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**THE IMPACT OF THE EC-AUSTRALIA WINE AGREEMENT AND TRIPS
ON AUSTRALIAN WINE LAW AND TRADE.**

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The use of wine zones and regions, as defined by Geographical Indications (“GIs”), is recognized as, amongst other things, an important brand marketing opportunity and, arguably increases the wine exporting opportunities for Australia. This article will explore the operation and impact of the GI regime and the significance and consequences of its implementation in the Australian wine sector. Also, the use and impact of GIs as important brand marketing tools and impact on trade relations.

I INTRODUCTION

Geographical Indications (“GIs”) are as prominent as ever in the 21st Century. Issues surface not only as a vexed issue when considering overlaps between pre-existing trade mark rights, but also the extent of its impact on the international marketing forefront.

The negotiation of Agreement between Australia and the European Community on Trade in Wine, and Protocol¹ (“the Wine Agreement”) in 1994, aimed to preserve heritage and, in part, to encourage foreign investment by making Australia more competitive in a global market. The critical question, however, is to what extent is the GI system effective both on a national and global front.

This article will begin by outlining the concept of GIs, their overlap with trade marks; then proceed to discuss the impact on marketing in Australia and on trade relations, in particular with the European Union (“EU”).

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¹ *Agreement Between Australia and the European Community on Trade in Wine*, opened for signature 31 January 1994, 1820 UNTS 3 (entered into force 1 March 1994) (“Wine Agreement”).

**II GEOGRAPHICAL INDICATIONS, BILATERAL AGREEMENTS AND LAW IN
AUSTRALIA**

A What is a Geographical Indication?

Fundamentally, GIs would appear to be merely a location or place name. But, they are more than that, as not every name of a place is a GI. “Hunter”, for example, is registered as a GI but, while many of the place names within the region are closely associated with wine, they are not GIs.

GIs are afforded different names in different national laws, for example, in France they are known as ‘appellations of origin’, also in the EU, generally, ‘designations of origin’.

The most commonly acknowledged definition of a GI is contained in Article 22 of the Trade Related Aspects of Intellectual Property Rights Agreement² (“TRIPS”), which reads:

‘Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.’

This is also the definition used in the Wine Agreement.³

Interestingly, while the “old world”⁴ has afforded recognition and protection GIs for more than 100 years, the “new world”⁵ has only been struck with GIs since the late

² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1867 UNTS 299 (“TRIPS”).

³ Above n 1.

⁴ For example, France, Germany, Austria, Italy, Spain.

⁵ Latin America, Australia, United States of America, South Africa, New Zealand, North Africa, Israel and Asia.

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1980s⁶ — a factor which has formed the basis of a rift between the “old world” and “new world”.

B *Why the need for laws governing wine regions?*

In the 20th and 21st Centuries, the “old world” countries in the EU have remained on a lesser scale, small producer cooperatives.⁷ In contrast, the “new world” countries have boomed through globalization,⁸ investing in multinational wine co-operations.⁹ Also, the individual viticulturalists and winemakers have exported aboard their expertise and services,¹⁰ and have prospered immensely. It is these differences that have, arguably, raised concerns in the “old world”.¹¹

As wine produced by the “new world”¹² threaten the wine producers and cooperatives of the “old world”, the EU’s protectionist stance becomes exacerbated in order to retain their traditional know-how and recover the use of usurped names within the wine sector.¹³ Wine classifications in Bordeaux and Burgundy, for example, grew out of the desire for the wealthy French landowners to ensure their ongoing survival and prosperity.¹⁴ While European countries may not be able to stop the knowledge of their wine making techniques and production methods from trailing abroad, protectionism can be exercised in other ways – such as restricting the “new world” from using and registering certain GIs.¹⁵

⁶ See *Australian Wine and Brandy Corporations Act 1980* (Cth) (“AWBC Act”).

⁷ Kym Anderson, David Norman & Glyn Wittwer, ‘Globalisation of the World’s Wine Markets’ (2003) 26(5) *The World Economy* 659, 670 – 687.

⁸ Ibid.

⁹ Johnathan Nossiter, ‘Mondovino’ (2004). See also: Mondavino website <<http://www.mondovinofilm.com>> at 5 February 2008; Andrew Jefford, *The New France: A complete Guide to Contemporary French Wine* (2002).

¹⁰ Kym Anderson, David Norman and Glyn Wittwer, ‘Globalisation and the World’s Wine Markets: Overview’ (Working Paper No 143, Centre for International Economic Studies, 2001) 8.

¹¹ Richard Smart, ‘Overseas Consulting: Selling the Family Silver, or Earning Export Income?’ (1999)

14 *Australian and New Zealand Wine Industry Journal* 4, 65.

¹² Colin Cheung, ‘Feta Cheese – Geographic Indication or Generic Term?’ (2004) 16(9) *Australian Intellectual Property Law Bulletin* 133, 134.

¹³ Tatiana Zalan, ‘Global, Local or Semi-Global? The Case of the Wine Industry’ (Working Paper No. 6, Australian Centre for International Business, 2005) 7; Susette Biber-Klemm, Thomas Cottier, *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (2005) 230-232.

¹⁴ Tim Unwin, *Wine and the Vine: An Historical Geography of Viticulture and the Wine Trade* (1991) 278. See also Jancis Robinson, *The Oxford Companion to Wine* (3rd ed., 2006).

¹⁵ Foreign Agricultural Service, *EU Wine Trade Issues – EU US Wine Agreement* (2005) <<http://www.useu.be/agri/wine.html>> at 5 February 2008.

Arguably, this is justified. One view is that the vast number of wineries worldwide, in lieu of consistency amongst GI systems and thus quality, may inevitably lead to a “race to the bottom”. Such a “race to the bottom” is not an ideal situation for European wineries passionate about their wine and century old family businesses. For this reason it is in their interest to protect their wine names and to retain the legacy and value of that wine.¹⁶ That is one view. On the other hand, particularly over the last 10 years, there has been a “race to the top” between the “new world” and “old world” wines¹⁷ — not only in quality, but marketing niches.

