

BOARD-IN-CONFIDENCE



FOOD STANDARDS
Australia New Zealand
Te Mana Kounga Kai – Ahitereiria me Aotearoa

1-04

18 February 2004

FINAL ASSESSMENT REPORT

APPLICATION A459

**GEOGRAPHIC INDICATIONS TO
DESCRIBE SPIRITS**

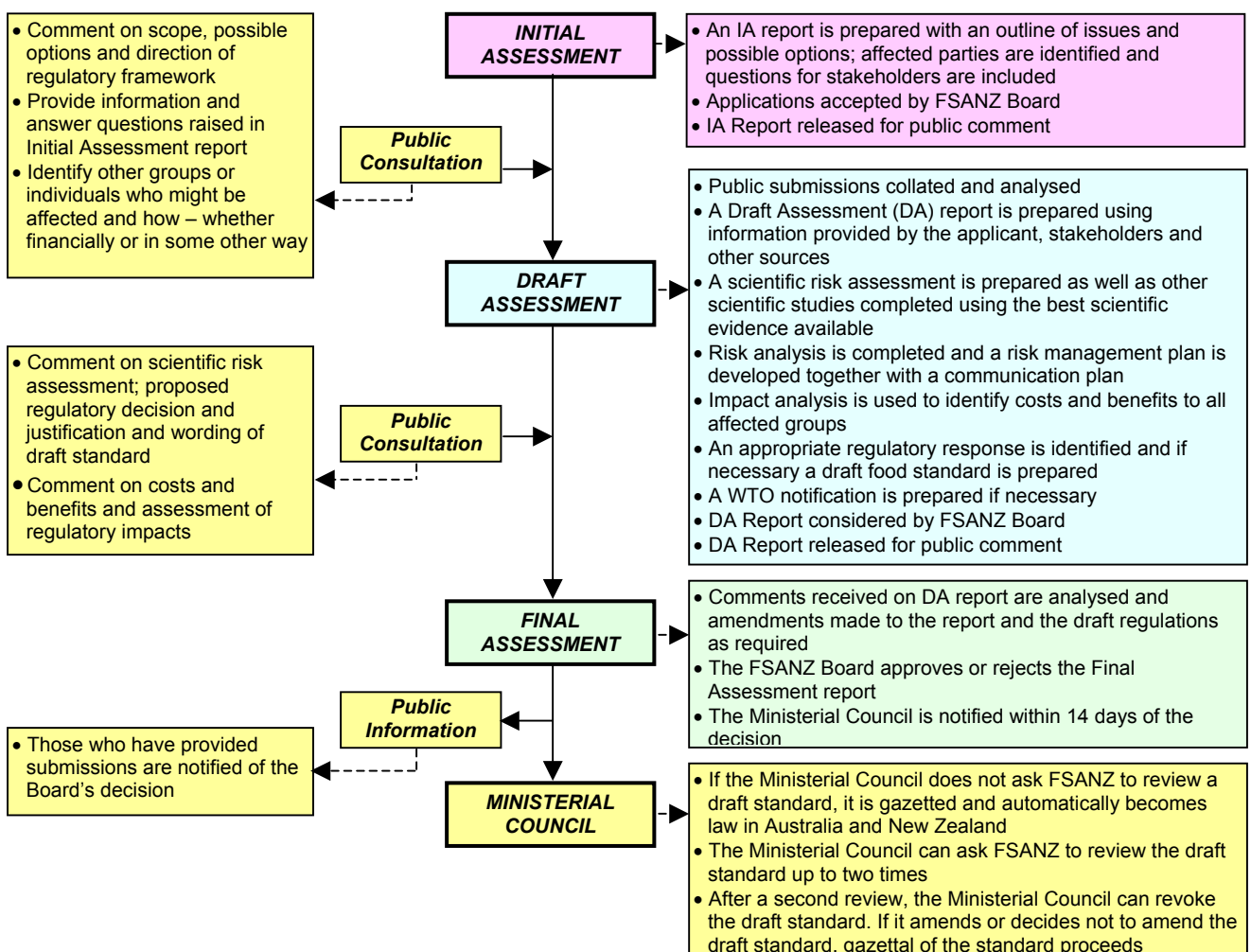
FOOD STANDARDS AUSTRALIA NEW ZEALAND (FSANZ)

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.



