

# WINE MARKET REFORM: A TALE OF TWO MARKETS AND THEIR LEGAL INTERACTION

VICKI WAYE\*

The Australian wine industry is in crisis. More than one sixth of Australian vineyards are non-viable. The wine surplus is now so large that it is causing long term damage to the Australian brand through entrenched discounting. Long term global competitiveness is further constrained by factors such as increasing water costs, unfavorable exchange rates, escalating labour costs and potentially higher costs imposed under a proposed carbon emissions trading plan (albeit a postponed plan). Like the EU, the Australian wine industry has been forced to restructure and is exploring options including the grubbing up of vineyards. The industry has also targeted brand segmentation and the promotion of region in an effort to improve market demand and to develop a national reputation for fine wine.

Brand segmentation and the promotion of region require significant collective investment that can be easily undermined by the failure to legally protect the cachet that is intended to be generated. On the other hand, measures that facilitate supply control through the monopolisation of production methods to particular regions or brands are neither desirable nor economically rational. Differing levels of legal protection between markets and the differing levels of competitive advantage and/or supply control that are thereby engendered can also potentially act as technical barriers to international wine trade. Institutional measures that support market re-orientation proposed in Australia and elsewhere therefore need to ensure that they do not unduly stymie innovation and trade. However, the incentives for designing sub-optimal levels of protection when profitability is under threat are high.

This article explores current legal developments in Australia regarding the protection of brand and region in light of the revised Australia – EC Wine Trade Agreement and the reform of the EU wine market, as well as proposed reforms designed to achieve greater efficiency and transparency in the auditing of Australian wine provenance. The influence of other trends including the demand for greater accountability and restraint apropos the health impacts of wine, and the demand for proof of sustainability will also be noted insofar as they relate to the protection of brand and region.

## I INTRODUCTION

Worldwide demand for wine is falling much faster than supply leading to marginal profitability for many in the wine industry. Attempts to switch to lower levels of production of higher quality wine have been stymied by the global financial crisis. In Australia, the switch to lower levels of higher quality production will require major industry restructuring. Despite the challenge of major restructuring in each jurisdiction, the EU and Australia have reaffirmed and extended their wine trade agreement. Under the *Agreement between Australia and the European Community on Trade in Wine*,<sup>1</sup> in exchange for ostensibly more secure market access, Australia has given up the use of a large number of European geographical indications and traditional expressions which

---

\* LLB (Hons) (Adelaide), LLM (Adelaide), PhD (Sydney). Professor at University of South Australia.

<sup>1</sup> Brussels 1<sup>st</sup> December 2008; Entered into Force 1 September 2010.

would otherwise be unlikely to be protected.<sup>2</sup> Australia has also agreed to protect these terms from misuse by third countries.

However, given that the EU has recently adopted internal market regulation that abandons many of the technical barriers to trade that Australia might face, arguably the proffered rationale for giving up the use of terms such as ‘port’, ‘sherry’ and ‘champagne’ is open to debate. While Australian wine makers may have faced considerable difficulty in accessing European markets in the past, as a result of changes to EU wine law between 2007 – 2009 impediments to trade have been substantially reduced. This article will therefore consider the motivations underlying the extension of our wine trade agreement with the European Union and consider some of its costs and benefits. In examining these matters, the article will focus upon the role played by path dependence. Path dependence maintains that legal outcomes, including international treaties, are largely the product of previous outcomes, rather than a response to current political, social and economic conditions.<sup>3</sup> In a path dependent process, past history is determinative even though that history may no longer be significant and that current actors may make different choices if they were proceeding to consider the legal position afresh.<sup>4</sup> While pursuing this theme the article will outline some of the history underlying the 2008 Agreement and examine parallel developments in Australian and EU wine markets. In particular the article, will examine whether entry into the 2008 Agreement is too heavily anchored by the earlier *Agreement between Australia and the European Community (EC) on Trade in Wine and Protocol 1994*,<sup>5</sup> or whether considered afresh the same incentives that underlay Australia’s decision to enter the 1994 treaty apply equally in 2008 – 2010 in the cold hard light of wine market restructuring. To some extent this will involve a review of the advantages, disadvantages and effects of the original 1994 Agreement.

Following a discussion of the evolution of the Australia-EU wine trade relationship and the respective conditions in each of the markets, the article will also examine specific features of the 2008 Agreement and its implementation into Australian domestic law under the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth). The article will conclude with some observations about the merits of the treaty.

## II THE AUSTRALIAN WINE INDUSTRY: CURRENT ISSUES

The growth of the Australian wine industry over the past twenty five years has been nothing short of remarkable. Between 1986 and 2009 the amount of land under vine

---

<sup>2</sup> Article 25.6 TRIPs Agreement (*Agreement on Trade Related Aspect of Intellectual Property Rights*, Apr. 15, 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round 33 ILM 81 (1994) does not require prescription of generic geographical indications. TRIPS does not protect against misuse of traditional expressions.

<sup>3</sup> Oona A Hathaway ‘Path Dependence in the Law: The Course and Pattern of Change in a Common Law Legal System’ (2000 – 2001) 86 *Iowa Law Review* 601; James Mahoney ‘Path Dependence in Historical Sociology’ (2000) 29 *Theory and Society* 507; SJ Liebowitz & Stephen E Margolis ‘Path Dependence, Lock-in and History’ (1995) 11 *Journal of Law, Economics & Organization* 205.

<sup>4</sup> Hathaway, see above n 3, 631, noting that the lock in effect of the doctrine of *stare decisis* runs counter to scholarship promoting the efficiency of the common law.

<sup>5</sup> [1994] ATS 6. The Agreement was completed in 1993 and came into force on 1 March 1994. The Agreement was implemented in legislative form by the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth) which came into force on 16<sup>th</sup> December 1993.

increased from 59,970 to 162,550 hectares,<sup>6</sup> and during the same period annual wine beverage production grew from 336.4 million litres to 1.2 billion litres.<sup>7</sup> Much of the growth in Australia's wine industry has been export driven. In the mid-1980s Australia exported about 2% of total production and was a net importer of wine. Currently, wine is Australia's third largest agricultural export,<sup>8</sup> with export sales of \$AUD 2.43 billion in 2008-09.<sup>9</sup>

The initial surge in Australian wine production and export in the mid 1980s was assisted by a devaluation and subsequent fall in value of the Australian dollar, changes in liquor licensing laws in the United Kingdom that allowed for the mass marketing of low price point wine in supermarkets, and a decrease in the consumption of European origin wine as a result of widely publicized wine contamination scandals in Austria and Italy.<sup>10</sup> As Australian wine imports into Europe using European geographical indications and traditional expressions accelerated, the Europeans became determined to set about legally protecting what they perceived to be an unfair and improper usurpation of their wine heritage. Negotiations with Australia began in 1988 to claw back European wine terms and to lay down a process for the recognition of Australian oenological practices. In 1992 Australia and the European Community initialed a Draft Agreement whereby Australia agreed to cede the use of certain European terms including 'beaujolais', 'frascati' and 'chianti' in exchange for better market access for its wines. That Agreement was implemented by the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth), and came into force on 1<sup>st</sup> March, 1994. The Agreement envisaged that further negotiations would take place between the parties regarding the date when other sensitive names such as 'burgundy', 'champagne', 'port' and 'sherry' would be phased out by Australian wine makers. Thus insofar as the 2008 Agreement which implemented phase out dates for these names is concerned, Australia had already committed to this action under the 1994 Agreement. From a path dependent perspective, the 2008 Agreement was consequently the inevitable consequence of the earlier promise.

Spurred on by the 1994 *EC-Australia Wine Trade Agreement*,<sup>11</sup> for many years the United Kingdom and other European countries were Australia's major wine export destinations.<sup>12</sup> However, more recently Australian wine exports have expanded into other

<sup>6</sup> *Australian Wine and Brandy Corporation Annual Report 1987 – 97*, 8; Australian Bureau of Statistics, *Australian Wine and Grape Industry 1329.0* (2009) 5.

<sup>7</sup> *Australian Wine and Brandy Corporation Annual Report 1987 – 97*, 28; Australian Bureau of Statistics, *Australian Wine and Grape Industry 1329.0* (2009) 3.

<sup>8</sup> *Agriculture and the WTO*, Australia, Department of Foreign Affairs and Trade (2010); available at <[http://www.dfat.gov.au/trade/negotiations/trade\\_in\\_agriculture.html](http://www.dfat.gov.au/trade/negotiations/trade_in_agriculture.html)> at 25<sup>th</sup> November 2010.

<sup>9</sup> *Australian Wine Export Approvals by Country, Volume and Value* Australian Wine and Brandy Corporation: available at <<http://www.wineaustralia.com/australia/LinkClick.aspx?fileticket=15ivUQNnUoM%3d&tabid=5419>> at 25<sup>th</sup> of November 2010.

<sup>10</sup> Kym Anderson et al, 'The global picture' in Kym Anderson (ed) *The World's Wine Markets: Globalization at Work* (2004) 5.

<sup>11</sup> *Agreement between Australia and the European Community (EC) on Trade in Wine and Protocol [1994] ATS 6*. The Agreement was completed in 1993 and came into force on 1 March 1994. The Agreement was implemented in legislative form by the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth) which came into force on 16<sup>th</sup> December 1993.

<sup>12</sup> Australian Bureau of Statistics, *Australian Wine and Grape Industry 1329.0* (1994) 16: stating that: 'Europe is the main market for Australian wine taking 73.3 million litres or over half the total exported in 1993-94'.

markets including the United States of America, Canada, Japan and China.<sup>13</sup> Globally, Australia is the fourth largest wine exporting nation.<sup>14</sup>

Despite its happy history, the Australian wine industry is currently in crisis. Although the volume of wine exports has continued to steadily increase, over the five years to 2009 - 2010 the value of exports has declined by an average annual rate of 6.5%.<sup>15</sup> According to the *New York Times*, the average price per litre of Australian wine exports has declined 25% over the last decade.<sup>16</sup> In the year ending March 2010 alone, reflecting reduced demand associated with the global financial crisis, exports of bottled wine to two of Australia's largest markets, the United Kingdom and the United States, fell by 14% and 6% respectively.<sup>17</sup> The fall in the value of 2009 exports was preceded by similarly large falls the previous year: 13.3% in the United Kingdom, 27.1% in the United States and 13.4% in Canada.<sup>18</sup> Replicating worldwide trends (especially in the 'old world' wine producing regions of Europe),<sup>19</sup> Australian wine production has fallen from its peak of 1,420,348 kilo litres in 2004 – 2005 to 1,171,233 kilo litres in 2008 – 2009.<sup>20</sup> However, the fall in supply has not matched plummeting demand. Consequently, an ever increasing proportion of Australia's wine exports are made up of cheap, bulk wine.<sup>21</sup>

Although the Australian wine industry's woes have been exacerbated by the global financial crisis and a relatively strong Australian currency, long term demand for Australian wine may not necessarily improve following global recovery.<sup>22</sup> For at least the past five years there has been a worldwide oversupply of wine,<sup>23</sup> and Australia has been challenged by increasing competition from other lower cost wine producing countries such as Chile and South Africa.<sup>24</sup> At the same time, growth in the domestic consumption of wine has remained relatively flat.<sup>25</sup> While stalled by global recession, value growth through the marketing of premium wine has proven to be an effective buffer against

<sup>13</sup> Australian Wine and Brandy Corporation, *Winefacts: Australian Wine Export Approvals by Country, Volume and Value* (2005–2009): available at <<http://www.wineaustralia.com/australia/LinkClick.aspx?fileticket=15ivUQNnUoM%3d&tabid=5419>> at 10<sup>th</sup> May 2010.

<sup>14</sup> Australian Wine and Brandy Corporation, *Winefacts: Australian Industry Overview*: available at <[http://www.wineaustralia.com/australia/Portals/2/winefacts/\\_FREE/Industry%20Overviews/Australian%20Industry%20Overview08.pdf](http://www.wineaustralia.com/australia/Portals/2/winefacts/_FREE/Industry%20Overviews/Australian%20Industry%20Overview08.pdf)> at 10<sup>th</sup> May 2010.

<sup>15</sup> Steven Connell, IBIS World Industry Report C2183, *Wine Manufacturing in Australia* (2010) 7.

<sup>16</sup> Meraiah Foley 'For Australian Winemakers More Turns Out to be Less' *New York Times* (New York) July 3<sup>rd</sup> 2009.

<sup>17</sup> Australian Wine and Brandy Corporation, *Wine Export Approval Report*, March 2010.

<sup>18</sup> Australian Wine and Brandy Corporation, *Wine Export Approval Report*, March 2009.

<sup>19</sup> Australian Wine and Brandy Corporation, *Global Wine Supply Monitor*, January 2009.

<sup>20</sup> Australian Wine and Brandy Corporation, *Beverage Wine Production*, February 2010.

<sup>21</sup> Australian Wine and Brandy Corporation, *Wine Export Approval Report*, March 2010, reporting that in the preceding year, 39% of Australian wine exports were of bulk wine. During that year bulk wine exports increased overall by 38%.

<sup>22</sup> Editorial 'Industry called to action to eliminate over supply' (2009) 24 (6) *Wine Industry Journal* 4, 5 – 6.

<sup>23</sup> The global oversupply of wine and concomitant downward pressure upon producer prices was predicted in Glyn Wittwer & Jeremy Rothfield 'Projecting the World Wine Market from 2003 to 2010' (2005) 13 *Australian Agribusiness Review Paper* No. 21.

<sup>24</sup> Steven Connell, IBIS World Industry Report C2183, *Wine Manufacturing in Australia* (2010) 7.