C Regulation in the “old world” – the European Community (EC)

In Europe, wine production is highly regulated and the naming of wines by their locality is a century old practice where regulation continues at the national level.¹⁸ Comparatively, the success of “new world” wineries is often due to local competition, experimentation, technological innovation and, often, an absence of regulatory intervention.¹⁹

Treaties and various Regulations in the EU provide a minimum threshold of protection and this is by virtue of the doctrine of supremacy developed in *Costa v ENEL*²⁰, which established that Community Law is ‘directly applicable’ to Member States. This has now been drafted into Article 249 of the *Treaty Establishing the European Community* (“TEC”).²¹

¹⁶ See Johnathan Nossiter, ‘Mondovino’ (2004). See generally Mondavino website <<http://www.mondovinofilm.com>>; Andrew Jefford, *The New France: A complete Guide to Contemporary French Wine* (2002).

¹⁷ See Kym Anderson, ‘Australia’s Grape and Wine Industry into the 21st Century’ (Discussion Paper No. 99/24, Centre for International Economic Studies, 1999).

¹⁸ Stephen Stern and Christine Fund, ‘The Australian System of Registration and Protection of Geographical Indications for Wine’ (2000) 5 *Flinders Journal of Law Reform* 39, 34.

¹⁹ David Alyward, ‘A Documentary or Innovation Support among New World Wine Industries’ (2003) 14 *Journal of Wine Research* 31.

²⁰ Case 6/64 *Costa v ENEL* [1964] ECR 585, 593; See also Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel* [1970] ECR 1125, [3].

²¹ *Treaty establishing the European Community (consolidated text)* [2002] OJ C 325/33, 132.

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By way of example, national French laws, in place since 1824, allow only French wine made from grapes grown in the Champagne region, to be called “Champagne”.²² French laws enshrine local traditions known as ‘*les usages locaux, loyaux et constants*’, now commonly known as ‘*Appellation d’Origine Contrôlée*’ (“AOC”) or the registration of designation of origin. The AOC registration may refer to unique and fundamental identifiers of an area and include natural factors such as locality, microclimate, soil, winemaking procedure, pruning methods and maturation.²³ In comparison, “new world” countries are in an emergent state of development, where wine regions are predominantly determined by geography, thus allowing a greater array of grape varieties to be cultivated, even within the same winery.

The French *Institut National des Appellations d’Origine* (“INAO”) administers the appellation system and sets the boundaries for the appellations by taking into account the report of the ‘*terroir*’ - the region,²⁴ and amongst other things the application of the vigneron for the right to plant specific vines in the region. Interestingly, since 1973, this has been a very rare occurrence due to an oversupply of grapes in Europe.²⁵ Now, Regulation 1493/1999²⁶ prohibits new plantings of both table and quality wine vines until 2010, unless production of a particular vine from a GI is well below market demand.

In Regulation 823/1987²⁷ and Regulation 1493/1999,²⁸ Member States are given the task of establishing their own criteria for the demarcated areas of production. Further, the recent adoption of European Commission Regulation 1429/2004²⁹ amended Regulation 753/2002 and laid down certain rules for applying Council Regulation

²² Contributed article, ‘Champagne Producers Still Fighting’ (2002) 16 *World Intellectual Property Report* 11, 18.

²³ Jancis Robinson, *The Oxford Companion to Wine* (3rd ed., 2006), 676.

²⁴ Above n 18, 42-43.

²⁵ Roger Voss, *The European Wine Industry: Production, Exports, Consumption and the EC Regime* (1984) 71.

²⁶ Council Regulation (EC) No 1493/99 of 17 May 1999 on the common organisation of the market in wine [1999] OJL 179/1, 2.

²⁷ Council Regulation (EC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specific regions [1987] OJL 84/69, 68.

²⁸ Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine [1999] OJL 179/1.

²⁹ Commission Regulation (EC) No 1429/2004 of 9 August 2004 amending Regulation (EC) No 753/2002 laying down certain rules for applying Council Regulation (EC) No 1493/1999 [2004] OJL 263/11.

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1493/1999 regarding the description, designation, presentation and protection of certain wine sector products. This Regulation amended the list of EU wines bearing a GI and particularly, but not exclusively, addressing wines from the twelve new Member States, namely: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic, Slovenia.

Since EU countries are World Trade Organisation (“WTO”) members protection is extended internationally to those countries by virtue of both the World Intellectual Property Organisation (“WIPO”) agreement and the WTO itself.³⁰ As will be discussed in the next section, this has secured an avenue for monitoring compliance with the TRIPS Agreement and thus the availability of EU market access to the “new world”.

D Favouritism or Incidental?

It is not an exaggeration to say that internal protectionism exists in the international arena and this exists on two levels. Firstly, internal free movement of goods and, secondly, EC Council Regulation 2081/92³¹ and EC Council Regulation 510/2006.³²

Firstly, it appears that EU appears to have stamped out internal protectionism by virtue of the free movement of goods provisions. Article 28 (Ex. Art 30) TEC³³ reads:

‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’

The EU has made good progress since the Case 168/78 *Commission v France (Re Taxation of Spirits)*³⁴ and Case 120/78 *Rewe-Zentral AG. v.*

³⁰ See World Trade Organisation Website

<http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm> at 5 February 2008.

³¹ *Council Regulation (EC) No 2081/92, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs* [1992] OJ L 208/11, superseded by *Council Regulation (EC) No 510/2006, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs* [2006] OJ L 93/12.

³² *Ibid.*

³³ *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11, art (entered into force 1 January 1958).

