

LOCAL TO GLOBAL: PROVENANCE BRANDING AND FARMER CO-OPERATION FOR HIGH VALUE EXPORT MARKETS

This report concerns how farmers can best secure maximum returns from producing high quality local food products for overseas markets where consumers are willing to pay higher prices for products reliably identified as special local foods from the many Australian regions.

It proposes that farmers can benefit from collaborating to produce such high value goods for international markets and to protect the resulting returns. Mechanisms for provenance brand protection in key export markets such as China and Japan are examined, along with options for Australia to better take advantage of the protection offered by such systems.

In recent years, Australia has undergone unprecedented agricultural changes. Australia is now among the top ten agricultural exporting countries in the world. Australian agriculture has high regulatory standards in terms of food quality and safety resulting in a clean and green image that appeals to consumers in other countries, particularly those in Asia.

Where high value foods are locally produced in Australia and sold in foreign markets, provenance brand recognition and protection is critical. However, brand values are threatened by free-riding, which reduces returns to Australian farmers from their investment in producing high quality consumer-oriented food products.

While consumer interest in the provenance of food products is growing in Australia, it is already well established in export jurisdictions such as China and Japan, where consumers have traditionally focused on the local origin of their favourite foods.

This Report explores the opportunities farmers investing collaboratively in local value-adding have to protect their common reputation through provenance branding. The Report stresses that although they can utilise technological means to combat fraud, they must also take full advantage of the legal options and strategies available.

The Report aims to determine how Australian farmers collaborating in a particular area can maximise the value of the provenance brands that reflect their local product qualities in important export markets such as China and Japan, and by analogy in other Asian markets.

The Report argues that the introduction of an Australian Geographical Indication (GI) register for all foodstuffs could enhance the potential for farmers to combat free-riding in such countries. China and Japan as well as other Asian nations have GI protection systems in place that Australian producers could benefit from. However, domestic Australian GI registration is a precondition for such foreign protection. The Report also argues that close local collaboration will allow farmers to take full advantage of developing export demand.

“Close local collaboration will allow farmers to take full advantage of developing export demand.”

These conclusions are based on a qualitative study including a review of relevant literature, 35 semi-structured interviews and in-country fieldwork in Australia, China and Japan. The interviews were conducted across a considerable breadth of agricultural industries (including livestock exporter industries such as beef, and dairy industries); legal practitioners; judges; experts and officials.

The interviews unlocked detailed information about the present state and probable future development of provenance brand protection in some of Australia's critical Asian food export markets. They revealed the strategies being deployed by various nations to enhance reciprocal protection of GIs.

The report tracks the moves of the European Union in this regard and the reaction of Chinese and Japanese officials. It determines that Australia could strategise more effectively to maximise potential benefits from reciprocal GI protection in trade negotiations. Australia should consider acquiring its own domestic GIs and actively seeking their protection in overseas markets.

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WHO IS INTERESTED?

The report is targeted at two main groups of stakeholders concerned about Australia's high quality locally produced foods and the use of provenance branding to maximise their value.

- Firstly, decision makers including rural co-operation and development specialists; intellectual property law specialists; international trade negotiators; state and regional branding administrators; and competition law specialists, interested in the legal instruments that will maximise provenance brand protection in Australia and abroad.
- Equally, farmers who are interested in collaborating around value-added local food products and developing a provenance branding strategy will benefit from this Report's findings; co-operatives; regional and local councils; farmers groups and associations.

“ Farmers who are interested in collaborating around value-added local food products and developing a provenance branding strategy will benefit from this Report's finding. ”



KEY FINDINGS

- Export trade involves additional cost burdens which farmers will be able to afford through effective collaboration and cost-sharing. Australian agriculture is highly deregulated with a strong sense of individualism and hyper-competitiveness. However, a shift is proposed where farmers use a range of collaborative options available to them, firstly to invest in the production of high value consumer-oriented products, and secondly, to protect resulting returns derived from trading such high value goods in international markets. Farmers' collaboration should be based on a sound legal footing, that is, on an appropriate and well-structured legal vehicle such as a co-operative, company or association.
- Technological remedies against free-riding are currently in use and constantly being adapted to new challenges from imitators and counterfeiters. Some producers have taken the path of using solutions such as holographic marks, QR codes and increasingly complex markings on boxes. These self-help technological authentication and prevention measures are interesting solutions but tend to be efficient only in the short-term with fraudsters being more and more sophisticated and proactive.
- A critical finding of the in-country research is that it is also essential to deploy an operational legal strategy with proactive registration of marks and brands, effective policing and a visible effort at enforcement. This should allow farmers to more effectively capture and protect the additional value they create by generating provenance-based goodwill in those markets.