<sup>25</sup> *Ibid* 6.

decreasing consumption in ‘old world’<sup>26</sup> wine producing countries.<sup>27</sup> On the other hand, as a result of a discounting frenzy in Australia’s major export markets and a lack of strong brand equity, Australian wine has largely traded down.<sup>28</sup> Domestically too, while the average price per unit of wine has remained steady, as a result of diminished capacity to penetrate export markets, there has been a rapid rise in the sale of clean skin bottled wine, most selling well below cost.<sup>29</sup>

As global demand for Australian wine at higher price points has decreased, concurrently Australian wine production costs have increased, further undermining industry profitability. In many instances, Australian wine production costs are too high for Australian wine to remain viable in the global wine market.<sup>30</sup> Labour, water and energy constitute the major inputs in Australian wine production. Relative to other wine producing countries, in Australia all three are escalating in cost, both in the short term and the long term.

When the Labor government ascended to power in 2007 it committed to implementing a workplace relations system comprising minimum national labour standards and the adoption of additional minimum industry or occupation based standards, which resulted, among other things, in the *Australian Wine Industry Award 2010*. It is generally acknowledged that the adoption of the Award has increased Australian wine industry production costs in the short term due to the elimination of differential wage rates between Australian states and regions, increased casual labour rates, and raised costs by mandating minimum engagement periods.<sup>31</sup> In the long term, Australia’s slowing population growth rate and its increasing proportion of the aging are likely to result in a continuing tight labour market and therefore higher labour costs.<sup>32</sup> Already the Australian wine industry has identified the lack of skilled labour as a matter of serious concern.<sup>33</sup>

Climate change has also been identified as a significant challenge for the Australian wine industry both in respect of production costs and in respect of long term

<sup>26</sup> ‘Old world’ wine producing countries are European countries where wine making has been practised for over a thousand years such as Italy, France and Spain. ‘New wine’ producing countries are Europe’s former colonies where wine making was introduced at European settlement. New world countries include Australia, New Zealand, USA, Chile, Canada, South Africa & Argentina. See further, Gwyn Campbell & Nathalie Guibert, ‘Old World Strategies Against New World Competition in a Globalising Wine Industry’ (2006) 108 (4) *British Food Journal* 233, 235.

<sup>27</sup> Euromonitor International, *Global Alcoholic Drinks: Wine: Maturity Constrains Growth* (October 2008) and Euromonitor International, *Alcoholic Drinks and the Great Recession – the Present and Future of the Global Market* (April 2010).

<sup>28</sup> Euromonitor International (2010) *ibid.* See further, Caroline Gunning-Trant & Gemma Kwan, *Wine and Wine Grapes Outlook to 2014 – 15*, (2010) 17 (1) *Australian Commodities* 54, 57; reporting that the average unit export price of wine in 2008 – 09 fell by 17% and that approximately 85% of wine exports fell into the lowest price ranges.

<sup>29</sup> Euromonitor International: Country Sector Briefing, *Wine-Australia* (March 2010) 2.

<sup>30</sup> Winemakers’ Federation of Australia; Wine Grape Growers’ Australia; Australian Wine and Brandy Corporation & Australian Grape and Wine Research Development Corporation Joint Statement, *Wine Industry Must Confront the Reality of Oversupply* (November 2009).

<sup>31</sup> South Australian Wine Industry Association, Fair Work Australia Minimum Wage Panel, *Submission 2010 Annual Wage Review* (March 2010) 15: available at <[http://www.fwa.gov.au/sites/wagereview2010/submissions/SAWIA\\_sub\\_awr0910.pdf](http://www.fwa.gov.au/sites/wagereview2010/submissions/SAWIA_sub_awr0910.pdf)> at 11<sup>th</sup> May 2010.

<sup>32</sup> Australia, Department of Treasury, *The 2010 Intergenerational Report*, Ch 1: available at <<http://www.treasury.gov.au/igr/igr2010/default.asp>> at 11<sup>th</sup> May 2010.

<sup>33</sup> Wine Australia: Directions to 2025, *Audit of Infrastructure Constraints*, 3: available at <<http://www.wineaustralia.com/australia/LinkClick.aspx?fileticket=i5AAyI64tn0%3D&tabid=3533>> at 11<sup>th</sup> May 2010.

sustainability.<sup>34</sup> Climate change will adversely affect grape quality, and will reduce the amount of land where grapes can be cultivated.<sup>35</sup> Climate change is also associated with substantial depletion of the quantity and quality of water resources.<sup>36</sup> Grape production and wine processing are heavily dependent upon timely access to good quality water. However, water restrictions imposed because of severe drought and the instigation of water trading, have caused water prices to rise significantly, especially over the past 5 years.<sup>37</sup> During 2008 – 2009, a period of extreme drought, the average price of high reliability water entitlements was \$AUD 2000 per mega litre,<sup>38</sup> whereas in 1990 the average value of South Australian water entitlements was reportedly between \$AUD50 - \$100 per mega litre.<sup>39</sup> Longer term, climate change is expected to keep water prices high.

Energy costs have also risen substantially.<sup>40</sup> Demand for energy Australia wide is growing rapidly placing considerable pressure upon aging energy infrastructure, which requires substantial outlay to cope with the rising demand.<sup>41</sup> Sizeable investment is also required to fund a switch to more sustainable energy production methods.<sup>42</sup> While the implementation of a proposed emissions trading scheme has been postponed,<sup>43</sup> because of the pressing need for new infrastructure there is no guarantee of a respite from further rising prices.<sup>44</sup>

Wine makers are also under increasing pressure vis-à-vis their sustainability credentials and in relation to the promotion of consumer well-being. As part of a worldwide trend exacerbated by growing sensitivity to climate change, consumers are becoming more attracted to sustainably produced food and wine. Perceptions of wine

<sup>34</sup> Leanne Webb, *The Impact of Projected Greenhouse Gas-induced Climate Change on the Australian Wine Industry*, (PhD Thesis, 2006): available at <[http://dtl.unimelb.edu.au/R/U6YXVTM54XYLAJMBUVYHYQVKB91QIS652P6E47CIJFUA8VNL6-00638?func=dbin-jump-full&object\\_id=67182&pds\\_handle=GUEST](http://dtl.unimelb.edu.au/R/U6YXVTM54XYLAJMBUVYHYQVKB91QIS652P6E47CIJFUA8VNL6-00638?func=dbin-jump-full&object_id=67182&pds_handle=GUEST)> at 11<sup>th</sup> May 2010, and Karen L Blackmore, Ian D Goodwin & Steve Wilson, *Analysis of Past Trends and Future Projections of Climate Change and their Impacts on the Hunter Valley Wine Industry* (2009): available at <[http://www.hccrems.com.au/climate\\_change/Wine%20Industry%20PDF/Case%20study%201.pdf](http://www.hccrems.com.au/climate_change/Wine%20Industry%20PDF/Case%20study%201.pdf)> at 11<sup>th</sup> May 2010.

<sup>35</sup> HR Schultz & M Stoll 'Some Critical Issues in Environmental Physiology of Grapevines: Future Challenges and Current Limitations' (2009) 16 *Australian Journal of Grape and Wine Research* 4; Leanne Webb et al, 'Climate Change and Wine Grape Quality in Australia' (2008) 36 *Climate Research* 99.

<sup>36</sup> As a result of prolonged drought and climate change, water resources are becoming increasingly saline and therefore unsuitable for grape growing: Rob Walker et al, 'Rootstock Effects on Salt Tolerance of Irrigated Field-Grown Grapevines (*Vitis vinifera* L. cv. Sultana): 1. Yield and Vigour Inter-Relationships' (2002) 8 *Australian Journal of Grape and Wine Research* 3.

<sup>37</sup> Glyn Wittwer, *Will Drought Erode the Competitiveness of Australia's Wine Industry?* (Centre of Policy Studies, 2008): available at <<http://www.monash.edu.au/policy/ftp/workpapr/g-173.pdf>> at 11<sup>th</sup> May 2010.

<sup>38</sup> Australia, National Water Commission, *Australian Water Markets Report 2008 – 9*, 6.

<sup>39</sup> Bob O'Brien 'Trading Water Comes of Age as Market Finds True Value', *Stock Journal*, 11<sup>th</sup> February 2010, 6.

<sup>40</sup> Dr Darren Oemcke & Karl Forsyth 'Responding to Increases in Electricity Costs' (2009) 24 (4) *Australia & New Zealand Wine Industry Journal* 19, reporting rises in electricity costs of between 16 – 36% in 2008 – 9.

<sup>41</sup> Hon Martin Ferguson, Minister for Resources, Energy and Tourism, *Energy Prices Will Keep on Rising*, The Australian (Sydney), March 22<sup>nd</sup> 2010.

<sup>42</sup> Ibid.

<sup>43</sup> Hon Penny Wong, Minister for Climate Change, Energy Efficiency and Water, *Carbon Pollution Reduction Scheme Delay*: available at <<http://www.climatechange.gov.au/en/minister/wong/2010/transcripts/April/tr20100428b.aspx>> at 12<sup>th</sup> May 2010.

<sup>44</sup> See above n 41.

quality have become closely linked with clean and green agricultural practices.<sup>45</sup> Sustainable food and wine are also perceived as healthier than conventional food and wine.<sup>46</sup> As a result, winemakers have been gradually compelled by powerful retailers, themselves responding to consumer trends and government regulation, to demonstrate that their products are pure, have a low carbon footprint, and are consistent with notions of rural idyll.<sup>47</sup> Retailers in the United Kingdom, one of Australia's largest wine markets are particularly concerned about waste, water use and greenhouse gas emissions.<sup>48</sup> Pressure from retailers and governments and a grass roots movement from within the wine industry to improve sustainability have thus required investment to fund changes to practices and technologies.

In addition, the alcohol industry is confronting a growing attack from the preventative health lobby concerned about rising levels of unacceptable alcohol abuse in the community.<sup>49</sup> Research produced by the health lobby shows that alcohol is the most significant risk factor for fatal and non-fatal injuries in Australia.<sup>50</sup> In light of these statistics and others demonstrating causal connections between alcohol abuse and disease, further regulatory restrictions are being mooted in respect of wine marketing and labelling so as to convince consumers to drink less or not at all. Many winemakers are unhappy that strategies such as graphic pictorial warning labels, brown paper packaging and restrictions on advertising will undermine their investment in brand building, lead to loss of market share and generally depress consumer demand for wine.<sup>51</sup> They are afraid that wine may become the new 'tobacco' bogey.

Australian wine production and exports are dominated by a small number of large producers: Foster's Group Ltd, Constellation Wines Australia, Pernod Ricard Pacific Holdings Pty Ltd, Australian Vintage Ltd and Casella Wines Ltd.<sup>52</sup> As a result of the difficulties facing the industry, all have announced critical reviews of their businesses<sup>53</sup> including proposed asset sales, decreases in the number of wines in their respective portfolios, reduced employment, changes to business models (such as increasing reliance

<sup>45</sup> Gary Zucca et al 'Sustainable Viticulture and Winemaking Practices in California: What is it, and do Customers Care' (2009) 2 *International Journal of Wine Research* 189, 193; Keith Douglass Warner, 'The Quality of Sustainability: Agroecological Partnerships and the Geographic Branding of California Winegrapes' (2007) 23 *Journal of Rural Studies* 142.

<sup>46</sup> Magali A Delmas & Laura E Grant 'Eco-Labeling Strategies and Price Premium: The Wine Industry Puzzle' (2010) 20 *Business & Society* 1, 6.

<sup>47</sup> Winemakers Federation of Australia, *Trends in Environmental Assurance in Key Australian Export Markets*, (2007) 1.5: available at <[http://www.wfa.org.au/resources/1/Reports/Trends\\_in\\_Env\\_Assurance.pdf](http://www.wfa.org.au/resources/1/Reports/Trends_in_Env_Assurance.pdf)> at 27<sup>th</sup> May 2010.

<sup>48</sup> Ibid 1.5.

<sup>49</sup> AMA Information Paper: *Alcohol Use and Harms in Australia* (2009); Public Health Association (Australia), *Submission to the Senate Standing Committee on Community Affairs: Alcopop Tax Bills* (2009); John Greenaway, 'Agendas, venues and alliances: New opportunities for the alcohol control movement in England' (2008) 15 *Drugs* 487.

<sup>50</sup> Public Health Association, *ibid* citing, Bauman KE, Foshee VA, Ennett ST, et al. 'Family matters: A family-directed program designed to prevent adolescent tobacco and alcohol use. Health Promotion' (2001) 2 *Practice* 81.

<sup>51</sup> Winemakers Federation of Australia, *Submission to the National Preventative Health Taskforce*, (2008): available at <[http://www.wfa.org.au/files/reports/2008\\_Preventative\\_Health.pdf](http://www.wfa.org.au/files/reports/2008_Preventative_Health.pdf)> at 27<sup>th</sup> May 2010.

<sup>52</sup> Steven Connell, IBIS World Industry Report C2183, *Wine Manufacturing in Australia* (2010) 30.

