



# CHANGING THE MARLBOROUGH GI: Options and issues

Report prepared for Wine Marlborough

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## INTRODUCTION

Wine Marlborough has asked John Barker Law (JBL) to prepare a report on the options and issues involved with changing the boundaries of the Marlborough geographical indication (GI), which is registered under the Geographical Indications (Wine and Spirits) Registration Act 2016 (the GI Act).

Some members of Wine Marlborough have expressed concern about the development of unsuitable vineyard areas that have the potential to harm the reputation of the Marlborough GI. It has been suggested that the Marlborough GI should be restricted to the areas defined on the map recently developed by Appellation Wine Marlborough (AWM), with an average rainfall of <1200mm. A number of possible options have been identified within AWM.

Wine Marlborough has proactively sought advice from JBL in order to understand the legal process for amending the current boundaries of Marlborough GI as well as the potential risks and issues associated with the legal process. In addition to the possible options identified by AWM, a further two options were added to allow for a more complete discussion of the possible approaches. The options considered are:

1. Revise the current GI boundary (AWM)
2. Revoke and re-issue the GI boundary (AWM)
3. Create a new Marlborough Sauvignon Blanc GI (AWM)
4. Create one or more sub-regional GIs
5. Status quo

This report is structured in three parts. Part 1 sets out the legal requirements and processes for each of these options. Part 2 outlines some of the important contextual considerations for each option. Part 3 suggests future steps to move the discussion forward.

The report draws a number of conclusions. In our opinion, Options 2 and 3 are unlikely to be viable from a legal perspective. Option 1 is possible from a legal perspective, although it faces evidential hurdles and involves potentially significant risks and costs. Option 4 is also possible from a legal perspective, and is likely to face fewer (but not zero) evidential hurdles and lower risks and costs compared with Option 1. Status quo does not involve further any additional procedural steps.

Before deciding on taking any of these options forward, our view is that there is more work to be done to establish the core justifications and objectives for a potential change of boundaries. Changing the boundaries of a GI is a major undertaking with potentially damaging and costly implications if it becomes contentious. A strong case needs to be made for any departure from the status quo before commencing. Whatever decision is finally made on this proposition must be based

on a high degree of consensus in order to mitigate the risk of conflict, cost and reputational damage to the Marlborough GI.

## PART 1- LEGAL REQUIREMENTS

### Option 1- Revise the current GI boundary

It is possible to revise the boundary of a current registered GI such as Marlborough. This requires an application to alter the register under section 46 of the GI Act.

Section 46 provides as follows:

#### ***46 Alteration of register***

*(1) The Registrar may, on his or her own initiative or on the application of an interested person, alter a registered geographical indication, or the conditions or boundaries relating to a registered geographical indication, if the Registrar is satisfied that—*

*(a) the alteration is necessary; and*

*(b) the alteration will not substantially alter the character of the geographical indication; and*

*(c) the alteration is not likely to mislead the public. [...]*

An alteration may be initiated either by the Registrar or on application by an “interested person”. In this case, an “interested person” application would be required. “Interested person” is not defined in the GI Act or Regulations. Wine Marlborough is clearly an interested person as the original registrant. It is likely that any producer or group of producers of Marlborough GI wine would be considered interested persons for the purposes of applying for an alteration.

The conditions that must be met for an alteration of the register are different from the criteria for applying for registration of a GI in the first place. These conditions are more difficult to fulfil because they involve a change to a standing decision of the Registrar and an established intellectual property right, which is a step that is not taken lightly. The decision to alter the register is an exercise of discretion on the part of the Registrar. The Registrar is not compelled to exercise their discretion if these conditions are met, but they cannot exercise their discretion unless the conditions are met.

In practice, the powers of the Registrar are exercised through the Intellectual Property Office of New Zealand (IPONZ). IPONZ has not issued any Practice Guidelines regarding alteration of a GI, so there is little relevant guidance on the meaning of these criteria and how the Registrar will exercise their discretion. However, some key considerations are discussed in Part 2.

