulations as it is no longer needed. Regulation 6AA was originally introduced to deal with a specific requirement of the European Community (EC). As the EC have now amended the requirement, there is no longer a need for regulation 6AA.

Item [12] Regulation 6A

This item substitutes the existing regulations 6A and 6B with a new subregulation.

Regulation 6A (conditions of export – food standards)

New regulation 6A has been rewritten to modernise the language and to add a new requirement that the AWBC can ask for proof that the grape product complies with the Australian New Zealand Food Standards Code.

Regulation 6B, Conditions of export — labelling of grape products other than wine, brandy or grape spirit

New regulation 6B states conditions of export grape products other than wine, brandy or grape spirit. It provides that the following can not be used to describe and present a grape product for export other than wine, brandy or grape spirit:

- a registered GI other than the term “Australia”; or
- a registered translation; or
- the name of a variety or varieties of grapes; or
- the year in which the grapes were harvested.

Item [13] Subregulation 7(4)

This regulation omits the requirement of ‘at least three days’ due to the introduction of electronic processing forms. The introduction of electronic forms has made this requirement redundant.

Item [14] Paragraph 10(aa)

This item inserts the words *Australia New Zealand* before *Food Standards Code*.

Item [15] After Part 2

This item inserts a new Part 2A and new Regulation 11A.

Part 2A Label Integrity Program

Regulation 11A, Prescribed geographical indication

New regulation 11A ensures that those GIs listed in the Register of Protected Geographical Indications and Other Terms are the GIs referred to in the Label Integrity Program.