

# THE NEXT STEPS FORWARD FOR PROTECTING AUSTRALIA'S WINE REGIONS

VICKI WAYE\* AND STEPHEN STERN\*\*†

*The Australian wine industry is attempting to transform its reputation as a producer of generic mass produced wine to a producer of premium regional wine. However, with no emphasis on wine typicality, Australia's legal framework of wine geographical indications is not well placed to promote and protect Australia's wine regions. In this article we explore the framework's genesis as an indication of source rather than a true geographical indication framework that links wine characteristics with place. We analyse case law and subsequent legal reform designed to correlate Australian wine law with international developments, noting that the reform has occurred after almost all of Australia's existing wine geographical names and their boundaries have been determined. We consider whether future geographical names and their boundaries should be determined on a different basis, compare different legal models that will facilitate the promotion of wine typicality and regionality, and suggest legislative changes that might implement a framework that better aligns the law with international consumer expectations for regional wine.*

## I INTRODUCTION

Since 2007, the Australian wine industry has been in the doldrums.<sup>1</sup> To redress an international reputation for producing generic, mass produced wine,<sup>2</sup> it has begun to develop and promote the distinctive regional qualities of its wines as a means of increasing profitability.<sup>3</sup> Ideally, the legal framework protecting regional quality claims should be aligned with that aspiration.

At face value it appears that Australia has a legal framework of geographical indications ('GIs') for protecting the reputation of its regional wine. However,

\* University of South Australia, Australia [vicki.waye@unisa.edu.au](mailto:vicki.waye@unisa.edu.au)

\*\* Corrs Chambers Westgarth, [stephen.stern@corrs.com.au](mailto:stephen.stern@corrs.com.au)

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1 Centaurus Partners, 'Wine Industry Report: Expert Report on the Profitability and Dynamics of the Australian Wine Industry' (Report, Winemaker's Federation Australia, August 2013) 17–18 <<http://www.wfa.org.au/assets/noticeboard/Expert-Review-Report.pdf>>.

2 Jancis Robinson, *Australia's Love-Hate Relationships* (18 April 2012) <<http://www.jancisrobinson.com/articles/australias-love-hate-relationships>>.

3 Wine Australia, *Directions to 2025: An Industry Strategy for Sustainable Success* (Report, Wine Australia, May 2007) 3–4, 14 <<http://www.wfa.org.au/assets/strategies-plans/pdfs/Directions-to-2025.pdf>>. For an empirical consideration of the increasing distinctiveness of Australia's wine regions see Kym Anderson, 'Terroir Rising? Varietal and Quality Distinctiveness of Australia's Wine Regions' (2009) 2(1) *Enometrica* 9.

appearances can be deceptive. Notwithstanding the evolution of Australia's legal framework over a number of years, problems related to the scope of what the Australian legal system protects remain. This is not simply a dry legal matter. First, the scope of what Australia's wine GI system protects has a direct association with the way in which regional boundaries for wine are drawn. Being inside or outside a regional boundary can have a significant impact on winemaker success. Secondly, if well-informed consumers of wine are intended to be the ultimate beneficiaries of Australia's legal framework, it remains unclear whether the current legal framework supports their expectations. The primary postulation underpinning any GI framework is that the legal certification it provides operates as a credible signal of provenance, character and authenticity.<sup>4</sup>

However, GIs may have little meaning for consumers if they are unable to connect them with wine characteristics and qualities that they otherwise find difficult to discern.<sup>5</sup> Alternately, there may be substantial divergence between consumer conceptions of a region compared with its legal definition.<sup>6</sup>

In this article, we explore whether the current Australian legal framework for geographical indications is fit for the purpose of protecting and promoting Australia's wine regions. We first briefly outline a number of basic concepts associated with the legal character of wine GIs and with the broader concepts of typicality and regionality. Our analysis shows that Australia adopted an indication of source framework that has left little room for the expression of typicality and regionality. We consider the motivations underlying that choice and examine how these motivations shaped the definition of key matters in Australia's GI framework such as the definition of 'region' and 'sub-region' and the problems that flow from these definitions. We then consider how the Australian wine industry's ambitions for developing premium regional wine dovetail with the existing legal framework and, by examining other possible models, discuss how the current system might be improved. During these discussions we explore the views of a small number of regional wine associations to the effect that most would prefer to promote wine regionality by non-legal means. Finally, we examine the advantages and disadvantages of legal and non-legal means for promoting wine regionality and typicality, and conclude that the industry's export orientation and international legal developments warrant the adoption of a wine GI system more sophisticated than a mere indications of source.

4 Dev S Gangjee, 'Proving Provenance? Geographical Indications Certification and its Ambiguities' (2016) *World Development* (forthcoming).

5 Felice Adinolfi, Marcello De Rosa and Ferruccio Trabalzi, 'Dedicated and Generic Marketing Strategies: The Disconnection between Geographical Indications and Consumer Behaviour in Italy' (2011) 113 *British Food Journal* 419.

6 Thomas S Atkin and Sandra K Newton, 'Consumer Awareness and Quality Perceptions: A Case for Sonoma County Wines' (2012) 23 *Journal of Wine Research* 155, 155, 162, 167; Ray Johnson and Johan Bruwer, 'The Balancing Act between Regionality and American Viticultural Areas (AVAs)' (2007) 18 *Journal of Wine Research* 163, 163, 166–7.

## II BASIC CONCEPTS

### A *Appellations of Origin, Geographical Indications and Indications of Source*

To understand how the concepts of regionality and typicality interact with laws designed to prohibit false claims of geographical provenance, it is first necessary to identify the different types of geographical indications that are recognised by laws or treaties and which are used as legal instruments by policy makers and legislatures. When applied to wine, geographical terms can be categorised within a three-tier hierarchy:

1. Indications of source refer to the country or place within a country where grapes are sourced. Indications of source are purely identifiers of geographical origin and generally have little, if any, connection with the characteristics or reputation of the wine. A classic non-wine example is ‘Carrara’ for marble.
2. Geographical indications refer to the region or locality where the wine is made and where a given quality, reputation or other characteristic is essentially attributable to that geographical origin.<sup>7</sup> Geographical indications include ‘Mendoza’ in Argentina and ‘Pays d’Oc’ in France.
3. Appellations of origin refer to the region or locality where the wine is made such that its quality and characteristics are due exclusively or essentially to that geographical environment including both natural and human factors.<sup>8</sup> Well-known appellations of origin include Barolo, Chianti, Bordeaux, and Champagne.

There are two major differences between geographical indications and appellations of origin. The first difference is that the concept of appellations of origin incorporates not only natural factors such as soil and climate, but also human factors involved both in the vineyards and in the winemaking processes, generally referred to as the traditional methods or practices of the relevant area.<sup>9</sup> These are known in the French system as *les usages locaux, loyaux et constants* (local traditional and constant practices). The second major difference is the degree of causality between the wine’s characteristics and its geographical origin.

7 *Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications*, WIPO Lex No TRT/LISBON/009, adopted by the World Intellectual Property Organisation Diplomatic Conference for the Adoption of a New Act of the Lisbon Agreement on 20 May 2015, art 2.

8 *Ibid.*

9 Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2012) 133, citing International Association for the Protection of Intellectual Property, ‘Resolution on Appellations of Origin at the 23<sup>rd</sup> Congress of Stockholm’ (26–31 May 1958).

## B Typicality

The above hierarchy correlates with the degree of typicality (equivalent to *typicité*) exhibited by wine. By 'typicality' we mean the characteristics of a wine made in one locality that make it distinctive in nose and taste compared with wines made in other localities.<sup>10</sup> Typicality derives from the soil and climate where grapes are grown (known in France as *terroir*), viticultural techniques, and varietal, vintage, and local oenological practices.<sup>11</sup> Typicality can be measured using a variety of chemical and/or sensory techniques.<sup>12</sup> Wines which are 'Made in France' or 'Made in Australia' exhibit low levels of typicality, whereas wines made within and complying with the local production rules of an appellation of origin generally exhibit a significantly higher degree of typicality.<sup>13</sup>

## C Regionality

Although sensory typicality is an important driver of regionality, the concept of regionality encompasses much more.<sup>14</sup> Wine regionality also incorporates perceptions and experiences of regional gastronomy, social and commercial networks, culture, heritage and the surrounding built environment. Thus, it is impossible to divorce the Barossa Valley wine region from the legacy of its early Prussian settlers, the grandiose facades of its wineries such as Seppeltsfield or Chateau Tanunda, and its 'Barons of the Barossa' wine fraternity.<sup>15</sup> In much the same way as geographers promote a socially and politically grounded conception

- 10 Yves Cadot et al, 'Sensory Dimension of Wine Typicality Related to a Terroir by Quantitative Descriptive Analysis, Just About Right Analysis and Typicality Assessment' (2012) 660 *Analytica Chimica Acta* 53, 53.
- 11 See, eg, Ellena S King et al, 'Regional Sensory and Chemical Characteristics of Malbec Wines from Mendoza and California' (2014) 143 *Food Chemistry* 256; Yves Cadot et al, 'Characterisation of Typicality for Wines Related to Terroir by Conceptual and by Perceptual Representations: An Application to Red Wines from the Loire Valley' (2012) 24 *Food Quality and Preference* 48; J A Green et al, 'Sensory and Chemical Characterisation of Sauvignon Blanc Wine: Influence of Source of Origin' (2011) 44 *Food Research International* 2788.
- 12 See, eg, Roberto Riovanto et al, 'Discrimination between Shiraz Wines from Different Australian Regions: The Role of Spectroscopy and Chemometrics' (2011) 59 *Journal of Agricultural and Food Chemistry* 10356; Wies Cynkar et al, 'Classification of Tempranillo Wines According to Geographic Origin: Combination of Mass Spectrometry Based Electronic Nose and Chemometrics' (2010) 660 *Analytica Chimica Acta* 227; Amalia Z Berna et al, 'Geographical Origin of Sauvignon Blanc Wines Predicted by Mass Spectrometry and Metal Oxide Based Electronic Nose' (2009) 648 *Analytica Chimica Acta* 146; Cadot et al, 'Characterisation of Typicality', above n 11; I Maitre et al 'Sensory Typicality of Wines: How Scientists Have Recently Dealt with This Subject' (2010) 21 *Food Quality and Preference* 726.
- 13 Wendy V Parr, 'WineSense: Geographical Indication and the Concept of Wine Typicality' (2009) 11(2) *ChemoSense* 16, 16–17; Lucie Perrin and Jerome Pagès, 'A Methodology for the Analysis of Sensory Typicality Judgments' (2009) 24 *Journal of Sensory Studies* 749, 761.
- 14 Chris Easingwood, Larry Lockshin and Anthony Spawton, 'The Drivers of Wine Regionality' (2011) 22 *Journal of Wine Research* 19, 22, 28–9. Easingwood, Lockshin and Spawton define regionality as 'the reputation a wine region has for producing wines with a particular style': at 21.
- 15 Leanne White, 'Branding the Barossa: Pioneers, Heritage and Tourism in Australia's Famous Wine Region' in Matt Harvey, Leanne White and Warwick Frost (eds), *Wine and Identity: Branding, Heritage, Terroir* (Routledge, 2014) 236, 243–6.

of *terroir*, regionality characterises wine as an artisanal and culturally authentic product rather than simply a product determined by the biophysical properties and winemaking practice of the locality where it is made.<sup>16</sup>

Wine regionality is a socially constructed narrative of wine and place,<sup>17</sup> and does not necessarily entail a causal connection between wine and geographic origin. The Barossa Valley region itself comprises many different soil types, topographies, and mesoclimates, and there is no narrowly confined winemaking style that is used by all or even most winemakers, prompting some to conclude that Barossa Shiraz, the most popular varietal produced in the Barossa, cannot be identified in a ‘single, all encompassing regional description’.<sup>18</sup> Rather from a wine typicality perspective, the Barossa Valley comprises up to 11 subregions each with its own specific Shiraz identity.<sup>19</sup> Yet, despite the lack of compelling typicality, few would deny that the Barossa Valley is one of Australia’s oldest and most well-known wine regions,<sup>20</sup> or that it has a reputation for producing full flavoured, rich Shiraz wine.<sup>21</sup> A similar story of *terroir* and viticultural diversity could be told of the Napa Valley in the United States.<sup>22</sup> Consequently, given its broader compass and its socially constructed nature, wine regionality is far more porous and malleable than typicality. Regionality includes many aspects that do not impact on the nose or taste of a wine. Thus the two concepts, whilst perhaps overlapping to some degree, are quite different. Moreover, from a regionality perspective, the size and composition of a wine region may change rapidly in a short time. The transformation of the distinctive and small scale Martinborough area of New Zealand where vineyards were first developed in the late 1970s into the regional behemoth it is today to accommodate an increase in scale and output illustrates this point.<sup>23</sup> But as a wine region grows, the typicality shown by wines from within it may vary more and more.

