

10/03
16 July 2003

INITIAL/DRAFT ASSESSMENT REPORT

APPLICATION A459

GEOGRAPHIC INDICATIONS TO DESCRIBE SPIRITS

DEADLINE FOR PUBLIC SUBMISSIONS to the Authority in relation to this matter:

27 August 2003

(See 'Invitation for Public Submissions' for details)

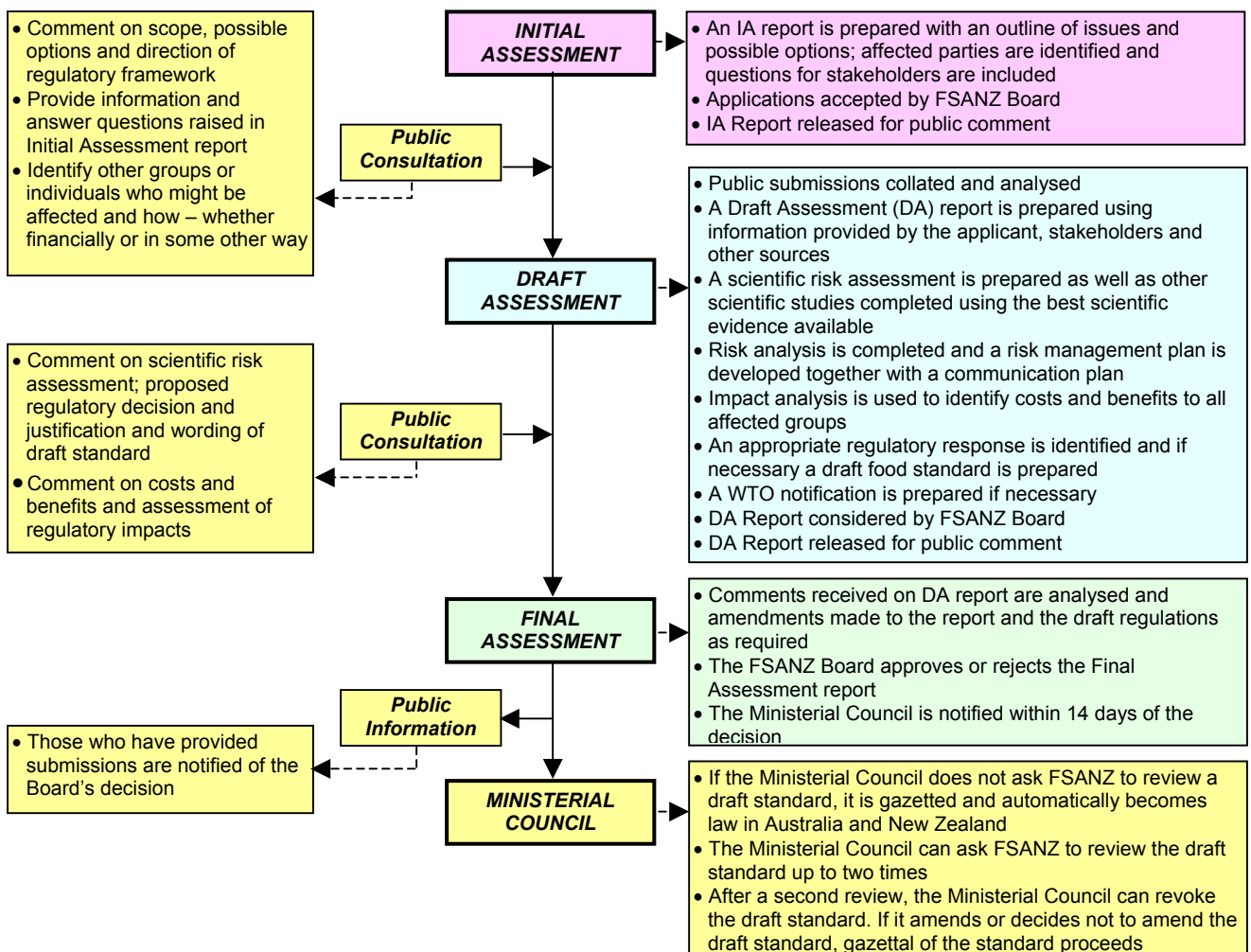
FOOD STANDARDS AUSTRALIA NEW ZEALAND (FSANZ)

FSANZ's role is to protect the health and safety of people in Australia and New Zealand through the maintenance of a safe food supply. FSANZ is a partnership between ten Governments: the Commonwealth; Australian States and Territories; and New Zealand. It is a statutory authority under Commonwealth law and is an independent, expert body.