“ It takes time to build a brand but consumers are interested in what is new. If you tell the story about where it is from, people really take an interest in it. ”
(Respondent # 14)



“ Australia is pre-empted all the time by EU but at the same time as we can't beat them so join them. ”
(Respondent #14)

- Based on solid organisational underpinning, farmers can benefit from implementing an effective provenance brand with real and visible in-country presence and a robust knowledge of the legal system in the relevant country. Although the 'Australian made' label is valuable in foreign markets, consumers are becoming more and more sophisticated and prepared to pay more for specific 'terroir' products with which they are familiar and which they trust.
- Globally, the GI system is becoming increasingly important. This Report concludes that it is well-developed in China and Japan and growing particularly in the rest of Asia, largely under EU influence. For the EU, the implementation of a unique or sui generis GI system for food stuffs is now a precondition for the conclusion of any free trade agreement. In the export countries visited by the research team, EU GIs are often protected by way of direct government-to-government protocols with exchange of lists of nominated GIs to be registered in each country.
- To obtain GI registration in China and Japan requires a domestic GI registration system. In Australia, this option is currently only available for wine. The Report demonstrates that there is a strong argument for the GI scheme to be extended to all food products. This should enable Australian producers, either individually or through Australian government negotiations with foreign jurisdictions, to benefit from an en bloc protection (with an exchange of lists). Thus, the implementation of a GI system in Australia would enable processors to register a GI locally but also to use it for provenance brand protection in foreign markets.

HOW CAN AUSTRALIAN FARMERS BEST PROTECT PROVENANCE BRANDS IN EXPORT MARKETS AND IN AUSTRALIA

This project finds that in China and Japan the collective/certification trade mark systems and sui generis registered GI schemes are well-established with particularly accelerated development of the latter. It is important for Australian producers to have an in-depth understanding of these systems and conditions of registration in order to effectively protect provenance brands.

The Chinese system

In China, the place name of origin can be registered as a certification or a collective mark rather than as a standard trade mark, by the China Trade Mark Office (CTMO) within the State Administration for Industry and Commerce (SAIC).

A two-track system

If a trade mark is infringed, the applicant may either start legal proceedings or resolve the matter by referring it to an administrative body. Most applicants (especially if smaller targets are pursued) will choose the administrative track, which is shorter and less complex. Administrative authorities are empowered with important investigative and command authority. The administrative track does not result in compensation but in practical countermeasures.

Both the administrative and judicial regimes are quite efficient with consistency and transparency and an emerging jurisprudence. However, Australian producers should be aware that a trade mark is a private right and the onus of proof is on the applicant individually to prove the merits of their case. The local modalities of the system have to be well understood and respected.

Certification marks or GIs?

The downside of a certification or collective trade mark is that they are subject to all trade mark exceptions and derogations, including good faith use to indicate place of origin. This may water down the value of a certification or collective mark in an export jurisdiction.

As an alternative, the Chinese sui generis GI system extends to foreign registered GIs. When the right is granted, a GI logo is applied to the product, which provides a government stamp of approval. While the enforcement regime is only administrative and still uncertain, GIs are not subject to the same exceptions and derogations as the trade mark system.

The Chinese GI system is improving with increased collaboration with other jurisdictions. The Report highlights some relevant case studies where the Chinese Government intervened successfully and actively pursued food fraud for European GIs registered in China (see the Scotch Whisky, Cognac and Champagne cases). Being able to rely on government intervention to pursue en bloc protection for Australian GIs is a strong argument for the Australian government to introduce a domestic GI system.