<sup>53</sup> See, for example, Foster's Group, *Wine Strategic Review Briefing*, 17 February 2009: available at <<http://www.fosters.com.au/investors/docs/ChairmanCEOwinereview.pdf>> at 11<sup>th</sup> May 2010, and Anonymous, *Constellation Wines Australia to Sell Certain Assets and implement Operational Changes to Improve Efficiencies and Returns*, Food Industry News 07/08/2008.

upon the spot market for grapes instead of long term grape supply contracts)<sup>54</sup> and a shift in production toward the premium end of the wine market.<sup>55</sup>

Meanwhile, the financial prospects of many of the remainder of Australia's 2300 small wineries are under threat. A joint statement from Australia's leading wine institutions and trade organizations, has characterized at least 17% of Australia's vineyard capacity as non-viable,<sup>56</sup> while a study cited in the joint statement found that 70% or more of production in at least 10 Australian wine regions was uneconomic.<sup>57</sup>

### III STRATEGIES TO ADDRESS PROBLEMS

The Australian wine industry has devised a number of strategies to address its problems. These strategies include:

#### 1. Industry restructuring

On 10<sup>th</sup> November 2009, the Winemakers' Federation of Australia, Wine Grape Growers' Australia, the Australian Wine and Brandy Corporation and the Grape and Wine Research and Development Corporation announced a Wine Restructuring Action Agenda.<sup>58</sup> The Agenda includes materials and workshops designed to help operators of vineyards and wineries determine whether they should exit the wine industry or change their operations. Industry organizations have also lobbied governments at state and federal levels for exit packages similar to those offered to drought and small block irrigators.<sup>59</sup> As a result of the restructure, grubbing up of uneconomic vineyards producing low quality wine will be an unwelcome necessity in a number of marginal Australian wine regions.

#### 2. Taxation review

The Australian government was considering a volumetric tax upon domestic wine sales, instead of the current Wine Equalisation Tax (WET) which is based upon wholesale value.<sup>60</sup> As a result of a WET producer rebate for the first \$1.72 million of wholesale sales, the overwhelming majority of Australian wineries pay no WET.<sup>61</sup> If the government changed to a volumetric tax, that position would be reversed and would lead to a doubling or tripling of domestic wine prices, substantial dampening of domestic demand, and concomitant losses in the wine sector. Due to strong lobbying from the Winemakers Federation of Australia, in May

<sup>54</sup> Caroline Gunning-Trant & Gemma Kwan 'Wine and Wine Grapes Outlook to 2014 – 15' (2010) 17 (1) *Australian Commodities* 54, 54.

<sup>55</sup> Euromonitor International: Country Sector Briefing, *Wine-Australia* (March 2010) 4.

<sup>56</sup> Winemakers' Federation of Australia; Wine Grape Growers' Australia; Australian Wine and Brandy Corporation & Australian Grape and Wine Research Development Corporation Joint Statement, *Wine Industry Must Confront the Reality of Oversupply* (November 2009).

<sup>57</sup> *Ibid.*

<sup>58</sup> See, Winemakers Federation of Australia, *Wine Restructuring Action Agenda*: available at <<http://www.wfa.org.au/WRAA.aspx>> at 11<sup>th</sup> May 2010.

<sup>59</sup> See above n 22, 6.

<sup>60</sup> Australia, Department of Treasury, *Australia's Future Tax System*, (2<sup>nd</sup> May 2010) Chapter E: available at <[http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs\\_reports.htm](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm)> at 11<sup>th</sup> May 2010.

<sup>61</sup> *A New Tax System (Wine Equalisation Tax) 1999 (Cth)* Div 19.



2010, the government announced that it would not adopt volumetric taxation.<sup>62</sup>

3. An industry development plan

Responding to warning signs early on, including more effective competition from other wine producing countries, in 2007 the Australian Wine and Brandy Corporation together with the Winemakers' Federation of Australia undertook a number of studies that culminated in an industry development plan: *Directions to 2025*.<sup>63</sup> *Directions to 2025* lays down a blueprint for restoring the Australian wine industry to sustainable profitability. It promotes greater use of market intelligence, improvement in environmental performance and social responsibility, the creation of new markets, and brand segmentation targeting particular categories of consumer. Russia, Japan, China and South Korea Asia were specifically identified as potential areas of further market development.<sup>64</sup>

4. Further development of region and brand

The *Directions to 2025* plan also foreshadowed industry institutions' and trade organizations' intentions to focus their marketing efforts on advancing Australia's wine producing regions such as the Margaret River and the Clare Valley, rather than promoting the broader concept of 'Brand Australia'. It is hoped that this will result in better levels of international consumer knowledge of Australian wine, especially of mid price point, higher quality wine, and ameliorate the impression that Australia is an industrial producer of cheap, low quality wine.<sup>65</sup>

#### IV LEGAL ISSUES CONCERNING REGIONALITY AND BRAND SEGMENTATION

There is strong evidence that a focus upon regionalization and brand segmentation will assist to realize the aspiration to attain a greater share of the premium wine market and help to shake off insinuations of 'industrial' wine.<sup>66</sup> A number of studies demonstrate that when purchasing wine, consumers discriminate between wines from various regions and that they are willing to pay a premium for wine originating from an area with a

<sup>62</sup> Joint Media Release - Prime Minister The Hon Kevin Rudd MP and Treasurer The Hon Wayne Swan MP, *Stronger, Faster, Simpler – A tax plan for our future*, May 2<sup>nd</sup> 2010.

<sup>63</sup> *Directions to 2025: An Industry Strategy for Sustainable Success*: available at <<http://www.wineaustralia.com/australia/Default.aspx?tabid=3529>> at May 12<sup>th</sup> 2010.

<sup>64</sup> *Directions to 2025: Global Consumer Trend, Overview*, 20: available at <<http://www.wineaustralia.com/australia/Default.aspx?tabid=3529>> at May 12<sup>th</sup> 2010.

<sup>65</sup> According to Jonathan Scott 'The Future of Australia's Wine Industry: Challenges and Change' (2010) 25 *Australia & New Zealand Wine Industry Journal* 38, 39: Australia's increasing reliance on the bulk export of cheap low quality wine has fuelled negative consumer perceptions of the quality of Australia wine in general. See further the Youtube debate from Sydney International Wine Competition 2010, *Australia's Industrial Wine Image: Justified or False?*: available at <<http://www.youtube.com/watch?v=4J5NervkrHo>> at 12<sup>th</sup> May 2010.

<sup>66</sup> See, for example, Claire Chambolle & Eric Giraud-Héraud 'Economic Analysis of Certification by an AOC,' in Silvia Gatti, Eric Giraud-Héraud & Samir Mili (eds.) *Wine in the Old World: New Risks and Opportunities* (2003) 16.

reputation for producing high quality wine.<sup>67</sup> In the minds of consumers, the ‘mystique and romance’ of wine is closely associated with the land where the wine is made and where the wine’s grapes are grown.<sup>68</sup> Brand segmentation has also been established as a key purchasing heuristic employed by wine makers to target particular categories of consumer and thereby increase the efficacy of their marketing efforts.<sup>69</sup> Cues such as region and brand are particularly important in wine marketing because wine is a ‘credence good,’ whose quality cannot be ascertained prior to consumption.<sup>70</sup> Promoting regions to particular segments of consumer is likely to be an especially important strategy for Australia’s small to medium wineries, which are struggling to penetrate narrow distribution to market channels, and whose viability is under threat.<sup>71</sup>

Advancement of regional reputation and brand segmentation are also tied to product differentiation. Anderson documents the variability of wine grape quality across Australian wine regions demonstrating that regional differentiation has substantially intensified since 2001.<sup>72</sup> Redirecting and amplifying marketing efforts to promote these regional differences to various segments of wine consumers, however, requires considerable resources, in many cases marshalled on a collective basis between wine makers from the various grape growing and wine making areas. In turn, therefore, increased focus upon regionalization and brand segmentation increases the demand for legal protection that guarantees winemakers’ investment in product differentiation, brand segmentation, and regional image is not hijacked by other unscrupulous wine producers and traders seeking to unfairly free ride on their efforts.<sup>73</sup>

Within Australia, the major legal vehicle for the protection of investment in the promotion of wine regions is the ‘geographical indication’ laid down by the *Australian Wine and Brandy Corporation Act 1980* (Cth). Brand is primarily protected by the *Trade*

<sup>67</sup> See, for example, Pascale Questor & Justin Smart ‘The Influence of Consumption Situation and Product Involvement Over Consumers’ Use of Product Attribute’ (1998) 15 *Journal of Consumer Marketing* 220; M Tustin & Larry Lockshin ‘Region of Origin: Does it Really Count?’ (2001) 16 *Australia and New Zealand Wine Industry Journal* 139; Dimitris Skuras & Aleka Vakrou ‘Consumers’ Willingness to Pay for Origin Labelled Wine: A Greek Case Study’ (2002) 104 *British Food Journal* 898; Günter Schamel & Kym Anderson, ‘Wine Quality and Varietal, Regional and Winery Reputations: Hedonic Prices for Australia and New Zealand’ (2003) 79 *The Economic Record* 246; Emily McCutcheon et al, ‘Region of Origin and its Importance Among Choice Factors in the Wine-Buying Decision Making of Consumers’ (2009) 21 *International Journal of Wine Business Research* 212. The effect of region of origin is amplified with consumer sophistication: Emily McCutcheon et al supra; Jean Philippe Perrouy et al, ‘The Influence of Wine Attributes on Region of Origin Equity: An Analysis of the Moderating Effect of Consumer’s Perceived Expertise’ (2006) 22 *Agribusiness* 323.

<sup>68</sup> Ulrich R Orth et al, ‘Dimensions of Wine Region Equity and their Impact on Consumer Preferences’ (2005) 14 *Journal of Product and Brand Management* 88, 96.

<sup>69</sup> Nelson Barber et al, ‘Purchase Attributes of Wine Consumers with Low Involvement’ (2007) 14 *Journal of Food Products Marketing* 69; Trent Johnson & Johan Bruwer ‘An Empirical Confirmation of Wine-Related Lifestyle Segments in the Australian Wine Market’ (2003) 15 *International Journal of Wine Marketing* 5.

<sup>70</sup> Michael R Darby & Edi Karni ‘Free Competition and the Optimal Amount of Fraud’ (1973) 16 *Journal of Law and Economics* 67.

<sup>71</sup> McCutcheon, see above n 67, 230; David Aylward & Michael Clements ‘Crafting a Local-Global Nexus in the Australian Wine Industry’ (2008) 2 *Journal of Enterprising Communities: People and Places in the Global Economy* 73.

<sup>72</sup> Kym Anderson, ‘Terroir Rising? Varietal and Quality Distinctiveness of Australia’s Wine Regions’ (2009) 2 (1) *Econometrica* 9.

<sup>73</sup> GianCarlo Moschini & Daniel Pick ‘Geographical Indications and the Competitive Provision of Quality in Agricultural Markets’ (2008) 90 *American Journal of Agricultural Economics* 794; C Bramley & JF Kirsten ‘Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture’ (2007) 46 *Agrekon* 69, 80.

*Marks Act 1995* (Cth). Division 4D *Australian Wine and Brandy Corporation Act 1980* (Cth) addresses overlap between the trade mark and geographical indication regimes. Both legal regimes have been in place for some time, although from September 1 2010 when the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) came into effect the protection for geographical indications has been broadened and existing requirements for the auditing of claims of origin have also been strengthened.

The term ‘geographical indication’ is defined as a word or expression used to indicate the country, region or locality where a wine originated or a word or expression used to suggest that a wine has a particular quality associated with a country, region or locality.<sup>74</sup> Sections 40C – 40F *Australian Wine and Brandy Corporation Act 1980* (Cth) prohibit the sale, export or import of wine with misleading or false geographical indications. The prohibition extends to descriptions or presentations of wine that imply that the wine is of the ‘kind’, ‘type’, ‘style’, ‘imitation’ or ‘method’ of the protected term.<sup>75</sup>

Under the Act, geographical indications are closely allied with another more controversial concept: the ‘traditional expression’. A traditional expression is ‘a word or expression used in the description and presentation of the wine that refers to the method of production, or to the quality, colour or type, of the wine’.<sup>76</sup> Traditional expressions include terms such as ‘amontillado’, ‘claret’, ‘fino’ and ‘auslese’. As the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) has reserved a large range of traditional expressions for exclusive use by European wine makers, there has been some disquiet as to whether the Act goes too far, facilitating monopolisation of production methods rather than protecting wine makers from unfair competition or protecting consumers from being misled about wine quality.<sup>77</sup>

The *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) has (among other things) brought the *Agreement between Australia and the European Community on Trade in Wine* into force. However, before embarking upon an analysis of the new Agreement and the terms of the amending Act in more detail, this article will examine parallel developments in the EU wine market. The nature and scope of the new Agreement and its implementation in Australia cannot be separated from an understanding of the context in which the Agreement was negotiated in both markets.

## V EU MARKET REFORM

The EU wine market has been oversupplied for decades. Oversupply has occurred because of declining consumption rates, increases in production, falling exports, and rising imports of wine.<sup>78</sup>

Wine oversupply in the EU originated in the implementation of Europe’s Common Wine Policy (CWP), first addressed by European regulation in 1962<sup>79</sup> but not fully

<sup>74</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s4.

<sup>75</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s40D(4). The extension of the protection to anything which purports to have a connection with a geographical origin or traditional expression is consistent with Art 23 TRIPS (see below).

<sup>76</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s4.

<sup>77</sup> See for example the comments of Dr Matthew Rimmer, Monash University outlined at 3.22 – 3.26, Australia, Parliament, *Report 101: Treaties Tabled on 3 February 2009, Agreement between Australia and the European Community on Trade in Wine* (2009): available at <<http://www.aph.gov.au/house/committee/jsct/3february2009/report1/chapter3.pdf>> at 19<sup>th</sup> May 2010.

<sup>78</sup> Council Regulation (EC) No. 479/2008, Preamble at (2).