In spite of their differences, typicality and regionality can be symbiotically related. When discussing how typicality is established and valorised, historians and sociologists include elements such as the local socio-economic conditions,

16 Nick Lewis, ‘Mobilizing Brands and Terroir in Champagne’ in Steve Charters (ed), *The Business of Champagne: A Delicate Balance* (Routledge, 2012) 69, 76.

17 Ibid 74.

18 Trent E Johnson et al, ‘Preliminary Insights into the Regional Characteristics of Australian Shiraz’ (2014) 29(2) *Wine & Viticulture Journal* 66, 68.

19 Thomas Girgensohn, *Barossa Shiraz: Discovering the Tastes of the Barossa’s Regions* (Wakefield Press, 2013).

20 Lyn Leader-Elliott, ‘Cultural Landscape and Sense of Place: Community and Tourism Representations of the Barossa’ in Ian Convery, Gerard Corsane and Peter Davis (eds), *Making Sense of Place: Multidisciplinary Perspectives* (Boydell Press, 2012) 207, 213.

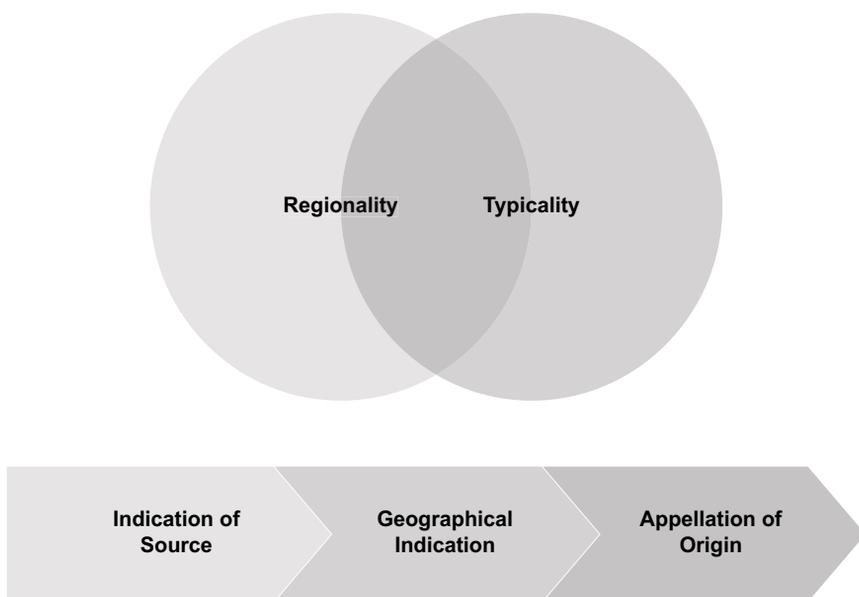
21 James Halliday, *Wine Atlas of Australia*, (Hardie Grant, 2014) 18.

22 Napa Valley Vintners, *Napa Valley American Viticultural Area (AVA)* (2016) Napa Valley Vintners <[http://www.napavintners.com/napa\\_valley](http://www.napavintners.com/napa_valley)>.

23 Warwick E Murray and John Overton, ‘Defining Regions: The Making of Places in the New Zealand Wine Industry’ (2011) 42 *Australian Geographer* 419, 425–8.

tradition and culture associated with wine making and wine consumption.<sup>24</sup> The 'story of the wine' is as much a part of what some wine consumers may seek as the wine's organoleptic qualities.<sup>25</sup> Taste and style can become memorable partly because they are hooked together with a regional profile comprised of these elements. Further, as we noted above, wine region identity is stronger where the region specialises in one or two notable wine styles,<sup>26</sup> that is, where wine typicality is also clearly demonstrated. Wine achieves this typicality through the collective strategies of grapegrowers and winemakers operating within their localised institutional, social and cultural milieus.<sup>27</sup>

The relationship between typicality, regionality and the legal objects identified earlier is illustrated in the diagram below. The diagram illustrates that typicality is stronger for appellations of origin and that indications of source exhibit neither strong regionality or typicality.



**Figure 1: Relationship between Regionality and Typicality**

- 24 Maura Franchi, 'The Contents of Typical Food Products: Tradition, Myth, Memory' in Giovanni Ceccarelli, Alberto Grandi and Stefano Magagnoli (eds), *Typicality in History: Tradition, Innovation and Terroir/La Typicité dans l'Histoire: Tradition, Innovation et Terroir* (Peter Lang, 2013) 45, 59–60; Amy B Trubek, *Taste of Place: A Cultural Journey into Terroir* (University of California Press, 2008) ch 1.
- 25 Jennifer Smith Maguire, 'Provenance as a Filtering and Framing Device in the Qualification of Wine' (2013) 16 *Consumption Markets & Culture* 368, 369–71.
- 26 Easingwood, Lockhsin and Spawton, above n 14, 26.
- 27 Anil Hira and Tim Swartz, 'What Makes Napa Napa? The Roots of Success in the Wine Industry' (2014) 3 *Wine Economics and Policy* 37, 38–40; Christian Barrère, 'The Strategic Building of Typicality: Learning from the Comparative History of Three French Sparkling Vineyards' in Giovanni Ceccarelli, Alberto Grandi and Stefano Magagnoli (eds), *Typicality in History: Tradition, Innovation and Terroir/La Typicité dans l'Histoire: Tradition, Innovation et Terroir* (Peter Lang, 2013) 285, 286.

### III GEOGRAPHICAL INDICATIONS IN AUSTRALIA

When first enacted, the text of Australia's geographical indication legislative provisions drew on the definition contained in the *Agreement Between Australia and the European Community on Trade in Wine*, which provided that a geographical indication was:

an indication as specified in Annex II, including an 'Appellation of Origin', which is recognized in the laws and regulations of a Contracting Party for the purpose of the description and presentation of a wine originating in the territory of a Contracting Party, or in a region or locality in that territory, where a given quality, reputation or other characteristic of the wine is essentially attributable to its geographical origin.<sup>28</sup>

However, rather than enacting the treaty definition word for word, the original *Australian Wine and Brandy Corporation Act 1980* (Cth) bifurcated it into two alternative parts. Section 4 provided that geographical indications were either:

- (a) A word or expression used in the description or presentation of the wine to indicate the country, region or locality where the wine originated; or
- (b) A word or expression used in the description and presentation of the wine to suggest that a particular quality, reputation or characteristic of the wine is attributable to the wine having originated in the country, region or locality indicated by the word or expression.<sup>29</sup>

The first alternative requiring no regionality or typicality was not discussed by the Explanatory Memorandum that accompanied the Australian Wine and Brandy Corporation Amendment Bill 1993 (Cth).<sup>30</sup> However, the Minister for Primary Industries and Energy's speech, which heralded the Bill's second reading in the Australian Parliament, indicated that the work of the legislation was to be confined to determining the boundaries of wine geographical indications and to support enforcement of the wine industry's Label Integrity Program.<sup>31</sup> The Label Integrity Program, which had been enacted three years earlier,<sup>32</sup> requires Australian winemakers to maintain records of vintage, varietal, and region of origin, as well as source of supply, date of receipt and quantity of grape products received from grape growers. When the Australian GI framework was implemented, the Label Integrity Program was strengthened by the adoption of strict blending rules.

28 *Agreement between Australia and the European Community on Trade in Wine*, signed 31 January 1994, ATS 6 (entered into force 1 March 1994) art 2 ('*Australia-European Community Agreement of 1994*'). This definition is very similar to the definition of 'geographical indication' subsequently adopted by the multilateral TRIPS Agreement, except that TRIPS does not include 'country' within the ambit of geographical indications: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*TRIPS Agreement*').

29 *Australian Wine and Brandy Corporation Act 1980* (Cth) s 4, as inserted by *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth) item 4.

30 Explanatory Memorandum, Australian Wine and Brandy Corporation Amendment Bill 1993 (Cth).

31 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 September 1993, 1342-4 (Simon Crean).

32 *Australian Wine and Brandy Corporation Act 1980* (Cth) pt VIA, as inserted by *Australian Wine and Brandy Corporation Amendment Act 1989* (Cth) s 7.

The blending rules which are currently found in the *Australian Grape and Wine Authority Regulations 1981* (Cth) are set out below.<sup>33</sup>

	<b>Vintage</b>	<b>Variety</b>	<b>Geographical Indication</b>
Single	85 %	85 %	85 %
Multiple	100 %	85 %	95 % – min 5 %

**Table 1: Australia, Blending Rules**

The terms of the blending rules which refer to wine obtained from grapes grown in the GI and the Minister's second reading speech, clearly demonstrate that Parliament intended to enact merely an indication of source framework. Later on, in *Baxendale's Vineyard Pty Ltd v Geographical Indications Committee*,<sup>34</sup> Australia's Full Federal Court reinforced that view, distinguishing, on the one hand, between terms that indicated a region of origin and, on the other hand, terms which suggested that a particular quality, reputation or characteristic of wine might be attributed to its geographical origin. Hence, the term 'King Valley' could satisfy the first alternative definition but not the second definition, since that term did not evoke anything about the qualities or characteristics of the wine made in the King Valley area.<sup>35</sup> Only terms like 'Champagne' could satisfy the second alternative. The fact that the first alternative rendered the second otiose or that the two were inconsistent was not explained by Parliament or the Full Federal Court.

Consistent with the brevity of the Explanatory Memorandum, the reasons for implementing a truthful origin claim regime rather than a geographical indication or appellation of origin framework remain unclear. As well as the Label Integrity Program, Australia already had, in its consumer protection legislation, a broad prohibition against misleading and deceptive conduct and against making a false or misleading claim about place of origin.<sup>36</sup> However, insofar as wine regions were concerned, up until this point there were no definitive boundaries or official names that would assist the prosecution of the prohibitions. It was essential to determine where the boundaries lay.

Of course, the need for effective enforceability explains why Australia established the Geographical Indications Committee, but it does not explain why regionality and typicality were regarded as inconsequential to its mandate. Philosophically the latter issue is important because the scope of legal protection provided to Australian GIs extends to claims that the relevant wine meets the typicality requirements of its local production area. The Australian provisions prohibit expressions that falsely indicate the wine is of a kind, style, type, or made according to the local method employed within the geographical indication

33 *Australian Grape and Wine Authority Regulations 1981* (Cth) regs 20–1.

34 (2007) 160 FCR 542 ('*Baxendale's Vineyard*').

35 *Ibid* 565 (Dowsett J).

36 *Trade Practices Act 1974* (Cth) ss 52–3.

area.<sup>37</sup> Moreover, any false reference to a protected geographical indication, even accompanied by a statement of the wine's true origin, will establish a breach.<sup>38</sup> In other words, there is little connection between the object of protection (an indication of source) and the scope of the protection (extends to representations that the wine displays particular qualities associated with the area of production).

#### IV WHY DID AUSTRALIA ADOPT AN INDICATION OF SOURCE BASED FRAMEWORK?

We believe that Australia's decision to initially adopt an indication of source framework reflected a disdain for perceived over-regulation of wine making by European appellation control systems.<sup>39</sup> That disdain is encapsulated in the evidence of John Pendrigh in the *Baxendale's Vineyard* case.<sup>40</sup> John Pendrigh is a wine industry expert who was involved in the negotiations between Australia and the European Community leading up to the *1994 Agreement* and who testified to the key differences between Australia's indication of source regime and the laws of various European Union ('EU') jurisdictions that required a nexus to be established between the wine and its place of origin to warrant legal protection. Among other matters, Pendrigh referred to the EU's 'outdated' restrictions on viticultural practices, including restrictions on vines per hectare, yield and pruning, limits on the volume of wine that might be produced by a winemaker, stipulated minimum and maximum alcohol content, and unjustified restrictions on the use of varieties and wine blending.<sup>41</sup> According to Pendrigh, the assumption that 'the individuality and quality of a wine is primarily attributable to its place of origin' was untrue, as this ignored problems such as over-cropping, lack of disease control, or poor viticultural practices that might occur despite restrictions on yield and volume, which he regarded as uncompetitive and likely to stifle innovation.<sup>42</sup> He also said in his evidence in *Coonawarra Penola Wine Industry Association Inc and Geographical Indications Committee*<sup>43</sup> that the Australian industry did not want a complex system, just lines on maps. In other words, Pendrigh believed that strict production guidelines did not necessarily result in wines of consistent style and quality. Rather, he and many other Australian winemakers of the time believed that the appellation system might lead to a decrease in quality by allowing winemakers within an appellation to free ride on the appellation's prestige.<sup>44</sup> These personal views which adopted common criticisms of the European wine

37 *Australian Grape and Wine Authority Act 2013* (Cth) ss 40C–40D.