FSANZ is responsible for developing, varying and reviewing standards and for developing codes of conduct with industry for food available in Australia and New Zealand covering labelling, composition and contaminants. In Australia, FSANZ also develops food standards for food safety, maximum residue limits, primary production and processing and a range of other functions including the coordination of national food surveillance and recall systems, conducting research and assessing policies about imported food.

The FSANZ Board approves new standards or variations to food standards in accordance with policy guidelines set by the Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) made up of Commonwealth, State and Territory and New Zealand Health Ministers as lead Ministers, with representation from other portfolios. Approved standards are then notified to the Ministerial Council. The Ministerial Council may then request that FSANZ review a proposed or existing standard. If the Ministerial Council does not request that FSANZ review the draft standard, or amends a draft standard, the standard is adopted by reference under the food laws of the Commonwealth, States, Territories and New Zealand. The Ministerial Council can, independently of a notification from FSANZ, request that FSANZ review a standard.

The process for amending the *Australia New Zealand Food Standards Code* is prescribed in the *Food Standards Australia New Zealand Act 1991* (FSANZ Act). The diagram below represents the different stages in the process including when periods of public consultation occur. This process varies for matters that are urgent or minor in significance or complexity, as is the case with this Proposal.



INVITATION FOR PUBLIC SUBMISSIONS

The Authority has prepared an Initial/Draft Assessment Report of Application A459, which includes identification and discussion of the key issues and a draft variation to Volume 2 of the *Food Standards Code*.

Under Section 36 of the FSANZ Act, the Authority opted to omit one round of public consultation prior to making a Draft Assessment as it was satisfied that this application addresses issues of minor technical significance and that it would not have a significant adverse effect on the interests of any person or body. Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal, for review of the decision (under section 36) by a person whose interests are affected by the decision.

FSANZ will conduct a single round of public consultation and now invites submissions on this Initial/Draft Assessment Report based on the regulation impact principles and the draft variation to Volume 2 of the *Food Standards Code* for the purpose of preparing an amendment to the *Food Standards Code* for approval by the FSANZ Board.

Written submissions are invited from interested individuals and organisations to assist the Authority in preparing the Final Assessment for this application. Submissions should, where possible, address the objectives of the Authority as set out in section 10 of the *Food Standards Australia New Zealand Act 1991* (FSANZ Act). Information providing details of potential costs and benefits of the proposed change to the *Australia New Zealand Food Standards Code* from stakeholders is highly desirable. Claims made in submissions should be supported wherever possible by referencing or including relevant studies, research findings, trials, surveys etc. Technical information should be in sufficient detail to allow independent scientific assessment.

The processes of the Authority are open to public scrutiny, and any submissions received will ordinarily be placed on the public register of the Authority and made available for inspection. If you wish any information contained in a submission to remain confidential to the Authority, you should clearly identify the sensitive information and provide justification for treating it as commercial-in-confidence. Section 39 of the FSANZ Act requires the Authority to treat in-confidence, trade secrets relating to food and any other information relating to food, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure.

Submissions must be made in writing and should clearly be marked with the word 'Submission' and quote the correct project number and name. Submissions may be sent to one of the following addresses:

Food Standards Australia New Zealand
PO Box 7186
Canberra BC ACT 2610
AUSTRALIA
Tel (02) 6271 2222
www.foodstandards.gov.au

Food Standards Australia New Zealand
PO Box 10559
The Terrace WELLINGTON 6036
NEW ZEALAND
Tel (04) 473 9942
www.foodstandards.govt.nz

Submissions should be received by the Authority **by 27 August 2003**. Submissions received after this date may not be considered, unless the Project Manager has given prior agreement for an extension. While FSANZ accepts submissions in hard copy to our offices, it is more convenient and quicker to receive submissions electronically through the FSANZ website using the Standards Development tab and then through Documents for Public Comment. Questions relating to making submissions or the application process can be directed to the Standards Liaison Officer at the above address or by emailing slo@foodstandards.gov.au.

Assessment reports are available for viewing and downloading from the FSANZ website or alternatively paper copies of reports can be requested from the Authority's Information Officer at either of the above addresses or by emailing info@foodstandards.gov.au including other general enquiries and requests for information.