<sup>79</sup> Council Regulation 24/1962.

implemented until 1970.<sup>80</sup> When introduced, the aims of the CWP were to (1) create a single European market for wine; (2) protect the income of European wine makers (3) reduce wide annual fluctuations in production and (4) improve wine quality.<sup>81</sup> Initially the CWP did not restrict vineyard plantings or wine production and, apart from restrictions on alcohol content and chaptalisation,<sup>82</sup> which varied between European zones, imposed few restrictions on production methods. Vines were classified into 'recommended', 'authorised' and 'provisionally authorised' for each wine region.<sup>83</sup> Wine produced from vines that did not fall into these categories, was to be excluded from sale and distilled. Wine quality was also categorized into two levels: (1) table wines and (2) quality wines, although it was left to each national legislature to determine which specific wines fell into either category. The CWP also included a system of price support. If the market was depressed private storage aid and subsidised distillation of table wine were available.<sup>84</sup>

However, there was an inherent tension between price support and a lack of restriction on vineyards and wine production. Shortly after the CWP was established, Europe faced a massive surplus in wine production due to the expansion of vineyards in Germany and Italy, increased availability of cheap Italian wine, high consumption duties on sales of wine in northern EU countries, and declining consumption elsewhere.<sup>85</sup> Violence erupted when French wine makers attempted to blockade cheap Italian wine imports.<sup>86</sup>

In 1976 the EU responded with Regulation 1163/1976 which imposed a ban on new vine planting and established subsidies for the conversion of vineyards into other crops.<sup>87</sup> The prohibition is still in force today, although since 1996 Member States have been able to exclude all or part of their territories from the ban. Under the 1976 reform, income support measures were broadened to enable a partial price guarantee.<sup>88</sup>

Unfortunately, however, the 1976 measures did little to reduce Europe's wine surplus and a series of further regulations were introduced including a premium for the permanent abandonment of vineyards by Regulation 457/1980, and, in 1982 by way of amendments to Regulation 337/1979, the adoption of a higher price guarantee; the broadening of optional distillation; and the introduction of compulsory distillation where there was a severe market imbalance.<sup>89</sup> Compulsory distillation was further addressed by Regulation 822/1987 which re-oriented the purpose of distillation away from support of the market to the deterrence of surplus wine production.

Initially the 1987 reforms were successful and structural wine surpluses were significantly reduced during the early 1990s.<sup>90</sup> However these gains were short lived and in conjunction with reviews of other agricultural sectors, a new Common Market

---

<sup>80</sup> Council Regulation 816/1970 & Council Regulation 817/1970. Antonio Niederbacher, *Wine in the European Community* (2<sup>nd</sup> ed, 1988) 50: argues that the long period of gestation for full implementation was due to substantial differences in approach between the French and Italian wine markets.

<sup>81</sup> Niederbacher, *ibid* 54 – 57.

<sup>82</sup> The addition of sugar to must prior to the completion of fermentation.

<sup>83</sup> Council Regulation 816/1970.

<sup>84</sup> Niederbacher, *see above* n 80, 56.

<sup>85</sup> *Ibid* 57 – 59.

<sup>86</sup> *Ibid* 58 – 59; Tim Unwin *Wine and the Vine: An Historical Geography of Viticulture and the Wine Trade* (1991) 322.

<sup>87</sup> Unwin *ibid*.

<sup>88</sup> Niederbacher, *above* n 80.

<sup>89</sup> *Ibid* 67 – 68.

<sup>90</sup> Piero Conforti & Roberta Sardone, 'Assessing the Effectiveness of the EU Common Market Organization for Wine: A Research Agenda' in Silvia Gatti, Eric Giraud-Héraud & Samir Mili (eds.) *Wine in the Old World: New Risks and Opportunities* (2003) 86

Organization for Wine was promulgated by Regulation 1493/1999. The aims of the 1999 CMO were to increase the competitiveness of EU wine producers relative to non-EU wine producers; increase EU wine exports to third countries; formalize the role of wine producing organizations; promote regional diversity; and maintain a balance between demand and supply in the EU domestic market.<sup>91</sup> The 1999 CMO consolidated many of the same measures previously applicable under the 1987 regime, and introduced a new system to facilitate restructuring or relocation of vineyards to assist adaption to changes in consumer demand; aid for the use of grape musts; rationalization of the various methods of distillation; as well as recognition and participation of producer and sectoral organizations in common market regulation.

In addition to measures designed to correct market imbalance, the 1987 and 1999 regimes maintained the two major categories of wine – ‘quality wine produced in specified regions’ (quality wine psr) and ‘table wine’. However it was still left to national legislatures to demarcate production regions and determine vine varieties that could be used to produce quality wine, wine growing methods, maximum yield, and minimum alcoholic strength. In these respects, national legislatures diverged significantly.

The 1999 CMO also addressed oenological practices, rules on designation and presentation, wine labelling, protection of geographical indications, and rules governing the movement and release of wine for consumption. Thus, in addition to being supplemented by a plethora of divergent national regulation on the technical aspects of wine production, the CMO overlaid every aspect of the wine supply chain. Consequently, in a review in 2006, the European Commission described the 1999 CMO as ‘the most complex and far reaching’ set of rules under any of Europe’s common agricultural policies.<sup>92</sup>

The failure to fully implement the ban on new plantings, the creation of new planting rights and the insulation of production from the effects of falling demand combined to undermine attempts to halt the growing market surplus. In 2007 the European Commission estimated that by 2010 - 2011, excess wine production was likely to constitute 15% of annual wine production.<sup>93</sup> By that stage compulsory distillations were routine and income generated from wine production was falling as export subsidies decreased and imports rose. The European Commission estimated that it was spending half a billion Euros annually destroying surplus wine.<sup>94</sup> While efforts to deter excessive production were not as effective as hoped for, simultaneously the fall in consumption rates also increased. Although the EU accounts for around 50% of total volume and total value of the global wine trade, due to lifestyle changes emphasizing health and wellbeing among Western Europeans, between 2002 – 2007 consumption of wine declined by 6% in Italy, 11.9% in France and 7.7% in Spain.<sup>95</sup> Some growth from a very low base was reported in Eastern Europe during the same period. However, as a result of the global recession, growth in Eastern Europe has also stalled.<sup>96</sup>

---

<sup>91</sup> Ibid.

<sup>92</sup> European Commission, Directorate-General for Agriculture and Rural Development, Working Paper, *Wine: Common Market Organization* (February 2006) 2.1: available at <[http://ec.europa.eu/agriculture/markets/wine/studies/rep\\_cmo2006\\_en.pdf](http://ec.europa.eu/agriculture/markets/wine/studies/rep_cmo2006_en.pdf)> at 21<sup>st</sup> May 2010.

<sup>93</sup> European Commission, *Reform of the Wine Sector: Commission Proposal*: available at <[http://ec.europa.eu/agriculture/capreform/wine/index3\\_en.htm](http://ec.europa.eu/agriculture/capreform/wine/index3_en.htm)> at 20<sup>th</sup> May 2010.

<sup>94</sup> Ibid.

<sup>95</sup> Euromonitor International, *Global Alcoholic Drinks: Wine: Maturity Constrains Growth* (October 2008).

<sup>96</sup> Euromonitor International, *Alcoholic Drinks and the Great Recession – the Present and Future of the Global Market* (April 2010).

In 2006 the European Commission proposed a ‘root and branch’ reform of the Common Market Organization for wine.<sup>97</sup> Its primary aim was to make European wine makers more competitive in the global wine market, and to win back market share from new world wine countries like Australia, which had made substantial inroads into European markets and European export destinations. After much stormy debate at the national and European levels, the Council of Ministers endorsed Regulation 479/2008.<sup>98</sup> The major features of the reform are:

1. A phasing out of distillation support over four years. Distillation subsidies will be redirected to the budgets of Member States so that they can apply funds to promote their wine outside of the EU; encourage innovation; provide harvest insurance; promote green harvesting; assist restructuring the supply chain; and so on.<sup>99</sup>
2. A grubbing up scheme (to eliminate producers who are dependent on the rejected distillation policy).<sup>100</sup>
3. A phasing out of planting rights by 2016.<sup>101</sup> This will eliminate restrictions on new vineyard planning and enable successful producers to expand their vineyards as demand requires.
4. Lower limits on permissible chapitalisation.<sup>102</sup>
5. A reduction in aid for the use of grape must.<sup>103</sup>
6. Simpler labelling rules. As a result of consumer confusion and evidence that less regulated table wines were outperforming more heavily regulated quality wines, the old dichotomy of quality wines psr and table wines has been abandoned. Quality will be signified by geographical indication or designation of origin,<sup>104</sup> and traditional terms.<sup>105</sup> For wines that do not have a geographical indication or designation of origin, EU winemakers are now permitted to label their wine with the vintage year and grape variety.<sup>106</sup>
7. The transfer of the regulation of oenological practices to the Commission acting on recommendations of the International Organization of Vine and Wine (OIV).<sup>107</sup>

<sup>97</sup> European Commission, *Communication from the Commission to the Council and the Parliament, Towards a Sustainable European Wine Sector* (22.06.2006): available at <[http://ec.europa.eu/agriculture/capreform/wine/com2006\\_319\\_en.pdf](http://ec.europa.eu/agriculture/capreform/wine/com2006_319_en.pdf)> at 21<sup>st</sup> May 2010.

<sup>98</sup> Most of the new market rules came into force on 1<sup>st</sup> August 2008: Regulation 555/2008. Changes to wine making practices and labelling came into force on 1<sup>st</sup> August 2009: Regulation 436/2009; Regulation 606/2009; and Regulation 607/2009. For a more detailed analysis see, Tim Iannetoni, ‘Commission Impossible: The Commission of the European Communities’ Attempt to Reform the Common Market Organization for Wine’ (2009) 19 *Indiana International and Comparative Law Review* 383.

<sup>99</sup> Regulation 479/2008, Arts 7, 12 – 18, 23.

<sup>100</sup> Ibid art 9, 98 - 102.

<sup>101</sup> Ibid arts 91 - 94

<sup>102</sup> Regulation 606/2009, Annex 1D.

<sup>103</sup> Regulation 479/2008, Art 19

<sup>104</sup> A designation of origin requires that the wine’s characteristics are essentially or exclusively due to natural and human factors in the geographic area of origin. Further, for a designation of origin to apply, the entire production process must occur within the geographic area of origin. On the other hand, a geographic indication merely requires that 85% of the wine’s grapes originate from a particular geographic area of origin and that the wine produced possesses some qualities that are attributable to that area: Ibid art 34.

<sup>105</sup> Ibid art 34 – 46.

<sup>106</sup> Ibid art 60.

<sup>107</sup> Ibid art 29 & Regulation 606/2009 Annex 1A.

VI THE AGREEMENT BETWEEN AUSTRALIA AND THE EUROPEAN COMMUNITY ON  
TRADE IN WINE

In responding to their respective wine surplus, clearly there are many similarities between European and Australian aims and objectives. Both have adopted market restructuring, the promotion of regional diversity, and an increase in exports as major strategies. The transfer of regulatory responsibility over oenological practices to a single entity in the EU also more closely reflects existing institutional arrangements in Australia.

From an Australian perspective, however, the latest reform to the Common Organization for Wine raises a number of competitive challenges. First, the phasing out of distillation is likely to lead to a flooding of European markets with low quality wine which will threaten Australia's bulk wine exports and further depress prices for low price point bottled wine. While the grubbing up scheme may ameliorate the increase of cheap wine on the market, it is unlikely that it will completely off-set increased wine availability, at least in the short term. Second, European wine makers will now be able to call upon national governments for greater funds to help them promote their wines to consumers. Australian wine makers may not be able to compete as effectively in the face of substantial increases in the European marketing effort. Third, any competitive advantage Australia may have had with its simpler and more consumer oriented labelling regime will now be diminished by the adoption of a simpler and more consumer oriented labelling regime in Europe. In particular, although Europe has maintained an appellation system based on terroir under the protected designation of origin, the European system of protected geographical indications is defined and will apply in analogous fashion to Australia's system of protected geographical indications.

Notwithstanding this and that the Australian wine industry's difficulties are likely to be compounded by Europe's fight back against contracting market share, Australia has gone ahead with the *Agreement between Australia and the European Community on Trade in Wine*. One may well question why Australia would do so given that the Agreement appears to undercut the interest Australian wine makers may have had in the continued use of a number of geographical indications and traditional expressions that will now be prohibited. A path dependent theorist would contend that regardless of the merits of the 2008 Agreement, the primary reason that Australia entered the 2008 Agreement was because it had promised to do so in 1994, when market access into Europe was far more problematic and when the Australian wine industry was emerging as a competitive force within the global wine market. Nonetheless, to safely agree with the path dependent explanation for the 2008 Agreement, a convincing case would have to be established that by 2008 the rationale underlying the 1994 Agreement had waned, and that, independent of the 1994 Agreement, the justification for the 2008 Agreement was weak. Consequently, as well as highlighting some of the features of the *Agreement between Australia and the European Community on Trade in Wine* this section of the article will also consider why Australia entered the new Agreement.

The stated purpose of the *Agreement between Australia and the European Community on Trade in Wine* is to 'facilitate and promote trade in wine originating in the (European) Community and Australia'.<sup>108</sup> The Agreement's basal objective is thus to secure continued access to European markets for Australian wine makers. Security of market access is crucial to Australia's heavily export dependent wine industry.<sup>109</sup> Without security of access, Australian wine may face a number of barriers to entry in European markets. Barriers include: sanitary and phytosanitary measures such as

<sup>108</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 1.