“ Chinese consumers need a stamp of approval from objective judges. ”
(Respondent # 15)

» **Table1: Options available in China to protect provenance brand**

	GI	Regional collective trade mark (RCTM)
Relevant laws	Provisions for the Protection of Products of Geographical Indication.	Trademark Law of the People’s Republic of China.
Institutions and filing	General Administration of Quality, Supervision, Inspection and Quarantine (AQSIQ). Application is filed with the local AQSIC representative authority and reviewed centrally.	China Trade Mark Office (CTMO), within the State Administration For Industry & Commerce (SAIC).
Opposition	An objection is possible by the expert committee which examines the application.	Three month period for opposition by interested parties.
Exceptions / protection	Most extensive protection, no exceptions apply. The GI owner can prevent third party use of the GI even in good faith. Consumer deception never needs to be proved.	Certification and collective trade marks are subject to all the normal registered trade mark exceptions. The trade mark owner cannot prevent another producer from using it in good faith to indicate place of origin.
Quality control	Quality guaranteed with the stamp of approval given by the government.	Requirements are established by the organisation that registers the trade mark. Quality control can be exercised through informal support and regular site visits.
Enforcing	Only administrative intervention available by local AQSIQ authorities with extensive powers. Governmental cooperation to enforce GI rights.	Options : - start legal proceedings: onus of proof is on the applicant; or - initiate an administrative procedure by referral to a local authority with broad powers. Administrative process is shorter and less complex, ideal for small targets or simple cases.
Period of protection	No limitation.	10 years, renewal possible.
Foreign GI	Applications for registrations of foreign GIs are accepted.	Foreign GI can be registered as a CCTM. The application must be made with the help of an agent or an organisation appointed by the Chinese government. Same conditions as a domestic GI + evidence of the protection by registration as a GI or a certification or collective trade mark in the country of origin required.

The Regional Collective Trade Mark in Japan (RCTM)

In Japan, co-operatives or other legally recognised organisations can file an application with the Japan Patent Office (JPO) in order to register a geographic term as an RCTM. The usual requirement of distinctiveness for trade marks does not apply.

Conditions for registration

The product must be from the area (no specific features are required) and the trade mark must be well-known amongst consumers. For Australian exporters, volume of sales and advertising expenditure will be examined.

Nature and level of legal protection

As an RCTM is a private right, the trade mark owner must enforce rights directly in court and can claim compensation for the economic damage suffered, or obtain an injunction.

All trade mark exceptions apply which diminishes the protection. Quality specifications are originally adopted by the co-operative which applies for protection of the RCTM. No government mandated quality controls apply to producers over time. Most famous Japanese brands are registered as RCTM but only few international GIs are.

Alternatively, a GI system is also available under the supervision of the Ministry of Agriculture, Forestry and Fishery (MAFF).

Below: Ibaraki pumpkins, one of the new registered GI products in Japan.



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» **Table 2: Options available in Japan to protect provenance brand**

	GI	Regional collective trade mark (RCTM)
Relevant laws	<i>Act on Protection of the Names of Specific Agricultural, Forestry and Fishery Products and Foodstuffs</i> (Act No. 84 of 2014).	<i>Trade Mark Act.</i>
Conditions	<p>All products that are related to agriculture, forestry and fisheries can be registered.</p> <p>The product must originate from a specific area and must present quality, reputation or other characteristics which are attributable to this origin.</p> <p>An informal condition of continuous previous production for 25 years applies.</p> <p>The application can be filed by any group of producers of a region.</p>	<p>No need to prove that the trade mark is distinctive.</p> <p>RCTM must be well-known amongst consumers (in Japan – significant imports should be proven if the applicant is a foreign owner).</p> <p>The applicant must be recognised and established by the law, irrespective of the form of incorporation (a business legal entity) – the application cannot be filed by an individual only.</p>
Institution	The Ministry of Agriculture, Forestry and Fishery (MAFF).	Japan Patent Office (JPO).
Opposition	MAFF has to make the application and the relevant documents available on its website - written opinions and oppositions (for a period of three months) are possible.	Three month period for opposition.
Exceptions / protection	Broad protection, no exceptions apply. The GI owner can prevent use of the GI even in good faith.	Certification and collective trade marks are subject to all the normal exceptions of a trade mark. The trade mark owner cannot prevent good faith use of the same name in a descriptive and honest manner.
Quality control	Quality guaranteed with a government stamp of approval. The group of producers actually verifies compliance with specifications themselves, but MAFF monitors the production process management and quality control standards. A penalty system also exists for those who violate the requirements.	Absence of independent quality control by an external agency. A purely private system with no government oversight or control of the application of quality requirements and standards.
Enforcing	<p>MAFF has broad powers:</p> <ol style="list-style-type: none"> 1) To issue an administrative order; 2) Penal sanctions may then apply for non-compliance. <p>No civil action is available based on the GI system.</p>	A trade mark is a private right, the trade mark owner enforces rights directly in court and can claim compensation for the economic damage suffered, or obtain an injunction.
Period of protection	No limitation but cancellation possible by MAFF.	10 years, renewal possible.
Foreign GI	Registration possible and probably increasing number of registrations in the future	Registration possible but only very few foreign GIs registered as CCTM.