Further Information

Further information on this Application and the assessment process should be addressed to the FSANZ Standards Liaison Officer at one of the following addresses:

Food Standards Australia New Zealand
PO Box 7186
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1. Executive Summary and Statement of Reasons

Regulatory Problem

The current regulations allow for spirits to be bottled and sold at 37% alcohol by volume (ABV) in Australia and New Zealand. For spirits with geographic indications (GI spirits) the regulations require products bottled in the country of origin, Australia or New Zealand to be bottled at a % ABV required by the laws of the country of origin. For example, Scotch whisky bottled in Scotland, Australia or New Zealand must comply with the laws of the United Kingdom which state that the product must be bottled at no less than 40% ABV. However, a potential 'loophole' exists where a GI spirit bottled in a third country would not have to comply with the laws of the country where it is produced and so could be bottled at 37% ABV.

Objectives

The three specific objectives of this assessment are to:

1. ensure that consumers can make informed choices about spirits;
2. promote fair trade through the development of a consistent and fair regulatory system for all involved in the spirits industry; and
3. prevent misleading and deceptive conduct among manufacturers and bottlers of spirits for consumption in Australia and New Zealand.

Regulatory Options

The issues assessed in this paper are considered to be of a minor technical nature and the range of options is limited.

1. maintain the status quo approach; or
2. amend Standard 2.7.5 in the Code to close a 'potential loophole' in the drafting to prevent bulk GI spirits being bottled in a third country at a % ABV below that permitted by the laws of the country of origin and then imported and sold in Australia or New Zealand under that geographic indication.

Impact

The preferred Option is 2 because this option satisfies the objectives of the Assessment and the benefits outweigh the costs.

Consultation

Pursuant to Section 36 of the *Food Standards Australia New Zealand Act 1991*, the Authority has opted to omit one round of public comment prior to making a Draft Assessment as it is satisfied that this application raises issues of minor complexity or significance only and can be addressed through minor technical amendments to Standard 2.7.5.

FSANZ plans to consult on this assessment with all submitters to FSANZ's review of Alcoholic Beverages and Alcohol Labelling of Foods containing Alcohol (P204) which was undertaken during the review of the Code. Other key stakeholders who will be targeted for consultation include key stakeholders in the spirits industry, consumers and government agencies.

Conclusion and Statement of Reasons

It is recommended that subclause 4(2) of Standard 2.7.5 be amended to close a potential 'loophole' in the drafting to prevent bulk spirits with geographic indications being bottled in a third country and then imported and sold in Australia and New Zealand at a % ABV that is below that permitted by the laws of the country of origin. It is concluded that the benefits of this approach outweigh maintaining the status quo, where bottlers in Australia and New Zealand may be disadvantaged. No costs have been identified from taking the preferred approach.

The benefits of closing the potential 'loophole' to prevent GI spirits being bottled in a third country at a lower % ABV and then sold in Australia and New Zealand include:

- creating an even playing field for all bottlers of GI spirits; and
- enabling consumers to make informed choices about GI spirits.

The New Zealand Ministry for Foreign Affairs and Trade (MFAT) and the Department of Foreign Affairs and Trade (DFAT) have given preliminary advice that suggests that the proposed amendments are compliant with the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs).

2. Introduction

2.1 Nature of Application

The Distilled Spirits Industry Council of Australia (DSICA) submitted an application to FSANZ on 19 October 2001 to vary clause 4 of Standard 2.7.5 of the *Australia New Zealand Food Standards Code* to ensure certainty, accuracy and truthfulness in the use of geographic indications to describe spirits. DSICA believes an amendment is necessary because the clause as gazetted does not preclude inaccurate use of geographic indications in some cases, and other cases its operation is unclear.

2.1.1 Loophole for Spirits with Geographic Indications

DSICA is seeking to close a loophole in the drafting to prevent bulk GI spirits being bottled in a third country and then imported and sold in Australia and New Zealand at a % ABV that is below that permitted by the laws of the country of origin. For example, Scotch whisky bottled at 37% ABV in a third country and then sold in Australia and New Zealand as Scotch whisky when the laws of the United Kingdom require Scotch whisky to be bottled at no less than 40% ABV.

2.1.2 Protection for GI Spirits

DSICA is seeking clarification that the *Food Standards Code* provides the same level of protection for GI spirits as exists in the country of origin, but no more.