Final Assessment Stage (s.36)

FSANZ has now completed the assessment of the Application and held a single round of public consultation under section 36 of the FSANZ Act. This Final Assessment Report and its recommendations have been approved by the FSANZ Board and notified to the Ministerial Council.

If the Ministerial Council does not request FSANZ to review the draft amendments to the Code, an amendment to the Code is published in the *Commonwealth Gazette* and the *New Zealand Gazette* and adopted by reference and without amendment under Australian State and Territory food law.

In New Zealand, the New Zealand Minister of Health gazettes the food standard under the New Zealand Food Act. Following gazettal, the standard takes effect 28 days later.

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
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

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

CONTENTS

EXECUTIVE SUMMARY AND STATEMENT OF REASONS	6
REGULATORY PROBLEM	6
OBJECTIVES	6
REGULATORY OPTIONS	6
IMPACT ANALYSIS	6
CONSULTATION	6
CONCLUSION AND STATEMENT OF REASONS	7
1. INTRODUCTION.....	8
1.1 NATURE OF APPLICATION	8
1.1.1 <i>Loophole for GI Spirits</i>	8
1.1.2 <i>Protection for GI Spirits</i>	8
2. REGULATORY PROBLEM.....	8
2.1 CURRENT REGULATIONS.....	8
3. OBJECTIVE	9
4. BACKGROUND	9
4.1 HISTORICAL BACKGROUND	9
4.1.1 <i>Geographic Indications and the TRIPs Agreement</i>	9
4.1.2 <i>National Food Authority review and the AAT Decision</i>	10
4.1.3 <i>Development of a joint Australia New Zealand Standard</i>	11
5. RELEVANT ISSUES	12
5.1 GI FOR BOURBON WHISKY	12
5.2 CONSISTENCY WITH TRIPs	12
5.3 WTO NOTIFICATION	13
6. REGULATORY OPTIONS.....	13
7. IMPACT ANALYSIS	13
7.1 AFFECTED PARTIES	13
7.2 IMPACT ANALYSIS	13
7.2.1 <i>Option 1: Maintain the status quo approach</i>	13
7.2.2 <i>Option 2: Amend Standard 2.7.5 in the Code to close a loophole in the drafting to prevent bulk GI spirits being bottled in a third country at a percentage 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.</i>	14
7.2.3 <i>Recommended Option</i>	14
8. CONSULTATION	15
8.1 WORLD TRADE ORGANIZATION (WTO)	15
9. CONCLUSION AND RECOMMENDATION	16
10. IMPLEMENTATION AND REVIEW	16
ATTACHMENT 1 - DRAFT VARIATION TO THE AUSTRALIA NEW ZEALAND FOOD STANDARDS CODE.....	17

ATTACHMENT 2 - CURRENT CLAUSE 4, STANDARD 2.7.5 DRAFTING.....18
ATTACHMENT 3 - SUMMARY OF SUBMISSIONS.....19

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 percentage ABV required by the laws of the country of origin. For example, Scotch whisky bottled in either Scotland, Australia or New Zealand must comply with the laws of the United Kingdom (UK) which state that the product must be bottled at no less than 40% ABV. However, currently a potential loophole exists where a GI spirit (such as Scotch whisky) bottled in a third country would not have to comply with the laws of the country where it was produced such that it could be bottled at 37% ABV.

Objectives

The specific objectives of this Application 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 in this paper are considered to be of a minor technical nature and the range of options is limited to:

1. maintain the status quo; or
2. amend Standard 2.7.5 in the *Australia New Zealand Food Standards Code* (the Code) to close a potential loophole in the drafting to prevent bulk GI spirits being bottled in a third country at a percentage 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 Analysis

The preferred Option is Option 2. This option satisfies the objectives of the assessment and the benefits outweigh the costs.

Consultation

FSANZ made its decision under section 36 because it was satisfied that omitting to invite public submissions prior to making a Draft Assessment would not have an adverse effect the interests of stakeholders and that the application raised issues of minor significance or complexity only.