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Bundesmonopolverwaltung für Branntwein.³⁵ The latter case concerned a German law requiring liqueurs to have a minimum alcohol content of 25%. Discrimination arose regarding French liquor which could not be sold in Germany because the alcohol content was 15-20%, and below the minimum standard. The European Court of Justice (“ECJ”) ruled that the German law was contrary to the Treaty, however Germany upheld their own domestic law. This demonstrates that compliance is an issue and Member States’ are protective of their own domestic market despite being members of the EU.

More recently, the decline in the number of cases appearing before the ECJ is an example that all countries that the EU encompasses have been acknowledged and are operating as a single market. At the same time, it conducts well the logistical operations by cautioning and enforcing disciplinary measures against those Member States seen to be breaching the law. This is apparent particularly in the above Case 168/1978 and Case 120/78.

In any event, it can be argued that the operation of the appellation system is contrary to Article 28, as, having names protected, will inhibit the smooth operation of a single market.

Secondly, the ability of the EU to protect its own internal market from the threat of “outsiders”. Take, for example, the dispute settlement initiated by the United States and Australia against the EU before the WTO in response to EC Regulation 2081/92.³⁶ The United States and Australia contented that this Regulation was heavily biased in favour of GIs originating from EU Member States at the expense of GIs originating from other countries, also that its treatment of trade marks following registration of subsequent conflicting GIs was unjust.³⁷ It was alleged by Australia

³⁴ [1980] ECR 347.

³⁵ [1979] ECR 649.

³⁶ *Council Regulation (EC) No 510/2006 of March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs* [2006] OJ L 93/20.

³⁷ See *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS290/1 (2003) (Request for Consultations by Australia); *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS174/1 (1999). (Request for consultations by United States).

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and the USA that this Regulation was in breach of Articles 1, 2, 3, 4, 16, 20, 22, 24, 41, 42, 63 and 65 of the TRIPS Agreement, Articles I and III of GATT 1994, Article 2 of the TBT Agreement and Article XVI:4 of the WTO Agreement. The United States and Australia took issue with the fact that the Regulation effectively forced nations, other than EU Member States, that sought to register GIs in the EU to adopt the EU's regulatory scheme for protection of GIs in their country as a pre-condition to receiving GI protection in the EU.³⁸ In particular, three explicit conditions needed to be met.³⁹ First, the nation seeking registration had to be capable of offering guarantees regarding the GI analogous to those obtained through the screening of an application for GI registration carried out by the competent authorities in an EU Member States. Secondly, it had to have inspection procedures relating to the GI equivalent to those established for GIs in the EU. Thirdly, the nation had to be 'prepared to provide protection equivalent to that available in the EU to corresponding agricultural products for foodstuffs coming from the EU'⁴⁰.

Through the operation of a separate Panel, formed at the request of Australia and the USA, and the WTO Dispute Settlement Body ("DSB"), it was reported on 15 March 2005 that the GI provisions relating to the registration of GIs originating from non-EU countries in the EU impeded equal access to protection and, as such, violated the national treatment principle of the TRIPS Agreement.⁴¹ On the other hand, the requirement that terms previously registered as trade marks must coexist with identical terms subsequently registered as GIs did comply with the fair use provision of the TRIPS Agreement,⁴² and so the US and Australian complaints on this aspect were rejected.

Notwithstanding this, however, the Panel found that there was no finding that the substance of the EU system of GI protection, which requires product inspection, is

³⁸ See *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* WTO Doc WT/DS174/R (2005) [7.106] (Panel Report).

³⁹ See *Council Regulation (EC) No 2081/92 of 14 July 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs* [1992] OJ L 208/1, 5–6.

⁴⁰ *Ibid.*

⁴¹ See *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS174/R (Mar. 15, 2005) [7.213] (Panel Report); TRIPS, above n 2.

⁴² TRIPS, above n 2, art. 16(1).

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inconsistent with WTO obligations. The EU amended the Regulation following a decision of the WTO Panel report, to afford all GIs equal protection regardless of their national provenance.⁴³ It is debateable, however, whether the EU has in fact fully implemented the DSB's recommendations and rulings because even the current revised Regulation treats GIs that originate from non-EU countries differently than those originating from an EU Member State.⁴⁴

III BACKGROUND OF THE EC-AUSTRALIA WINE LAW AGREEMENT

In the late 1980s, the Australian wine industry was faced with the issue of how wine exports could be increased, especially in the EU. Australian wine producers were advised that, in order to access the EU, they would need to discontinue use of these European terms and devise their own appellation-style system⁴⁵ - a clear indication of the EU's focus on economic factors apparent since is evident from its formation.⁴⁶

Australia sought the least intrusive regulatory mechanism, which was achievable as neither TRIPS nor the Wine Agreement specified the legal means by which WTO members must implement their obligations to protect GIs. Rather, members may decide the manner in which these obligations are implemented in accordance with their social, economic and legal needs as well as traditions.⁴⁷ This is an advantage for Australia where the wine sector is a marketing driven industry allowing for collective

⁴³ See *Council Regulation (EC) No 510/2006, On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs* [2006] OJ L 93/ 12.

⁴⁴ *Ibid*, arts. 5(9).

⁴⁵ See Bernard O'Connor, *The Law of Geographical Indications* (2004); William van Caenegem, 'Registered Geographical Indications: Between Intellectual Property and Rural Policy' (Pt 1) (2003) 6 *Journal of World Intellectual Property* 699; William van Caenegem, 'Registered Geographical Indications: Between Intellectual property and Rural Policy' (Pt 2) (2003) 6 *Journal of World Intellectual Property* 861.

⁴⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585, 593; Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1; *Treaty Establishing the European Economic Community* opened for signature 25 March 1957, 298 UNTS 167 (entered into force 1 January 1958). See also *Council Regulation (EC) No 2658/87 of 23 July 1987 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff* [1987] OJL 256/1, followed by the *Council Regulation (EC) No 1677/77 of 19 July 1977 amending Regulation (EC) No 816/70 laying down additional provisions for the common organization of the market in wine* [1977] OJL 100/21, 21.