In terms of process, to request an alteration of the register, an application must be filed with IPONZ which includes details of the proposed alteration and the grounds upon which the alteration is proposed. This would include substantive evidence supporting the grounds for alteration. A fee of \$1000 would be payable.<sup>1</sup> If the application is made by an interested party other than Wine Marlborough (who is the original applicant), they would also need to provide a statement of the basis on which they claim to be an interested person.

An application to alter a registered GI can be opposed by an interested person by filing a counter-statement within 2 months from the date when the application is first notified. The counter-statement should include: a statement of the basis on which the opponent claims to be an interested person (if they are not the original registrant); a response to the applicant's grounds for the proposed alteration, by admitting, denying, or claiming lack of knowledge of each assertion made in the application; and a brief statement of the facts on which the opponent relies in opposing the proposed alteration.

The decision to alter a registered GI is made by the Registrar in the first instance. In the case of an opposition or if requested, the decision will be subject to a hearing. There is a right of appeal to the High Court from the Registrar's decision.

## Option 2- Revoke and re-issue the GI boundaries

Revoking and re-issuing the GI boundaries would be a two-part process in legal terms. Revoking the boundary would in effect mean revoking the GI, before filing a fresh application for a new GI. The process for filing an application for a new GI is discussed below, but for this option the first and major obstacle would be the revocation of the GI.

Section 45 of the GI Act allows for a registered GI to be removed if particular conditions are met.

Section 45 provides as follows:

### ***45 Removal from register***

*(1) The Registrar may remove a registered geographical indication from the register if satisfied that any of the following grounds exist:*

*(a) in the case of a foreign geographical indication, it is not, or has ceased to be, protected in its country of origin:*

*(b) it has fallen into disuse in its country of origin:*

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<sup>1</sup> reg. 49, Geographical Indications (Wine and Spirits) Registration Regulations 2017

*(c) it should not have been registered because it did not meet the requirements of the definition of a geographical indication in section 6(1):*

*(d) it should not have been registered because it fell under 1 or more of the restrictions in sections 10 to 17:*

*(e) it has become a term customary in common language as the common name for a wine or spirit in New Zealand.*

*(2) The Registrar may remove a registered geographical indication under subsection (1) on his or her own initiative, or on the application of any interested person.*

*(3) The Registrar may refuse an application for removal that in the Registrar's opinion is vexatious or frivolous.*

*(4) The Registrar must remove a registered geographical indication from the register when required to do so under section 47C(2).*

Again, a removal can be initiated either by the Registrar or on application by an "interested person". The decision to remove a GI is a discretionary decision, based on specified grounds. The grounds for removal are quite limited and in almost all cases could not apply to the Marlborough GI.

Sections 45(1)(a), (b), (d) and (e) clearly do not apply. With regard to section 45(1)(c), whatever the views about the current boundaries of the Marlborough GI, the Marlborough GI was clearly shown to meet the requirements of s6(1) in the original application (i.e., the definition of a GI). The Registrar has already considered the grounds thoroughly and, in our view, it is very unlikely that they would consider themselves to have been completely mistaken in coming to the conclusion that Marlborough fulfilled the requirements for registration.

In the unlikely event that an application under section 47(1)(c) was successful, this could become problematic for a subsequent application. It would be difficult to present a compelling case for a new Marlborough GI if it has already been argued and decided that Marlborough is not a GI. This could also create trade problems for markets where the Marlborough GI as registered has been formally recognised - specifically via the UK and EU Free Trade Agreements. Consequently, pursuing this option is not advised.

The process to remove a registered GI is largely the same as the process for alteration. There is an additional discretion for the Registrar to refuse an application for removal that is vexatious or frivolous. A GI must be removed from the register if it is not renewed within statutory timeframes. The Marlborough GI is next up for renewal on 27 July 2032.