<sup>109</sup> *Regulatory Impact Statement for the Proposed Australia – European Community Agreement on Trade in Wine* [2009] ATNIA 2

maximum limits upon mineral and chemical content, prohibitions on the use of additives or processing aids, and prohibitions upon certain oenological practices; onerous packaging and labelling requirements; as well complex import procedures.<sup>110</sup>

From the perspective of the Australian government and Australian wine industry, under the *Agreement between Australia and the European Community on Trade in Wine*, security of access has been realized at a comparatively low economic cost.<sup>111</sup> As noted earlier, the 2008 Agreement was preceded by the 1994 *Agreement between Australia and the European Community (EC) on Trade in Wine and Protocol*, which laid the foundation for Europe's acceptance of Australian wine making practices and the reciprocal protection of Australian and European wine description and presentation. In 2008 Australia had thus already given up a large number of geographical indications without any significant harm to the wine industry. To the contrary, since entering the 1994 Agreement, Australia's share of the global wine trade steadily increased at the expense of European winemakers.<sup>112</sup>

Nonetheless, the original 1994 Agreement did impose a high demand upon private and public resources that ought to be evaluated when considering further expansion. The 1994 Agreement not only required Australia to prohibit the inappropriate use of European terms, it also required the Europeans to reciprocally protect a number of Australian terms of origin. However, original list of geographical indications provided by Australia was not intended to be exhaustive, and more importantly, there was no regulatory mechanism for determining where the boundaries of the named wine regions might be drawn. Consequently, while the 1994 Agreement did not mandate the creation of a domestic system of registration of geographical indications, such a system was deemed a necessary compliment to the Agreement for the ongoing development of Australia's wine regions and to delineate their location.<sup>113</sup> The registration of geographical indications also complimented the Australian Wine and Brandy Corporation's existing label integrity program (a system for auditing wine provenance and authenticity) which had been established at the outset of negotiations with Europe in 1989.<sup>114</sup>

The label integrity program and registration of geographical indications are both costly to administer. The aim of the label integrity program is to ensure the truthfulness of statements by winemakers regarding the vintage, variety and origin of wine made in Australia.<sup>115</sup> The program is reinforced by mandatory record keeping requirements for winemakers<sup>116</sup> and mandatory independent auditing of winemaker claims.<sup>117</sup> During 2008 – 9, for example, the Australian Wine and Brandy Corporation inspected 17,977 wine labels to ensure that they accurately reflected the provenance of wine.<sup>118</sup> The Corporation also issued 1407 certificates of origin, and provided 251 formal opinions on

<sup>110</sup> See further, EC Regulation 479/2008 Art s 27, 59 and Title IV (Trade with Third Countries).

<sup>111</sup> *Regulatory Impact Statement for the Proposed Australia – European Community Agreement on Trade in Wine* [2009] ATNIA 2.

<sup>112</sup> Mahmood Hussain et al, 'An Analysis of Globalization Forces in the Wine Industry: Implications and Recommendations for Wineries' (2007) 21 *Journal of Global Marketing* 33–40; Campbell & Guibert, see above n 26; Kym Anderson et al, 'The Global picture' in Kym Anderson (ed.) *The World's Wine Markets: Globalization at Work* (2004).

<sup>113</sup> See, Australia, House of Representatives (1993) 189 *Debates* 1342.

<sup>114</sup> *Australian Wine and Brandy Corporation Amendment Act 1989* Cth (No 144 of 1989) – now found in Part VIA *Australian Wine and Brandy Corporation Act 1980* (Cth).

<sup>115</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s39A.

<sup>116</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) ss39F – 39ZAC.

<sup>117</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) ss39ZA – 39 ZH.

<sup>118</sup> Australian Wine and Brandy Corporation, *Annual Report 2009*, 21.



wine labels.<sup>119</sup> One hundred and twenty two label integrity field audits were conducted across Australia.<sup>120</sup>

There are no figures available indicating how much of the Australian Wine and Brandy Corporation's annual \$14.6 million expenditure<sup>121</sup> is attributable to compliance costs under the label integrity program. However, given that the program constitutes one of the Corporation's three major activities (comprised of marketing, export licensing and the label integrity program) costs are likely to be reasonably substantial.

Approximately 41% of the Australian Wine and Brandy Corporation's activities are funded by industry levies<sup>122</sup> consisting of: (1) the wine grape levy<sup>123</sup> and (2) a wine export charge.<sup>124</sup> There is thus a strong element of cost recovery from the wine industry and, of course, wine makers also bear the cost of maintaining their own records so that they are able to demonstrate the provenance and authenticity of their wine.

Substantial costs are also incurred by winemakers when applying for a geographical indication, albeit that these costs are generally shared among winemakers from a region. The application fee for the determination of a geographical indication is \$27,500. If the application is lengthy or complex additional charges may apply.<sup>125</sup> When applying for a geographical indication for a region or sub-region, winemakers must prove that the area under consideration is a single tract of land that is 'discrete and homogenous in its grape growing attributes'.<sup>126</sup> Various criteria are taken into account including the area's natural features, evidence of past use of the geographical indication in the community, the history of the development of the area, construction features, ordinance surveys, climate, soil and hydrology.<sup>127</sup> Thus, to establish these criteria, winemakers must expend considerable sums upon the gathering, organising and adducing of evidence (including expensive expert evidence). Often the scientific evidence and testimony from witnesses in the relevant community is voluminous.<sup>128</sup>

Where disputes arise between factions of grape growers or wine makers in relation to a geographical indication or the boundaries of a geographical indication costs escalate exponentially. These costs are partly derived from uncertainty due to the lack of priority between the criteria applicable to determinations, partly from scientific uncertainty as to which factors are the most relevant to determining whether land has a connection to grape growing attributes and how that might inform the strict delineation of geographical boundaries, and partly from entrenched positioning between divergent interest groups of grape growers and wine makers. As a result one commentator has characterised the regime of geographical indications as 'bedeviled by administrative complexity and uncertainty, legal conflict and disputation, and social disruption'.<sup>129</sup> Another has

---

<sup>119</sup> Ibid 22.

<sup>120</sup> Ibid 22.

<sup>121</sup> Ibid 52.

<sup>122</sup> Ibid 28.

<sup>123</sup> *Primary Industries (Excise) Levies Act 1999* (Cth), Sch 26, Cl 6.

<sup>124</sup> *Primary Industries (Customs) Charges Act 1999* (Cth), Sch 13.

<sup>125</sup> Australian Wine and Brandy Corporation, Industry Notification, May 13 2010: available at <[http://www.wineaustralia.com/australia/Portals/2/IndustryNotification\\_changes\\_to\\_GIC\\_and\\_application\\_fees.pdf](http://www.wineaustralia.com/australia/Portals/2/IndustryNotification_changes_to_GIC_and_application_fees.pdf)> at May 25<sup>th</sup> 2010.

<sup>126</sup> *Australian Wine and Brandy Corporation Regulations 1981* (Cth) Reg 24.

<sup>127</sup> *Australian Wine and Brandy Corporation Regulations 1981* (Cth) Reg 25.

<sup>128</sup> *Coonawarra Penola Wine Industry Association Inc & Ors and Geographical Indications Committee* [2001] AATA 844, [28].

<sup>129</sup> Matthew Rimmer, Submission to the Joint Standing Committee on Treaties, *The Agreement Between Australia and the European Community on Trade in Wine 2009* (3 February 2009).

characterized a specific long running and controversial dispute, the dispute over the boundary of the Coonawarra wine region, in similar terms.<sup>130</sup>

Added to the costs of applying for a geographical indication are the costs associated with maintaining and promoting the geographical indication to consumers. As a result, individual wine makers bear a double set of substantial costs associated with protecting their investment in building a market for their wine: one related to the promotion of brand (ie the costs associated with establishing, maintaining and protecting their trademarks) and the other related to the promotion of region (ie the costs associated with establishing, maintaining and protecting geographical indications).

A path dependent theorist might counter, however, that once Australia had established its own domestic sui generis system for identifying and protecting geographical indications in response to the 1994 Agreement, it then became too costly to consider other alternative forms of legal protection. To dismantle the geographical indication system and replace it with another system of legal protection not so tied to the 1994 Agreement might be more costly than retaining the current system of protection.

Arguably, however, many of the costs in relation to Australia's label integrity program and geographical indication registration system are outweighed by their benefits, are costs that might have to be borne in another form in any event, and in relation to costs associated with uncertainty vis-à-vis the registration of geographical indications are costs which are diminishing over time due to developing jurisprudence. These matters also have to be considered when evaluating the extension of the *Agreement between Australia and the European Community on Trade in Wine*.

The promotion of the integrity of Australian wine is one of the major benefits arising from the label integrity program and the geographical indication registration system. The simplicity and rectitude of Australia's labelling system have been identified as significant market advantages<sup>131</sup> which would be adversely affected by product substitution or product standard scandal. Those promoting Australia's strict auditing requirements frequently refer to the 1980s Austrian ethylene glycol contamination scandal and the consequential freefall in Austrian wine sales as a salutary lesson justifying vigilance in relation to the provenance and authenticity of wine.<sup>132</sup>

A second important advantage is the avoidance of the need to establish the time-consuming and costly legal proof that the use of a geographical indication misleads consumers or amounts to unfair competition.<sup>133</sup> All that Australian wine makers need to do under the registration system is show that wine has been falsely described or presented.<sup>134</sup>

Enabling the cost of applying, maintaining and promoting geographical indications to be spread across all producers within the region who are likely to benefit is another advantage of a sui generis geographical indication protection system. Free riding is otherwise likely to occur, with the enforcement cost likely to fall on the very few. Smaller winemakers may not be able to afford to protect their geographical indications at all. The provision of a state mandated system of registration and protection is particularly important in the international wine trade. It is highly unlikely that groups of Australian wine makers would be able to send inspectors all around the world to monitor the sale of

---

<sup>130</sup> Gary Edmond 'Disorder with Law: Determining the Geographical Indication for the Coonawarra Wine Region' (2006) 27 *Adelaide Law Review* 59.

<sup>131</sup> Australia, Parliament, *Australian Wine and Brandy Corporation Amendment Bill 2009: Explanatory Memorandum*, 5 - 6.

<sup>132</sup> *Ibid.*

<sup>133</sup> Bernard O'Connor, *The Law of Geographical Indications* (2004) 402. For an example of a case where the expense and complexity of the proof require to demonstrate consumer deception in relation to a contested trademark was considered please see, *CA Henshke & Co v Rosemount Estates* (1999) 47 IPR 63.

<sup>134</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s40C.

wine with false designations of origin, and then once default was discovered mount expensive legal action in foreign courts. Maintaining a reciprocal system of registration and protection on a government-to-government basis, which can prevent entry of falsely designated products at the border, is a much more cost efficient prophylactic than after the event individualised action, which is unlikely to fully recover the cost of the harm done to markets.

Finally, Australia's geographical indication system creates a single authorized system for defining and protecting regions rather than several overlapping and ill-defined privately monitored schemes which are likely to confuse consumers and thus undermine winemakers' investment in the creation and promotion of their geographical indications.

A number of the above benefits (particularly the second, third and fourth benefits mentioned) underscore why other systems of protection for geographical indications are likely to be as costly as or even more costly than the current system which the *Agreement between Australia and the European Community on Trade in Wine* affirms and augments. Consequently, although it might be argued that Australia's entry into the 1994 Agreement and the subsequent creation of a domestic system for the registration of geographical indications represent sunk costs that cannot easily be abandoned, it does not necessarily follow that entry into the 2008 Agreement is wholly path dependent.

Apart from the 1994 Agreement, Australia remains bound to provide protection for geographical indications for wine pursuant to its obligations under Articles 22 and 23 of the TRIPS Agreement.<sup>135</sup> Although neither Article mandates a system of registration or a label integrity program clearly the legal means for ensuring that wine is not marketed to give a false impression of origin must be established and maintained by Member States apropos the rights of producers from other Member States. Apart from the registration of geographical indications, other jurisdictions provide protection through trademarks or by more general statutory prohibitions against misleading and deceptive conduct.<sup>136</sup> As noted above, however, because of the need to adduce evidence of deceptive similarity or consumer confusion, enforcing breach of a trademark or misleading use of a geographical indication can be very costly and it is more likely that because enforcement of these protections is largely private, that the cost of doing so will fall upon a few individual producers.

Even though Australia allows for the registration of geographical indications as trademarks provided this is not false or misleading<sup>137</sup> or otherwise contrary to law,<sup>138</sup> ordinary trademarks are not a good vehicle for protecting a link between wine and place. Ordinary trademarks aim to establish a link between the maker and the goods,<sup>139</sup> and so they are usually owned by single producers. Consequently, those wishing to protect regional groups of winemakers would be required to seek a collective trademark under

---

<sup>135</sup> *Agreement on Trade Related Aspect of Intellectual Property Rights*, Apr. 15, 1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round 33 ILM 81 (1994).

<sup>136</sup> See, for example, *Trade Practices Act 1974* (Cth) s53(eb).

<sup>137</sup> *Trade Marks Act 1995* (Cth) s61. The use of words that imply origin may also be misleading under *Trade Marks Act 1995* (Cth) s43.

<sup>138</sup> *Trade Marks Act 1995* (Cth) s42(b) and applied in *Re Southcorp Wines* [2000] ATMO 34.

<sup>139</sup> *Bocaccio Pty Ltd v Hardy Wine Company Ltd* [2008] ATMO 16; *Redbank Long Paddock Pty Ltd* [2007] ATMO 37. See, more generally, *Colorado Group Ltd v Strandbags Group Pty Ltd* (2007) 164 FCR 506, 516 [29] per Kenny J, 519 [41] per Gyles J.