38 *Comite Interprofessionnel des Vins des Cotes de Provence v Bryce* (1996) 69 FCR 450, 459.

39 See, eg, Winemakers' Federation of Australia, *Strategy 2025* (1996) which stated that the Australian wine industry compared favourably to the European wine industry because it was 'free of the regulatory rigidity which stifles European viticulture': at pt 5 <[http://winetitles.com.au/statistics/strategy2025/2025\\_5.asp](http://winetitles.com.au/statistics/strategy2025/2025_5.asp)>.

40 (2007) 160 FCR 542, 570–2 [121]–[125].

41 *Baxendale's Vineyard* (2007) 160 FCR 542, 570 [122].

42 *Ibid* 571 [124].

43 [2001] AATA 844 (5 October 2001).

44 *Ibid*.

sector, set Australia on a path that resulted in Australia 'throwing the baby out with the bathwater'. To avoid any of the unwanted regulations and to maintain a crucial right to experiment with areas, varieties, viticultural practices and the like, Australia also rejected rules that would enable its wine regions to develop typicality.

An appellation of origin regime fostering localised agrifood systems, small scale production and social relationships as pathways to production was antithetical to the market based philosophies that predominated policy formulation in Australia when its GI system was being established.<sup>45</sup> At that time, very different conditions prevailed from those operating in Europe when the EU appellation of origin system was first implemented. In Australia, the 1990s witnessed the enthusiastic adoption of World Trade Organisation measures including the lowering of tariffs and the phasing out of trade subsidies, the drafting of a neo-liberal national competition policy, the privatisation of many public utilities, and the dismantling of statutory protections for agricultural marketing.<sup>46</sup> Deregulation was the mantra of the day with the aim of transforming Australia into an 'open, dynamic, flexible and high productivity economy'.<sup>47</sup> A liberal wine regulatory framework that enabled winemakers to make production decisions according to market conditions and to experiment corresponded well with that political philosophy. By contrast, the creation of the Appellations d'Origine Contrôlées ('AOC') system in France in 1935, which formed the basis for subsequent EU law, was presaged by the need to protect a fragile industry decimated by phylloxera, and under threat from widespread fraud and adulteration, and to mitigate threats from a deluge of cheap wine imports.<sup>48</sup> The prevailing economic rationale underpinning the AOC system and its subsequent EU progeny was thus market support,<sup>49</sup> whereas Australia's attitude to market regulation in the 1990s was to avoid it unless market failure could be demonstrated.<sup>50</sup>

Australia's disdain for EU style appellations, which imposed strict quality controls, was fortified by interrelated EU common market policies comprised of restricted planting rights, wine production and price control mechanisms, import tariffs, and heavy subsidisation of grape growing and winemaking through

45 Bill Pritchard, 'The Regulation of Grower-Processor Relations: A Case Study from the Australian Wine Industry' (1999) 39 *Sociologia Ruralis* 186, 189–91.

46 Douglas M Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada*, (McGill-Queen's University Press, 2002) ch 7.

47 Rod Sims, 'Australia's Experience Driving Economic Growth through Competition Policy Reforms' (Speech delivered at the World Bank Forum — Making Markets Work for Development: A Reform Agenda on Competition, Warsaw, 23 April 2013).

48 Giulia Meloni and Johan Swinnen, 'The Political Economy of European Wine Regulations' (2013) 8 *Journal of Wine Economics* 244, 258–60; Erica A Farmer, "'Local, Loyal and Constant": The Legal Construction of Wine in Bordeaux' in Rachel E Black and Robert C Ulin (eds), *Wine and Culture: Vineyard to Glass* (Bloomsbury Academic, 2013) 145, 238–50.

49 Michael Handler, 'The EU's Geographical Indications Agenda and its Potential Impact on Australia' (2004) 15 *Australian Intellectual Property Journal* 173, 176–8.

50 Ibid 179. See also Gary Banks, 'Structural Reform Australian-Style: Lessons for Others?' (Speech delivered to the IMF, World Bank and OECD, Washington DC and Paris, May 2005) <<http://www.pc.gov.au/news-media/speeches/cs20050601/cs20050601.pdf>>.

government financed distillation programs.<sup>51</sup> These common market policies, which were eventually substantially diminished as a result of reforms in 2008,<sup>52</sup> were perceived as unfair and essentially a means to extract economic rents in favour of existing EU winemakers. Australian attitudes to the EU's common market policies during that period are best summed up by the following quote from Eleanor Sharpston, who later became Advocate General at the Court of Justice of the European Union:

The EU's agricultural markets consist of butter mountains, wine and milk lakes and olive oil pools, surrounded by happy, lazy, over-subsidised EU farmers who are kept in idle luxury by the EU's policy of keeping out all agricultural produce from third countries including Australia.<sup>53</sup>

Consistent with its disdain for apparent protectionist regulation, Australia's implementation of an indication of source framework also reflected the view that a minimalist approach to regulation better aligned with Australia's science based, experimental and market driven approach to winemaking.<sup>54</sup> At the time of implementation, Australian wine makers were characterised as market and business performance oriented, and proactive in seeking out opportunities in new markets, especially export markets. They regarded a permissive legal framework for winemaking and place claiming as essential for the agility required to take advantage of upcoming opportunities and to respond efficiently to changes in market and environmental conditions.<sup>55</sup> A highly educated cadre of oenologists and wine scientists, and the deployment of technology, were also seen as key to the industry's rapid expansion during the late 1980s and early 1990s.<sup>56</sup> Consequently, there was a widespread view that wine quality was governed by the skill of the winemaker rather than the place where the grapes were grown and that *terroir* was simply a marketing ploy. The idea that the environment where the wine was made might be determinative contradicted modernist Australian values which privileged business acumen and science over nature.<sup>57</sup>

Simple and easy to understand labelling and marketing based on brand and varietal were also regarded as more consumer friendly than marketing based on appellations that required a degree of sophistication that some consumers

51 Meloni and Swinnen, above n 47, 250–5.

52 *Council Regulation (EC) No 479/2008 of 29 April 2008 on the Common Organisation of the Market in Wine, Amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and Repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999* [2008] OJ L 148/1.

53 Eleanor Sharpston, 'The Common Agricultural Policy' in Cheryl Saunders and Gillian Triggs (eds), *Trade and Cooperation with the European Union in the New Millennium* (Kluwer Law International, 2002) 29, 29.

54 Tim Unwin, 'Terroir: At the Heart of Geography' in Percy H Dougherty (ed), *The Geography of Wine: Regions, Terroir and Techniques* (Springer, 2012) 37, 42–4.

55 Rohan Jordan, Pietro Zidda and Larry Lockshin, 'Behind the Australian Wine Industry's Success: Does Environment Matter?' (2007) 19 *International Journal of Wine Business Research* 14, 17–18.

56 David K Aylward, 'Diffusion of R&D within the Australian Wine Industry' (2002) 20 *Prometheus* 351, 354.

57 Robert Swinburn, 'The Things that Count: Rethinking Terroir in Australia' in Rachel E Black and Robert C Ulin (eds), *Wine and Culture: Vineyard to Glass* (Bloomsbury, 2013) 33.

found alienating.<sup>58</sup> The liberal framework for place claiming also provided the foundation to rapidly grow in scale, enabling Australian winemakers to respond quickly ahead of other international competitors to market opportunities such as changes in the United Kingdom's liquor licensing laws, which allowed the marketing of wine in supermarkets.<sup>59</sup> The transformation to large-scale operations required a legal framework that allowed winemakers to blend their wines across regions and produce wine of a consistent standard that could be sold in these new marketing fora.<sup>60</sup>

Others have argued that any requirement of typicality was ill-suited to Australia because of the widespread use of irrigation and soil conditioning which reduced the expression of *terroir*, the rapid expansion of vineyards between 1990 and 2007 which provided little time for the development of regionality or experimentation with matching varieties and viticultural practice to local soils and microclimates, and the large scale nature of Australian grape growing and winemaking operations.<sup>61</sup>

However, gradually the distinctiveness of Australia's wine regions in terms of grape quality and varietal mix has been intensifying and the reputation of Australia's regionality growing.<sup>62</sup> Australian consumers are now far more likely to associate particular grape varieties with well-known regions.<sup>63</sup> Thus, while at the time it implemented its GI framework the Australian wine industry pursued a wine business model predominantly based upon brand and multi-regional varieties,<sup>64</sup> in the years following implementation and as the industry has matured, typicality and regionality have become far more significant to winemakers and to increasingly sophisticated consumers. But before discussing how the shift to regionality and typicality demands a review of Australia's indication of source legal framework, we consider legal developments subsequent to the enactment of the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth).

58 Jamie Goode and Sam Harrop, *Authentic Wine: Toward Natural and Sustainable Winemaking* (University of California Press, 2011) 28.

59 Kym Anderson, 'Contributions of the Innovation System to Australia's Wine Industry Growth' (Working Paper No 0310, Wine Economics Research Centre, University of Adelaide, February 2010) 5–6.

60 Glenn Banks and Scott Sharpe, 'Wine, Regions and the Geographic Imperative: The Coonawarra Example' (2006) 62 *New Zealand Geographer* 173, 176.

61 Keith Grainger, *Wine Quality: Tasting and Selection* (Wiley-Blackwell, 2009) 99.

62 N R Verdonk, K L Wilkinson and J Bruwer, 'Importance, Use and Awareness of South Australian Geographical Indications' (2015) 21 *Australian Journal of Grape and Wine Research* 361, 363; Anderson, 'Terroir Rising?' above n 3, 9; Easingwood, Lockshin and Spawton, above n 14, 28–9; Goode and Harrop, above n 58, 25.

63 Verdonk, Wilkinson and Bruwer, above n 62, 365.

64 Glenn Banks et al, 'Place "From One Glance": The Use of Place in the Marketing of New Zealand and Australian Wines' (2007) 38 *Australian Geographer* 15, 15 noting at the time of publication, the Australian wine industry's focus on 'bulk, value-driven wines' derived from multi-regional blends.

## A Subsequent Developments

Initially Australia submitted 650 potential GIs to the EU for inclusion as protected terms in the 1994 Wine Trade Agreement. These were eventually winnowed down to 128.<sup>65</sup> However, none of the borders for these names had been fixed, and so the Geographical Indications Committee ('GIC') and accompanying rules were created to facilitate that task. Regulations promulgated a short time after the GI framework's enactment created three categories of Australian GIs: zone, region and subregion.<sup>66</sup>

Zones are large land areas comprising one or more regions. South Eastern Australia, which encompasses New South Wales, Victoria and winegrowing areas in South Australia and Queensland is Australia's largest and most referenced zone. Given their size and range of climatic and other growing conditions, zones are impossible to fit within the broadly accepted international definition of GIs which require a connection between the unique qualities of the wine and its region of origin.<sup>67</sup> However, by defining regions and subregions according to their grape growing attributes, the *AWBC Regulations* imply, at least insofar as regions and subregions are concerned, that a nexus between grape characteristics and origin is essential to attain geographical indication status. *Australian Grape and Wine Authority Regulations 1981* (Cth) reg 24 defines regions and subregions as follows:

- Region means a 'single tract of land that is discrete and homogeneous in its grape growing attributes' in a manner that is 'measurable' but 'less substantial than a subregion'; that 'produces at least 500 tonnes' of grapes per annum; and that comprises at least five independently owned grape wine vineyards of at least five hectares each;
- Subregion means 'a single tract of land that is discrete and homogeneous in its grape growing attributes' to a substantial degree; that 'produces at least 500 tonnes' of grapes per annum; and that comprises at least five independently owned grape wine vineyards of at least five hectares each.

Regulation 25 elaborates upon matters that the GIC may take into account when determining the name and boundaries of a proposed region or subregion including the history of the area, its natural and built environment, soil composition, local boundary maps, local geological and climatic conditions, and elevation.<sup>68</sup> At

65 Nicholas Faith, *Liquid Gold: The Story of Australian Wine and Its Makers* (Pan Macmillan, 2002) 315.

66 *Australian Wine and Brandy Corporation Regulations (Amendment) 1994* (Cth) reg 3.

67 For example, compare and contrast the concept of a 'zone' with *TRIPS Agreement* art 22.1 which requires an essential link to be established between the GI and the wine to qualify for legal protection. If, however, the zone acquired a reputation for producing wine with particular qualities then it would fall within the TRIPS definition, see *FAGE UK Limited v Chobani UK Limited* [2014] ETMR 26 in which the Court of Appeal of England and Wales held that Greek yoghurt can only be marketed in the United Kingdom if made in Greece because Greek yoghurt had developed a particular secondary meaning among UK consumers.