### Option 3- Create a new Marlborough Sauvignon Blanc GI

An application to create a new Marlborough Sauvignon Blanc GI within the existing Marlborough GI would be the same as for the registration of any new GI. However, because the proposed GI would distinguish itself from the existing GI on the basis of a grape variety name, certain unique considerations would apply.

Any “interested person” can apply for a new GI, and the decision to register is an exercise of discretion on the part of the Registrar.<sup>2</sup> In order to be eligible for registration as a GI, the applicant must demonstrate that the indication “identifies a wine or spirit as originating in the territory of a country, or a region or locality in that territory, where a given quality, or reputation, or other characteristic, of the wine or spirit is essentially attributable to its geographical origin”.<sup>3</sup>

The Registrar has issued extensive Practice Notes in relation to the definition of GI boundaries and of the required evidence of quality, reputation or other characteristic.<sup>4</sup> Without going into the detail, in principle a legitimate GI should be able to gather sufficient information to support registration.

However, in addition to the meeting the definitional requirements, there are restrictions and limitations on the types of indications that can be registered. Of particular relevance is the prohibition on registering a GI for wine that is identical to an existing GI for wine<sup>5</sup> or that is identical to the customary name for a grape variety<sup>6</sup>.

In our opinion, these restrictions could create difficulties for a proposed “Marlborough Sauvignon Blanc” GI because there is a significant risk that the GI would be considered functionally identical to the Marlborough GI. The term “Sauvignon Blanc” is not protectable in itself as a GI since it is a grape variety name.<sup>7</sup> Used in combination with Marlborough, it adds nothing of geographical significance. It is simply a descriptive term that any producer within the existing Marlborough GI might legitimately want to use. The only geographical (and therefore protectable) element is the word “Marlborough” which is identical to an existing GI. That being the case, an application to create a new Marlborough Sauvignon Blanc GI is not advised.

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<sup>2</sup> s.36, GI Act

<sup>3</sup> s.6(1), GI Act

<sup>4</sup> <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/#group-current-practice-guidelines>

<sup>5</sup> s.10, GI Act

<sup>6</sup> s.11, GI Act

<sup>7</sup> The NZ government has generally been strongly opposed to the protection of grape variety names as, or as part of, GIs. Under the EU-NZ Free Trade Agreement, some EU GIs that include grape variety names will be registered. However, NZ is not obliged to protect the element of the GI that is a grape variety name.

## Option 4- Create one or more new sub-regional GIs

The process of applying for registration of a new sub-regional GI is the same as for any GI. Since a sub-regional GI would not be identical to the Marlborough GI, the restriction affecting the Marlborough Sauvignon Blanc GI would not apply.

An application for registration of a new sub-regional GI can be made using the same process previously followed by Wine Marlborough for the Marlborough GI. The application can be made by any interested person, although if it is not supported by the relevant regional or national organisations, this may be a reason for the application for the Registrar to establish a Geographical Indications Committee to advise the Registrar.<sup>8</sup>

Preparation of the application is a substantial task that requires, among other things, gathering evidence that the GI meets the definitional requirements, and preparing the geographic data files showing the boundaries.

The application is submitted to the Intellectual Property Office of New Zealand (IPONZ) together with a fee of \$5000 +GST. The application is then examined by an Examiner within 3 months. If accepted, the applicant is notified and the acceptance is advertised. If the Examiner raises an objection, a Compliance Report is issued and the Applicant is given 3 months to respond to the objection. If accepted, the applicant is notified and the acceptance is advertised. If rejected, the Applicant may seek a hearing.

Once an accepted application is advertised, there is a 3 month period for any opposition to be lodged and, if there is no opposition the GI will proceed to registration no less than 6 months after the application is filed. If an opposition is lodged, the matter will proceed to a hearing. The decision whether or not to register a GI is at the discretion of the Registrar. There is a right of appeal to the High Court from the Registrar's decision.