3. Regulatory Problem

3.1 Current Regulations

The current regulations allow for spirits to be bottled and sold at 37% ABV in Australia and New Zealand. However, for GI spirits the regulations require products bottled in the country of origin, Australia or New Zealand to be bottled at a % ABV required by the laws of the country of origin. For example, Scotch whisky bottled in Scotland, Australia or New Zealand must comply with the laws of the United Kingdom which state that the product must be bottled at no less than 40% ABV. However, a potential 'loophole' exists where a GI spirit bottled in a third country would not have to comply with the laws of the country where it is produced and so could be bottled at 37% ABV.

This scenario could create an uneven playing field for bottlers of GI spirits. Those who bottle GI spirits in a third country would have a significant advantage over bottlers from the country of origin, Australia and New Zealand for the following reasons:

1. The difference in government excise for spirits bottled at a lower % ABV. For example, a third country bottler would pay less tax because they could bottle their GI spirits at a lower % ABV.
2. Spirits diluted to a lower % ABV would produce a greater number of bottles and therefore increase profit margins.

The third country bottling scenario could potentially mislead and deceive consumers where they believe they are purchasing a GI spirit with all the properties of the spirit as produced

according to the laws of the country of origin but they are in fact getting a different product as far as quality, character and % ABV is concerned.

3.2 Objective

In developing or varying a food standard, FSANZ is required by its legislation to meet three primary objectives which are set out in section 10 of the *Food Standards Australia New Zealand Act 1991*. These are:

- the protection of public health and safety;
- the provision of adequate information relating to food to enable consumers to make informed choices; and
- the prevention of misleading or deceptive conduct.

In developing and varying standards, FSANZ must also have regard to:

- the need for standards to be based on risk analysis using the best available scientific evidence;
- the promotion of consistency between domestic and international food standards;
- the desirability of an efficient and internationally competitive food industry;
- the promotion of fair trading in food; and
- any written policy guidelines formulated by the Ministerial Council.

The specific objectives of this application are to:

- ensure that consumers can make informed choices about spirits;
- promote fair trade through the development of a consistent and fair regulatory system for all involved in the spirits industry; and
- prevent misleading and deceptive conduct among manufacturers and bottlers of spirits for consumption in Australia and New Zealand.

4. Background

4.1 Historical Background

4.1.1 Geographic Indications and the TRIPs Agreement

Geographic indications become important to trade when the name of a particular region or country of origin becomes identified with a product made in that region. The geographic indications for many foods are valuable because of the reputation or style the region or country has established for that food. Thus ‘Scotch’ is a malt whisky produced in Scotland and ‘Bourbon’ is a maize whisky produced in the USA (originally in Bourbon Kentucky). These geographical indications denote unique products with established reputations based on quality and/or character. Thus ‘Scotch’ and ‘Bourbon’ usually will be considered by most consumers to have a particular quality and/or character that other products called only ‘whisky’ may not have.

In order to ensure protection of the reputations associated with the geographic indication, there are international agreements regulating the use of such names. Signatories to these

agreements are required to ensure certain protection to particular goods of trade. Australia and New Zealand are currently signatories to an agreement, the Trade Related Aspects of International Property Rights Agreement (known as the TRIPS Agreement), which covers the use of geographical indications for goods, particularly wine and spirits.

The Agreement provides general protection for geographical indications with respect to goods, requiring that the use of geographical indications must not be false and misleading.

‘Geographical indications’ are defined under the TRIPs agreement as – *indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.*

Articles 22 and 23 of the TRIPs agreement require members to provide legal means for interested parties to prevent the use of any designation or representation of a good that indicates or suggests that the good originates in a geographical area other than the true place. Article 23 provides additional protection to wines and spirits which prevents manufacturers from using expressions such as ‘kind’ ‘style’ ‘imitation’ and the like even when the true indication of the goods is indicated.

4.1.2 National Food Authority review and the AAT Decision

In 1991 the United Kingdom Scotch Whisky Association (SWA) applied to the National Food Authority (NFA) to vary Standard P3 of the Australian *Food Standards Code* to require that Scotch whisky contain no less than 40% ABV, and qualify for domestic consumption in accordance with the laws of the United Kingdom. The application was rejected by the Authority and the SWA applied to the Administrative Appeals Tribunal (AAT) to have the Authority’s decision reviewed.