In response to the Initial/Draft Assessment Report, a total of 12 submissions were received from a variety of stakeholders, which included industry, academics and government. No submissions were received from consumer groups or individual consumers. Of those submissions received, 7 were from Australia, 3 from New Zealand and 2 from international organisations. All submitters supported the draft amendment to subclause 4(2) of Standard 2.7.5.

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 GI spirits being bottled in a third country and then imported and sold in Australia and New Zealand at a percentage ABV that is below that permitted by the laws of the country of origin. 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 percentage 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.

FSANZ and Diageo have different opinions with regard to the interpretation of the geographic indication for Bourbon whisky. In FSANZ's view, Australia and New Zealand can bottle Bourbon at 37% ABV without reflecting that the product has been diluted, whereas Diageo believe that Bourbon may not be sold in Australia and New Zealand at a percentage ABV, which is less than that permitted in the US i.e. 40% ABV. However, the Applicant was not seeking an amendment to address this issue and Diageo support the draft amendment to Standard 2.7.5. Therefore, FSANZ recognises that the issue of Bourbon and geographical indications is the subject of divergent legal opinion and Application A459 does not require FSANZ to make a determination on this issue.

The New Zealand Ministry of Foreign Affairs and Trade (MFAT) and the Australian Department of Foreign Affairs and Trade (DFAT) have advised that the proposed amendments to the Standard are compliant with the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) and are unlikely to be challenged through the World Trade Organization (WTO) dispute settlement process.

1. Introduction

1.1 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 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 the inaccurate use of geographic indications in some cases, whilst in other cases its operation is unclear.

1.1.1 Loophole for GI Spirits

DSICA is seeking to close a potential 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 percentage 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 UK require Scotch whisky to be bottled at no less than 40% ABV.

1.1.2 Protection for GI Spirits

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

2. Regulatory Problem

2.1 Current Regulations

The current regulations allow for spirits to be bottled and sold at 37% ABV in Australia and New Zealand. For GI spirits the regulations require products bottled in either the country of origin, Australia or New Zealand to be bottled at a percentage ABV required by the laws of the country of origin. 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 percentage ABV. For example, a third country bottler would pay less tax because they could bottle their GI spirits at a lower percentage ABV.
2. Spirits diluted to a lower percentage 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 percentage ABV is concerned.

3. 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 FSANZ Act. 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 United States of America (US) (originally in Bourbon, Kentucky). These geographical indications denote unique products with established reputations based on quality and/or character.

Thus ‘Scotch’ and ‘Bourbon’ will usually 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 protect reputations associated with geographic indications, 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 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 UK Scotch Whisky Association (SWA) applied to the then 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 that it qualify for domestic consumption in accordance with the laws of the UK. The application was rejected by the NFA 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 UK at 40% ABV is not the same product as whisky produced in the UK 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 Australian 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 NFA, 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 UK, the country of its production.

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

4.1.3 Development of a joint Australia New Zealand Standard

The issue of GI spirits was considered in the review of the Code as part of Proposal P204 – Alcoholic Beverages and Alcohol Labelling of Foods containing Alcohol.

4.1.3.1 Submissions

Most submitters to Proposal P204 supported the proposed approach as it ensured that Australia and New Zealand met their international obligations under the TRIPs Agreement in a way that applied consistently across the sector. They also argued that as New Zealand and Australia were signatories to the TRIPs Agreement 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 and the Alcohol Advisory Council of New Zealand, in a joint submission, rejected FSANZ's proposal to implement an extended interpretation of TRIPs obligations in the joint spirits 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.

4.1.3.2 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). (refer section 5.1 below)

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's obligations for geographical indications under the TRIPs Agreement including Article 23.

4.1.3.3 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.

4.1.3.4 FSANZ Approach

FSANZ proposed in P204 to include in the joint spirits standard an extension of Australia and New Zealand's obligations under the TRIPs Agreement. These provisions would ensure that all GI spirits 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.

5. Relevant Issues

5.1 GI for Bourbon Whisky

Diageo Australia Ltd (Diageo) supports the amendment to the Code to close the 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 percentage ABV that is below that permitted by the laws of the country of origin. However, it did not support FSANZ's interpretation of the geographic indication for Bourbon whisky.