At any stage, the Registrar can convene a Geographical Indications Committee to advise it on matters including the boundaries of a GI or the use of a place name as a GI. The Registrar may register a geographical indication with conditions as the Registrar thinks fit, including conditions on the use of the geographical indication.

## Option 5- Status quo

Maintaining the status quo requires no further procedural steps until the current term of the Marlborough GI expires in 2032.

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<sup>8</sup> s.53(2)(b), GI Act



## PART 2- CONSIDERATION OF THE OPTIONS

Reviewing the above options from a procedural viewpoint, Option 2 - removal and replacement with a new GI - is not advised because the arguments necessary to achieve removal are unlikely to succeed, they would undermine the credibility of Marlborough GI and any subsequent attempt to re-submit an application for that GI, and they could create negative trade impacts. Option 3 - creation of a Marlborough Sauvignon Blanc GI - is also not advised due to the fact that it is functionally identical to the existing Marlborough GI. Options 1 and 4 are the most procedurally viable, and therefore the substantive and practical aspects of these two options will be considered in more detail below. Status quo also remains an important option against which the other options should be weighed.

### Option 1- Revise the GI boundary

The importance of consensus

Before embarking on any attempt to reduce the size of an existing GI, deep consideration and preparation are needed. This is an exercise that has the potential to negatively impact existing rights and economic interests. Experience shows that when economic interests are threatened, people will fight to defend them. That is why it is extremely rare to see existing GIs reduced in size, even within Europe.<sup>9</sup>

It is essential to acknowledge the potential risks to a GI from a contest over boundaries. There can be very significant financial costs involved. The two biggest cases over the economic rights to use a collective product name in our region - Coonawarra and Mānuka Honey - both involved legal fees reportedly in the millions of dollars and in both cases the parties seeking a more restrictive interpretation were unsuccessful.

A contest over boundaries also inevitably creates a division with the GI involved, which undermines cooperation and collaboration. Finally, there is the risk of negative publicity from having the GI debated and disputed in a public forum. These effects are felt by successful and unsuccessful parties alike.

That is why a strong case for change and a broad consensus of support are crucial to any application to alter a GI. Strong and motivated opposition, even by a minority, can significantly escalate the risks involved with such an application.

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<sup>9</sup> It is far more common in Europe for successful GIs to be expanded - as with Prosecco in Italy, and the perennial discussions about expanding the Champagne production zone in France.

## Determining if the alteration is “necessary”?

Under section 46, in order to change the boundaries of a GI, the Registrar must be satisfied that the alteration is:

- (a) necessary; and
- (b) will not substantially alter the character of the geographical indication; and
- (c) is not likely to mislead the public.

All of these conditions are important, but probably the most significant is condition (a), that the alteration is “necessary”. This would be a difficult condition to satisfy.

The core argument would be that it is necessary to exclude certain areas because they do not share the quality, reputation or other characteristics essentially attributable to the Marlborough GI.

While there is little guidance on interpretation of this condition, “necessary” will be read in the context of the existing Marlborough GI. Therefore, making that argument requires engagement with each of the elements - i.e., the quality, reputation or other characteristics - of the Marlborough GI as set out in the application and the Examiner’s report. It is unlikely to be sufficient to argue that an area lacks just one of these elements, because the Marlborough GI was granted on the basis of evidence about all of these elements.

This requires consideration of a number of further points as discussed below. It also reinforces the value of a consensus approach. The Registrar is less likely to consider an alteration as necessary if those within the GI itself cannot agree that it is necessary.

## The meaning of “quality”

“Quality” in the context of the GI definition refers to an identifiable and distinctive physical characteristic of the product – e.g., taste, colour, aroma - but not necessarily a superior characteristic. According to the application for the Marlborough GI, the GI encompasses a range of qualities from popular-premium to ultra-premium in a range of varieties and styles. The “quality” element of the GI recognised by the Registrar was that: *MARLBOROUGH GI wines display recognisable and consistent sensory characteristics across a range of varieties and styles due to the physical environment as well as viticultural and winemaking practices.* So lower quality potential does not in itself disqualify an area from the GI, as long as the wines show the sensory characteristics of the region. It follows that legally it is not “necessary” to exclude certain areas from the GI solely on the basis of lower quality potential.