⁴⁷ See TRIPS, above n 2, arts 1.1 and 22.1.

development initiatives⁴⁸ to be supported and modern technology not hampered by the traditions of the “old world”.⁴⁹

The Wine Agreement was completed in 1993 and came into effect on 1 March 1994.⁵⁰ It was agreed that Australia would gradually phase out the use of European expressions and commence using generic varietal names, for example: Cabernet Sauvignon, Chardonnay and Shiraz — a list that will be extended when the amended Wine Agreement comes into force in 2008. In addition, it was agreed that Australia would recognise and protect established European expressions. The current Article 7 provides the reciprocal protection of Australian GIs in the EU.⁵¹ Notably, no deadline has been set for the commencement of a transitional period for 10 European GIs under Article 8 of the Wine Agreement.

IV AUSTRALIAN DOMESTIC WINE LAWS GOVERNING THE DEFINITION AND PROTECTION OF GIS?

The *AWBC Act* was amended by the *Australian Wine and Brandy Corporation Amendment Act 1993* to give effect to the Wine Agreement.⁵²

The objects of the amended *AWBC Act* are set out in section 3 and are consistent with the goals motivating the Australian negotiators, as they place particular emphasis on the promotion of export trade. Yet, it is apparent that the “old world” European winemakers are eager to protect their image, brand-names and traditional production methods amid increasing competition from “new world” rivals including USA and Australia.⁵³ Section 3(1)(e) provides that the object of this Act is:

‘...to enable Australia to fulfil its obligations under prescribed wine-trading agreements.’

⁴⁸ See Australian Wine and Brandy Corporation website <<http://www.wineaustralia.com/australia/>> at 5 February 2008.

⁴⁹ Above n 18, 39.

⁵⁰ *Agreement between Australia and the European Community on Trade in Wine, and Protocol*, opened for signature 26 January 1994, ATS 1994 No 6 (entered into force 1 March 1994).

⁵¹ See Wine Agreement, above n 1, arts 7(1)(b) 7(3) and (4); *AWBC Act* s 40A.

⁵² Commonwealth, *Parliamentary Debates*, House of Representatives, 29 September 1993, 1342.

⁵³ See above n 12, 134.

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Australian GIs is a broad term defined under section 4 of the *AWBC Act* comprising of the names of all Australia's zones, regions and sub-regions and their relationship to each other, which are listed in a hierarchical structure. Despite the terms of the Wine Agreement, the meaning of GIs is restricted to section 63(a).⁵⁴ The *AWBC Act* also provides that the determination⁵⁵ of both the geographical boundaries of the proposed wine region and the name⁵⁶ used to designate that area is vested in an independent statutory body, namely the Geographic Indications Committee ("GIC").⁵⁷

Under sections 40U and 40V, the GIC is obliged to produce and advertise an 'Interim Determination' and accept submissions from interested party. Thereafter, under section 40W and 40X, the GIC is to make a 'Final Determination' which is formally gazetted. Any party aggrieved by a decision is entitled to seek a merits review by the Administrative Appeals Tribunal ("AAT") and thereafter appeal to the Federal Court of Australia ("FCA") on matters of law under section 40Y. As will be discussed, the dispute over the Coonawarra GI in fact followed this course.

Furthermore, amidst economic protection, it is interesting that Article 22.2 of TRIPS does not provide a specific law to deal with unfair competition. It would appear that it extends to the use of a GI other than acts which mislead the public as to the geographical origin. In jurisdictions which have GI registration systems, Article 22.2 fails to specify whether it is necessary to have a registered GI to enforce this action, or whether other laws provide relief.

⁵⁴ Notwithstanding the terms of the Wine Agreement, the *AWBC Act* has restricted the meaning of GIs to (a). See Stephen Stern, 'Geographical Indications – Suitability of the GIC's Current Criteria' (International Wine Law Association – Australasian Chapter, 25 October 1998).

⁵⁵ *AWBC Act*, s 40T.

⁵⁶ For example, because "Coonawarra" was already provided in the Annex to the Treaty, the GIC was only required to determine the appropriate regional boundary.

⁵⁷ See *AWBC Act* ss 40N, 40P, 40Q, 40T, 40U, 40V, 40W, 40X *AWBC Act*; *Australian Wine and Brandy Corporation Regulations 1981* reg 26. The GIC produced a guide to assist with applications: GIC, Details of Proposed Australian Geographical Indications (29 November 1994). See generally, Australian Wine and Brandy Corporation, About Us <<http://www.wineaustralia.com/australia/Default.aspx?tabid=146>> at 3 February 2008: 'The Australian Wine and Brandy Corporation is an Australian Government statutory authority established in 1981...to enhance the operating environment for the benefit of the Australian wine industry by providing the leading role in: market development; knowledge development; compliance; and trade.'

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In any event, Australia meets their obligation by virtue of sections 52, 53(eb) and 55 of the *Trade Practices Act 1974* (Cth), equivalent provisions exist in the States' and Territories' fair trading legislation,⁵⁸ and the common law provisions of passing off and truth in labelling legislation.⁵⁹ Of particular interest is section 53(eb) of the *Trade Practices Act*, which introduces a scheme governing representations about the origin of consumer goods supplied in Australia.⁶⁰ One could even say that the major geographical descriptor was "Australia", as reinforced by section 53(eb).

Interestingly, in relation to wines and spirits, European countries have called for higher levels of protection for GIs to prevent fraud to the origin of their product. Article 23 of TRIPS provides for this regarding GIs for wines and spirits by prohibiting the use of GIs when the goods do not come from the place named, even if the origin of the good has been indicated.