68 *Australian Grape and Wine Authority Regulations 1981* (Cth) reg 25.

the time the Regulations were implemented, no explanation was provided for the emphasis on the distinctive environmental features of the region and for the absence of any wine typicality or regionality. Nor was any explanation provided for the '5 x 5 x 500 rule'.<sup>69</sup> It is thought the industry members assisting in the legislative drafting process wanted to avoid monopolies as that was seen as too European.

Subsequent case law elaborated further on the matters relevant to GI determination. In *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* ('Coonawarra'), the Full Court of the Federal Court approached the task of interpreting regs 24 and 25 from the starting point of the definition of 'geographical indication' set out in the *Australia-European Community Agreement of 1994*.<sup>70</sup> The term 'Coonawarra' had already been designated as a GI under the Agreement. Consequently, it was only necessary for the relevant decision maker to concentrate on matters pertinent to the drawing of its boundary. According to the Court, when considering where the boundary should lie, the chief factors to bear in mind were the degree of homogeneity and discreteness in grape growing attributes set out in reg 24. Pre-existing administrative boundaries such as local administrative boundaries (known as the Hundreds) that were fixed many years before grape growing and winemaking was established in the area were therefore of limited relevance to that task. Rather the Court held that the focus of inquiry should be the criteria in reg 25 that were more closely related to grape growing attributes.<sup>71</sup>

*Baxendale's Vineyard* included a re-examination of some of the judicial commentary in the earlier *Coonawarra* decision. This dispute arose in September 1997 when the King Valley vignerons applied to the GIC for determination of the King Valley region. Following an interim determination regarding King Valley by the GIC, in June 1998 the Whitlands vignerons made an independent application for the determination of the Whitlands High Plateaux region. The proposed Whitlands region fell wholly within the proposed King Valley region.

As part of their argument the Whitlands vignerons argued that the wine produced from their region was qualitatively different from the wine made in the King Valley region. The Full Federal Court noted that wine typicality was not an essential requirement of a GI, adding that it could not act on this contention because it had not been raised in the Whitlands vignerons' notice of appeal, nor was the Court directed to any evidence on this point.<sup>72</sup>

69 To constitute a region or subregion, there must be at least five separate vignerons in the region or subregion each having at least five hectares in vineyards, and the combined vineyard annual grape production must be at least 500 tonnes of grapes: *Australian Grape and Wine Authority Regulations 1981* (Cth) reg 24 (definition of 'region' and 'subregion'), as inserted by *Australian Wine and Brandy Corporation Regulations (Amendment) 1994* (Cth) reg 3. See also Explanatory Statement, Australian Wine and Brandy Corporation Regulations (Amendment) 1994 (Cth).

70 (2002) 125 FCR 155, 172–3 [59]. See also *Australia-European Community Agreement of 1994* art 2.

71 *Coonawarra* (2002) 125 FCR 155, 172–4.

72 *Baxendale's Vineyard* (2007) 160 FCR 542, 565 [101] (Dowsett J).

## **B Limitations of the Existing Framework Regarding the Expression of Typicality and Regionality**

In line with an overarching indication of source legal framework, both the *Coonawarra* and *Baxendale's Vineyard* decisions underscore that the focus of regs 24 and 25 is upon grape growing homogeneity. Although the regulations allow for the consideration of historical and social factors, such as the history of grape growing and development within the relevant region or subregion, they say nothing about localised winemaking practices that might also affect typicality, let alone about typicality per se. Nor is there any requirement that the wine made from the grapes within the region conform to any regional profile. Indeed, such a requirement contradicts the ability to incorporate up to three different geographical indications on Australian wine labels.<sup>73</sup> Moreover, even though both cases, to a greater extent the *Baxendale's Vineyard* case, indicate that historical and social elements are relevant, it seems that biophysical factors related to grape growing predominate in the determination of how a region or subregion will be demarcated. Apart from harvest date, there is no explicit reference in regs 24 and 25 to differentiating viticultural practices, such as trellising and irrigation,<sup>74</sup> or other human aspects of grape growing, let alone winemaking.

The requirement of a discrete grape growing area, coupled with the 5 x 5 x 500 rule, in the definitions of region and subregion reinforce the lack of typicality and low level of regionality embedded in Australia's legal framework. The 5 x 5 x 500 rule, designed to prevent monopolies, is a threshold requirement that need not hold once the GI has been promulgated. Nonetheless, it signals a legislative intention that small, low producing GIs are not welcome. The requirement of a discrete land area vis-a-vis grape growing means that there is no provision for a region to be comprised of more than one 'island'. All that can be promulgated is a subregion with even stronger grape growing homogeneity than the region in which it sits.

By inhibiting islands and by imposing a minimum threshold for production, the architecture of Australia's legal framework thus inevitably leads to the designation of large wine regions that allow blending across various biophysical environments while maintaining a single GI, inevitably making it unlikely that there will be any regional typicality in their wine. What we are left with is wines whose styles are driven by the individual preferences of each producer. At best, the only typicality that can be perceived by tasting is whether the grapes come from cool, temperate or warm climate areas.<sup>75</sup> Consequently, although it is possible to discriminate

<sup>73</sup> *Baxendale's Vineyard* (2007) 160 FCR 542, 569 [117] (Dowsett J).

<sup>74</sup> Although the availability of irrigation, a biophysical factor, is relevant under *Australian Grape and Wine Authority Regulations 1981* (Cth) reg 25(i)(v), whether it is commonly used is not explicitly relevant.

<sup>75</sup> Although no formal document of the conference session records the outcomes, in about 2010 the Association Internationale des Juristes du Droit de la Vigne et du Vin ('AIDV') Australasian Chapter held its annual conference in the Yarra Valley to which were invited expert wine tasters. The session focused on whether one could by organoleptic testing determine any typicality of Australian wine regions, even when limited to a single grape variety. The conclusion was that this could not be done.

between wine from Australia, New Zealand and France,<sup>76</sup> typicality from within Australian wine regions is extremely difficult to detect and so rarely mentioned.<sup>77</sup> Hardly a recipe for consumer engagement with Australia's wine regions.

### **C Other Problems with Australia's Current GI Legal Framework**

Another limitation arising with respect to the terms of Australia's blending rules relates to the conjoining of regional and subregional names. The regulations stipulate that up to three GIs may appear on wine labels provided: that the wine sourced from each of them adds up to 95 per cent of the wine's volume; that at least five per cent of the wine must be sourced from grapes grown in each of the regions; and that the GIs appear in order of their proportion in the wine.<sup>78</sup> This wording would seem to preclude conjoining of regional and subregional GIs if the wine sourced from the subregional GI exceeds 95 per cent of wine volume. In other words, conjoining is not possible unless the wine from the subregion is blended with wine from the larger region. This limitation acts as a disincentive for developing subregional typicality because it will preclude winemakers in the initial stages of subregional development from enjoying the halo effect of association with a more well-known region. Evidence from the US indicates wine consumers, even regular wine consumers, value broad based regional branding over appellation or sub-American Viticulture Areas ('AVA') branding as an extrinsic cue for their wine purchases.<sup>79</sup> Thus, provided the region has a positive wine image, regional association enhances more specific appellations, especially if the sub-AVA is little known.<sup>80</sup> Australian winemakers are likely to be cautious about diluting well-established regional names such as Margaret River or Coonawarra if there is no meaningful connection between the proposed subregion and wine profile.<sup>81</sup>

Furthermore, because of the emphasis on grape growing homogeneity, the boundaries of Australia's designated regions and subregions may have little connection with wine regionality. The geographical indication 'Barossa' provides an example. Barossa is a zone incorporating the Adelaide metropolitan region, Gawler, Hamley Bridge, Truro, and the Barossa Valley. However, most consumers

76 J A Green et al, 'Sensory and Chemical Characterisation of Sauvignon Blanc Wine: Influence of Source of Origin' (2011) 44 *Food Research International* 2788, 2796.

77 Johnson et al, above n 18, 69. For example, a search by the authors of Westlaw's Australia and New Zealand newspapers database using the search terms 'wine' and 'typicality' and 'Australia' found only four entries (conducted 3 July 2015). Three of the entries, from 2013–14, referred to research funding for a project to discover how regions might establish wine typicality.

78 *Australian Grape and Wine Authority Regulations 1981* (Cth) regs 21(3)–(4).

79 Thomas Atkin and Ray Johnson, 'Appellation as an Indicator of Quality' (2010) 22 *International Journal of Wine Business Research* 42, 58; Johan Bruwer and Ray Johnson 'Place-Based Marketing and Regional Branding Strategy Perspectives in the California Wine Industry' (2010) 27 *Journal of Consumer Marketing* 5, 12.

80 Bruwer and Johnson, above n 79, 11–12.

81 Ray Johnson and Johan Bruwer, 'The Balancing Act between Regionality and American Viticultural Areas (AVAs)' (2007) 18 *Journal of Wine Research* 163, 165–7, quoting Richard Mendelson.

would associate the Barossa name with the much smaller geographical indication ‘Barossa Valley’, which encompasses Nuriootpa, Tanunda, and Lyndoch. If consumers see Barossa on a wine label, this is likely to evoke a perception of the Barossa Valley because that is the area they associate with winemaking along, perhaps, with Prussian heritage, regional cuisine, and a culture of rural stewardship.<sup>82</sup> However, the use of the Barossa GI on a wine label actually means, from a legal perspective, something quite different to the name Barossa Valley. Similarly, the boundaries of the geographical indication, ‘Yarra Valley’ are essentially the boundaries of County Evelyn fixed by the Victorian Governor in 1849. These boundaries extend well beyond the valley of the Yarra River into the Dandenong Ranges, whereas most of the winemaking of the Yarra Valley is concentrated in the Valley itself around Healesville, Coldstream and Yarra Glen. Like most Australian GI boundaries, the Yarra Valley boundaries were initially fixed by agreement between local vignerons to enable future expansion and blending across a broad range of *terroirs* rather than to conform to regional perceptions. Of course, typicality was never envisaged as a component of the boundaries, and so the only definitive characteristic of Yarra Valley wine is ‘cool climate’ wine. Whether consumers who are not expert can determine this is another matter.

## D The Limits of the 2010 Reforms

The *Agreement between Australia and the European Community on Trade in Wine* of 2008 prompted a major overhaul of the *Australian Wine and Brandy Corporation Act 1980* (Cth), including how it defined GIs. The new definition reverted to the European original, mirroring the *TRIPS Agreement* art 22.1 definition, so that a geographical indication was now ‘in relation to wine goods, an indication that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin’.<sup>83</sup>

The Explanatory Memorandum accompanying the Australian Wine and Brandy Corporation Amendment Bill 2009 (Cth) indicated that the change was implemented to align Australia’s definition of GIs with art 22.1 of the multilateral *TRIPS Agreement*.<sup>84</sup> Otherwise, once more there was little discussion of the costs and benefits of the change, consideration of how the change might affect existing GIs that were previously registered on a different legal basis, or any discussion as to how the change might impact upon the practices of the GIC. While arguably

82 White, above n 15; Adrian Peace, ‘Barossa Dreaming: Imagining Place and Constituting Cuisine in Contemporary Australia’ (2011) 21 *Anthropological Forum* 23.

83 *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) sch 1 item 7, amending *Australian Wine and Brandy Corporation Act 1980* (Cth) s 4. See also *Agreement between Australia and the European Community on Trade in Wine*, opened for signature 1 December 2008, [2010] ATS 19 (entered into force 1 September 2010) (*Australia-European Community Agreement of 2008*); *TRIPS Agreement* art 22.1.

84 Explanatory Memorandum, Australian Wine and Brandy Corporation Amendment Bill 2009 (Cth) 19–20.

shifting from indications of source to GIs was a fundamental reorientation of Australia's legal framework, it appears that not much actual change was envisaged, and that, accordingly, the amendment was largely regarded as semantic tidying up. After all, regs 24 and 25 remain unchanged and continue in their original form today. Moreover, as most of Australia's wine growing regions had already attained a GI, unless there were future applications to amend existing GIs, any change to the framework was only likely to affect a negligible number of new applicants. Only one of Australia's 114 registered GIs has been registered since the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) came into effect on 1 September 2010.<sup>85</sup> Since that application was submitted to the GIC by the Mount Gambier Regional Winemakers Association in May 2010 with apparently no opposition,<sup>86</sup> it throws no light on the impact of the 2010 amendment.