The AAT concluded that whisky produced and bottled in the United Kingdom at 40% ABV is not the same product as whisky produced in the United Kingdom and bottled in Australia at 37% ABV. There was nothing that would indicate to the consumer that he or she was getting anything other than Scotch whisky as it would be consumed in Scotland where it is produced. Therefore, in the AAT’s view, the Australia Standard as it existed at the time did not enable the consumer to make an informed choice about the product. The consumer may have also been incorrectly led to believe that the product as produced but bottled in Australia was in fact bottled in Scotland and imported in that form to Australia. The consumer would also have no way of knowing that the alcohol content of the product played such a vital role in determining the character of the product.

The AAT ruling was formulated not on TRIPs grounds, but principally on issues of consumer information and fraud and deception. The AAT ultimately concluded that to prevent fraud and deception the Authority, must develop a variation to Standard P3 in the following terms –

- (a) Scotch whisky shall not contain less than 40% ABV; and
- (b) Scotch whisky sold in Australia qualifies for domestic consumption in the United Kingdom, the country of its production.

New Zealand did not change its food regulations in response to a similar application from the SWA.

4.1.3 Development of a joint Australia New Zealand Standard

The issue of geographic indications for spirits was considered in the development of the Australia New Zealand *Food Standards Code* as part of Proposal P204 – Alcoholic Beverages and Alcohol Labelling of Foods containing Alcohol.

Submissions

Most submitters to P204 supported the proposed approach to include in the joint spirits standard an extension of Australia's and New Zealand's obligations under the TRIPs Agreement as it ensured that Australia and New Zealand met their International obligations in a way that applied consistently across the sector. They also argued that as New Zealand and Australia were signatories to the TRIPs agreement that it was necessary for the joint spirits standard to fully implement the protection afforded to the geographical indications by this provision.

The New Zealand Ministry of Health, Ministry of Commerce, MFAT, and Ministry of Agriculture and Forestry (MAF) and the Alcohol Advisory Council of New Zealand (ALAC), in a joint submission, rejected FSANZ's proposal to implement an extended interpretation of TRIPs obligations in the joint spirit standards. They believed that FSANZ should have looked at other ways of abiding by the AAT decision on Scotch whisky, which did not involve the precedent-setting extension of obligations under the TRIPs agreement.

Advice from DFAT and MFAT

Advice from DFAT and MFAT at the time work on P204 was being undertaken, indicated that matters under TRIPs Article 22 were covered by existing fair trading laws and there was no need for duplication in food standards. Consequently, spirits with geographical indications should be sold according to the domestic laws in their place of origin, otherwise it would likely be a breach of existing fair trading law (unless, as is the case with Bourbon, there were administrative waivers on these conditions set by the government in the spirit's place of origin).

MFAT further advised that there should be no provisions regarding geographical indications in food standards because geographic indications are an international trade issue and have no place in food standards. This is of particular importance where Australia and New Zealand have differing trade policies. Thus in MFAT's view, a joint food standard was an entirely unsuitable place for provisions covering the TRIPs agreement, especially when the New Zealand Government had drafted a *Geographical Indications Act* that fully implemented New Zealand obligations for geographical indications under the TRIPs Agreement including Article 23.

Advice from the Australian Attorney-General's Department

The Australian Attorney General's Department and DFAT advised that existing fair trading laws in Australia and New Zealand may not implement TRIPs Article 23 requirements.

FSANZ Approach

FSANZ proposed in P204 to include in the joint spirits standard an extension of Australia's and New Zealand's obligations under the TRIPs Agreement. These provisions would ensure that all spirits with geographical indications were bottled in accordance with the domestic laws of consumption and/or export. In other words, Scotch whisky would need to be bottled at 40% ABV.

The current drafting as gazetted is at Attachment 2.

4.2 Workplan Classification

This Application had been provisionally rated as complexity Category 5 and placed in Group 2 on the FSANZ standards development Workplan. This Initial/Draft Assessment confirms that the issues raised in the application are of a minor technical nature and therefore the Application has been reclassified as Complexity Category 3. Further details about the Workplan and its classification system are given in *Information for Applicants* at www.foodstandards.gov.au.

5. Relevant Issues

5.1 Potential 'Loophole' for GI Spirits

This application seeks to close a potential 'loophole' to prevent bulk GI spirits from being bottled in a third country at a % ABV below that permitted by the laws of the country of origin and then imported into Australia and New Zealand. To close this potential 'loophole' a minor wording change is required from the existing drafting.

MFAT and DFAT have advised FSANZ in preliminary discussions that a minor change to the drafting to close this loophole is unlikely to have an effect on TRIPs compliance.