The Application from DSICA sought clarification that the Code provides the same level of protection for GI spirits, in particular Bourbon, as exists in the country of origin, but not more. In the Initial/Draft Assessment Report, FSANZ provided a legal interpretation that an administrative waiver by the US that provides for the bottling of exports of Bourbon at 37% ABV without reflecting that the product has been 'diluted', forms part of the laws of the US. Therefore, in FSANZ's view Australia and New Zealand can bottle Bourbon at 37% ABV without reflecting that the product has been diluted.

Diageo stated in its submission that the laws of the US to which Standard 2.7.5 refers cannot be a reference to an administrative waiver. This is because the Director has a discretion to waive this requirement provided it is in accordance with the rules of Australia and New Zealand. Diageo states the laws of Australia and New Zealand cannot assume that the Director's discretion has already been exercised. Therefore, Diageo believes that Bourbon whisky may not be lawfully imported and sold in Australia and New Zealand at a percentage ABV, which is less than that permitted in its country of origin.

FSANZ has sought DSICA's view with respect to Diageo's interpretation of this issue. Whilst DSICA recognised that this is a difficult issue, at this stage, it does not seek any further amendment to Standard 2.7.5 to address the Bourbon issue and would in fact oppose it.

FSANZ recognises that there are differences in opinion on this matter. However, as DSICA is not seeking any further amendment to the Code in this regard and Diageo support the proposed draft amendment, FSANZ believes no further action is required.

5.2 Consistency with TRIPs

Following consultation with MFAT, the New Zealand Food Safety Authority (NZFSA) has stated that for consistency's sake the drafting should reflect, in paragraph 2 (a), the TRIPs – consistent wording which is used in the first part of the subclause 4 (2) to refer to the origin of the geographic indication, i.e. 'territory, locality or region', rather than 'country, locality or region', as not all WTO members are countries (e.g. Hong Kong).

DFAT has indicated that the proposed amendments are unlikely to be successfully challenged under the formal dispute settlement processes in accordance with the WTO's agreement on TRIPs. Therefore, FSANZ has amended the drafting to use TRIPs consistent language, which would make WTO challenge even more unlikely.

5.3 WTO Notification

In the Initial/Draft Assessment Report FSANZ stated that amending the Code to prevent bulk GI spirits from being imported into Australia at a percentage 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. However, the NZFSA stated that whether a measure complies with international obligations is not a relevant consideration as to whether a technical regulation will have a significant effect on international trade. It believes an assessment of the trade effects of the measure is necessary to determine this.

FSANZ does not agree that it is necessary to notify the WTO to make an assessment of the trade effects when advice from DFAT and MFAT indicate that the proposed amendments are TRIPs compliant and unlikely to be successfully challenged through the WTO dispute settlement process.

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 percentage 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

7.1 Affected Parties

The parties affected by this Application are:

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

7.2 Impact Analysis

7.2.1 Option 1: Maintain the status quo approach

7.2.1.1 Benefits

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

7.2.1.2 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 different characteristics to those of the country in which they originate. They may in fact be a different product e.g. have a lower % ABV (37% rather than 40%).

Government

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

7.2.2 Option 2: Amend Standard 2.7.5 in the Code to close a loophole in the drafting to prevent bulk GI spirits being bottled in a third country at a percentage 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.

7.2.2.1 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.

7.2.2.2 Costs

No additional costs have been identified for any affected party.

7.2.3 Recommended Option

The recommended option is option 2.

Option 2 is favoured over Option 1 as it offers clear benefits to industry and consumers in both Australia and New Zealand without any additional costs.

Option 2 will create an even playing field for manufacturers in all countries who bottle GI spirits and sell them in Australia and New Zealand and consumers can be confident that GI spirits will be made according to the laws of the country in which they are produced.

Option 1 is not considered appropriate as bottlers of GI spirits in Australia and New Zealand will have a distinct market disadvantage as opposed to bottlers in other countries that export to Australia and New Zealand. Also 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.

The proposed drafting amendments to Standard 2.7.5 are at Attachment 1.

8. Consultation

FSANZ made its decision under section 36 of the FSANZ Act because it was satisfied that omitting to invite public submissions prior to making a Draft Assessment would not have an adverse effect on anyone's interests and that the application raised issues of minor significance or complexity only.

