



Australian Dairy Industry Council Inc.



**Australia-EU FTA
Geographical Indications
Public Objections Process**

**Submission by:
Australian Dairy Industry Council
and
Dairy Australia**

November 2019

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**SUBMISSION TO OBJECT TO TERMS PROPOSED BY THE
EUROPEAN UNION FOR PROTECTION AS GEOGRAPHICAL
INDICATIONS IN AUSTRALIA**

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Executive Summary

The Australian Dairy Industry Council (ADIC) and Dairy Australia welcome the opportunity to provide comment on the Geographical Indicators (GIs) public objections process and the list of dairy products the EU is seeking to protect in the Australian market, as part of the Australia - European Union Free Trade Agreement (Aust-EU FTA).

The ADIC is the peak national representative body of the Australian dairy industry, representing the interests of dairy farmers and processors across the entire dairy value chain, to create a more prosperous and sustainable future for the dairy industry. This submission represents the views of our members.

Dairy Australia is the national services body for dairy farmers and the industry. Its role is to help farmers adapt to a changing operating environment, and achieve a profitable, sustainable dairy industry. As the industry's research and development corporation (RDC), it is the 'investment arm' of the industry, investing in projects that cannot be done efficiently by individual farmers or companies.

Australia is a multicultural nation with a significant portion of the population of European heritage. According to the 2016 Census over 6 million or 30 per cent of Australians were born overseas and over 300 languages and ancestries are identified. Six of the ten most common ancestries reflected a European heritage.

The Australian dairy industry is a supporter of an open trading environment and welcomes free trade agreements that create market access opportunities between countries. We raise significant concerns with the overly restrictive and anti-competitive nature of the proposed GIs regime on Australia. The EU's attempts to seize common food names, unfairly displace Australian products and misuse its market powers are unjustified. In effect, they will privilege one set of food producers – those in the EU – over others.

The blanket adoption of the EU's request for the GI protection of 56 cheese products would impact a considerable proportion of Australian cheese production and exports, with costly implications for local sales, marketing and employment. Put simply, it undermines many of the recipes, brands and businesses that have long been established by hard-working Australian families of mostly European descent.

Further negotiations are mandatory to ensure an Aust-EU FTA that is workable and fair for both parties.

The dairy industry provides the following positions and recommendations for negotiations as part of the IP Chapter in the Aust-EU FTA:

1. We strongly oppose the 'blanket adoption' of the EUs current GI request for the 56 cheese products it is looking to protect in the Australian market:
 - Many of the cheese names are widely considered to be common food names.
 - *The Australian dairy industry must have an ongoing right to use of common food names that are part of the public domain.*

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2. Existing trading rights must be upheld, and not overridden or nullified by the IP outcomes of a FTA:
 - Many of the GI names proposed for protection in Australia are covered by existing trademark protections under Australia's domestic intellectual property laws;
 - Many of the requested cheese names have well established unique tariff codes and rules governing their access to various domestic markets including the EU;
 - Many local Australian firms have well-established local, registered trademarks for their products, reflecting their ethnic background and traditional skills base of migrant owner operators;
 - *The Australian dairy industry asks that any discussion relating to GIs must recognise and protect the continuity and standing of well-established local Australian dairy company trademarks.*
3. The FAO's Codex Alimentarius has established 16 individual agreed standards, with clear defining product characteristics that are recognised and used internationally:
 - Australia should retain the right to continue to produce, sell and export these cheese varieties without restriction;
 - *The Australian industry rejects the inclusion of any of these Codex Standard cheeses in any final list of protected GIs under a FTA with the EU. We also reject any limitations being imposed on the future marketing of Australian-produced Codex Standard cheeses via any GI-related evocation rules in any FTA.*
4. Evocation provisions should not apply to any Australian dairy products that are exempted from any final GI protection provisions. This will include:
 - Continued production and sales rights for all Australian products that are not subject to direct GI protections;
 - *No restrictions being imposed on the future use of colours texts, flags in the labels of Australian dairy products whose names are exempt from GI protection (with clear rights regarding future usage being set out in any agreed texts).*
5. In addition:
 - *The Australian dairy industry asks that there be no expansion of any initially agreed list of EU dairy GIs. If, however, provisions for this are negotiated as part of any FTA, clear guiding principles, including an administration/objections process must be in place.*

The public objections process seeks comments on the EU's request on a product-by-product basis. These are attached and provided as commercial-in-confidence (and not to be shared with the EU).