However, despite the limitations described above (amongst others), we do not recommend a wholesale dismantling of the current Australian legal framework for wine GIs. It is too late to undo what has been done. Attempts to rewrite boundaries are likely to result in significant disputation. Moreover, to 'start again' would involve enormous costs at every level and possibly result in the implementation of a GI system where no one is (yet) entitled to use the new GIs!

Nevertheless, to maximise the value of the GI in the minds of consumers, wine must remain true to what GIs represent. We have demonstrated that as an indication of source framework our legal system has failed to promote regionality and typicality. The consequences are that Australian wine's international reputation as a commodity rather than as an artisanal product has been difficult to bat away. Our wines have never been promoted as having any discernible typicality and that we have nothing that makes our wines stand out and be different. In light of that we next discuss potential options that might be available to Australian winemakers seeking to market their wine by reference to typicality (and regionality). We consider these options as additional to, rather than as alternatives to, Australia's existing 'indication of source' wine terms.<sup>87</sup>

## V OTHER MODELS OF PROTECTION

The *TRIPS Agreement*, which is the most significant multilateral agreement governing the protection of GIs, does not prescribe the relevant legal framework that a World Trade Organization ('WTO') jurisdiction must adopt to comply with its obligations. Rather, WTO members are only required to provide the legal means for interested parties to prevent the misuse of GIs, including misuse that suggests that a wine is of a kind or style of wine coming from the protected area. Internationally, therefore, there is a variety of legal models available for

85 The Mount Gambier GI was registered on 21 December 2010.

86 Commonwealth, *Government Notices Gazette*, No GN 44, 10 November 2010, 2535–9.

87 For that reason, we do not consider models from jurisdictions which provide non-registered sui generis GI protection such as Jordan, Singapore and Sri Lanka.

GI protection and many instances of overlapping protection.<sup>88</sup> Australia itself illustrates how various forms of protection may overlap. Although a specific GI protection framework has been developed for wine, it is also possible to protect wine GIs using collective or certification trademarks, non-registered contractual means, through the common law tort of passing off, or by the prohibition in the *Australian Consumer Law* against misleading or deceptive conduct.<sup>89</sup> The latter are characterised by more limited involvement of public authorities than a typical *sui generis* GI framework.

### **A Model One: A Tiered GI Protection Approach**

Instead of a ‘one size fits all’ approach that focuses solely on grape origin, other jurisdictions have adopted a tiered approach to geographical terms, which allows agricultural producers and winemakers the option of differentiating their products according to degrees of typicality and regionality. The EU’s two tiered GI framework is an example.<sup>90</sup> Outside of the EU, tiered GIs are also found in Israel,<sup>91</sup> Georgia,<sup>92</sup> Brazil,<sup>93</sup> and Argentina.<sup>94</sup> Such an option is not currently available to Australian winemakers and would require substantial law reform to implement. However, for reasons explained below it remains worthy of consideration. Arguably, as Australia has an established GIC, naming system and label integrity program, adding the option of obtaining an appellation more strongly tied with typicality, and regionality, will not substantially add to the expense of maintaining the existing framework, will leave the existing system in place, but also leave options open to winemakers wishing to adopt more informative second tier GIs.

EU law distinguishes between protected geographical indications (‘PGIs’) and protected designations of origin (‘PDOs’).<sup>95</sup> PDOs require demonstration of wine typicality and are founded upon the *terroir* based French appellation system,

88 Irina Kireeva and Bernard O’Connor, ‘Geographical Indications and the TRIPS Agreement: What Protection is Provided to Geographical Indications in WTO Members?’ (2010) 13 *Journal of World Intellectual Property* 275.

89 *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

90 *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 Establishing a Common Organisation of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007* [2013] OJ L 347/671, arts 92–3.

91 *Appellations of Origin (Geographical Indications) (Protection) Law 1965* (Israel), 7 July 1965, 5725—1965, arts 21B–21C.

92 *Law of Georgia on Appellations of Origin and Geographical Indications of Goods* (Georgia), 22 June 1999.

93 *Lei da Propriedade Industrial* (Brazil), 14 May 1996, No 9.279, arts 177–8.

94 *Ley por la que se Establecen las Normas Generales para la Designación y Presentación de Vinos y Bebidas Espirituosas de Origen Vinico de la Argentina* (Argentina), 15 September 1999, No 25.163, arts 4, 13.

95 *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 Establishing a Common Organisation of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007* [2013] OJ L 347/671, arts 92–3.

whereas PGIs merely require demonstration of wine regionality and reflect reputation based links between the wine and its region of origin.<sup>96</sup> Generally, because the required link between wine and place is stronger for a PDO than a PGI, it is expected that PDO specifications will incorporate higher levels of production control than PGI specifications.

The value of differentiating between degrees of typicality and regionality for consumers can be linked to the concept of 'indexical authenticity'.<sup>97</sup> Goods with indexical authenticity are valued by consumers because of their unique and inimitable qualities, which in the case of wine is often linked to region of origin. The more specific the attributes of a wine's place of origin, the more likely it is that consumers will prefer that wine.<sup>98</sup> Hence, consumers will usually perceive a wine from a single vineyard or chateau as more valuable than a wine from a non-distinctive zone. Accordingly, wine originating from 'old world' wine producing countries that promote PDOs with robust typicality requirements are usually more highly valued by both European and United States consumers than wine from new world producing countries which often lack typicality (and in the case of Australia even regionality).<sup>99</sup>

International recognition as a specialised form of GI is one of the most important legal advantages of an appellation of origin. Appellations of origin are protected by the *Paris Convention for the Protection of Industrial Property*,<sup>100</sup> the *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods*,<sup>101</sup> the *General Agreement on Tariffs and Trade*,<sup>102</sup> the *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration*,<sup>103</sup> and the *TRIPS Agreement*.<sup>104</sup> In addition, GIs that encompass appellations of origin are recognised and protected by numerous regional and bilateral agreements including the *Australia-European Community Agreements of*

96 See Gangjee, *Relocating the Law of Geographical Indications*, above n 9, 223–31 for a historical explanation for the development of twin strands of GI protection in the EU.

97 Julie Moulard, Barry J Babin and Mitch Griffin, 'How Aspects of a Wine's Place Affect Consumers' Authenticity Perceptions and Purchase Intentions: The Role of Country of Origin and Technical Terroir' (2015) 27 *International Journal of Wine Business Research* 61, 67; Josias A Engelbrecht, Frikkie Herbst and Johan Bruwer, 'Region-of-Origin (ROO) Certification as Marketing Strategy in the South African Wine Market' (2014) 26 *International Journal of Wine Business Research* 139, 145–7, 152.

98 Moulard, Babin and Griffin, above n 97, 68; Edi DeFrancesco, Jimena Estrella Orrego and Alejandro Gennari 'Would "New World" Wines Benefit from Protected Geographical Indications in International Markets? The Case of Argentinean Malbec' (2012) 1 *Wine Economics and Policy* 63, 65

99 Moulard, Babin and Griffin, above n 97, 71–3. The authors study used a sample of United States MBA students. For European data they cited Nathalie Spielmann and Stephen Charters, 'The Dimensions of Authenticity in Terroir Products' (2013) 25 *International Journal of Wine Business Research* 310.

100 *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 305 (entered into force 26 April 1970) art 1.2.

101 *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods*, opened for signature 14 April 1891, 828 UNTS 163 (entered into force 1 June 1963) art 3bis.

102 *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force provisionally 1 January 1948) art IX ('GATT').

103 *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration*, opened for signature 31 October 1958, 923 UNTS 189 (entered into force 25 September 1966) art 1.

104 *TRIPS Agreement* arts 22–3.

1994 and 2008, the *Economic Partnership Agreement between the CARIFORUM States and the European Community and Its Member States*,<sup>105</sup> and the *Trans-Pacific Partnership*.<sup>106</sup>

In terms of strength and breadth of coverage, arts 22–3 of the *TRIPS Agreement* are the most significant. Article 22 obliges WTO Members to provide remedies against the false or misleading use of a GI or against any use that amounts to unfair competition or passing off. Article 23, which only applies to wines and spirits, goes further and obliges WTO Members to provide remedies for the false or misleading use of GIs including suggestions that a wine or spirit is of a kind, type, style, imitation, or like the wine or spirit made in the geographical area alluded to by the winemaker. The protection for wine and spirits applies regardless of whether any consumers have actually been misled by the claim or whether use of the GI amounts to unfair competition. International or national registration is not a requirement for protection.

Questions may be raised as to whether consumers would be able to successfully distinguish between the two tiers if the Australian wine industry were to implement something similar. Bearing in mind that French consumers have had a three-tier system (*Appellations d'Origine Contrôlées*, *Vins Délimités de Qualité Supérieure* and *Vins de Pays*) for decades that appears to have been generally understood by wine-purchasing consumers, there are few studies that measure consumer awareness of the difference between PGIs or PDOs, or studies that measure whether PDOs are subjectively more highly valued than PGIs.<sup>107</sup> However, research undertaken for the European Commission has found that the distinction between the two is particularly important for wine and that for France, Italy, Spain and Germany, PDOs dominate the wine market in terms of sales volume and value. The study also found that across the EU the average price of PDO wines was also substantially higher than PGI wines indicating the higher value placed on PDO wines by EU consumers.<sup>108</sup> Insofar as Australia has not adopted a two-tiered system, these findings are at least consistent with Australian data which finds a price premium for regional and subregional wine.<sup>109</sup>

105 *Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part* [2008] OJ L 289/3, art 46.5.

106 *Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) art 18.30.

107 But see Oana C Deselnicu et al, 'A Meta-Analysis of Geographical Indication Food Valuation Studies: What Drives the Premium for Origin-Based Labels?' (2013) 38 *Journal of Agricultural and Resource Economics* 204, 214 noting the higher price premium for PDO versus PGI agricultural products.

108 Tanguy Chever et al, 'Value of Production of Agricultural Products and Foodstuffs, Wines, Aromatised Wines and Spirits Protected by a Geographical Indication' (Final Report, European Commission, October 2012) 38–46.

109 See, eg, Verdonk, Wilkinson and Bruwer, above n 62, 363; Edward Oczkowski, 'Hedonic Wine Price Functions with Different Prices' (2015) 60 *Australian Journal of Agricultural and Resource Economics* 196, 206; Günter Schamel and Kym Anderson, 'Wine Quality and Varietal, Regional and Winery Reputations: Hedonic Prices for Australia and New Zealand' (2003) 79 *Economic Record* 357.

To provide the warranty sought by consumers, ideally the various degrees of wine typicality and regionality should be objectively verifiable.<sup>110</sup> Yet how typical regional wines have to be to enable the region's name to be promoted from a PGI to a PDO is not yet clear, and the task of differentiating between these legal objects appears deeply contextual.<sup>111</sup> Indeed, how does one decide what is the 'standard' with which all other wines need to comply to use the GI? 'Champagne' is a PDO with an area of 25 000 hectares. It comprises a single PDO spread across 314 villages each ranked for quality under the *Échelle de Crus* system. Champagne produces sparkling wine made exclusively from Pinot Noir, Pinot Meunier and/or Chardonnay grapes. 'English' is also a PDO registered by the European Commission incorporating the whole of England, an area of approximately 13 260 000 hectares, where a large number of varieties and wine styles are permitted. Although the specifications for the English PDO provide that winemakers must ensure that their wine is distinguishable from other wines, the actual criteria applied do not seem to extend beyond basic matters such as lack of fault, alcohol content and sulphur dioxide content. By contrast, the *Pays d'Oc*, an area of 88 000 hectares in South Western France, also claims to produce wine with a high degree of typicality derived from its *terroir* and strictly controlled production quality criteria (including internal and external monitoring of analytical quality, aromatic profile and taste merits).<sup>112</sup> However, the *Pays d'Oc* enjoys PGI, not PDO, status. While the typicality of Champagne wine appears to be unique, the distinction between English and *Pays d'Oc* is far less clear. The lack of clarity clearly stems from widely different cultural attitudes across Europe towards wine designation. One would expect that in a more homogenous jurisdiction like Australia that practice would be more consistent. Nonetheless, the failure to articulate a bright line between PGIs and PDOs poses problems for law and policy.

Another potential problem regarding GI tiers that distinguish between degrees of typicality relates to the determination of when a wine fits or does not fit a quality specification. In France, the official documentation that outlines the technical aspects of the wine's profile and methods of quality control is known as the

110 Gangjee, *Relocating the Law of Geographical Indications*, above n 9, 232.

111 The World Intellectual Property Organization ('WIPO') indicates that the basic difference between them lies in the strength of the connection between the geographical location and wine quality. According to WIPO, wine can only attract an appellation of origin if the grapes which form the wine are grown in the relevant area and the wine making process occurs in the relevant area. However, for GIs, a single criterion attributable to geographical origin is sufficient: see generally World Intellectual Property Organization, *Frequently Asked Questions: Geographical Indications: What is the Difference between a Geographical Indication and an Appellation of Origin?* <[http://www.wipo.int/geo\\_indications/en/faq\\_geographicalindications.html](http://www.wipo.int/geo_indications/en/faq_geographicalindications.html)>. A different approach applies in the European Union which provides that wine must be made from grapes grown in, and must be processed in, the relevant region to attract either a protected designation of origin or a protected GI: see *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of December 2013 Establishing a Common Organisation of the Market in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007* [2013] OJ L 347/671, art 93.