Section 63 of the FSANZ Act provides that, subject to the *Administrative Appeals Tribunal Act 1975*, an application for review of FSANZ's decision to omit to invite public submissions prior to making a Draft Assessment, may be made to the Administrative Appeals Tribunal. No application was made in relation to this decision.

In response to the Initial/Draft Assessment Report, a total of 12 submissions were received from a variety of stakeholders which included industry, academics and government. No submissions were received from consumer groups or individual consumers. Of those submissions received, 7 were from Australia, 3 from New Zealand and 2 from International organisations. All submitters supported the draft amendment to subclause 4(2) of Standard 2.7.5.

The Initial/Draft Assessment sought comment on the impacts (costs and benefits) to industry, consumers and enforcement agencies if GI spirits are bottled in a third country at a percentage ABV that is below that required by the laws of the country of origin and then imported into Australia and New Zealand. The issues raised in submissions are outlined in Section 5 of this report. A full summary of submissions is at Attachment 3.

FSANZ also consulted with DFAT and MFAT on the TRIPs compliance of the proposed amendments to Standard 2.7.5. The outcome of this consultation as well as their submissions are discussed in greater detail in Section 5 of this report.

8.1 World Trade Organization (WTO)

As members of the 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 Code to prevent bulk GI spirits from being imported into Australia at a percentage 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 was therefore not notified to the agencies responsible for Australia and New Zealand's obligations under the WTO Technical Barrier to Trade or Sanitary and Phytosanitary Measure Agreements.

Please refer to Section 5 of this Report for further discussion of this issue.

9. Conclusion and Recommendation

It is recommended that Standard 2.7.5 of the Code be amended to close a potential loophole in the drafting to prevent bulk GI spirits being bottled in a third country at a percentage 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 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 percentage 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.

FSANZ and Diageo have different opinions with regard to the interpretation of the geographic indication for Bourbon whisky. In FSANZ's view, Australia and New Zealand can bottle Bourbon at 37% ABV without reflecting that the product has been diluted, whereas Diageo believe that Bourbon may not be sold in Australia and New Zealand at a percentage ABV, which is less than that permitted in the US i.e. 40% ABV. However, the Applicant was not seeking an amendment to address this issue and Diageo support the draft amendment to Standard 2.7.5. Therefore, FSANZ recognises that the issue of Bourbon and geographical indications is the subject of divergent legal opinion and Application A459 does not require FSANZ to make a determination on this issue.

MFAT and DFAT have given advice that the proposed amendments to the Standard are compliant with the TRIPs Agreement and are unlikely to be challenged through the WTO dispute settlement process.

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 percentage ABV permitted by the laws of the country of origin and sold in Australia and New Zealand.

ATTACHMENTS

1. Draft variation to the *Australia New Zealand Food Standards Code*
2. Current clause 4, Standard 2.7.5 drafting
3. Summary of issues raised in public submissions

Draft Variation to the *Australia New Zealand 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 territory, locality or region 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.

Summary of Submissions

INDUSTRY

Australian Food and Grocery Council	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>State the ‘loophole’ has the potential to disadvantage consumers, exporters of the ‘genuine’ article and Australian bottlers.</p>
Coles Myer Ltd	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>States that customers expectations of the integrity of the product, according to its original country of origin would be best supported by this option.</p>
Diageo Australia Ltd	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>States that the proposed amendment will reinforce the existing legal requirement. This provides that the percentage of ABV contained in spirits to which geographic indications apply, as mandated by the laws of the country or origin, must be applied to spirits imported and sold in Australia and New Zealand.</p> <p>Does not support FSANZ’s interpretation of the geographic indication for Bourbon whisky.</p> <p>States the laws of the United States to which clause 4(2)(a) of Standard 2.7.5 refers cannot be a reference to the administrative waiver. This is not because the administrative waiver is not a law of the United States, but because the Director has a discretion to waive the requirement provided it is in accordance with the rules of Australia and New Zealand.</p> <p>States what is in accordance with the laws of Australia and New Zealand cannot assume that the Director’s discretion has already been exercised.</p> <p>States Bourbon Whisky may not be lawfully imported and sold in Australia and New Zealand at an ABV which is less than that permitted in its country of origin, that is say, 40%.</p> <p>States FSANZ should reconsider its interpretation of the geographic indication for Bourbon whisky as it applies to Australia and New Zealand.</p>
Distilled Spirits Association of New Zealand Inc	<p>Supports Options 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>States the Application is an important initiative that will enhance the certainty of legal protection for GI spirits and give consumers greater product confidence.</p> <p>States the absence of an amendment would mean consumers could be potentially misled and deceived, believing they are purchasing the said product which has all the prescribed attributes, but in fact receive a different product.</p> <p>States the amendment clearly tidies up an interpretational loophole and effects closure of the anomaly ensuring all manufacturers in all countries who bottle GI spirits are on the same playing field.</p> <p>State the amendment is unlikely to cause manufacturers of genuine products any substantial impacts.</p>
Distilled Spirits Council of the United States Inc	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p>
Distilled Spirits Industry Council of Australia	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p>
Food Technology Association of Victoria Inc	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p>
The Scotch Whisky Association	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p>