## Multi-factor v single-factor GI

The elements of the GI to which the quality, reputation or other characteristics are attributable are complex and interwoven. The GI Act allows for a combination of natural and human factors to be taken into account, similar to other GI regimes such as the EU Protected Geographical Indications and Protected Designations of Origin schemes. In the Marlborough GI registration it is recognised, for example, that the sensory characteristics of wines from the GI are due to both the physical environment and viticultural and winemaking practices.

Therefore, re-defining the boundaries of the Marlborough GI to exclude certain areas solely on the basis of average rainfall as a single environmental criterion would not be a robust approach. It is apparent that the characteristics of wines from the Marlborough GI are not dependent on rainfall alone, and this was not the basis for registration of the existing GI.

Average rainfall is itself only a very rough indicator since it conceals many variables in year-on-year rainfall and in geographical distribution. Determining an average is highly dependent upon the location, timescale and resolution of the measurement. Climate change can be expected to increase that variability and to shift the average over time. All of these aspects mean that a boundary drawn on such a basis would be highly disputable now and into the future.

This is also relevant to the second ground for alteration of a GI - the Registrar must be satisfied that the proposed alteration will not substantially alter the character of the geographical indication. Changing the basis for defining a GI's boundaries from a political boundary based on usage over time to a boundary determined by a single physical factor could be argued to substantially alter the character of the GI.

## Homogenous v variable GI

There is no requirement that the physical aspects of a GI - for example, climate or geology - are homogenous. Variation within a GI may in fact be a distinctive feature. That was the case with the registration of the Marlborough GI. One of the specific characteristics of the GI was: *A range of topography and aspect within the region's many valleys, combined with young and diverse soils and subsoils, create micro-variations across the region - allowing for both a range of styles and complexity within single styles.*

The current Marlborough GI area covers all land within the boundaries, whether suitable or unsuitable. This was consistent with existing usage of the GI and with formal recognition of the Marlborough GI in official documents in New Zealand and overseas. The overall size of the Marlborough GI was a specific characteristic of the GI that was recognised in the registration process

as follows: *The region's total land area is over 17,500 square kilometres which allows the development of both large-scale and boutique wine companies.*

The rationale for this approach is that it is not necessary to exclude unsuitable land from the GI because its unsuitability rules it out of wine production. If wine can viably be made there, then the land is potentially suitable. In a comparatively young region, this approach it allows for continued exploration of the terroir. The history of Marlborough and other South Island regions is a history of pioneering producers exploring unplanted regions that were previously considered unsuitable.

Again, the question of whether the alteration substantially alter the character of the GI is relevant here. The current character of the GI is non-exclusive and does not limit further development. Therefore, introducing limitations on further development could be argued to substantially alter the character of the GI either by the Registrar or an opponent.

### Anti-competitive behaviour

Economic arguments can be part of the matrix of factors that leads to the registration of a GI. However, care is needed to ensure that, by excluding areas from the Marlborough GI, producers are not seeking to block competition from lower priced products that would otherwise be entitled to use the GI. This is unlikely to be considered "necessary" and could risk breaching the Commerce Act.

### Option 4- Sub-regional GI

Because of the difficulties involved with reducing the boundaries of an existing GI, one strategy that is used to distinguish the more established or "classic" areas within a large GI is to create sub-regional GIs. The practical considerations involved with an application for a new sub-regional GI are far less onerous. There is no need to meet the tests required for the alteration of a GI. What is required instead is to provide evidence that the new GI meets the requirements of the GI definition.