Submitters are invited to comment in particular on the impacts (costs and benefits) to industry, consumers and enforcement agencies if GI spirits are bottled in a third country at a % ABV that is below that required by the laws of the country of origin and then imported into Australia and New Zealand.

5.2 Protection for GI Spirits

The current regulations for spirits only allow geographic indications to be indicated for spirits if the %ABV in the spirit is at a level permitted by the laws of the country of origin.

5.2.1 Bourbon whisky

Under US law the federal regulations specify no whisky can be called Bourbon unless it has been manufactured within the United States according to a specific Bourbon formula. This formula requires Bourbon to be bottled at not less than 80 degrees proof (40% ABV) unless otherwise noted on the label it has been 'diluted'. However, the US provides a waiver for exports which permits the bottling of Bourbon at 37% ABV without reflecting that the product has been 'diluted'.

The question remains as to whether Bourbon at 37% ABV is at a level permitted under the laws for Bourbon whisky of the USA and if it can therefore be sold at 37% ABV in Australia and New Zealand under the geographic indication ‘Bourbon’.

It is the Authority’s view that the administrative waiver is part of the laws of the US and therefore Australia and New Zealand can bottle Bourbon at 37% ABV without reflecting that it has been diluted (Attachment 3). Therefore, no regulatory problem has been identified with respect to this issue raised by the applicant because the *Food Standards Code* currently provides the same level of protection for GI spirits as provided by the laws of the country of origin.

6. Regulatory Options

Possible options are:

1. maintain the status quo approach;
2. amend Standard 2.7.5 in the Code to close a potential loophole in the drafting to prevent bulk GI spirits being bottled in a third country at a % ABV below that permitted by the laws of the country of origin and then imported and sold in Australia or New Zealand under that geographic indication.

7. Impact Analysis

FSANZ is required, in the course of developing regulations suitable for adoption in Australia and New Zealand, to consider the impact of various options (including non-regulatory options) on all sectors of the community, including consumers, the food industry and governments in both countries. The regulatory impact assessment will identify and evaluate, though be not limited to, the advantages and disadvantages of amendments to the standards, and their health and economic impacts.

7.1 Affected Parties

Parties affected by this Proposal include:

- Consumers of GI spirits;
- Industry – manufacturers, bottlers, importers and exporters of GI spirits.
- Government agencies that enforce the *Food Standards Code*.

7.2 Impact Analysis

Option 1: Maintain the status quo approach

Benefits

- No additional benefits have been identified for any affected party.

Costs

Industry

- Bottlers of GI spirits in the country of origin, Australia and New Zealand will have a distinct market disadvantage as opposed to bottlers in other countries that export to Australia and New Zealand because of the increased tax excise they will have to pay on GI spirits.

Consumers

- Consumers may be potentially misled, believing they are purchasing spirits with the characteristics of the country in which they originate, but in fact it may be a different product.

Government

- It will be difficult for enforcement agencies to enforce the existing regulations as they are not clear.

Option 2: Amend Standard 2.7.5 in the Code to close a potential loophole in the drafting to prevent bulk GI spirits being bottled in a third country at a % ABV below that permitted by the laws of the country of origin and then imported and sold in Australia or New Zealand under that geographic indication.

Benefits

Industry

- This will create an even playing field for manufacturers in all countries who bottle GI spirits and sell them in Australia and New Zealand.

Consumers

- Consumers can be certain the GI spirits are made and produced according to the laws of the country in which they originate.

Government

Costs

No additional costs have been identified for any affected party.

Preferred Option

The preferred Option is 2 because this option satisfies the objectives of the Assessment and the benefits outweigh the costs.

8. Consultation

The issue of geographic indications for spirits was considered by FSANZ in the review of the Code as part of Proposal P204 – Alcoholic Beverages and Alcohol Labelling of Foods containing Alcohol. It is proposed that all the submitters who submitted comments to that review will be targeted for consultation in relation to Application A459.

Other key stakeholders who will be targeted include key stakeholders in the spirits industry, DFAT and MFAT.

8.1 World Trade Organization (WTO)

As members of the World Trade Organization (WTO), Australia and New Zealand are obligated to notify WTO member nations where proposed mandatory regulatory measures are inconsistent with any existing or imminent international standards and the proposed measure may have a significant effect on trade.