“ Farmer groups interested in collaborating to produce typical high quality, high value local food products should develop a provenance branding strategy. ”

The GI System in Australia

At present only for wine

In Australia, a GI registration scheme is only available for wine. The system does not impose quality requirements or specifications over and above rules of origin.

Australian producers can register certification and collective marks but very few incorporating a place name are registered in Australia. Place names generally lack the required level of distinctiveness although Australian law allows registration of standard trade marks with very low distinctiveness (that is, on the basis of limited use). Thus, many place names are currently registered as a standard trade mark.

Expanding to all food products?

Modifications of the Australian system are required to better protect local provenance brands. The alternative of modifying the certification and collective trade mark system is not optimal. The simplest option is arguably to extend the GI scheme for wine to cover all food products.

The importance of trade strategy for GIs

Other countries including EU member states, are taking advantage of the global GI system. Australian producers could also benefit from it, but only if a domestic registration system is adopted. Registration of domestic GIs could result in foreign protection of Australian provenance brands either through government-to-government protocols or individual applications.

“ Australian producers should be pro-active in export markets. An early registration of a trade mark might prevent bad faith trade mark applications in export jurisdictions. Active policing of foreign trade mark applications by third parties is essential. ”





KEY INSIGHTS

- Policymakers should consider the introduction of a GI registration system in Australia for a greater range of food products. This Report reinforces the findings of an earlier RIRDC report (report No 15/O60) by concluding that Australian GI registration could provide significant advantages to exporters of high value food products to export markets. GIs have advantages over all forms of trade marks because they are permanent and not subject to the typical trade mark exceptions and derogations such as generic use, good faith descriptive use and non-trade mark use. They are also not private property so do not result in the privatisation of place that trade mark registration effectuates.
- If Australia adopts a GI system, it could be in a better position to negotiate Free Trade Agreements, in particular with the EU. It will be able to offer and seek reciprocal protection of important provenance brands through direct government-to-government protocols.
- Farmer groups interested in collaborating to produce typical high quality, high value local food products should develop a provenance branding strategy. They should adopt an appropriate collaborative legal vehicle to underpin their investment in high value-added products. To adequately protect their products, farmers should adopt effective legal measures for registration of their provenance brands, develop an in-country strategy to protect those brands in countries such as China and Japan, and rely both on technology and legality to maximise protection.

FUTURE OPTIONS

Local provenance has great potential to add to the brand value of food produced in Australia's many and varied unique regions. Further development of provenance brand protection for Australian foodstuffs would lead to greater opportunities in broader export markets and ultimately benefit Australian producers. Further research can deepen our understanding and knowledge of how we can best take advantage of these opportunities. Specifically, consideration should be given to:

- gathering more data and detail concerning GI systems in different countries in Asia
- re-examining the availability of standard, certification and collective marks for provenance branding in Australia, in particular with a view to assessing distinctiveness levels required and comparison with approaches in other relevant jurisdictions
- developing the details and modulations of a GI protection scheme in Australia for all foods and presenting a model law for public comment after consultation with stakeholders
- conducting a survey on potential Australian food GIs in all states and regions.

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Full report

This document provides a summary of the findings of '*Local to Global: Provenance Branding and Farmer Co-operation for High Value Export Markets*'. A separate full report document has been prepared with the details of the analysis undertaken in the project and is commended to the reader for further information in support of the issues outlined in this document.

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