112 Pays d'Oc Wines, *Pays d'Oc IGP, Certified Qualities* <<http://www.paysdoc-wines.com/en/pays-oc-igp-certified-qualities>>.

*cahier des charges*.<sup>113</sup> Following adoption in national law and registration by the European Commission, for a number of PDOs and PGIs, certified independent organisations, such as the Inspection-Control-Origin or Quali-Bordeaux,<sup>114</sup> audit the implementation of the *cahier des charges* requirements and organise accreditation wine tastings to ensure that wines proposing to bear a PDO or PGI designation are typical of the region's specified profile. Each year a representative range of wines is selected and used as a reference point for the particular characteristics of the vintage. Professional tasters are appointed, evaluated and trained by the independent certification organisation. Winemakers submit their wines for tasting. Wine that does not meet the regional profile, that is, wine which fails to express the appropriate typicality, is rejected and cannot be marketed using the relevant PGI or PDO.

However, because the typicality requirements are subjective and not definitively articulated in advance, accreditation tastings are controversial.<sup>115</sup> The controversy over accreditation tastings is exacerbated by the evolving nature of typicality expressed vintage by vintage. Typicality can sometimes derive from more of 'joint' preferences by the body of regional winemakers than biophysical *terroir*.<sup>116</sup> Academic studies of wine experts demonstrate that complete consensus on typicality evaluation for PDOs is difficult to achieve, especially with respect to closely related PDOs, although results fluctuate according to the number of wines assessed, variability within the appellation, and with the strength of the assessors' links to the appellation.<sup>117</sup> Without an objective means to verify the judgements made by the tasting panels, it is difficult to determine whether they have correctly or falsely evaluated typicality. Consequently, given that the *cahier des charges* rarely incorporates sensory details, rejected winemakers have little recourse for rejection.<sup>118</sup>

The above suggests that if Australia were to adopt a two-tiered GI framework on the basis of its international advantages, it should naturally be very wary of incorporating mandatory tastings or complex production controls.

113 Theodore Georgopoulos, 'France' in Matt Harvey and Vicki Waye (eds), *Global Wine Regulation* (Thomson Reuters, 2014) 362, 363–4.

114 The independent organisation responsible for verifying conformity with the product specification must be set out in the *cahier des charges*: Regulation (EU) No 1308/2013 of the European Parliament and of the Council of December 2013 Establishing a Common Organisation of the Market in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347/671, art 94(2)(i).

115 Geneviève Teil, 'Nature, the CoAuthor of Its Products? An Analysis of the Recent Controversy Over Rejected AOC Wines in France' (2014) 17 *Journal of World Intellectual Property* 96, 97–8.

116 Chloé Roullier-Gall et al, 'A Grape and Wine Chemodiversity Comparison of Different Appellations in Burgundy: Vintage vs Terroir Effects' (2014) 152 *Food Chemistry* 100, 106; Yves Cadot et al, 'Sensory Dimension of Wine Typicality Related to a Terroir by Quantitative Descriptive Analysis, Just About Right Analysis and Typicality Assessment' (2012) 660 *Analytica Chimica Acta* 53. Contra María Reyes González-Centeno et al, 'A Multivariate Methodology to Distinguish among Wine Appellations of Origin' (2015) 35 *Agronomy for Sustainable Development* 295 finding that the terroir distinctiveness of appellations could be discriminated from the human factors associated with winemaking.

117 I Maitre et al, above n 12, 731; Cadot et al, above n 116.

118 Teil, above n 115, 98.

As demonstrated by the English PDO and the *Pays d'Oc* PGI, such a requirement will not hamstring winemakers in terms of their choice of varietal, style or blend, as they would not be obliged to use a second tier GI. Nevertheless, it will allow winemakers who do use the second tier GI to demonstrate to consumers that their wines meet production and origin criteria, and it reinforces collective action by winemakers to promote the regionality of their wine. The outstanding success of the *Pays d'Oc* region in France in transforming itself from a region known as a producer of basic wine largely supplied in bulk into a region with a reputation for producing high quality wine,<sup>119</sup> accompanied by collective efforts to decrease vineyard hectareage and wine production and focus on aromatic varieties suited to its Mediterranean climate, establishes that being able to articulate wine regionality and typicality, while still promoting varietal and brand, has significant benefits. *Pays d'Oc* is now France's most important PGI responsible for the majority of French wine PGI production and a primary driver of French wine exports.<sup>120</sup> Of course, the second and key advantage would be in the marketplace, where consumers would learn of or be educated about the typicality of Australia's wine regions and could make wine purchasing decisions not based on hazard or their recollection of a particular wine, but rather based on the knowledge of the flavour and nose profiles that they can confidently expect to find in a wine sold under a particular GI.

## **B Model Two: Collective and Certification Marks**

Trade marks have similar functions to GIs. Both instruments signal that goods like wine bear certain qualities, aim to protect consumers from false attribution of provenance, and protect producers against unfair competition.<sup>121</sup> However, registration of regional names under the *Trade Marks Act 1995* (Cth) as either collective or certification marks may be problematic as a result of the requirement of distinctiveness.<sup>122</sup> Using a place name makes it far more difficult to establish distinctiveness, although it might be argued that conjoined terms such as '100 per cent pure Hunter Valley' (rather than just 'Hunter Valley') overcome this problem, especially when the sign is mixed with graphical material that makes it clear that the branding is association rather than place based.<sup>123</sup>

119 Paulo André Niederle, 'O Mercado Vitivinícola e a Reorganização do Sistema de Indicações Geográficas na Região do Languedoc, França' (2012) 14 *Organizações Rurais & Agroindustriais* 155.

120 Jancis Robinson and Julia Harding, *The Oxford Companion to Wine* (Oxford University Press, 4<sup>th</sup> ed, 2015) 369.

121 Gail E Evans, 'A Comparative Analysis of the Protection of Geographical Indications in the European Union and the United States under Sui Generis and Trademark Systems' in Toshiko Takenaka (ed), *Intellectual Property in Common Law and Civil Law* (Edward Elgar, 2013) 248, 261; Emily Nation, 'Geographical Indications: The International Debate over Intellectual Property Rights for Local Producers' (2011) 82 *University of Colorado Law Review* 959, 970–1.

122 *Trade Marks Act 1995* (Cth) ss 41, 177. See also *Re Parish of Pokolbin* [2014] ATMO 98 (9 October 2014) — an application to register the Parish of Pokolbin as a certification mark for wine and tourism goods and services was rejected on the basis of lack of distinctiveness.

123 See, eg, *Bavaria NV v Bayerischer Brauerbund eV* (2009) 177 FCR 300, 316 [74]–[75], 335 [182] — a Dutch beer maker was permitted to term 'Bavaria' as a brand name on its beer labels.

Putting aside the ability to trade mark conjoined terms, any such trade mark may also be inconsistent with an existing registered GI. Under the *Australian Grape and Wine Authority Act 2013* (Cth) any winemaker sourcing grapes from the registered zone, region or subregion is entitled to use the name of that area, not just those with a certification mark. Provided the name was used in good faith to designate the wine's geographical origin there would be no trade mark infringement.<sup>124</sup> Consequently, registration of any association's certification mark incorporating a regional name could be opposed under the *Trade Marks Act 1995* (Cth) s 61 on the ground that it may cause confusion among consumers as to the rightful owner of the regional name. Indeed, registration of the place name 'Great Western' was successfully opposed in the High Court decision of *Thomson v B Seppelt & Sons Ltd*, on the basis that the name had not become distinctive of the applicant's wines versus wines made by other vignerons from the same region.<sup>125</sup>

Although trade marks are protected under the *TRIPS Agreement* and numerous other bilateral and regional agreements, because trade marks are private instruments that protect the rights of producers rather than collective instruments overseen by public bodies like the Australian Grape and Wine Authority, it will be the responsibility of the owners of the trade marks to monitor breaches in the many overseas markets where their products are sold, and then address infringement in each of those markets. Most small regional associations could ill afford to do so outside of their own jurisdictions. By contrast, incorporating an appellation system within Australia's GI framework enables protection of the appellations to be advanced on a government to government or national regulator to national regulator basis, through means such as treaties similar to the *Australia-European Community Agreements of 1994 and 2008*. This thus reduces the cost of enforcement to regional wine producing associations.

### **C Model Three: Non-Registered Contractual Means**

A variety of non-registered contractual means have been pursued by winemakers around the world to further develop typicality and regionality. The Barossa Trust Mark ('BTM') is an Australian example that encompasses not just winemakers but also food, tourism and hospitality providers within the Barossa region.<sup>126</sup> Use of the BTM is licensed to those that demonstrate exceptional achievement across five different aspects of the value chain including origin, integrity, quality, environment and community. Consequently, although typicality is clearly encapsulated within its penumbra, its primary focus is upon the broader, socially constructed concept of regionality. BTM licenses are only available for particular products and experiences rather than granted to producers or suppliers located within the region. The BTM is owned by the Barossa Trust Mark Inc, but is not registered as a collective or certification trade mark under the *Trade Marks Act 1995* (Cth).

124 *Trade Marks Act 1995* (Cth) s 122(1)(b)(i).

125 (1925) 37 CLR 305, 316.

126 See Barossa Australia, *Barossa Trust Mark* <<http://www.barossa.com/barossa-trust-mark>>.

However, it would be wrong to conclude that the BTM provides evidence that industry participants have made a positive choice to reject a trade mark or an appellation of origin in favour of more privately ordered protection. In this instance, an appellation of origin was not available as an option. Rather the BTM constitutes an innovative solution to a shortfall in the law governing the protection and promotion of typicality and regionality. Consequently, misuse of the BTM is either addressed as a breach of the Barossa Trust Mark Inc's internal rules or, if consumers are misled by the inappropriate use of the mark, by the general prohibition against misleading and deceptive conduct set out in the *Australian Consumer Law*.<sup>127</sup>

The BTM and other contractual models fall outside of the *TRIPS Agreement* and other international provisions governing GIs. As a result, there will be difficulties involved in preventing misuse of the BTM in overseas jurisdictions, and this will be significant for many Australian winemakers that export a large proportion of their wine production. For example, fraudulent use of GIs, including Australian GIs, has been detected as a major problem in China, one of Australia's largest wine export markets.<sup>128</sup> Moreover, many overseas regimes including China<sup>129</sup> and the EU<sup>130</sup> will not allow foreign GIs to be registered and protected in their regime unless the GIs are also registered in their jurisdiction of origin. Further, unless the renown of the BTM makes it a unique signifier of the qualities of the goods and services it certifies in the relevant foreign jurisdiction, it will also be difficult to establish common law mark status.<sup>131</sup>

## D Summary

Our analysis thus favours consideration of a two-tiered framework that enables consumers to better identify wine with strong degrees of typicality and regionality. However, before examining the changes that might be required to achieve that goal, we decided it would be useful to examine the wine industry's position.

127 *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

128 Laura Zanzig, 'The Perfect Pairing: Protecting US Geographical Indications with a Sino-American Wine Registry' (2013) 88 *Washington Law Review* 723, 723.

129 «集体商标、证明商标注册和管理办法» [Measures for the Registration and Administration of Collective Marks and Certification Marks] (People's Republic of China) State Administration for Industry and Commerce, Order No 6, 17 April 2003, art 6.

130 *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of December 2013 Establishing a Common Organisation of the Market in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007* [2013] OJ L 347/671, art 94(3).

131 See, eg, *Institut National des Appellations d'Origine v Brown-Forman Corp*, 47 USPQ 2d 1875 — the common law mark status of cognac was recognised on the basis that this was a protected French appellation of origin known for many years among the US purchasing public.

## VI INDUSTRY ATTITUDES

To understand industry attitudes to Australia's current legal framework and gauge demand for other models we undertook an informal survey of Australia's regional wine associations. Regional winemaking associations listed on websites maintained by Wine Australia and the Winemakers' Federation of Australia were contacted by email and asked to nominate a representative to participate in a twenty-minute telephone survey. A copy of the survey is appended to the article. While only seven regional associations responded to the invitation and participated in the survey, they represented almost 1200 members<sup>132</sup> and provided some useful, albeit limited, qualitative commentary regarding the advantages and disadvantages of Australia's current GI framework, and their attitudes towards possible legal reform.