Amending the *Food Standards Code* to prevent bulk GI spirits from being imported into Australia at a % ABV below that permitted by the laws of the country of origin is unlikely to have a significant effect on international trade as it would be TRIPs compliant. The issue will therefore, not be notified to the agencies responsible for Australia and New Zealand's obligations under the WTO Technical Barrier to Trade (TBT) or Sanitary and Phytosanitary Measure (SPS) Agreements.

9. Conclusion and Recommendation

It is recommended that Standard 2.7.5 of the *Food Standards Code* be amended to close a potential 'loophole' in the drafting to prevent bulk GI spirits being bottled in a third country at a % ABV below that permitted by the laws of the country of origin and then imported and sold in Australia or New Zealand under that geographic indication. It is concluded that this issue is one of minor technical significance and the benefits of this approach far outweigh maintaining the status quo (the only alternative option assessed), where the potential loophole for GI spirits would remain. No cost has been identified from taking the preferred approach. The benefits of closing the loophole to prevent GI spirits being bottled in a third country at a lower % ABV and then sold in Australia and New Zealand include:

- creating an even playing for all bottlers of GI spirits; and
- enabling consumers to make informed choices about GI spirits.

MFAT and DFAT have given preliminary advice that suggests the proposed amendments are TRIPs compliant.

The Authority believes that the existing Standard provides the same level of protection for GI spirits that exists in the laws of the country of origin, but no more. Therefore no amendment to the Standard is required to address this issue identified by the applicant.

10. Implementation and review

The amendments to the Standard will come into effect on gazettal to minimise the opportunity for the potential ‘loophole’ to be exploited where GI spirits could be bottled in a third country at less than the % ABV permitted by the laws of the country of origin and sold in Australia and New Zealand.

11. ATTACHMENTS

1. Proposed draft variation to Standard 2.7.5 of the *Australia New Zealand Food Standards Code*
2. Current clause 4, Standard 2.7.5 drafting
3. Extract of Legal advice from FSANZ on % ABV and Bourbon whisky

DRAFT VARIATIONS TO *FOOD STANDARDS CODE*

To commence: on gazettal

Standard 2.7.5 of the *Australia New Zealand Food Standards Code* is varied by omitting subclause 4(2)

substituting -

(2) A spirit lawfully exported under a geographical indication, but bottled other than in the territory, locality or region indicated by the geographical indication must not be sold under that geographical indication –

- (a) unless the concentration of alcohol by volume in the spirit is at a level permitted under the laws for that geographical indication of the country, region or locality indicated by that geographical indication; or
- (b) if any other distinctive quality or characteristic of the spirit is such as to mislead or deceive the public as to the nature of the product identified by the geographical indication.

Current Clause 4, Standard 2.7.5 Drafting

4 Geographical indications

- (1) A geographical indication must not be used in relation to a spirit, even where the true origin of the spirit is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like, unless the spirit has been produced in the country, locality or region indicated.
- (2) A spirit lawfully exported under a geographical indication, but bottled in Australia or New Zealand, must not be sold under that geographical indication –
 - (a) unless the concentration of alcohol by volume in the spirit is at a level permitted under the laws for that geographical indication of the country, region or locality indicated by that geographical indication; or
 - (b) if any other distinctive quality or characteristic of the spirit is altered in a manner that would mislead or deceive the public as to the nature of the product identified by the geographical indication.

Extract of Legal Advice from FSANZ on % ABV and Bourbon whisky

THE ABV FOR “BOURBON”

Spirits may generally be sold in Australia at an ABV of not less than 37% (Standard 2.7.5 clause 1). However, further requirements in Standard 2.7.5 apply in relation to spirits described using by a “geographical indication” (GI) -

geographical indication means an indication, whether express or implied –

(a) which identifies a spirit as originating in a particular country, locality or region; and

(b) where a given quality, reputation or other characteristic of the spirit is essentially attributable to its origin in that particular country, locality or region.

4 Geographical indications

(1) A geographical indication must not be used in relation to a spirit, even where the true origin of the spirit is indicated or the geographical indication is used in translation or accompanied by expressions such as ' kind ', ' type ', ' style ', ' imitation ' or the like, unless the spirit has been produced in the country, locality or region indicated.

(2) A spirit lawfully exported under a geographical indication, but bottled in Australia or New Zealand, must not be sold under that geographical indication -

(a) unless the concentration of alcohol by volume in the spirit is at a level permitted under the laws for that geographical indication of the country, region or locality indicated by that geographical indication; or

(b) if any other distinctive quality or characteristic of the spirit is altered in a manner that would mislead or deceive the public as to the nature of the product identified by the geographical indication.