The final consideration of the EU's requests for the extension of GI protections to any product in the Australian dairy market as part of an FTA must take full account of a number of general facts and principles that apply simultaneously to many different cheese names and varieties. These are set out below and should be taken to apply equally to each of the attached product specific submissions.

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Basic Facts

As part of its effort to protect and advance the interests of its domestic dairy industries, the European Union currently classifies 242 dairy products (236 cheese designations and 6 butters and creams) as Geographical Indications (GI) or Protected Denominations of Origin (PDO).¹ Under EU rules, granting GI status to the producers of a specific product makes it unlawful for all other producers in the EU market to either:

- Directly or indirectly use this GI name in their commercial sales of any comparable product;
- Misuse or evoke a GI name in their sales of any comparable products, even if these products indicate their true (non-GI) origin, use a translation or transliteration of the protected name or are sold with accompanying descriptors such as “like”, “style”, “type”, “method”;
- Mislead EU consumers as to the true origin, nature or qualities of their product.

In its FTA negotiations with Australia the EU has requested that the above rules and protections be extended to the Australian market (and potentially to Australian food exports). The EU has submitted a list of food names - including 61 dairy products (56 cheeses, 4 butters, 1 cream) – that it wants Australia to recognise and protect as European-origin GI/PDOs in our market.²

The EU argues that its aims in extending GI protections are, firstly, to protect consumer interests and, secondly, to protect small-scale traditional European producers. The selective number of dairy products included in the EU’s GI protection list suggests, however, that their primary objective in this aspect of any FTA is to secure an ongoing commercial advantage for EU manufacturers in the EU, Australian and potentially third country export markets by limiting competition for numerous common cheese names in those markets.

While recognising the EU’s interest in protecting its own industries, the Australian dairy industry strenuously opposes the blanket adoption of the EU’s request in its current form.

In the case of cheese, the 56 names incorporated in the EU list account for a considerable proportion of current Australian production and exports. Therefore, the blanket approval of the EU request would cause considerable, and unnecessary, hardship and loss to Australian dairy industry participants, business supply chains, as well as confusion for customers of Australian dairy who have grown up with these well-established names. It would also damage the regional communities that support and benefit from Australian dairy production.

Given the large volumes of product involved, a blanket extension of GI rules on implementation is also very likely to cause significant disruption to local market supplies and market balance in the immediate aftermath of any FTA.

¹ *Europa – Electronic Denominations of Origin register (D.O.O.R) September 2019*. A further 35 products are subject to incomplete GI / PDO application processes – although a third of these applications involve requests to amend existing regulations governing the production and sale of already registered GI products (e.g. Edam Holland)

² *For simplicity, the term GI will be used to cover both Geographical Indications (GI) or Protected Denominations of Origin (PDO) from here on in.*

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The dairy industry strongly opposes the 'blanket adoption' of the EU's current GI request for the 56 cheese products it is seeking to protect in the Australian market.

Important General Issues/ Principles

Rather than giving blanket approval to the EU's public position, any consideration of the possible extension of GI protections to the Australian dairy market must take careful account of a number of general issues and principles. These include:

- I. **Existing Trademark Protections:** Australia already provides a functional mechanism by which EU producers (individually or in association with one another) and importers can protect the sale of their products in Australia through our current trademark system. In fact, almost a quarter of the cheese names for which the EU is seeking GI protection in its draft request list are already (or have been) protected under Australian domestic trademark law. For example:
 - Seven names - Asiago, Grana Padano, Montasio, Mozzarella* di Buffalo Campagna, Parmigiano Reggiano, Roquefort and Stilton – have current Certification or Collective Trademark protection in Australia;
 - Provolone* Valpadana previously had certification registration but this has lapsed;
 - A further five names - Gorgonzola, Queso Manchego, Pecorino* Romano, Pecorino Toscano and Taleggio - have Certification protection in relation to their marketing logos in Australia;
 - Importer companies have successfully trademarked multiple brands of European origin product that include the names Comte, Feta*, Piave and Vacherin.
 - There is also an existing trademark for Camembert* Fabrique en Normandie.