At the outset it is important to remark upon the significance of the connection between wine and place expressed by all participants. As one participant stated: 'Where wine is born is more important than grape varietal and so it is essential to be truthful about this.' Another stated that a wine's provenance was integral to the ability to discriminate a wine from a generic commodity.

All respondents were favourably disposed towards the current GI framework and most felt that GIs helped to promote and protect the grape growing and winemaking activities of their regions. Contrary to our previous commentary, the majority were even of the view that Australia's current GIs enabled winemakers to communicate the special regional characteristics of their wine. According to one participant: 'You have to ask why the GI system was created. It was created for product differentiation, and for my association the system is working.' Some commented that since their regional GI had been established, the typicality and reputation of the regional qualities of their wine had strengthened. Consistent with those comments, it was also acknowledged that it may take a number of years of experimentation to find the best regionally suited varieties, grape growing practices and winemaking styles and a number of years of consistent consumer messaging to build regional reputation. In most cases, the development of regionality had been coordinated and was undertaken on a cooperative basis with community-based regional associations and local tourism and hospitality providers. One participant noted that in this respect the creation of the region's GI had played an important role in regional development.

All were happy with Australia's liberal regime for obtaining a GI and believed that eschewing European style production controls and profiling requirements had served the Australian wine industry well. According to one, the industry did not want to be hamstrung by production rules that inhibited adaptation to

132 It is estimated that there are approximately 5141 grapegrowers and 2481 winemakers in Australia: Australian Bureau of Statistics, *Vineyard Estimates, Australia, 2014–15*, ABS Catalogue No 1329.0.55.002 (2015); Winetitles Media, *Wine Industry Statistics — Wine Producers* (2016) <[http://winetitles.com.au/statistics/wineries\\_numbers.asp](http://winetitles.com.au/statistics/wineries_numbers.asp)>. To comply with the *Australian Code for the Responsible Conduct of Research*, participation of regional associations was confidential and so none of the participants can be identified.

changes in consumer taste and did not provide a means to deal with shortfalls in grape quality through blending of up to 15 per cent of wine derived from grapes outside the relevant region or through blending with a broad array of varieties. Another commented that the liberality of Australia's regime also provided greater flexibility to respond to phenomena such as climate change and bushfire taint.

In addition to its adaptability, participants commented upon the link between the creation of Australia's GI framework and its successful expansion of market share in the global wine trade. One participant stated that 'the creation of GIs in Australia allowed Australian wine to stand shoulder to shoulder in global wine markets with wines from the European Union and the United States'. Insofar as consumers were concerned, the participants believed that the assurances provided by the current regime regarding the connection between wine and place were sufficient and were vigorously enforced.

On the negative side, a number of the participants commented upon the acrimony surrounding the formation of GI boundaries, and how this can negatively affect local communities. A number were also unhappy with the costs associated with disputed GIs, noting that disputes were usually long and hard fought, and so involved substantial legal and expert fees. Some participants felt that GI boundary drawing had little to do with grape growing geography or with localised practice and that, at times, boundaries were drawn to accommodate particular grapegrowers or winemakers whose location might otherwise fall outside of natural geographic borders. Accordingly, it might therefore be harder to relate the wine from those regions with particular regional characteristics.

A number of the participants were interested in the concept of an appellation of origin as an additional option to a GI. Most were in favour of something that might require them to demonstrate that 100 per cent of the wines originated from the relevant region. However, only one participant was prepared to go further than that, agreeing that the relevant public body responsible for granting appellation of origin status should be provided with details regarding the regional analytical and organoleptic qualities of the wine. All were against analytical and organoleptic testing. Suggestions that an independent tasting panel should verify that the wine conformed to a regional profile drew almost apoplectic responses.

## VII DISCUSSION AND RECOMMENDATIONS

From these conversations it appears that there is no current clear consensus regarding the concept of typicality, or *typicité*, across the Australian wine sector. Some winemakers regard typicality in terms of an association with a region, while others regard typicality more narrowly as the regional taste of a wine, while others again consider it in even narrower vineyard *terroir* terms. This demonstrates that prior to formulating a legal instrument which attempts to articulate typicality, deeper research is needed to explore what Australian winemakers understand by terms such as 'regionality' or indeed, 'typicality'. As we noted above, while some regions are associated with particular varieties such as the Barossa with

Shiraz, the Hunter with Semillion or the Yarra Valley with Pinot Noir, it would be useful to explore the means winemakers could express how a Yarra Valley Pinot Noir can be differentiated from a Tasmanian Pinot Noir or how a Hunter Valley Semillion might be differentiated from a Margaret River Semillion to further enhance the provenance of the wine in the minds of consumers.

Another issue that needs to be considered is that the Australian wine sector has traditionally been opposed to any form of ‘appellation’ system largely due to a misunderstanding of that term. In other words, in Australia the mere mention of the word ‘appellation’ carries significant negative connotations. Again it would appear to the authors that it may be necessary or desirable to have more detailed face-to-face discussions, focus groups and/or workshops with wine sector organisations, explaining what the present proposal of an appellation system would entail and debunking any thoughts that what is being put forward for consideration is a system that bears any resemblance to the European system of controlled appellations of origin or controlled designation of origins.

What we are proposing is very far from the French *cashier de charges* and is more in line with the English PDO or the *Pays d’Oc* PGI, that is, simply a requirement indicating the analytical and organoleptic qualities of wine from the region or subregion. By contrast, the prevailing industry perception appeared to be that the choice was between two extremes comprised of either a very liberal indication of source framework, or an overly bureaucratic, non-competitive European appellation system. A more calibrated Australian appellation was regarded as indistinguishable from European appellations that prescribed grape-growing and winemaking practices in micro detail. This was partly due to the nature of our survey, which did not provide an opportunity for the workshopping of various appellation options. As one participant commented, ‘it is hard to form a view when a specific proposal has not been put on the table and without full discussion within the industry’.

Given that all participants in our survey acknowledged the importance of regionality and the contribution that typicality could make to regional reputation, we feel it is important to set out the comparative advantages of the option to apply for an appellation of origin, and thereby to contribute to future debate within the Australian wine industry. We foresee that, while Australia might not yet be ready to change its current GI framework, as typicality and regionality intensify the apparently low demand for a suitable legal instrument to protect and promote the investment underpinning them may increase.

Accordingly, our first recommendation is that for future applications, including applications to amend existing GIs, a review of *Australian Grape and Wine Authority Regulations 1981* (Cth) regs 24–5 should be undertaken to ensure their constructive alignment with the new definition of GIs in the *Australian Grape and Wine Authority Act 2013* (Cth) s 4.

Second, as a result of the comparative advantages of adding a second tier of GIs within Australia’s GI framework discussed above, we recommend that consideration be given to creating a special category of GI, the second tier, that

conforms more closely to a true GI, that is, a GI that requires an essential link to be substantiated between the wine bearing the GI and its region. Development of a new tier of GIs will help build greater Australian wine diversity, facilitate new stories of place, and expand marketing opportunities beyond Brand Australia and the bigger well-known regions.<sup>133</sup> Provided the qualities of the new tier GIs are communicated consistently, coherently and regularly to consumers, true GIs are more highly valued than other region of origin claims.<sup>134</sup> Therefore, should regional winemaking associations invest in establishing distinctive wine and regional branding, as well as attaining an appellation, they will be able to extract higher price premiums for their wine<sup>135</sup> and increase their impact in export markets.<sup>136</sup> By providing this legal option, regional winemaking associations will be better placed to leverage from their efforts to develop regionality and typicality.

Insofar as the proposed second tier GI is concerned, we recommend a degree of post-production control to ensure against freeriding by winemakers within the GI that are unwilling to abide by typicality obligations and who thereby undermine consumer perceptions of appellation quality. While we would recommend against accreditation tasting as subjective as that employed in some French appellations, we would recommend analytical and organoleptic testing as well as the requirement of an objectively determined and reasonably liberal sensory profile that is established at registration and reviewed from time to time by the relevant regional winemaking association.<sup>137</sup> Winemakers and the community ought to be able to publicly access information that will assist and inform their production and consumption choices.

We also recommend that if such a second tier GI system were established, it be given a different name to clearly distinguish it from the existing system of Australian GIs, which have particular connotations in international markets. Whilst the word 'appellation' still has negative connotations in Australia, if winemakers can be educated to understand that an Australian wine 'appellation' does not encompass the bureaucracy or complexity of the EU meaning, then there are significant economic and marketing advantages to use a word that is internationally recognised as indicating a higher level of typicality than 'mere'

133 James A Hall, 'Terroir and Subregionality' [2015] (618) *Australian and New Zealand Grapegrower & Winemaker* 56, 56.

134 See, eg, Verdonk, Wilkinson and Bruwer, above n 62, 363 (Australia); Defrancesco, Orrego and Gennari, above n 98, 71 (Argentina); Engelbrecht, Herbst and Bruwer, above n 97, 155–6 (South Africa); María-Pilar Sáenz-Navajas et al, 'Perception of Wine Quality According to Extrinsic Cues: The Case of Burgundy Wine Consumers' (2013) 27 *Food Quality and Preference* 44, 51 (France).

135 Deselnicu et al, above n 107, 212. See also Institut National des Appellations D'Origine des Vins et Eaux-de-Vie, *A Success Story for France, L'Appellations D'Origine Contrôlée, Wines and Spirits*.

136 Mariarosaria Agostino and Francesco Trivieri, 'Geographical Indication and Wine Exports: An Empirical Investigation Considering the Major European Producers' (2014) 46 *Food Policy* 22, 33; G Malorgio, L Camanzi and C Grazia, 'Effectiveness of Appellations of Origin on International Wine Market' in Maurizio Canavari et al (eds), *International Marketing and Trade of Quality Food Products* (Wageningen, 2009) 43.

137 It is important to note that we are only recommending post-production analytical and organoleptic testing and tasting for fault for the higher level appellation. We are not suggesting that this form of testing should apply to pre-existing GIs.

GIs. The concept of an appellation that encompasses a causal link between a wine's character and a region, that is, a wine with distinctive regional typicality made from a limited range of varieties, needs to be differentiated from a GI wine that accommodates relatively lower levels of typicality.<sup>138</sup>

Institutionalising appellations through incorporation into the GI framework will reinforce the value of the appellations to consumers. The institutional warranty, like Australia's Label Integrity Program, is an important quality dimension for consumers.<sup>139</sup> While the BTM is managed in a careful and principled manner and has good buy-in from the local wine, food and tourism industries, it remains to be determined whether the trust mark will generate high levels of consumer awareness, and whether it will be a concept capable of export. Even assuming that the BTM attains high levels of consumer awareness and trust, a plethora of regionally based trust marks seeking to emulate the BTM's success but with variations in the requirements necessary to earn the mark may confuse consumers, especially if a number of similar trust mark organisations proliferate in the same or adjoining regions with overlaps between them or if they each use dissimilar rules. Embedding an appellation system within the GI framework reduces coordination costs between regional wine associations that might lay claim to overlapping boundaries and confuse consumers with a variety of rules and standards. One single GI and appellation scheme makes it easier for consumers to discriminate between each category of legal object and navigate between them.

Similar arguments apply to certification marks. Aside from the difficulty of obtaining a certification mark largely based on a place name, an uncoordinated array of privately owned certification marks with varying stipulations regarding authorised use over potentially overlapping geographical areas and overlapping ranges of goods and services is likely to be costlier overall compared to a streamlined federal GI and appellation system. A proliferation of certification marks is also likely to confuse consumers. Some certification marks may require adherence to strict production criteria, whereas others may simply require a weak connection between wine and place. In the eyes of consumers, the lack of consistency could thus end up undermining the credibility of all such certification marks regardless of their connection to typicality or regionality.<sup>140</sup>

Clearly, as far as wine is concerned, appellation or GI protection is likely to be stronger than that deriving from unfair competition laws or those prohibiting misleading representations, as it extends to references to the wine exhibiting the style of the appellation, and still applies even when accompanied by a truthful origin claim. Thus, it is not possible to avoid liability under *TRIPS Agreement*

138 GIs can, nonetheless, evoke high levels of regionality, ie socially constructed evocations of a link between the wine and the socio-economic and cultural dimensions of its region.

139 Spielmann and Charters, above n 99, 319 noting that there are three dimensions of authenticity in *terroir* products: product authenticity, institutional authenticity, and internalised authenticity. According to the authors perceived product authenticity is positively related to institutional authenticity, ie 'the more a product is regulated the more unique it is perceived to be': at 320.