The fundamental issue is whether “*the concentration of alcohol by volume in the spirit is at a level permitted under the laws for that geographical indication of the country, region or locality indicated by that geographical indication*” (my emphasis).

Laws of the USA

27CFR5.22

The standards of identity.

Standards of identity for the several classes and types of distilled spirits set forth in this section shall be as follows (see also Sec. 5.35, class and type):

.....

*(b) Class 2; whisky. "Whisky" is an alcoholic distillate from a fermented mash of grain produced at less than 190 deg. proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, stored in oak containers (except that corn whisky need not be so stored), **and bottled at not less than 80 deg. proof**, and also includes mixtures of such distillates for which no specific standards of identity are prescribed.*

(1)(i) "Bourbon whisky", "rye whisky", "wheat whisky", "malt whisky", or "rye malt whisky" is whisky produced at not exceeding 160 deg. proof from a fermented mash of not less than 51 percent corn, rye, wheat, malted barley, or malted rye grain, respectively, and stored at not more than 125 deg. proof in charred new oak containers; and also includes mixtures of such whiskies of the same type.

27CFR19.395

*Labels for **export** spirits.*

*All bottles containing spirits bottled for **export** shall have securely affixed thereto a label showing the following:*

(a) Kind of spirits;

(b) Percent-alcohol-by-volume of the spirits;

(c) Net contents, unless the markings on the bottle indicate such contents; and

*(d) The name (or, if desired, the trade name) of the bottler. The bottler may place on the label any additional information that he may desire if it is not inconsistent with the required information. The label information may be stated in the language of the country to which the spirits are to be exported provided the proprietor maintains on file an English translation of the information. The net contents and proof may be stated in the units of measurement of the foreign country provided the proprietor maintains a record of the equivalent units as they would be required to be expressed if bottled for domestic consumption. The Director may waive the requirement of showing any of the information required by this section, other than the kind of spirits, upon a showing that the country to which the spirits are to be exported prohibits the showing of such information. With respect to kind of spirits, the Director may waive the designation required by 27 CFR 5.22, only to the extent that the label need not bear the word "**diluted**" on distilled spirits bottled below the minimum bottling proof, provided this is in accordance with the rules of the countries to which such product is to be exported.*

Is the waiver under the law of the USA?

The question is whether 37%ABV is “a level permitted under the laws for” bourbon whiskey of the USA.

For domestic purposes in the USA, the minimum ABV requirement for bourbon is 80 degrees proof, or 40% ABV. However, “diluted bourbon”, with an ABV of less than 40%, may be sold in the USA, and in the case of diluted bourbon bottled for export, the requirement that the word “diluted” appear in the name of the food may be waived “provided this is in accordance with the rules of the countries to which such product is to be exported”.

In the Authority’s view, the regulation itself (27CFR19.395) is part of the laws of the USA. The discretionary power to grant the waiver is itself reposed in the law. If, by regulatory amendment, the USA repealed 27CFR19.395 no discretionary waiver would exist and the 40%ABV level would then apply unless the product was labelled as ‘diluted bourbon’. The lower than 40% level for export permitted through the exercise of the discretionary power is, therefore, “a level permitted under the laws for bourbon whisky of the USA”.

Furthermore, the Authority is not aware of any Australian or New Zealand law which would require bourbon to be labelled as being “diluted” if it has an ABV of less than 40%. To be sold as a spirit under Australian law, the product must have an ABV of at least 37%, which imposes a limit on the degree of dilution that would be permitted in relation to a product sold as “bourbon”, but the omission of the word “diluted” does not offend Australian or New Zealand law. In saying this, the effect of relevant provisions of the Commonwealth *Trade Practices Act 1974* and equivalent provisions of the New Zealand Fair Trading Act have been considered. It is doubtful that an offence under these provisions could be made out by the mere omission of the word “diluted” in the case of bourbon whisky.

Accordingly, it is the Authority's conclusion that 37% ABV is "a level permitted under the laws for bourbon whiskey of the USA", being a level at which the laws of the USA permit, subject to the obtaining of an administrative waiver, a bourbon whisky to be exported under the name "Bourbon".

Although the USA export regulation applies to bourbon bottled in the USA, there appears no reason why the above reasoning should not also apply to bulk bourbon originating in the USA.