This option will not prevent the development of previously unplanted areas under the Marlborough GI. But it will create a basis for differentiating and telling different stories about the various parts of the wider GI region. The basis of a new sub-regional GI does not need to be the same as the basis for the Marlborough GI. This option also does not eliminate the risk of division within the GI; on the contrary, it creates a formal geographical division. However, because it does not risk excluding people from existing economic rights in the Marlborough GI, there is less likely to be motivated opposition.

### Option 5- Status quo

All options should be measured against the status quo. Under this option, there is no additional cost and no risk in terms of a new application process. The question of whether the concerns that have

been identified by members outweigh the cost and risk involved with Options 1 and 4 is a threshold question for Wine Marlborough to determine before proceeding.

## **PART 3- MOVING THE DISCUSSION FORWARD**

### **Determine if there is a case for further action**

In the first two parts of this Report, we have examined the various options and the particular considerations that each option entails. But before making a decision about any of these, it is necessary to take a step back and examine the problem that these options are intended to resolve and determine whether there is a case for Wine Marlborough to take the matter further.

The starting point is the concern that the expansion of vineyards into less suitable areas within the Marlborough GI will lead to poorer quality products, which will in turn undermine the reputation of the Marlborough GI. It seems, however, that this concern may not be shared by all members. For a major change to a GI with potentially significant implications, a strong evidential basis and a thorough consideration of costs and benefits are required to establish whether or not there is a case for further action.

It is proposed as a first step that a sub-committee is formed to examine the nature and extent of the problem, identifying any other steps that might be taken to address the problem, and the weighing the costs and benefits involved in changing the GI. If the sub-committee determines that the case has been made for further action, this should put to the Board.

### **Seek a mandate from the membership**

Since changing the GI is a matter that can affect all members, it is strongly advised that a mandate should be sought from the membership for moving forward. If the Board decides that there is a case for seeking to change the GI, the options should be put to the membership for consideration.

This should follow a process similar to the process used for determining the boundaries of the Marlborough GI in the first place. There should be programme of communications including a public, in-person meeting (or meetings) to present the issues and the options to Wine Marlborough members. Members could be asked to provide feedback by a certain date or complete an online poll as to their preferred option.

### **Prepare the application**

If there is a mandate to pursue a change to the GI, then the next step is to prepare the application. This is a significant task and will require a dedicated committee as well as staff resource and/or

outside consulting or legal services. If Option 1 is chosen in particular, it may be necessary to seek legal advice on meeting the statutory requirements for alteration of a GI.

Once the application has been prepared, it should be circulated to the membership for comment - as was done with the original Marlborough GI application. If there are points of contention that could lead to a possible opposition, it is preferable to try to negotiate a resolution to these before proceeding as this will be less costly and polarising than an opposed application. Again, there should be a strong mandate for the finalised application to maximise the chances of success.

## The application process

After the application has been filed, it will be examined by IPONZ as the Registrar. The timeframe and process will depend upon the type of application made - alteration or new GI. It is possible that the Registrar will have some questions or request further information during the process, even if their view is generally favourable. It is also possible that there will be an opposition. Both of these eventualities will involve some degree of additional cost that will need to be provided for. This may be considerable in the case of an opposition. Throughout the process, it will be necessary to manage media and publicity - but this will particularly be the case if the application is opposed.

## CONCLUSION

In conclusion, our view is that applying to alter the boundaries of the Marlborough GI by significantly reducing the area of the GI will involve some legal complexity and, in the event of strong and motivated opposition, there is a serious risk of cost escalation, division within the GI, and negative publicity.

Applying for one or more sub-regional GIs has a lower level of legal complexity. There are nevertheless risks from an opposed application where people are cut out of a sub-region that they consider themselves entitled to use.

In respect of both options, there is still work to be done to understand the extent of the actual risk and the likelihood that changing the boundaries will address this risk. The risks and benefits of both options should be considered against the status quo.

Before moving forward with any option, a mandate from the members must be clearly established and supported by a strong consensus.