Part 15 *Trade Marks Act 1995* (Cth)<sup>140</sup> or a certification trademark under Part 16 *Trade Marks Act 1995* (Cth).<sup>141</sup> Collective trademarks and certification trademarks, however, are typically limited to the signs of the particular association or body certifying that the wine is made in a relevant region, and do not necessarily effectively protect against words, expressions or presentations that imply that goods are associated with a particular area.<sup>142</sup> For similar reasons it is open to question whether collective or certification trademarks or actions for misleading and deceptive conduct per se would meet the more onerous obligations of Member States for wine and spirits under Article 23 TRIPS Agreement.<sup>143</sup> Although the true origin of the wine may be indicated, Article 23 requires Member States to prevent the use of geographical indications for wines where they suggest that the wine is of a kind, type, style or like a wine from a particular region.<sup>144</sup> Absent a system for the protection of geographical indications, a certification mark such as ‘100% Napa Valley’ may not protect against wine presented as ‘Made in Australia in the Napa Valley Style’.<sup>145</sup>



Even assuming effective protection against false attribution of origin is available, registration of the trade mark in Australia will not necessarily lead to protection

<sup>140</sup> A collective trademark is held by an association. It is collectively owned by association members who are required to comply with production standards determined and applied by the association. US examples include: US Collective Mark Reg No. 0889138 (Black Rooster – Chianti Classico Design) and US Collective Mark Reg No. 1097779 (Frankfurter Äpfelwein). A search of the Australian trade mark register conducted on September 10<sup>th</sup> 2010 could find no registered collective trade marks for wine.

<sup>141</sup> Certification marks are not owned by the producers of the relevant goods. They are available to any producer that satisfies the production standards determined by an independent third party certification body which regulates use of the mark. There is only one registered Australian certification mark for wine: ‘Wines of Victoria Australia’. Examples of US certification marks include: ‘100% Napa Valley’ and ‘Vino Nobile Di Montepulciano’.

<sup>142</sup> See, for example, *Bavaria NV v Bayerischer Brauerbund eV* (2009) 81 IPR 279: where the Federal Court held that despite references to the word Bavaria in a Dutch company’s trade mark that because the trademark also contained clear references to Holland as the country of origin, the trade mark’s connotation of Bavarian origins was neutralised in the mind of the reasonable consumer (compare with *K-Swiss Inc v Federation of the Swiss Watch Industry* (2009) 83 IPR 635 – opposition to trade mark ‘K-Swiss’ upheld – no clear references to true origin incorporated into trade mark). See further, Irina Kireeva & 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, 289.

<sup>143</sup> Leigh Ann Lindquist, ‘Champagne or Champagne? An Examination of the US Failure to Comply with the Geographical Provisions of the TRIPS Agreement’ (1998 – 1999) 27 *Georgie Journal of International and Comparative Law* 309. Since the article was written the US has implemented a system for the protection of foreign appellations of origin for wine: see, 27 CFR § 4.25.

<sup>144</sup> Whether or not Art 23 TRIPS should protect against suggestions that wine is of a kind, type or style of a particular region, nonetheless, remains contentious: Geneviève Teil ‘The French Wine ‘Appellations d’Origine Contrôlée’ and the Virtues of Suspicion’ (2010) 13 *Journal of World Intellectual Property* 253.

<sup>145</sup> Indeed that would be the conclusion that follows from, *Bavaria NV v Bayerischer Brauerbund eV* (2009) 81 IPR 279, discussed above at n 140 and *Scotch Whiskey Association v Dewitt* (2006) 69 IPR 637.

elsewhere without further expensive and time consuming steps being taken. European geographical indication regimes for wine,<sup>146</sup> for example, may not otherwise provide parallel protection. At the very least international registration is advisable under the Madrid Protocol.<sup>147</sup> When seeking to register their trade marks in other countries, Australian wine makers may be faced with having to compete with similar, earlier registered trademarks which will take priority over their applications unless the earlier trademarks can be removed from the relevant national register. Alternately Australian wine makers may find, as the Europeans have found, that in other jurisdictions, registration of collective or certification trademarks is unavailable.<sup>148</sup>

It is also possible to fulfill TRIPS obligations by way of a statutory prohibition against the false or misleading use of a geographical indication including false use of an indication which suggests that the wine is made in the style of a particular region without an accompanying registration system and label integrity program to audit provenance.<sup>149</sup> That would certainly obviate the substantial administration costs that are currently born by Australian wine producers outlined above. Arguably, however, without a system of registration and audit, other, possibly greater, costs will be borne by Australian wine producers including: (1) costs associated with determining what words and expressions constitute the geographical indication, and of proving that the words and expressions are in fact geographical indications (i.e. that there is a link between the designation, the region and the wine); (2) costs associated with dealing with overlapping geographical indications; (3) costs associated with proving product substitution in the absence of an audit trail; (4) higher costs associated with addressing the divergent interests of registered trade mark owners and users of non-registered geographical indications; and (5) higher monitoring costs (without a clear list of protected geographical indications it will be much more difficult to prevent contraband in trade, especially international wine trade). There is thus little reason to believe that a state provided system of geographical indication registration and audit will be less efficient than an unregulated proliferation of privately monitored geographical indications.

Arguments that Australia's existing geographical indication registration system is dysfunctional can also be parried by pointing to developing Australian jurisprudence that is likely to reduce uncertainty relating to the determination of geographical indications. Case law which has provided greater certainty includes:

1. *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* (2002) 125 FCR 155

*Beringer Blass* established that when making a geographical indication determination the primary factors to consider are those that directly affect grape growing attributes. As a result, climate, soil and hydrology ought to be weighted more heavily in the Geographical Indications Committee's decision making than historical use of the proposed geographical indication or ordinance surveys.

<sup>146</sup> Art 36 EC Regulation 479/2008 allows foreign applicants to register for protection of their geographical indications provided the applicants are able to establish that the geographical indication is protected in the third country, and that the wine's principal analytical characteristics as well as an evaluation of its organoleptic characteristics accords with geographical origin. A similar regime operates in the US: 27 CFR §4.25.

<sup>147</sup> *The Madrid Protocol Relating to the Madrid Agreement Concerning the International Registration of Trade Marks* (adopted at Madrid on June 27, 1989).

<sup>148</sup> Kireeva & O'Connor, see above n 142.

<sup>149</sup> *Ibid* 277, refer to these systems as 'passive' or non-registration sui generis geographical indication protection systems. Examples cited include Singapore's *Geographical Indications Act 1998* and Jordan's, *Law on Geographical Indications No. 8 of 2000*.

2. *Baxendale's Vineyard Pty Ltd v Geographical Indications Committee* (2007) 160 FCR 542

*Baxendale's Vineyard Pty Ltd* reaffirmed that factors directly related to grape growing attributes are significant in a geographical indication determination, although it was noted that the weight given to the various criteria in Regulations 24 and 25 *Australian Wine and Brandy Corporation Regulations* would vary from case to case. Insofar as grape growing characteristics were concerned, homogeneity of climate, soil and geology played an important role.

In addition, the Full Federal Court,<sup>150</sup> determined that the term 'geographical indication' defined by s 4 *Australian Wine and Brandy Corporation Act 1980* (Cth) was broader than 'geographical indication' defined by Art 2, 1994 Agreement. In the 1994 Agreement, the term 'geographical indication' was employed where a given quality, reputation or other characteristic of wine was essentially attributable to its geographic origin. In other words, under the 1994 Agreement, 'geographic indication' was equivalent to the EU's current protected 'designation of origin'. According to the Court, the definitions applied in the 1994 Agreement did not constrain the interpretation of 'geographical indication' for the purposes of the Act, and therefore it was not necessary to establish an essential connection between wine and the land for the Geographic Indications Committee to validly determine the relevant geographical indication. It was sufficient if the geographical indication was used to identify the country, region or locality where the grapes were grown.

According to Dowsett J,<sup>151</sup> a reasonable inference could be drawn that the legislature intended that if a geographical indication had been classified in Annex II of the 1994 Agreement, the Geographical Indications Committee ought to give effect to that classification. However, since Dowsett J found that it was not necessary to determine that issue in the present case, his comments on that issue must be regarded as dicta only. He went on to state, however, that if a geographical indication were already recognized as a wine producing area by the 1994 Agreement, the history and geography of the area will be more relevant to determining the geographical indication than it would be otherwise.

3. *Rothbury Wines Pty Ltd v Tyrell* [2008] ATMO GI 1

Tyrell, an established winemaker, applied for registration of the name 'Rothbury' as a geographical indication. 'Rothbury' is a parish in the Hunter Valley wine region and is one of the terms listed in Annex II of the 1994 Agreement. 'Rothbury' also appears in 5 registered trademarks and two common law trademarks owned by Rothbury Wines Pty Ltd, another well known Australian winemaker and the objector to Tyrell's application. Since the late 1960s millions of bottles of wine were sold in Australia and elsewhere under these trademarks. 'Rothbury Estate', one of the more valuable trademarks was a company established by Murray Tyrell and Len Evans in 1968. Murray Tyrell later sold that interest to Fosters. Fosters then sold the winery at Rothbury, but kept the trademarks.

---

<sup>150</sup> Dowsett J (at 569), Emmett & Siopis JJ agreeing.

<sup>151</sup> At 567.

Based on its uniform geology, soil landscape and climate, Tyrell contended that Rothbury was a discrete and homogenous grape growing sub-region.

In opposition, Rothbury Wines Pty Ltd adduced evidence to the effect that most of the grape growers and wine makers in this part of the broader Hunter Valley region referred to the contested area as Pokolbin. Evidence was also submitted that the term ‘Rothbury’ was primarily associated with the Rothbury Estate vineyard and winery rather than the Rothbury area. In addition, Rothbury Wines Pty Ltd contended that there was no distinction in physical grape growing attributes between the parish of Rothbury and Pokolbin.

Given that history the Trademark Registrar had no difficulty in finding that the term ‘Rothbury’ had acquired a secondary meaning denoting wine produced by the objector and that accordingly Rothbury Wines Pty Ltd had standing to object to Tyrell’s application to register ‘Rothbury’ as a geographical indication.

The Registrar noted that more was required to establish ‘Rothbury’ as a geographical indication than simply an address on the back label of wine bottles. According to the Registrar, the interpretation of ‘geographical indication’ had to take colour from its intended purpose, that is, the protection of investment associated with building regional reputation and in the capacity to distinguish wines from various regions. In this instance there was scant evidence that the term Rothbury had been used in this manner or that, outside of the Rothbury Estate, Rothbury had ever been regarded as a grape growing or wine making region.

The Registrar deemed it relevant but not determinative that the term Rothbury appeared in Annex II 1994 Agreement.

When examining the merits of the *Agreement between Australia and the European Community on Trade in Wine* consideration should also be given to the manner in which the 2008 Agreement expands the original 1994 Agreement. The 1994 Agreement left several matters outstanding including the future use of generic terms such as champagne, port and sherry. In addition, since the earlier Agreement there have been a number of innovations in oenological practice, which require recognition to assure continued market access.<sup>152</sup> Included among these are the use of: oak chips,<sup>153</sup> electro dialysis treatment,<sup>154</sup> spinning cone technology,<sup>155</sup> and reverse osmosis.<sup>156</sup> The *Agreement between Australia*

<sup>152</sup> *Agreement between Australia and the European Community on Trade in Wine*, Annex 1, Part A.

<sup>153</sup> Oak chips enable oak character to be imparted without the use of expensive imported oak barrels.

<sup>154</sup> Electrodialysis treatment stabilizes for potassium tartrate and calcium tartrate. Stabilization of these prevents the occurrence of tartrate crystals in wine, which is an important concern for Australian wine makers whose wines are shipped over long distances.

<sup>155</sup> Spinning cone technology enables the alcohol content of wine to be reduced. This is important in Australia because of our warmer climate which generally leads to higher levels of sugar and thus higher levels of alcohol in Australian wine. Reducing alcohol content permits winemakers to make a more balanced wine.

<sup>156</sup> Reverse osmosis enables the constituent parts of wine to be broken down and for particular components to be reduced or removed. For example, reverse osmosis may be used to remove water from must to increase intensity and concentration of the wine. The technologies outlined in footnotes 152 – 156 are now also permitted in the EU: Regulation 606/2009; *Agreement between Australia and the European Community on Trade in Wine*, Annex 1, Part B.

and the European Community on Trade in Wine addresses these matters and others in the following manner:

1. The 2008 Agreement requires Australia and the EU to authorize the importation and marketing of wine produced using the processes and practices outlined.<sup>157</sup> The list of permitted oenological practices is set out in Annex 1, Part A. The new Agreement permits an additional 16 winemaking practices including those referred to above.
2. The parties have also agreed to authorize the importation of Australian wine reflecting the natural levels of mineral content in Australian agricultural soils.<sup>158</sup> This is advantageous because Australian soils tend to have a higher salt content than soils from the EU. Some EU country food standard regulations will not permit high mineral content in wine.<sup>159</sup> However, as a result of the 2008 Agreement these countries are now obliged to defer to Australian soil terroir.
3. The EU now authorizes the importation of wine with alcohol strength of up to 20% of volume.<sup>160</sup> Because of Australia's warmer climate, Australian wine typically is of higher alcoholic strength than EU wine. Under current EU regulation, apart from a limited number of regions where wines, such as German Prädikatsweins and Italian Moscatos are made, the toleration level of alcohol content is 15% of volume.<sup>161</sup>
4. Simplified processes have been introduced for the recognition of new oenological practices, processes, compositional requirements or modification.<sup>162</sup> The introduction of simplified processes will enable the parties to adapt more efficiently to innovation in wine making practice.
5. Article 10 establishes binding arbitration to resolve dispute that arise between the parties in relation to recognition of a new production process or practice.
6. Australia's labelling rules with respect to blended wines are less strict than those that would otherwise apply in the EU. Accordingly, Article 22.1 (b) *Agreement between Australia and the European Community on Trade in Wine* provides that where wine is not composed of entirely one variety (ies) at least 85% of the wine shall be obtained from the named variety (ies). Whereas, under Article 62 (1) (c) (ii) EC Regulation 607/2009 if two or more wine grape varieties or their synonyms are named, 100 % of the products concerned must have been made from these varieties.