** For the names marked with an asterisk above, IP Australia has also allowed local firms to register trademarks for products that incorporate these names.*

This means that if the EU firms or organisations that own the above trademarks can continue to demonstrate that they meet the requirements of domestic law, their sales will continue to be fully protected in this market without the need to resort to any additional GI enforcement rules. GI enforcement would simply shift the cost of maintaining this protection away from current EU rights holders to local authorities, while leaving Australian firms exposed to a full user-pays system. This would be commercially unfair and impractical.

The dairy industry requests that existing trading rights must be upheld, and not overridden or nullified by the IP outcomes of a FTA.

- II. **Cheese Names and International Trade:** A common characteristic of world cheese trade is that many countries have established tariff classification codes and rules governing import access to their domestic market based on the specific varietal names of different cheeses.

The EU Tariff Schedule identifies 59 individual cheese varieties in its tariff subheadings under 04.06. The EU subjects the entry of these individual cheese varieties to significantly different tariff duty rates, import access rules and volumetric tariff rate quota access provisions. The entry of named varieties into the EU market is essentially impossible under different generic tariff headings because of differences in the provisions relating to acceptable fat, moisture content, etc of different cheeses.

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In fact, of the 56 cheese varieties included in the EU GI request list to Australia no fewer than 16 of these cheeses are separately identified in the EU Customs Tariff as specific product descriptors for importable cheeses. This list including Asiago, Cantal, Feta, Fontina, Fontina, Grana Padano, Gruyere, Kefalograviera, Kasserli, Parmigiano Reggiano, Saint Nectaire and Taleggio. A further 10 cheese varieties with unique identifiers in the EU Tariff are common generic cheese names that have been incorporated into the multi-component names of specific EU GI products. These generic cheese names include Brie, Camembert, Cheddar, Edam, Gouda and Mozzarella.³

In past GI protection rulings, the EU has argued that there is no link between its own customs law and the intellectual property protections it has given EU firms via its decisions on the GI status of particular product names.⁴ This is clearly not the case. For all the above cheese names, Australia's access to the EU market (and third country markets) will be fundamentally altered if Australian firms are no longer able to use these names in future trade.

For example, in the case of Feta cheese, the EU traditionally provided access to its market for this cheese denomination through a separate tariff classification (04.06.90.32) and an associated Tariff Rate Quota. Following the declaration of Feta as a Greek GI, these market access rights have been effectively nullified. Equally, Australian firms' historical rights to export Feta to third country markets that have subsequently agreed to enforce EU GI rules in their domestic markets (such as Canada and Korea) have been nullified by these decisions.

The rules and decisions about what a cheese can be called have massive implications for their ability to be traded into specific markets and the economic value and viability of variety-specific market access entitlements that have been agreed to under different WTO, regional and bilateral trade agreements.

Australia's dairy industry sees no reason to allow the IP outcomes of any FTA to override and nullify our existing trade rights. Australia's current IP processes and rules are appropriate and adequate for Australia, and any discussion relating to GIs must recognise and protect the continuity and standing of well-established local Australian dairy company trademarks.

Equally importantly, Australia identifies import access to our market for various cheeses by their product name (e.g. we have established separate 10-digit HTS Tariff descriptors for Cheddar, Fetta, Parmesan and Mozzarella cheese). Australia also provides preferential access to our market for these cheese products under a range of pre-existing FTAs (e.g. Australia - New Zealand Closer Economic Relations Trade Agreement [ANZCERTA], and the Australia - United States Free Trade Agreement [AUSFTA]).

Agreeing to the EU GI requests would affect the future access and marketing rules applying to these cheeses. It would place Australia at considerable risk of having to make additional compensation to our non-EU trade partners to offset the impairments to their market access brought about by dairy GI extension in this market.