Obligations in respect of Article 23.1 are implemented into Australian domestic law in sections 40C-D of the *AWBC Act*, the *Australian Food Standards Code*, Spirits Standard in clause 12(g)(i), the *Trade Practices Act 1974* (Cth), common law provisions of passing off, States' and Territories' fair trading legislation and truth in labelling legislation.⁶¹

Currently, the effect of Article 23.1 means that producers from different regions or countries cannot use a wine or spirit GI, even in conjunction with a word such as "like" or "style". These terms are specifically intended to protect the consumer from deception as to the origin of the goods. There is suggestion that protection under Article 23 is more effective, easier to access and cheaper to actualise.⁶² Also, the

⁵⁸ See, eg, Fair Trading Acts of the Australian Capital Territory (1992), New South Wales (1987), South Australia (1987), Queensland (1989), Victoria (1985), Tasmania and Western Australia (1987); *Consumer Affairs and Fair Trading Act*, Northern Territory); See also, 'Review under Article 24.2 of the Application of the provisions of the section of the TRIPS Agreement on Geographical Indications', WTO Doc IP/C/W/211 (1999) 4 (Council for Trade-Related Aspects of Intellectual Property Rights).

⁵⁹ See, eg, *Commerce Trade Descriptions Act 1905* (Cth).

⁶⁰ See House of Representatives, *Trade Practices Amendment (Country of Origin Representations) Bill 1998*, Bills Digest No. 213 (1997-98)

⁶¹ *Review Under Article 24.2 of the Application of the provisions of the section of the TRIPS Agreements on Geographical Indications*, WTO Doc IP/C/W/117/Add.19 (1999) 3 (Response from Australia).

⁶² *Work on Issues Relevant to the Protection of Geographical Indications Extension of the Protection of Geographical Indications for Wines and Spirits to Geographical Indications for Other Products*, WTO

EU's point of view is that public integrity must be protected.⁶³ This highlights a perception of EU monopoly in that the "old world" aims to protect its GIs in a bid to win back global rights to these wine names such as 'Champagne' and 'Burgundy'

**V THE FEDERAL COURT OF AUSTRALIA'S DECISION: BERINGER BLASS WINE
ESTATES LIMITED V GEOGRAPHICAL INDICATIONS COMMITTEE (2002)**

While most wine regions in Australia are generally based on unchallenged and generally inclusive applications by their local wine industry, this section will discuss the implications of the GI system in Australia and inconsistencies of the GIC 'to identify the boundary of the area or areas to which the determination relates' in light of the FCA's reasoning in *Beringer Blass Wine Estates Limited v Geographical Indications Committee*.⁶⁴

This case was a full Federal Court appeal by five unsuccessful Applicants from the GIC to have their properties included within the Coonawarra wine region.⁶⁵ Notably, because the FCA was confined to considering matters of law, it was not authorised to fully rectify Coonawarra's final configuration.⁶⁶

Firstly, the importance of reading Regulations in line with the objects of the administering Act. The FCA ruled that the GIC and AAT had misconstrued the *AWBC Act* and Regulations, in particular section 40T, namely to 'identify the boundary...' and 'determine the word or expression to be used to indicate the area or areas...'. The GIC erred in their determination as they had conflated the criteria set

Doc IP/C/W/308/Rev.1 (2001) [11] (Communication from Bangladesh, Bulgaria, Cuba, Czech Republic, Georgia, Hungary, Iceland, India, Jamaica, Kenya, The Kyrgyz Republic, Liechtenstein, Moldova, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey).

⁶³ See generally Jill McKeough, Andrew Stewart and Philip Griffith, *Intellectual Property in Australia* (3rd ed., 2004) Ch 1. See also Dwijen Rangnekar, 'Geographical Indications: A Review of Proposals at the TRIPS Council' (2002) Capacity Building Project on Intellectual Property Rights and Sustainable Development, 8.

⁶⁴ (2002) FCR 155.

⁶⁵ *Coonawarra Penola Wine Industry association Inc v Geographical Indications Committee* [2001] AATA 844.

⁶⁶ *Administrative Appeals Tribunal Act 1975* (Cth) s 44; *Beringer Blass Wine Estates Limited v Geographical Indications Committee* (2002) 125 FCR 155, 183.

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out in regulation 25 by mixing criteria intended to assist with identifying the name of a wine region — which was not relevant as “Coonawarra” was already qualified by the Wine Agreement — with those that intended to assist with the determination of the boundaries of the wine region – which were.⁶⁷ The FCA placed emphasis on reading regulations 24 and 25 together and ‘grape growing attributes’⁶⁸ attributes:

‘... the criteria in reg 25(i), (viii) and (ix)... is concerned with the relevance of that history in identifying a single tract of land that is discrete and homogenous in its grape growing attributes.’

Accordingly, not all of the criteria listed in regulation 25 are relevant to the determination of the boundary of a wine region.⁶⁹

Secondly, the AAT’s finding that ‘...proximity to the cigar was an important indication of the boundaries’⁷⁰ was criticised by the FCA who held that ‘proximity was not alone enough to identify boundaries.’⁷¹ Again, the FCA held that the AAT ‘fell into error of law in its construction of Regulations 24 and 25’.⁷² In particular, the application by Petaluma Ltd, too much emphasis was placed by the AAT of ‘historical information, namely the industry and market acceptance and recognition of the Coonawarra region as a descriptor...’.⁷³ Of interest is that the full bench of the FCA implied that other applicants submitting evidence of an historical association with Coonawarra, supposedly similar to Kopparmurra, Riddoch Estate and St Mary’s, might also have held ‘overwhelming countervailing reasons’ for inclusion.⁷⁴ Parties with similar or even stronger claims than the few who had successfully appealed,

⁶⁷ *Beringer Blass Wine Estates Limited v Geographical Indications Committee* (2002) 125 FCR 155, 172 (“*Beringer Blass v GIC*”).

⁶⁸ *Ibid*, 174. See also *Baxendale's Vineyard Pty Ltd v Geographical Indications Committee* (2007) 96 ALD 254, 257.

⁶⁹ *Beringer Blass v GIC*, above n 67, 174.

⁷⁰ *Coonawarra Penola Wine Industry association Inc v Geographical Indications Committee* [2001] AATA 844 at [137].