---

<sup>157</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 5.

<sup>158</sup> *Agreement between Australia and the European Community on Trade in Wine*, Protocol.

<sup>159</sup> See, for example, German wine regulation, revised form, from May 14, 2002: Annex 7 to Article 13, paragraph 1, section 2 referred to in Maria del Mar Castiñeira Gmez et al, 'Changes of the Metal Composition in German White Wines through the Winemaking Process. A Study of 63 Elements by Inductively Coupled Plasma–Mass Spectrometry' (2004) 52 *Journal of Agricultural and Food Chemistry* 2953, fn1.

<sup>160</sup> *Ibid.*

<sup>161</sup> EC Regulation 479/2008 Annex IV, para 1; EC Regulation 606/2009, Art 2.

<sup>162</sup> *Agreement between Australia and the European Community on Trade in Wine*, Arts 6–9.



7. Both parties are required to prevent the use of certain protected terms (geographical indications and traditional expressions) in the labelling of wines produced in each of their jurisdictions.<sup>163</sup> Australia is required to prevent use of the terms set out in Annex II, Part A and Annex III of the Agreement. This extends to words or expressions that connote that the wine is made in the style of a particular region, such as ‘méthode champenoise’, ‘hermitage’ and ‘lambrusco’. To reciprocate, the EU must prevent the use of terms set out in Annex II, Part B of the Agreement. References to Australia or Member States of the EU may only be applied to wine originating in those jurisdictions.<sup>164</sup>

As a result of an increase in the size of the EU since the 1994 Agreement, the 2008 Agreement reserves a much larger range of geographical indications for exclusive EU use than the earlier Agreement. The range of prescribed traditional expressions has also been substantially enlarged, although the prohibition on misuse of traditional expressions only extends to presentation and description in the language listed in Annex III.<sup>165</sup> The latter qualification is important because it would otherwise forbid the use of common words such as ‘noble’ and ‘superior’. The fact that the prescription only extends to the names in the language listed also addresses (somewhat) disquiet over de facto monopolisation of production and presentation methods. There is less concern over the naming rights of production and presentation methods if Australian wine makers can continue to refer to these in English.

Each party has allowed the others’ wholesalers to exhaust existing stocks of wine whose labels contain prohibited terms for a period of up to 5 years in the case of liqueur wines and 3 years in respect of other wines.<sup>166</sup>

8. The EU recognizes Australia’s standard number of drinks labelling requirement.<sup>167</sup>
9. Although prohibited for use in the EU except as prescribed by EU regulation, Australia is permitted to use quality wine terms in the manner set out in Annex V.<sup>168</sup> Thus Australia may continue to apply the terms, ‘cream,’ ‘crusted,’ ‘ruby,’ ‘solera,’ ‘tawny,’ and ‘vintage’ to fortified wine. Other countries trading with the EU are no longer permitted to use these terms and so reservation of the terms for Australian use is an advantage.
10. Generic names are addressed by phasing out periods. Australia may only use the names Chablis, Champagne, Graves, Manzanilla, Marsala, Moselle, Port, Sauterne, Sherry, White Burgundy, Amontillado, Auslese, Claret, Fino, Oloroso and Spatlese for 12 months after the Agreement came into force on September 1<sup>st</sup> 2010. Tokay may be used for another 10 years after the Agreement came into force but from then on all use will be prohibited.<sup>169</sup> In light of the fact that these names had previously been

<sup>163</sup> *Agreement between Australia and the European Community on Trade in Wine*, Arts 12 & 16.

<sup>164</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 14.

<sup>165</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 16 (1) (b).

<sup>166</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 40.

<sup>167</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 22.4.

<sup>168</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 23.

<sup>169</sup> *Agreement between Australia and the European Community on Trade in Wine*, Arts 15 & 17.

identified in the 1994 Agreement for future prescription, apart from sherry, port and tokay, most of the names had been already voluntarily phased out by Australian wine makers.<sup>170</sup>

Insofar as Australian fortified wines are concerned the Australian government provided a grant of \$500,000 towards a re-badging project<sup>171</sup> that resulted in the Australian Wine Industry, Fortified Wine Code of Practice and a range of new Australian terms to replace port, sherry and tokay.<sup>172</sup> Consequently, the loss of the ability to use terms such as sherry, port and tokay has not been regarded as damaging over the long term. Although there are some transitional costs involved in re-badging, in educating consumers, and in building a market niche for the new names, the wine industry has optimistically categorised the introduction of new names for fortified wines as a market opportunity rather than simply as a transfer of monopoly rights to the EU.<sup>173</sup> In other words the Australian wine industry does not value use of the names sherry, port and tokay as highly as the EU wine industry, and so can easily give up these names in exchange for secured market access.

11. Both parties have agreed to abide by each other's allergen labelling requirements.<sup>174</sup>

12. Neither party may introduce more onerous labelling requirements after the Agreement enters into force.<sup>175</sup> This broader standstill requirement is of concern to Australia which has found that the EU has introduced more onerous requirements in the past without prior consensus between the two parties. An example is EC Regulation No 753/2002, which amended EC Regulation 1493/1999 in respect of the description and presentation of wine. Under the regulation, the EU required that certain information on wine labels had to be regulated in exporting countries for their use to be acceptable in the EU. Previously in Australia the relevant information had been optional and unregulated. Following negotiations that occurred after the event, that is, after the enactment of the regulation in the EU, Australia was required to implement an amendment to the Australian Wine and Brandy Corporation Regulations so that Australian wine makers exporting to the EU could satisfy the requirements of EC Regulation No 753/2002.<sup>176</sup>

<sup>170</sup> Australia, Parliament, *Report 101: Treaties Tabled on 3 February 2009, Agreement between Australia and the European Community on Trade in Wine* (2009) 3.14.

<sup>171</sup> *Ibid* 3.16

<sup>172</sup> Available at <[http://www.wfa.org.au/resources/1/Codes\\_and\\_guidelines/Fortified\\_Wine\\_Code\\_of\\_Practice\\_v7.pdf](http://www.wfa.org.au/resources/1/Codes_and_guidelines/Fortified_Wine_Code_of_Practice_v7.pdf)> at 27<sup>th</sup> May 2010.

<sup>173</sup> Australia, Parliament, *Report 101: Treaties Tabled on 3 February 2009, Agreement between Australia and the European Community on Trade in Wine* (2009) 3.20; Tony Battaglione, *The Australian Wine Industry Position on Geographical Indications*, Presentation to the Worldwide Symposium on Geographical Indications (June 27 – 29 2005): available at <[http://www.wipo.int/meetings/en/2005/geo\\_pmf/wipo\\_geo\\_pmf\\_05\\_inf\\_1\\_prov.html](http://www.wipo.int/meetings/en/2005/geo_pmf/wipo_geo_pmf_05_inf_1_prov.html)> at 28<sup>th</sup> May 2010.

<sup>174</sup> *Agreement between Australia and the European Community on Trade in Wine*, Joint Declaration on Allergens Labelling.

<sup>175</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 27.

<sup>176</sup> *Australian Wine and Brandy Corporation Amendment Regulations 2003* (No. 191 of 2003).

13. Australia is obliged to prevent misuse of protected EU geographical indications in relation to wine imported from third countries.<sup>177</sup> However that obligation does not extend to traditional expressions.<sup>178</sup>

As a result of the comparative analysis above and the discussion regarding developing Australian jurisprudence, it is difficult to argue that Australia's system of geographical indications originally advanced by the 1994 Agreement and now augmented by the 2008 Agreement, is any worse than other legal forms of protection that Australia would be obliged to implement under TRIPS. Furthermore, many of the EU concessions made in respect of Australian wine composition and oenological practice would appear to advantage Australia as would the EU's promise to protect Australian geographical indications in the EU against misuse by EU wine makers and wine makers from third countries. When the cost of maintaining the expanded protection for geographical names and traditional expressions is weighed against the loss of security of market access which the 2008 Agreement facilitates, the scales seem to tip in favor of supporting the 2008 Agreement.

However the path dependent theorist might counter argue that, in light of the WTO Agreement's national treatment principle,<sup>179</sup> perceived trade barriers between Australia and the EU are overblown and, accordingly, assertions that the *Agreement between Australia and the European Community on Trade in Wine* is a pre-requisite to secure market access are also overblown. The national treatment principle set out in Article 3.1, GATT and reiterated in the *Technical Barriers to Trade Agreement* (TBT Agreement)<sup>180</sup> and the *Sanitary and Phytosanitary Measures Agreement* (SPS Agreement)<sup>181</sup> requires that the EU not impose regulations regarding manufacture, sale, or distribution that discriminate between imported products and domestic products in a manner that affords protection to domestic products. In other words, regulation of the technical aspects of wine production, wine labelling, or wine distribution and sale in the EU must not directly or indirectly discriminate against imported wine.

In addition, Art 2.2 of the TBT Agreement provides that WTO members must ensure 'that technical regulations are not prepared, adopted or applied with a view to or the effect of creating unnecessary obstacles to international trade,' and that technical regulations are not 'more trade-restrictive than necessary' to fulfil public health and safety objectives. Under Art 2.2, despite conformity with the national treatment principle, any wine regulation that imposes production standards that cannot be justified in terms of the regulation's legitimate objectives are thus open to challenge.<sup>182</sup> A similar position prevails under Art 2.3 SPS Agreement and Art XX GATT. Cases such as the *Australia* –

<sup>177</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 13.

<sup>178</sup> *Agreement between Australia and the European Community on Trade in Wine*, Art 16.

<sup>179</sup> Article III.1, *General Agreement on Tariffs and Trade 1994* (GATT), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 1867 UNTS 187, 33 I.L.M. 1153 (1994)

<sup>180</sup> Art 11. 1, *Agreement on Technical Barriers to Trade*, (opened for signature 15 April 1994, 1868 UNTS 120, entered into force 1 January 1995).

<sup>181</sup> Art 11.3, *Agreement on the Application of Sanitary and Phytosanitary Measures*, (opened for signature 15 April 1994, 1867 UNTS 493, entered into force 1 January 1995).

<sup>182</sup> Michael Ming Du 'Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization' (2007) 6 *Chinese Journal of International Law* 269, 272.

*Measures Affecting Importation of Salmon*,<sup>183</sup> the *European Communities – Trade Description of Sardines*,<sup>184</sup> and *Australia - Measures Affecting the Importation of Apples from New Zealand*<sup>185</sup> demonstrate that the WTO will scrutinise domestic regulation carefully to ensure that it does not unduly inhibit international trade. Consequently even without a wine trade agreement, the EU is already compelled to permit Australian wine makers access to its markets unless there is a relevant international standard<sup>186</sup> or some scientific evidence to the contrary.

Most of the compositional requirements for wine and permitted oenological practices set out in the *Agreement between Australia and the European Community on Trade in Wine* are lawful anyway in the EU under EC Regulation 606/2009. Australian winemakers therefore are arguably gaining no more under the 2008 bilateral Agreement than what they would be entitled to enjoy under the WTO Agreement and existing EU regulation. In fact, Article 82 of EC Regulation 479/2008 appears to provide as much for as long as wine imported into the EU is certified to meet EU requirements. Similarly, protection for Australian geographical indications is available in the EU under Art 36 of EC Regulation 479/2008 without Australia having to enter into a bilateral agreement provided it can be shown that the term in question is protected in Australia as it would be under the current *Australian Wine and Brandy Act 1980* provisions.

Even so, there are some specific advantages to Australia in the *Agreement between Australia and the European Community on Trade in Wine* that go beyond what might be available to third countries dealing with the EU. These include the ban on more onerous labelling requirements, simpler processes for the adoption of new oenological practices, establishment of a resolution process to deal with disputes over changes in practice, the prohibition on words and expressions which connote that wine is from Australia or the EU or EU Member states, deference to Australian soil terroir, continued Australian use of quality terms with respect to fortified wines, and generous phasing out periods for sensitive terms. Furthermore it must be remembered that under its 1994 and 2008 Agreements Australia has secured market access at a much cheaper and relatively low transitional cost than the likely cost associated with time consuming and expensive WTO litigation.<sup>187</sup>

---

<sup>183</sup> Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, (adopted 6 November 1998, DSR 1998:VIII) 3327. In this dispute, compared to its treatment of importation of other fish Australia's ban upon importation of salmon from Canada was found to be inconsistent with Arts 2.2, 2.3, 5.1 and 5.5 SPS Agreement.

<sup>184</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, (WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII) 3359. In this dispute the Appellate Body determined that an EC Regulation laying down common marketing standards for preserved sardines that specified that only fish from the species *sardinas pilchardus* could be marketed as sardines was inconsistent with Art 2.4 TBT Agreement.

<sup>185</sup> T/DS367/AB/R 29<sup>th</sup> November 2010. The Appellate Body upheld an earlier WTO Panel Report which found that measures imposed by Australia to reduce or eliminate pests in apple imports such as orchard surveys conducted by Australian officers were more trade restrictive than necessary to achieve Australia's legitimate phytosanitary aims.

<sup>186</sup> The International Organization of Vine and Wine (OIV) is the relevant inter-governmental organization responsible for setting international viticultural and oenological standards.

<sup>187</sup> Sebastian Wilckens 'The Usage of the WTO Dispute Settlement System: Do Power Considerations Matter?' in Hamid Beladi & E. Kwan Choi (eds) 6 *Frontiers of Economics and Globalization* (2009): arguing that because of the high cost of WTO litigation high income countries with significant retaliatory power tend to dominate WTO litigation.

VII THE AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT ACT 2010  
(CTH)

Apart from implementing the *Agreement between Australia and the European Community on Trade in Wine* the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) implements a number of other changes which are summarized below.