³ See EU Official Journal L282 (31 October 2017), Pages 81- 83.

⁴ For example, in Regulation 110/2013 the EU argued that the prior existence of a specific tariff code for imports of Gruyere and related tariff rate quotas for this specific cheese should not be seen as relevant to a debate on the protection of intellectual property rights via GI registration for this cheese.

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- III. **Standard Cheese Names:** In line with the traditional Customs Tariff focus on cheese names, world dairy has long debated whether developments such as migration, technology transfers, spread of production etc. have resulted in individual product names that originated in one location morphing over time into common generic names or whether some products retain their regional specific basis.

In the Stresa Convention of 1951, international governments (including EU members such as France, Denmark and the Netherlands) created two agreed lists of cheese denominations – one that covered regional specific names (Annex A), the other (Annex B) that covered products that were identified by their common physical characteristics (i.e. generic cheeses) for production and trade purposes. Yet almost 70 years later the EU is seeking GI protection in its FTA list for at least four Stresa Convention Annex B (generic) cheese names – Asiago, Danablu, Fontina and Gruyere. **This is an unacceptable reversal of past positions.**

Both Australia and the EU member states are also members of the FAO Codex Alimentarius. This body develops internationally agreed food standards and related codes of practice to provide a global reference point for consumers, food processors, national food control agencies and international food trade. Codex has established 16 individual Cheese standards – which members recognise as individual cheese varieties that have clear, defining product characteristics and are concurrently produced, traded and consumed across a range of countries. These Codex standard cheeses include - *Brie, Camembert, Cheddar, Danbo, Edam, Emmenthal, Gouda, Havarti, Mozzarella, Provolone and Tilsit.*

The Australian industry rejects the inclusion of any Codex Standard cheeses in any final list of protected GIs under a FTA with the EU. We also reject any limitations being imposed on the future marketing of Australian-produced Codex Standard cheeses via any GI-related evocation rules in any FTA.

In this context, the EU, regrettably, has acted to extend GI protections in its internal market to two Codex Standards – Danbo and Havarti – in recent years.⁵ While these two names are not included in the current GI request list, Australia must make it very clear that such names will never be accepted as GIs in the Australian market under any future FTA list adjustment processes.

- IV. **Protection of Existing Trademarks:** An important test of fairness in any FTA is that it must not undermine (intentionally or otherwise) the commercial viability and value of longstanding Australian dairy company trademarks.

Given Australia's strong multicultural heritage, over past decades many local dairy firms have registered trademarks for their products that reflect the ethnic background and traditional skill base of their migrant owner operators. Examples of this include firms such as Perfect Italiano Cheese, Florida Cheese, Pantalica Cheese, La Casa del Formaggio or Lemnos Foods. Many of these have been registered for decades, and some for almost 100 years.

⁵ These decisions were made with the full knowledge that the EU had previously agreed in Codex that the two names were agreed International Standard cheese names, and that both varieties are separately identified importable cheese names in the EU Customs Tariff.

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All of these firms have well-established local trademarks that incorporate, to varying degrees, European colour schemes, place names or words. Florida and Pantalica for example are Italian place names reflecting the birthplace of their company founders. Lemnos is, in fact, a direct translation of the Greek, Λήμνος (Liminou) which is part of a multi-component product name being sought as a GI by the EU. Similarly, Perfect Italiano is named after Italian migrant, Natale Italiano, who arrived in Australia in 1922 and founded the company based on Natale's "dream of bringing Italian style cheese to Australia".⁶

At a product level Australian firms have established trademarks that incorporate common cheese names such as Fetta (e.g. Yarra Valley Dairy's *Betta with Fetta* or Pantalica Cheese's *Fresh Pecorino*).

Similarly, any FTA, must also ensure that the continuity and standing of local trademarks that incorporate words such as "Farmhouse" or "Blue" are not adversely affected by any list of protected names.

The industry strongly opposes the extension of GI protections under any FTA (and its associated evocation provisions) to negatively impact on the future continuity, viability and value of Australia's long-standing local trademarks in relation to the sale of common name cheeses.