⁷¹ *Beringer Blass v GIC*, above n 67, 175.

⁷² *Ibid*, 176.

⁷³ *Ibid*.

⁷⁴ *Ibid*. See also Gary Edmund, ‘Disorder with law : determining the geographical indication for the Coonawarra wine region’ (2006) 27(1) *Adelaide Law Review* 59.

remained excluded.⁷⁵ Unfortunately, the case could not be revisited by the original Tribunal for redetermination, in line with the FCA's interpretation of the Regulations, due to the retirement of Justice O'Connor and another member. Rather, a hearing *de novo* would need to ensue. This path was not followed. Instead a settlement was reached involving a small extension to the Coonawarra wine region which the Federal Court imposed on the parties, district and the AAT.

Notwithstanding the determination of the Coonawarra wine region boundary and addition of the five vineyards and to the appeal and meagre area of intervening land, the very process intended to produce a principled outcome and elucidate the meaning of the *AWBC Act* and Regulations, in fact added to the region's erratic shape.⁷⁶ Interestingly though, the FCA's persistence of 'grape growing attributes' and principled application of the *AWBC Act* and Regulations implies that Coonawarra should be larger than it is. Again, a detailed discussion of this point is beyond the scope of this article.

Still, in lieu of an objective way of approaching the criteria set out in the Regulations, a decision maker would be capable of producing boundaries more principled and rational by modifying the weight attached to the relevant criteria, or certain submissions of expertise in line with the FCA's ruling in *Berringer Blass*.⁷⁷

VI OVERLAP BETWEEN GEOGRAPHICAL INDICATIONS AND TRADE MARKS

The lack of the TRIPS Agreement and the Wine Agreement to specify the legal means that Members must implement their obligations to protect GIs, has proven to be problematic for the issue of overlap between trade marks and GIs.

⁷⁵ Regionalisation seems to be enduring. The *Australian Wine and Brandy Corporation Act 1980* (Cth) div 4A states that registered GIs can be 'omitted' from the Register if they are 'not in use' or 'no longer required'.

⁷⁶ See Gary Edmund, 'Disorder with law: determining the geographical indication for the Coonawarra wine region' (2006) 27(1) *Adelaide Law Review* 59.

⁷⁷ *Berringer Blass v GIC*, above n 67, 165.

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Although GIs and trade marks are both built on existing reputation, significant distinctions exist.⁷⁸ GIs cannot be created by an ‘intent to use’ or by the mere lodgement of an application with a registration system. GIs, whilst clearly a collective right, are incapable of ownership by a legal entity as GIs are a fixture to their region.⁷⁹

Prior to the Australia-US Free Trade Agreement⁸⁰ (“AUSFTA”) there was no clear position about Australia’s attitude towards the ‘first in time’ principle in circumstances where the use of a trade mark by one producer and subsequent attempt to register that name as a GI. The only guidance was that TRIPS did contemplate the co-existence of trade marks and GIs, giving priority to that which is ‘first in time’ by virtue of Articles 16 and 24(5). This rule requires that the adoption or use of a trade mark in one country takes place before that same name is recognized as a GI in its ‘country of origin’.⁸¹ In response to the AUSFTA, Australia implemented sections 40RA – 40 RG of the *AWBC Act*, which granted the Registrar of Trade Marks a broad discretion to register a GI notwithstanding that an objection of a pre-existing trade mark is ‘made out’.

However, this principle too is plagued with inconsistencies as a result of the broad discretion awarded to the Registrar of Trade Marks under section 40RC. Take for example, a name, such as “Great Western”, which has coexisted for the last 145 years as both an unregistered GI and trade mark. This is due to the fact that, while unregistered trade marks can be recognized at common law, GIs cannot be. To make matters worse, there is no guidance on what factors the Registrar of Trade Marks should be taken into account when determining if an objection is ‘made out’.

⁷⁸ Stephen Stern, ‘The Overlap between Geographical Indications and Trade Marks in Australia’ (2001) 2 *Melbourne Journal of International Law* 224, 231 See also: *La Provence* (1996) 35 IR 170, 14.

⁷⁹ Stephen Stern and Christine Fund, ‘The Australian System of Registration and Protection of Geographical Indications for Wine’ (2000) 5 *Flinders Journal of Law Reform* 39, 29. See Stephen Stern, ‘Are GIs IP?’ (2007) 29(2) *European Intellectual Property Review* 39.

⁸⁰ *The Australia-United States Free Trade Agreement*, 18 May 2004, Australia–USA, ATS 1 (entered into force 1 January 2005).

⁸¹ Stephen Stern, ‘The Overlap between Geographical Indications and Trade Marks in Australia’ (2001) 2 *Melbourne Journal of International Law* 224, 234. C.f. *Trade Mark Act 1995* (Cth) ss 41(6)(a) and 61(1).

Furthermore, consider the application to register “High Country” as a GI which was subsequently knocked back by the GIC as a result of a pre-existing trade mark, “High Country”. It is reasonable to say that the criteria ‘reasonable in the circumstances’ is inclusive and that the process of registering GI’s diverts from the process of ‘natural justice’ – perhaps further diluting Australia’s GI system.

The answer may lie in an objective method to approach the criteria, set out in the Regulations to create a more just and equitable process and consistent outcomes.

VII WINE MARKETING- IMPACTS, FACTS AND TRADE

The GI system can be seen to support both large and small Australian wineries. But what guarantees success of a vineyard? Marketing, location or taste?

A Domestic Marketing and Development

There is an absence of quality assurance in Australia in the *AWBC Act* and Regulations and so, marketing is the driving force.