140 See also Richard Bonsi, A L Hammett and Bob Smith, 'Eco-Labels and International Trade: Problems and Solutions' (2008) 42 *Journal of World Trade* 407, 419 — noting credibility problems arising from a plethora of varying eco-label standards.

compliant national legislation by presenting wine as 'Made in Australia' while at the same time claiming that the wine exhibits qualities associated with a foreign region like Chablis or Burgundy.<sup>141</sup>

Unfair competition, passing off and misleading conduct claims also require additional evidence to be adduced beyond the false attribution of geographic origin and are therefore much more expensive causes of action to prosecute than breach of a sui generis GI and appellation regime. For example, a claim for misleading and deceptive conduct must establish that consumers were misled or deceived or are likely to be misled or deceived.<sup>142</sup> In that respect, the courts have stated that it is relevant to consider the market in which the goods and services are sold, the way the goods and services are sold, and the purchasing habits of consumers.<sup>143</sup> Hence, in *Comité Interprofessionnel du Vin de Champagne v Powell*,<sup>144</sup> it was necessary to adduce extensive evidence of the meaning of the name Champagne in Australia, to demonstrate how and why Australian consumers might be misled by social media posted by the respondent, who claimed to be a Champagne 'ambassador' and who failed to distinguish between Champagne and other sparkling wine when promoting her educational services and views about sparkling wine to successfully establish a case of misleading and deceptive conduct.<sup>145</sup>

The elements of unfair competition vary according to jurisdiction, but in most jurisdictions unfair competition includes dilution of the distinctive character of a mark attached to a product that damages the owner's goodwill or reputation and therefore also requires evidence to be adduced regarding a supplier's goodwill and how the goodwill has been harmed by false attribution.<sup>146</sup>

Compared with an action for misleading conduct or unfair competition, breach of a certification mark may be easier to establish if the marks in question are substantially identical because this principally involves a side by side comparison of the marks.<sup>147</sup> However, if the breach is based upon an allegation that the marks are deceptively similar, evidence will have to be adduced of the probable visual impression on consumers or potential customers which would be produced as a

141 *TRIPS Agreement* art 22.4. See also *Australian Grape and Wine Authority Act 2013* (Cth) s 40D(4), explaining that false description and presentation includes material that indicates that the wine is similar or made in a style that does not reflect its true place of origin.

142 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 656 [52]–[53] (French CJ, Crennan, Bell and Keane JJ); *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45, 85 [102]–[103].

143 *Siddons Pty Ltd v The Stanley Works Pty Ltd* (1991) 29 FCR 14, 21 — commenting on how consumers would ordinarily react to the word 'Australia' embossed on a socket supplied by the respondent. See also, *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 209.

144 (2015) 330 ALR 67.

145 Interestingly the case against the respondent under the *Australian Grape and Wine Authority Act 2013* (Cth) ss 40C and 40E failed because the Court held that the respondent was not selling or offering to sell the wine depicted in her social media posts: *ibid* 137 [329].

146 See, eg, *Gesetz gegen den Unlauteren Wettbewerb* [Act against Unfair Competition] (Germany) 3 July 2004, BGBI I, 2010, 254, s 5(1).1.

147 *Vivo International Corporation Pty Ltd v Tivo Inc* (2012) 294 ALR 661, 675–7 [84]; *CA Henschke & Co v Rosemount Estates Pty Ltd* (2000) 52 IPR 42, 62 [44].

result of the ‘notional normal and fair use’ of the marks.<sup>148</sup> Furthermore, registering a certification mark that incorporates a place name will not prevent others from using that same place name in good faith, for example, if their business is located within the relevant region.<sup>149</sup>

The other drawback of a publicly based, versus a privately based, system of protection highlighted by the respondents to our survey is its more limited agility and responsiveness, although arguably that drawback is more relevant to a scheme like the BTM rather than certification marks where stipulations are also subject to potentially lengthy and costly public processes and scrutiny if amendments are proposed.

A related problem which we discerned from some of our respondents was the potential for alienation. Both of these problems flow from the regional association’s lack of direct and sole ownership and control over the rules governing certification and the necessity to comply with a bureaucratically constrained template for application that leaves little room for the type of creativity exhibited by the BTM. It is hard to imagine a bureaucratic template for an appellation of origin comprised of regionality factors such as integrity and community, along with the typicality features of a wine region. Yet clearly these are more important to the BTM community than the analytical and organoleptic qualities of the wine they are certifying as worthy of their trust mark. For similar reasons it will be very difficult to dovetail the BTM approach within a certification trade mark framework that requires objective specificity as to the requirements that must be met to satisfy authorised use,<sup>150</sup> as well as certification from the Australian Competition and Consumer Commission that the association is appropriately placed to authorise use, and that its rules are not detrimental to the public in terms of their potential anti-competitive effect.<sup>151</sup>

Nonetheless, it is possible that when it comes to wine and its connection to a region, agility and responsiveness may be overblown concerns. As our respondents commented, wine regionality takes many years to develop and requires consistent consumer messaging and alignment between the activities of many regional actors, not just winemakers. While flexibility needs to be built into the profiling required to qualify for appellation of origin status, our respondents made it clear that they remain committed to communicating the *terroir* of their wine. Although an appellation of origin may not have suited the Australian wine sector during the early stages of its expansion into global markets during the late 1980s and early 1990s, as regionality and typicality develop and strengthen, the demand for an effective means to communicate these qualities to consumers increases as does the need to protect the collective investment they represent.

148 *Coca-Cola Co v All-Fect Distributors Ltd* (1999) 96 FCR 107, 122–3 [41]–[42], quoting *Gardenia Overseas Pty Ltd v Garden Co Ltd [No 2]* (1994) 29 IPR 485, 493.

149 *Trade Marks Act 1995* (Cth) s 122(1)(b); *Angoves Pty Ltd v Johnson* (1982) 43 ALR 349.

150 *Trade Marks Act 1995* (Cth) s 173.

151 *Ibid* s 175.

Lastly, contrary to Australia's existing blending regulations and consistent with evidence from the United States related to the benefits of conjoining regional and appellation labelling, we would also recommend that winemakers should be permitted to claim association with the broad regional GI and the more specialised appellation on wine labels. This will prevent existing Australian regional GIs from being diluted through fragmentation into smaller islands and also enable winemakers in appellations to continue to enjoy the halo effect of the region while developing the reputation of their appellation. Available landscape and soil mapping information suggests that many of Australia's existing larger wine regions lend themselves to the development of subregional appellations.<sup>152</sup> In the same way that Burgundy, Bordeaux and *Pays d'Oc* accommodate smaller specialised PDOs, broader regions within Australia will also benefit by cross-referencing to the specialised product that their regions can offer.

## VIII CONCLUSION

This article has demonstrated that as an indication of source framework, albeit one that has been legislatively reformed, Australia's legal system for identifying the boundaries of GIs for wine is not well placed to promote regionality. Typicality is absent from the framework altogether. Nonetheless, the industry and marketing arms of the Australian Grape and Wine Authority have identified the promotion of regionality as a key plank for the recovery of the Australian wine industry. If that strategy is to be successfully advanced, the legislative reform of the definition of GIs implemented in 2010 will have to be followed up by changes in the *Australian Grape and Wine Authority Regulations 1981* (Cth). We believe that Australian winemakers should be given the option of establishing true appellations of origin. Should they wish to pursue both typicality and regionality they will need an effective legal framework to support their aspirations. Without it, consumers are unlikely to be convinced of their appellation credentials and winemakers may find it hard to maintain the collective approach that is required to create and grow the economic value of the appellation. Although it is clear that the Australian wine industry is not yet ready or interested in pursuing this option, it is also clear that the comparative costs and benefits of an Australian appellation have not been fully explored and remain mired in anti-European sentiment.

152 Hall, above n 133, 58–9.

## **APPENDIX — COPY OF SURVEY**

### **A *Introductory Questions***

To commence, I would like to ask you a few questions about your association and your role within that association.

1. When was your association formed?
2. Does your association represent (indicate which)
  - (a) Grapegrowers;
  - (b) Winemakers;
  - (c) Grapegrowers and winemakers;
  - (d) Grapegrowers, winemakers and tourist operators; or
  - (e) Grapegrowers, winemakers, tourist operators and local hospitality (eg restaurants).
3. How many members does your association represent and in what proportion to the above categories?
4. What is your role in the association?

### **B *Views on Current Australian Legal Framework for Geographical Indications and Wine***

I would now like to explore your thoughts on Australia's current legal framework of geographical indication protection for wine.

1. Do you know what a geographical indication for wine is? (Prompt — if the answer is no, please explain that a geographical indication for wine denominates where the grapes are grown that make up the wine. In Australia at least 85% of the grapes must originate from the relevant area which may be very specific such as Eden Valley or Pokolbin or very broad such as South-Eastern Australia to legitimately use the geographical indication in relation to wine; also mention that up to three GIs may be used).

Not sure                       No                                       Yes

2. Can you please tell us whether you agree with any of the statements below that relate to the benefits of geographical indications?

- a. Geographical indications help to promote and protect 'Brand Australia'.

Strongly disagree     Disagree                       Neutral                       Agree                       Strongly agree

b. Geographical indications help to promote and protect the grape growing and winemaking activities of the relevant wine region.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

c. A geographical indication can be used without having to fulfil any prescribed grape growing or wine making criteria.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

d. Geographical indications help winemakers communicate the special regional characteristics of their wine to consumers.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

e. Geographical indications can have a positive impact on the price of the wine.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

f. Geographical indications provide consumers with an assurance that the wine comes from a particular area.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

g. Other important or very important benefit — please specify

3. Can you please tell us whether you agree with any of the statements below that relate to the limitations of geographical indications?

a. The process for obtaining a geographical indication is expensive and time consuming.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- b. The economic value of an Australian geographical indication is unclear.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- c. The costs of maintaining and promoting a geographical indication are too high.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- d. There is too much free riding on the reputation of the geographical indication as any winemaker is free to use the geographical indication provided 85% of the grapes are grown in the relevant region regardless of where the winemaker is located, its affiliations, its oenological practices or the quality of wine produced.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- e. The geographical indication does not guarantee the special regional characteristics of the wine.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- f. There is no guarantee that all the wine comes from a relevant wine region (refer back to 85% rule; up to three GI rule and South-Eastern Australia) and so consumer assurance is limited.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- g. Other significant or very significant limitation — please specify.

### **C The Proposed New Appellation of Origin**

I want to talk now about a potential new form of legal protection that could operate in addition to and as an alternative to the current geographical indication. In other places, including the EU and Latin America, regional wine making associations may opt for of an appellation of origin (from a range of options which includes

indications of source and geographical indications). An appellation of origin requires an essential link to be established between the wine's characteristics and the region from where it originates. Even in the US which has a legal system much like Australia's current geographical indication system some regional wine associations, such as Coro Mendocino, use binding criteria like those used to establish an appellation of origin to create regional wine typicality. Others such as the Napa Valley Vintners use collective trademarks to advance the special regional characteristics of their wine.

1. Do you wish to have a broader choice of legal instrument relating to the promotion and protection of regional origin for Australian wine?

Not sure                       No                                       Yes

2. Would winemakers and or grape growers in your region want the ability to apply for an appellation of origin that requires an essential link to be established between the wine and its region of origin?

Not sure                       No                                       Yes

## ***D Factors affecting the Operation of the Proposed Appellation of Origin***

I would now like to talk about how the proposed appellation of origin might operate.

1. An appellation of origin requires an essential link to be established between the region of origin and the wine. Can you please indicate whether you agree with any of the following measures?

- a. Require that 100% of the grapes in the wine originate from the relevant region.

Strongly disagree    Disagree                       Neutral                       Agree                       Strongly agree

- b. Require that the public body responsible for granting appellation of origin status (GIC Committee) be provided with details regarding the analytical and organoleptic qualities of the wine and the essential link between the wine and the wine's geographical origin.

Strongly disagree    Disagree                       Neutral                       Agree                       Strongly agree

- c. Provide the public body responsible for granting appellation of origin status (GIC Committee) with details regarding regional viticultural and oenological practice that must be followed by winemakers to

qualify to use the appellation of origin as well as details regarding the essential link between the wine and the wine's geographical origin.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

- d. Require that each wine proposing to use the appellation of origin conform to a particular regional profile, tested by an independent tasting panel as well as providing details regarding the essential link between the wine and the wine's geographical origin.

Strongly disagree    Disagree    Neutral    Agree    Strongly agree

2. Can you please suggest any other measures you think appropriate?

3. Would you favour the ability to use conjoined geographical indications and appellations of origin, eg Pokolbin, Hunter Valley on wine labelling?

Not sure    No    Yes