- V. **Precedents/ Exemptions/ Clarifications:** Rather than pursue the adoption and protection of all its dairy GIs in recent FTAs, the EU - as it is doing with Australia - has only sought GI protection for a limited (and varying) sub-set of GI names⁷. Generally, the names which the EU seeks protection for are those cheeses where it sees that GI enforcement would deliver a significant commercial trade advantage for EU firms in export markets.

This implies that the EU's approach to GI extension is much more driven by potential market gains in specific country markets than it is by any desire to protect local consumer interests.

In other recent FTAs the EU has also provided significant clarifications to (and exemptions from) how its GI protections should be applied to specific cheeses in different partner countries. These exemptions sensibly reflect some of the commercial market realities in specific markets. A useful example of this is the Appendix to Annex II of Chapter XX in the draft EU: Mexico Global Agreement – which sets out a broad group of generic product names for which GI protection is not sought and which are exempt from evocation restrictions under the agreement.

Failure to treat Australian dairy consistently with our major competitors would be a major drawback of any FTA and would unnecessarily exacerbate its negative impacts on local producers and communities.

⁶ See Perfectitaliano.com.au

⁷ For example, in the JAEPA Agreement with Japan, the EU only sought GI protection for less than half the cheese names it is seeking protection for in Australia. In CETA with Canada, the EU did not seek protection for Gruyere as it has in Australia, but did seek protection for a number of cheeses that it has not included in the Australian request list (such as Pecorino Sardo)

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VI. **Future Adjustments to any GI List:** While the EU, to date, has sought FTA protection in Australia for only a subset of its existing registered (and partially registered) GI names it is clear that it will seek to have any FTA include some mechanism that will allow it to pursue future extensions of any list of agreed GI names. While claiming to protect traditional products, the EU continues to add new GI names to its list of protected products each year.⁸ Therefore, the dairy industry is concerned that the EU will continue to seek to add more cheese names to the list of GIs protected in Australia, as has been seen in the wine industry, most recently with prosecco. Australian dairy does not see that this is necessary (as any such extension requests can be dealt with equitably under Australia's existing certification trademark arrangements). However, if such an arrangement were to be agreed as part of any FTA, then some clear guiding principles for this must include:

- No future claims should be accepted for pre-existing EU GI names that the EU was not seeking protection for at time of entry into any FTA (i.e. only EU GIs newly created in future years should be eligible for any review);
- No future claims should be allowed for any EU products that do not incorporate identifiable regional place names. This means that products such as Havarti (derived from the Danish word for riverbank) and Halloumi (a Greek word historically loaned from Egyptian Arabic (halum) and Coptic words for cheese) are not eligible for any future protection claim;
- No future claims can be made for any Codex International Standard cheese names;
- Local industry bodies and firms, and any other interested parties, must have a clear right to oppose and object to individual requests well before there is any consideration given to accepting or registering additional names (and to appeal such preliminary decisions).
- Evidence of either the continued Australian production of products subject to an extension claim prior to, and after, the signing of any FTA, or their inclusion as an identified stand-alone name in the EU or Australian Customs Tariffs should be sufficient grounds for excluding any EU claim for additional GI protection.

The Australian dairy industry asks that there be no expansion of any initially agreed list of EU dairy GIs (and protected Australian dairy products). If, however, this is negotiated as part of any FTA, then clear guiding principles, including an administration/objections process, must be in place.

Interacting Elements of any FTA: It is also crucial to recognise that, by themselves, provisions exempting specific dairy products from GI protection under any FTA may not be sufficient to protect ongoing local industry rights. The full impacts of GI protection under a FTA will depend critically on how any GI rules interact with other elements of the final text including any evocation rules and/or market access arrangements.

The final outcome for Australian dairy producers will depend on whether the FTA's GI safeguards are accompanied by clear and concise understandings in related FTA texts in relation to:

- The future use of colours, labels, texts and flags in Australian non-GI products
- Interpretations of what messages, devices would mislead local consumers, and
- The relationship between GI protections and existing trademarks.