Many winemakers and vineyards claim that GIs confer value on their product. At higher price marks, a consumer is brand and region orientated in their choice of wine. When there are strongly identified brands, particularly of [larger] wineries in the Yarra Valley and Margaret River, the solution is easy. This hinders market access for smaller Australian wineries if little is known of their zone or region. Despite often high quality wine, vineyards in Victoria’s Gippsland zone, for example, often rely on cellar door sales and supplying local restaurants. One solution to improving the marketing of wineries in Gippsland and newer regions such as “New England”, is by creating more subregions and Australians’ willingness to embrace innovation and a fresh change would support this move. In any event, a wine region that is capable of internal expansion in future is consistent with the objects of the *AWBC Act* and the export direction of Australia’s wine industry.⁸² This is precisely why GIC

⁸² See *AWBC Act*, s 3.

determinations of GI names and boundaries are of paramount importance. While, on the one hand, a larger region could elevate a region's profile thus enabling them to produce the volume required to uphold a credible presence both domestically and on the international market. On the other hand, smaller quantities could drive up the marketing value and attract investors who seek out growth pockets.

On an international front, the EU's exclusive use over certain semi-generic terms such as port and sherry will dramatically reduce the size of the potential market for these products outside the EU and create a new market niche for "new world" producers of "vintage liqueur" and "liqueur shiraz". Locally produced wine will naturally have a comparative advantage as they shift consumer focus onto these wines and make market inroads leaving so called "traditional" European producers left out in the cold as their archaic appellation system and labelling regulations leave a willing industry unable to respond to the new market opportunity.

B Success of Australian Wine in the EU

While Australia may be self-sufficient in agriculture, natural minerals and skilled work, as an isolated island, it is dependent on international trade and therefore good trade relations with the EU is of paramount importance.

The EU is a major export market for Australian wines. In 2006, Australia exported A\$1.3 billion worth of wine to Europe, with the United Kingdom being the dominant export market – receiving 72 per cent of total Australian wine exports to the EU. This is up from the previous export amount in 2001 where Australian wine exported to the EU was valued at A\$1.032 billion.⁸³ Furthermore, the EU enlargement to 27 countries should create new market opportunities within the wine sector. Australia's overall trade with the EU in 2006 was valued at A\$75 billion of which Australian exports of goods and services to the EU was worth A\$28.6 billion - a 25 per cent increase over 2005.⁸⁴

⁸³ TBT Notification of Commission Regulation (EC) No. 753/2002 (Australian Government submission) 1 <http://www.dfat.gov.au/trade/negotiations/wto/eu_wine_label_reg_aus_sub_ec.pdf> at 7 July 2007.

⁸⁴ Department of Foreign Affairs and Trade <<http://www.dfat.gov.au>> at 21 August 2007.

In this sense, the Wine Agreement has been a valuable tool in facilitating Australia access to the EU wine market. For this reason, EU wine labeling regulations are of fundamental commercial interest to Australia and any change in these regulations may have a significant effect on Australia's wine trade.

Since adopting the GI system, Australian wineries have been disadvantaged earlier than their US counterpart, and perceived to be just another wine producer and exporter. US wineries, for example, were permitted to use semi-generic names such as Champagne, Chianti, Madeira, Sherry until September 2005 when the new EU-US Wine Accord came into effect;⁸⁵ and they continue to do so, benefiting from the use of well established GIs.⁸⁶ Interestingly, US wines account for 15% of wine sales in the UK and are known to be very popular abroad.⁸⁷

Arguably though, it is not always the GI that sells the wine. The ability to label wines with consumer-friendly information including information about variety and vintage and a colourful background gives Australian wines a marketing edge, especially where some European wines (e.g. France) are restricted to the information they are allowed to put on a label.⁸⁸

C Australia and Trade Barriers

Exporting wine from Australia is one of the most tightly regulated exporting activities, and this level of regulation has been increasing.⁸⁹

1 Generally

⁸⁵ European Commission, 'EU-US Wine Trade Accord Will Enhance Protection of European Names and Safeguard EU's Biggest Market' (Press release, 15 September 2005) <<http://europa.eu.int>> at 5 February 2008.

⁸⁶ Leigh Ann Lindquist, 'Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement' (1999) *Journal of International and Comparative Law* 309, 309. .

⁸⁷ A.C. Neilson figures, *Australian Wine Selector Magazine* (New South Wales), Spring 2005, 14.

⁸⁸ See generally Institut National des Appellations d'Origine <<http://vitis-vinifera.chez-alice.fr/index.html>> at 5 February 2008.

⁸⁹ See generally Winemakers' Federation of Australia <www.wfa.org.au> at 5 February 2008.

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In addition to wine testing and preferential trade arrangements, there are various compliance procedures that follow which come at a cost.⁹⁰ Such costs comprise of not only the costs of wine testing which is paid by the exporter, but also hidden costs such as time spent on the applications. Essentially, the smaller the exporter, the greater the cost per litre it is to export.⁹¹ In a competitive world market where cents can mean the success or failure of a deal this cost can be significant.

Also, tariffs on imported wine are low in Western Europe and North America but are relatively high in Asia and South America.⁹² There are also tariff quotas for wine imports in Switzerland, the EU, Eastern Europe and some Asian countries. While tariffs are generally not a key impediment to trade in Australia's principal export markets, excessive duties do however significantly inhibit trade with the majority of Asian countries and in South America.⁹³

2 *Common Agricultural Policy*

Production and export subsidies for wine also exist, and crowd out exports from more efficient wine producing countries. The European Common Agricultural Policy ("CAP") was established in 1962 and is the world's biggest system of farm subsidies, accounting for an astonishing 85% of the world's agricultural subsidies.⁹⁴ The CAP attempts to maintain stable and virtually fixed, domestic prices for most agricultural products. This has been achieved by restricting imports and the main instruments to achieve this goal have been the export subsidies and import levies⁹⁵

Notably, the combination of the CAP and GI system have greatly benefited EU winemakers. CAP reforms, adopted by Member States in 2003 and 2004, have commenced the process of separating farm support from production, thereby reducing incentives to over-produce and making the EU farm sector more market-oriented.