1. The label integrity program is extended from wine makers to incorporate all points in the wine supply chain including grape growers, agents, wholesalers and retailers. The objective is to provide the 'AWBC with a comprehensive system allowing a wine product to be traced from the grape vine to final sale,<sup>188</sup> and align the AWBC's powers of audit with international best practice in relation to food chain traceability.<sup>189</sup> Under s 39C, the requirement to maintain records in respect of variety, vintage and geographical indication applies to grape growers, wine makers, wholesalers, retailers and agents.<sup>190</sup> The records must show the identity of the record keeper, the kind of wine goods (eg must, juice, wine) to which the record relates; the date of receipt of the wine goods; the identity of the person from whom they are received; the quantity of the goods; the steps taken by the record keeper that changed or affected the vintage, variety or geographical indication of the wine goods and the manner and place where they were stored; the date of supply and the details of the supply.<sup>191</sup> Failure to maintain proper records constitutes an offence.<sup>192</sup>

The proposed expansion of the AWBC's powers arose out of industry based concern over rumors of adulteration in New South Wales, and fears that proven cases of product substitution or adulteration would damage vulnerable export markets.<sup>193</sup> Although the focus of the proposed amendments is upon substantiation of label claims rather than food safety, the amendment dovetails with worldwide trends toward improvement in the capacity to identify, contain and resolve outbreaks of food borne disease and effectively address cases of food contamination exacerbated

<sup>188</sup> Australia, Parliament, *Explanatory Memorandum: Australian Wine and Brandy Corporation Bill 2009*, 11.

<sup>189</sup> See, for example, ISO 22005: 2007, *Traceability in the Feed and Food Chain - General Principles and Basic Requirements for System Design and Implementation*; OIV Resolution CST1/2007, *Traceability Guidelines in the Vitivincultural Sector*; EC Regulation 178/2002; *Bioterrorism Act 2002* (US) Title III -- *Protecting Safety and Security of Food and Drug Supply*. The US House of Representatives has recently passed the *Food Safety Enhancement Act 2009* which will require food manufacturers to establish systems to determine the origin and movement of food with the whole supply chain. The Act is currently before the US Senate for consideration.

<sup>190</sup> Grape growers are not required to keep details of receipt of wine goods. Nor is it necessary to keep records of direct sales: *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) Schedule 2, Cl 39G.

<sup>191</sup> *Australian Wine and Brandy Corporation Amendment Act 2010*, Schedule 2, Item 28.

<sup>192</sup> *Australian Wine and Brandy Corporation Amendment Act 2010*, Schedule 2, Item 28.

<sup>193</sup> Australia, Parliamentary Library Bills Digest, *Australian Wine and Brandy Corporation Amendment Bill 2009*, 9.

by global distribution systems.<sup>194</sup> From a marketing perspective, increased traceability also fits with changes in consumer preference toward healthy risk free food.<sup>195</sup>

2. As a corollary to the above the Act broadens the AWBC's search and seizure powers,<sup>196</sup> so that search warrants can be obtained by telephone and other electronic means.
3. The AWBC's power to seek an injunction are expanded from matters under Part VIB of the Act (protection of geographical indications and other terms) to include a power to seek an injunction under Part VIA of the Act (label integrity program) and in relation to the export of grape products.<sup>197</sup> According to the Explanatory Memorandum accompanying the Bill, the expansion was required to enable the AWBC to prevent a person from breaching the objects of the Act and damaging the reputation of Australia's wine industry in international markets.<sup>198</sup> In the past the AWBC has not been able to prevent the export of wine even though it could not verify label claims. While the AWBC is already empowered to cancel or suspend export licenses, the broadening of the injunction power will provide the AWBC with a tool to prevent apprehended breach, and thus prevent damage before it occurs.
4. The Act eliminates the requirement to prove intentional breach of the provisions relating to the sale, import and export of wine with false and misleading descriptions and presentation. Instead, as a result of 5.6(2) *Criminal Code 1995* (Cth), recklessness is the requisite fault element for a breach of ss 40C – 40G *Australian Wine and Brandy Corporation Act 1980* (Cth). According to 5.4 *Criminal Code* recklessness can be established by proof of intention, knowledge or recklessness. Recklessness itself constitutes awareness of the risk of breach, for example, awareness that a geographical indication or traditional expression may be false or misleading and a determination to proceed to sale, import or export knowing that the risk is unjustifiable.  
The substitution of 'intention' with 'recklessness' as the fault element for offences is designed to ensure that winemakers are vigilant in their label claims and to ensure that prosecution of offenders is not made excessively difficult. Difficulties with prosecution under the current provision are illustrated by *Comite Interprofessionnel des Vins des Cotes de Provence v Bryce*.<sup>199</sup> In that case the defendants who owned and operated a small winery in Tasmania and marketed wine using the name 'La Provence'

<sup>194</sup> Linus U Opara, 'Traceability in Agriculture and Food Supply Chain: A Review of Basic Concepts, Technological Implications, and Future Prospects' (2003) 1 *Journal of Food Agriculture & Environment* 101; Linus U Opara & F Mazaud, 'Food Traceability from Field to Plate' (2001) 30 *Outlook on Agriculture* 239.

<sup>195</sup> Klaus G Grunert, 'Food Quality and Safety: Consumer Perception and Demand' (2005) 32 *European Review of Agricultural Economics* 369; Ruth Yeung & Joe Morris, 'Food Safety Risk: Consumer Perception and Purchasing Behavior' (2001) 103 *British Food Journal* 170.

<sup>196</sup> *Australian Wine and Brandy Corporation Amendment Act 2010*, Schedule 3, Part 1.

<sup>197</sup> *Australian Wine and Brandy Corporation Amendment Act 2010*, Schedule 3, Item 15.

<sup>198</sup> Australia Parliament, *Explanatory Memorandum: Australian Wine and Brandy Corporation Amendment Bill 2009* at 12.

<sup>199</sup> (1996) 69 FCR 450. However readers should note that the provisions dealt with in this case were since been amended by the Act.

were prosecuted under the then ss 40C and 40E *Australian Wine and Brandy Corporation Act 1980* (Cth) which required proof of intentional breach.

The term 'Provence' was part of a number of protected terms under the 1994 Agreement (including 'Baux-de-Provence' and 'Côtes de Provence') and a geographical indication within the meaning of s 4 of the Act. The defendants had been contacted by the Comité Interprofessionnel des Vins des Cotes de Provence and by the Institut National Des Appellations D'Origine (INAO) and advised that the use of the term 'La Provence' on their wine labels breached the Act. Notwithstanding that advice, because it could not be proven that the defendants had actual knowledge of the contents of the register of protected names prosecution under s 40C failed. The prosecution under s 40E failed for similar reasons as well as the fact that it could not be proven that the defendants knew that the phrase 'La Provence' was sufficiently similar to the protected terms to constitute a false claim of origin.

In the future, presumably advice of breach from organizations such as the AWBC or INAO or from winemaking organizations such as the Winemakers Federation of Australia will constitute a sufficient basis for an inference of recklessness.

5. The role of the Geographical Indications Committee is broadened to include not only determinations of a geographical indication but also to determine conditions of use that might be applied to registered geographical indications.<sup>200</sup> For example, the determination may govern what kinds of symbols or words can be used to denote the geographical indication or how the geographical indication might be used in wine marketing or applied to a wine label.
6. Analogous to Article 36, EC Regulation 479/2008, it is proposed that the Geographical Indications Committee will also be empowered to make determinations in relation to foreign geographical indications and translations and their use.<sup>201</sup> Applications may also be made to omit existing foreign geographical indications and translations from the Register.<sup>202</sup>
7. Where foreign geographical indications and translations interfere with existing trade mark rights, objection can be made to the Registrar of Trade Marks. Furthermore decisions made with respect to foreign geographical indications do not create or affect any trade mark right nor do they pre-empt decision making in respect of a pending application for a trade mark.<sup>203</sup>
8. Overlap between geographical indications and trademarks is further addressed by proposed amendments to the *Trade Marks Act 1995* (Cth).<sup>204</sup> The first of these provides that opposition to a proposed trade mark should fail notwithstanding that the trade mark contains a word or expression that

<sup>200</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s40T (1) (c).

<sup>201</sup> *Australian Wine and Brandy Corporation Amendment Act 2010*, ss40 ZAQ – 40ZAT.

<sup>202</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s 40ZAT.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Trade Marks Act 1995* (Cth) s61.

amounts to a geographical indication if the word or expression is a common English word and the applicant does not intend to use the trade mark in a way that is likely to deceive or confuse members of the public as to the origin of the relevant goods.<sup>205</sup> This amendment reflects proposed changes to the definition of what constitutes false and misleading use of a geographical indication or other term in s 40DA (2).

Two examples are outlined in the Explanatory Memorandum accompanying the Bill, which illustrate how Parliament intended the provisions to operate. First, currently use of the registered geographical indication 'Orange' in a trade mark 'Orange Roughy' would not be permitted when applied to wine unless the wine is made from grapes grown in Orange. However, s 40DA (2) now permits use of the term 'Orange' in this way provided it is done so in good faith and not used to indicate that the relevant wine came from Orange.

The second example given refers to the word 'Port' which will be a prohibited geographical indication when applied 12 months following the *Agreement between Australia and the European Community on Trade in Wine* coming into force. Since Port is also a common English word, trade mark owners will continue to be able to use this term provided it will not be used in a way which is likely to deceive or confuse consumers about the origin of the relevant goods. Thus 'Port Jackson Shark' and the like will be permitted trademarks provided consumers are not confused or deceived.

9. Lastly, a number of sensitive wine terms which the *Agreement between Australia and the European Community on Trade in Wine* will phase out are also comprised in a small number of registered Australian trademarks. Examples include following:



<sup>205</sup> *Trade Marks Act 1995* (Cth) s61(4).



Use of the trade marks following the expiration of the phase out date may result in the prosecution of the trade mark owners. Consequently s 83A *Australian Wine and Brandy Corporation Act 1980* (Cth) will allow the owners of the registered trademarks to request an amendment to their trade mark to enable them to comply with the new international obligations.

### VIII CONCLUSION

At first glance it might appear that the *Agreement between Australia and the European Community on Trade in Wine* reflects poorly upon Australia's size, influence and power vis-à-vis its trading relationship with the European Union. In the midst of economic difficulty, it appears that Australia has been forced to give up a large number of valuable terms and to support European monopolisation of the production methods associated with those terms.

But, in reality, Australia's interests have not been badly served. While there may be some transitional costs associated with moving to a system of new terms historically this has not proven to be greatly difficult or so costly as to amount to long term competitive disadvantage. No evidence of monopolisation of production methods has been forthcoming. Rights to use the name historically associated with culturally embedded production methods are simply not the same as the right to exclusive use of those production methods. In fact the Australian wine industry has clearly benefitted from its state mandated and state monitored system of authentication of wine provenance. Although it is possible to argue that Australia could have achieved the same level of penetration of global wine markets without the assistance of its bilateral trade agreement with Europe, it remains unclear whether it would have done so at the same relatively low cost.

Overall, therefore, despite its attractiveness as an explanation for legal development, including the development of legal relations at an international level, path dependence is unlikely to provide a complete account of the current legal framework or the motivations of key actors within that framework. By the same token, the law is not simply a function of economic, political and social conditions existent at the time when cases are decided, when parliament enacts legislation or when jurisdictions enter into treaties. Legal arrangements tend to become path dependent as a result of affirmative feedback.<sup>206</sup> While the benefits of entering into the 2008 Agreement appear to outweigh its cost at the time the Agreement was executed, it is almost impossible to discount the effect of the earlier 1994 Agreement. Without the positive experience of the 1994 Agreement, the current economic malaise of Australia's wine industry may have been an effective counterweight against entry into the 2008 Agreement. Furthermore, the requirements of reliability and predictability vis-à-vis Australia's wine trade with the EU are also likely to have been influential in colouring the perspectives of key wine industry lobbyists in the political process toward execution of the treaty and its subsequent implementation by way of the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth). Despite guarantees of market access under the WTO Agreements and EU regulations, Australian winemakers suffering from global over supply are likely to be highly risk averse to abandoning a workable existing relationship that continues to provide admission to markets of ongoing importance.

Rather than an overarching theory of legal change, because path dependence supplies an explanation for why sub-optimal outcomes can be generated in legal

---

<sup>206</sup> Alec Stone Sweet 'Path Dependence, Precedent, and Judicial Power' in Martin M Shapiro & Alec Stone Sweet (eds.) *On Law, Politics and Judicialization* (2002) 115.

development, it provides a useful departure point for evaluation. As a theory, path dependence encourages examination of legal arrangements to determine whether the arrangements have become locked in as a result of past events or whether other more creatively designed legal arrangements will yield greater mutual benefits for those involved. Path dependence also provides a better understanding of the constraints that may operate to undermine sudden and far reaching legal change.<sup>207</sup> Insofar as the former is concerned, this article has demonstrated that while Australia's entry into the 2008 Agreement may have been simply characterized as the fulfillment of a promise made over 16 years earlier, the justifications for the reaffirmation of reciprocal protection of Australia's and the EU's wine appellations and for continued co-operation in relation to mutual recognition of viticultural and oenological practices continue to apply. Path dependence while influential has not been determinative.

---

<sup>207</sup> Mariana Prado & Michael J Trebilcock, 'Path Dependence, Development and the Dynamics of Institutional Reform' (2009) 59 *University of Toronto Law Journal* 341; Marian Prado, 'The Paradox of Rule of Law Reforms: How Early Reforms Can Create Obstacles to Future Ones' (2010) 60 *University of Toronto Law Journal* 555.