⁸ In the past six months (i.e. since late May 2019), the EU Commission DOOR shows that it has registered one new cheese GI (Dzugas), published its intention to register a further eight GIs and accepted applications to register a further three cheese names. The publication stages include provisions to relax the rules governing the production and marketing of long standing GI denominations such as Asiago and Grana Padano.

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Similarly, decisions relating to reciprocal amendments to existing cheese tariff duties will also have an important bearing on the commercial outcome and required speed of industry adjustment under any FTA.

Therefore, a proper and complete assessment of the commercial consequences of all these potential interactions is needed before any final decisions can be made on the EU GI request list.

The Australian dairy industry insists that the evocation provisions of any FTA must not impose any restrictions on the future use of colours texts, flags in the labels of Australian dairy products whose names are exempted from GI protection, and that clear rights and rules regarding future usage are set out in any agreed FTA texts.

VII **The Importance and Transferability of Cheese Making Skills:** As noted above, Australia is a very successful multicultural nation. In the case of dairy, the websites and marketing materials of many Australian cheese manufacturers clearly identify how important the cheese making skills and knowledge learnt by key staff prior to their migration to Australia have been to the development of their businesses and product mixes to meet local demand. This historical transfer of skills and its importance in the development of Australian dairy must be effectively recognised in any FTA debate on GI protections.

When registering GI names, the EU nominates the importance of “terroir” (i.e. location, available feed and climate) in determining the final characteristics / quality of a specific GI. However, it also recognises the importance of cheese making processes and skills in product outcomes. For example:

- In 2013 the Consorzio del Formaggio Parmigiano-Reggiano, while noting the importance of “terroir”, identified that the traditional cow-rearing skill and the cheese production methods and knowledge used to manufacture it were equally important to Parmigiano Reggiano’s distinct quality, taste and success.⁹
- The current GI regulation for Grana Padano (2019/C188) notes the causal link between the characteristics of the product and the ‘casaro’ [cheesemaker] whose skills are of central and fundamental importance in the task of transforming milk into ‘Grana Padano’.
- The EU Parliament’s Foodstuffs Regulation of 2012 allows a product to continue to be designated as a GI even if the live animals, milk or meat that are used as raw materials in its production come from a geographic area that is larger, or different from, the GI’s defined geographic area, provided certain production conditions are met.¹⁰

As has been noted in past discussions in the World Intellectual Property Organisation (WIPO) Journal, if the EU is prepared to permit GIs to be produced from live animals, meat or milk that are sourced from outside their identified geographic area within Europe, it seems logical that it should also agree that cheese producers who have migrated to other countries but who use the traditional

^{9.} Consorzio del Formaggio Parmigiano-Reggiano, *The King of Chees and its IP Crown*, WIPO, November 2013

^{10.} EU regulation 1151/2012. Official Journal L343/1 November 21, 2012

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production techniques learned in their original homeland in manufacturing products can use the same nomenclature to describe these products.¹¹

Conclusion

The Australian dairy industry rejects the EU's attempts to extend its GI protection and evocation regime to the Australia dairy market. For local farmers, speciality cheese makers, larger processors and consumers, there is a real need to ensure Australian firms can continue to use common food names that are part of the public domain unencumbered under any FTA. These names have been used by Australian manufacturers for generations. Therefore, the potential negative impact on Australia's dairy industry of removing these existing rights is significant.

The impact of a strict agreement on GI protections will be keenly felt by farmers, with the possibility of lower demand for raw products that will impact on farmers' returns. Reduced company sales and revenues will flow through into weaker demand for off-farm milk and negatively affect regional farmgate prices.

There will also be a substantial impact on cheese manufacturers around the country. This includes large processors and more local, award-winning, specialty cheese makers. Many cheese makers brought their cheese making skills from Europe, as migrants to Australia, forming part of Australia's rich migration story. These businesses are often significant employers, who have grown their business over preceding decades.

All of these Australian businesses, small and large, must be allowed to continue to produce the products they are currently producing, using the well-established cheese names that are common food names.

¹¹. M Blakeney - GIs - What do they Indicate? - The WIPO Journal, Vol. 6, 2014, Pages 50-56