GOVERNMENT, PUBLIC HEALTH PROFESSIONALS AND ACADEMICS

<p>Department of Foreign Affairs and Trade</p>	<p>States the proposed amendments are unlikely to be successfully challenged under the formal dispute settlement processes in accordance with the WTO’s Agreement on TRIPS and other WTO provisions.</p>
<p>Miaolin Li (University of Auckland)</p>	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>States an additional benefit of amending the drafting would be to make it easier for enforcement agencies to set up clear regulations and put them into practice.</p> <p>States that some additional costs of amending the drafting would be: for government, costs associated with establishing a new standard; and for industry, the new regulation may cause the discontinuation of some trading partnerships and so lead to profit losses and decrease in the business’s reputation.</p> <p>States the costs associated with amending the drafting are small compared with the costs relating to maintaining the status quo.</p> <p>States there are some potential problems for industry if the status quo is maintained. These include:</p> <ul style="list-style-type: none"> • some companies in ‘third countries’ may exploit the loophole and bottle GI spirits with a lower percentage ABV than that required by the laws of the country of origin because of lower production and tax related costs; • Lower costs may lead many companies to change their method of production and exploit the loophole; • The resulting competition may decrease the profits of local companies or even drive some of them out of business; and • It is likely that the price of spirits according to the original formulation will increase. <p>States that there is another potential problem. The bottle volume of some spirits (e.g. Scotch whisky) has decreased 1125 ml to 1000 ml, but the price has not decreased. This could be a reflection of the competition with the ‘non-original’ spirits imported from ‘third countries’ as it is more profitable to bottle lower volume spirits and/or those containing lower percentage ABV.</p>
<p>New Zealand Food Safety Authority</p>	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>States the proposed amendments do not appear to create any problems for New Zealand in terms of their trade policy on geographic indications.</p> <p>Reports that the Standard already provides a TRIPs plus level of protection for spirits produced and sold in New Zealand, and making the proposed change will not affect this (or make it worse) but would close the loophole which exists in respect of GI spirits bottled in a third country.</p> <p>States for consistency’s sake that the drafting should repeat, in 2(a), the TRIPs-consistent wording which is used in the first part of the subclause 4 (2) to refer to the origin of the geographic indication, i.e. ‘territory, locality or region’, rather than then ‘ country, locality or region’, as not all WTO members are countries (e.g. Hong Kong).</p> <p>States that whether a measure complies with International obligations is not a relevant consideration as to whether a technical regulation will have a significant effect on international trade. Suggest an assessment of the trade effects of the measure is necessary to determine this.</p>
<p>Queensland Health – Environmental Health Unit</p>	<p>Supports Option 2 to amend Standard 2.7.5 to close a potential loophole in the drafting.</p> <p>Acknowledges that geographic indications denote unique products with established reputations based on quality and/or character and that a third country bottling scenario can result in different product as far as quality, character and percentage ABV.</p> <p>States the benefits of closing the identified loophole will create an even playing field for all bottlers of GI spirits and allow consumers to make more informed choices about GI spirits.</p>

CONSUMERS

No submissions were received from consumer groups or individual consumers.