⁹⁰ See Margaret Thatcher, *Statecraft: Strategies for a Changing World* (2002), 336.

⁹¹ See David Wollan, 'The Australian Wine Industry – A Sceptic's View?' (Paper presented at the ABARE Outlook 1998 Conference, Canberra, February 1998).

⁹² Kim Anderson, *The World's Wine Markets: Globalization at Work* (2004), 322-323,

⁹³ Kim Anderson, *The World's Wine Markets: Globalization at Work* (2004), 324.

⁹⁴ Margaret Thatcher, *Statecraft: Strategies for a Changing World* (2002), 336.

⁹⁵ World Trade Organisation, *Trade Policy Review: European Communities, Report by the Secretariat* (2004) WT/TPR/S/136 (2004) 1, 12.

The reforms, however, do not reduce the total level of EU farm support, nor improve market access or address export subsidies. Given these other barriers, how effective an instrument will the Wine Agreement be in providing for a reciprocal arrangement?

3 *Common Market Organisation*

The Common Market Organisation (“CMO”), which was reformed in May 1999, aims to rebalance the supply and demand whilst reorienting the EU wine sector toward domestic and export market demands. A feature of the new CMO is large expenditures on the restructuring and conversion of vineyards to produce more marketable varieties of grapes.⁹⁶ While ‘New World’ countries produce, on thousands of hectares, standardised, simple, but flawless wines, the effect of such export subsidies not only lowers world wine prices, but, as a result encroaches in the realm of the ‘New World’s’ export market.

Even if a winery were successful in gaining access to the gateway to export wine, there are other inhibiting external factors - in particular, environmental considerations.

In lieu of standard environmental assurance requirements across the EU, it is likely that suppliers exporting to the EU will need to demonstrate how their product meets the intent behind EC Council Directives, as they relate to the environment. Some of the major EC Council Directives that have a direct impact on the wine industry are:

- Emission Trading Scheme Directive;⁹⁷
- EU regulatory framework for chemicals⁹⁸
- Integrated Pollution Prevention and Control Directive;⁹⁹

⁹⁶ *Commission Regulation (EC) No 1227/2000 of 31 May 2000 laying down detailed rules for the application of Council regulation EC (1493/1999) on the common organisation of the market in wine, as regards production potential* [2000] 143/1.

⁹⁷ *Council Directive (EC) No. 2004/101 of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol’s project mechanisms* [2004] OJEU 338/18, 19. .

⁹⁸ *Regulation (EC) No. 396/2005 of 23/2/05 on MRLs of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC* [2005] OJ L 70/1.

⁹⁹ *Council Directive (EC) No. 96/61 of 24 September 1996 concerning integrated pollution prevention and control* [1996] OJL 257/26.

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- Packaging and Packaging Waste Directive;
- Waste Framework Directive;¹⁰⁰

The existence of the Food Industry Sustainability Strategy¹⁰¹ (“FISS”) in the UK, allows governments to place indirect pressure on suppliers of wine to the UK market to meet their baseline assurance standard by raising consumer awareness of what this standard is and the existence of a higher level assurance scheme. While it is considered unlikely that retailers, as a group, will seek to create a single environmental standard or certification scheme solely for wine suppliers, it is probable that suppliers will need to demonstrate how their products meet the intent behind EU Environmental Directives. The Australian wine industry can avoid adverse impacts of such a move through early adoption of an assurance scheme that encourages wineries working collaboratively to maintain and raise standards. Such responsiveness to EU trends would enhance Australia’s position as an environmentally responsible wine producer.

With the wine industry at crossroads with decreasing prices and enhanced potential for increasing production, it is time to have an independent study of the impact and effectiveness of the *AWBC Act* and Regulations with a view to strengthening Australia’s position in the world wine market. It is crucial to enhance the operating environment for the benefit of the Australian wine industry through market development, knowledge development and compliance.

VIII CONCLUSION

On an international forefront, the TRIPS Agreement and Wine Agreement has facilitated access but has done little to dramatically improve access of Australian wine to the EU. In particular, the lack of guidance in implementing a comparable or similar GI system of protection has led to the inability of, for example, the WTO, EU

¹⁰⁰ Council Directive (EEC) No. 75/442 of 15 July 1975 on Waste Framework [1975] OJL 75/1.

¹⁰¹ ‘Draft Food Industry Sustainability Strategy’, UK Dept of Environment, Food and Rural Affairs, Draft for consultation, April 2005.

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or Australia to reconcile the national protection of GIs in the “old world” and “new world”. Australia seems to have met part of this challenge by presenting wine labels with consumer-friendly information, giving Australian wines a colourful marketing edge, especially where some European wines are restricted to the information they are allowed to put on a label. So, while the EU may presently hold the upper-hand in trade relations between the “old world” and the “new world” [Australia], serious consideration should be given to fully implementing the DSB’s recommendation and revise EC Regulation 510/2006, if the tides were ever to turn.

While an apparent equitable process was created by Australia’s acceptance of the ‘first in time’ principle after the US-FTA, the overlap between GIs and trade marks is still rife. To avoid further inconsistencies where there are pre-existing trade marks, the answer may lie in narrowing the discretion awarded to the Registrar of Trade Marks by setting out an objective approach in the Regulations. Further to this, Australia’s process of determining GIs is plagued with inconsistencies, centrally due to the inconsistent interpretation of the *AWBC Act* and Regulations by the GIC and AAT. It is imperative that this is rectified by learning from the mistakes associated with the Coonawarra region and establishing an independent study into amending the Regulations and possibly establishing a Code so that natural justice is achieved in future and public confidence in the GI determination system is restored.

Such commitment could not just amend the process but also ensure that current overseas market access increases and allow Australian wine regions to focus on marketing strategies and tapping into market niches. It will be interesting to see that, as a new wave of consumers enter the market, sherry and port may well be seen as obscure European ‘brands’ that can’t compete with the progressive and quality “new world” fortified wines.